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Briefings on How To Use the Federal Register
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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
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3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

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

WASHINGTON, DC
(TWO BRIEFINGS)

WHEN: January 13 at 9:00 am and 1:30 pm

WHERE: Office of the Federal Register, 7th Floor Conference Room, 800 North Capitol Street NW, Washington, DC (3 blocks north of Union Station Metro)

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 93-AWP-5]

Establishment of Class D Airspace, Gila Bend Air Force Auxiliary Field, AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This document contains corrections to the final rule published on December 10, 1993. This final rule established Class D airspace at Gila Bend Air Force Auxiliary Field, AZ effective January 10, 1994. This correction to the final rule will establish the Class D airspace at Gila Bend effective on March 3, 1994.

EFFECTIVE DATE: Effective January 7, 1994. The effective date of the final rule at 58 FR 64879 is corrected to be 0901 U.T.C. March 3, 1994.

FOR FURTHER INFORMATION CONTACT: Gene Enstad, Airspace Specialist, System Management Branch, AWP-530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261: telephone (310) 297-0010.

SUPPLEMENTARY INFORMATION: On December 10, 1993, the Federal Aviation Administration (FAA) published a final rule that established Class D airspace at Gila Bend Air Force (AF) Auxiliary (AUX) Field, Gila Bend, Arizona (58 FR 64879). The effective date was established as 0901 U.T.C., January 10, 1994. That date was incorrect. The new effective date is now 0901 U.T.C., March 3, 1994.

Correction of Final Rule Effective Date

Accordingly, pursuant to the authority delegated to me, the publication on December 10, 1993; (58 FR 64879), is corrected as follows:

On page 64879, in the third column, in **EFFECTIVE DATE** by removing "0901 U.T.C., January 10, 1994" and inserting in its place "0901 U.T.C., March 3, 1994".

Issued in Lawndale on December 21, 1993.

Harvey R. Riebel,

Manager, System Management Branch, AWP-530.

[FR Doc. 94-364 Filed 1-6-94; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8456]

RIN 1545-AQ14

Capitalization of Certain Policy Acquisition Expenses; Correction

AGENCY: Internal Revenue Service, Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the final regulations (T.D. 8456), which were published Tuesday, December 29, 1992 (57 FR 61813), relating to the requirement that insurance companies capitalize specified policy acquisition expenses for tax purposes.

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Gary Geisler (202) 622-3970, (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of this correction contains final income tax regulations under section 848 of the Internal Revenue Code.

Need for Correction

As published, T.D. 8456 contains an error which may prove to be misleading and is in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 1.848-2(i)(4)(iii)(C), the language "Calculate the ratio between the results in paragraphs (i)(4)(ii) (A) and (B) of this section for each agreement;" is removed and the language "Calculate the ratio between the results in paragraphs (i)(4)(iii) (A) and (B) of this section for each agreement;" is added in its place.

Jacquelyn B. Burgess,

Alternate Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 94-309 Filed 1-6-94; 8:45 am]

BILLING CODE 4830-01-U

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 2 and 3

[CGD 93-020]

Captain of the Port Zone Boundaries; Correction

AGENCY: Coast Guard, DOT.

ACTION: Correction to final rule.

SUMMARY: This document contains corrections to the final rule on Captain of the Port (COTP) Zone Boundaries (CGD 93-020) which was published Monday, October 4, 1993, (58 FR 51726). The regulations related to extending the Coast Guard COTP zone boundaries seaward to the limit of the Exclusive Economic Zone (EEZ).

EFFECTIVE DATE: January 7, 1994.

FOR FURTHER INFORMATION CONTACT: Mary-Jo Cooney Spottswood, Project Manager and Project Counsel, Oil Pollution Act (OPA 90) Staff, (202) 267-6402.

SUPPLEMENTARY INFORMATION:

Background

The final rule that is the subject of this correction extended the COTP zone boundaries to the seaward limit of the

EEZ and made changes to the onshore boundaries of several COTP zones.

Need for Correction

A clarification of the boundaries of the Wilmington, North Carolina, Portland, Oregon, and Honolulu, Hawaii, COTP zones is necessary.

Correction of Publication

Accordingly, the publication on October 4, 1993, of the final rule on COTP Zone Boundaries (CGD 93–020), which is the subject of FR Doc. 93–24206, is corrected as follows:

§ 3.25–20 [Corrected]

1. On page 51728, in the third column, § 3.25–20(b) is corrected to read as follows:

* * * * *

(b) The boundary of the Wilmington Marine Inspection Zone and Captain of the Port Zone starts at the sea at 34°59.8′ N. latitude, 76°07.8′ W. longitude, and proceeds along a line northwesterly to a point 35°01.5′ N. latitude, 76°10′ W. longitude; thence westerly to a point 35°01.5′ N. latitude, 76°20′ W. longitude; thence westerly to a point 35°37′ N. latitude, 76°32′ W. longitude; thence northerly and westerly along the western boundaries of Hyde and Washington Counties to a point 36°00′ N. latitude, 76°41′ W. longitude; thence northerly along the west bank of the Chowan River to the North Carolina-Virginia boundary; thence westerly along the North Carolina-Virginia boundary to Kerr (Buggs Island) Lake; thence along the shore of Kerr Lake in North Carolina to the North Carolina-Virginia Boundary; thence westerly along the North Carolina-Virginia boundary to the Tennessee boundary; thence southwesterly along the North Carolina-Tennessee boundary to the Georgia boundary; thence easterly along the North Carolina-Georgia boundary to the South Carolina boundary; thence easterly along the South Carolina-North Carolina boundary to the sea. The offshore boundary of the Wilmington Captain of the Port Zone starts at the coast at 34°59.8′ N. latitude; thence proceeds easterly to the outermost extent of the EEZ; thence southerly along the outermost extent of the EEZ to a line bearing 122° T from the intersection of the South Carolina-North Carolina boundary and the sea to the outermost extent of the EEZ; thence westerly along a line bearing 122° T to the coast.

§ 3.65–15 [Corrected]

2. On page 51731, in the third column, in § 3.65–15(b), the sentence beginning on line 8 and ending on line 15 is corrected to read as follows:

* * * * *

(b) * * *

The offshore boundary is bounded on the south by the southern boundary of the Thirteenth Coast Guard District which is described in § 3.65–10, to the outermost extent of the EEZ; thence northerly along the outermost extent of the EEZ to 47°32′ N. latitude; thence easterly along 47°32′ N. latitude to the coast.

§ 3.70–10 [Corrected]

3. On page 51731, in the third column, § 3.70–10, paragraph (c)(8) is added before paragraph (d) to read as follows:

* * * * *

(c) * * *

(8) Midway Island and the adjacent waters of the EEZ.

* * * * *

Dated: December 23, 1993.

A.E. Henn,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 94–263 Filed 1–6–94; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 165

[COTP Corpus Christi, Texas, Regulation 93–023]

Safety Zone Regulations; Gulf Intracoastal Waterway, Matagorda Bay

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone in the Gulf Intracoastal Waterway from mile marker 475 to mile marker 455. Shoaling into the center of the channel has occurred between green buoy 97 and green buoy 105. The safety zone is needed to prevent vessels from grounding on shoal areas near the narrowed channels. Entry into this zone is restricted to singlewide tows only. No oversize or doublewide tows are permitted to transit through the safety zone. All vessels are restricted to one way traffic, between green buoy 89 and green buoy 115.

EFFECTIVE DATE: This regulation becomes effective at 12 a.m., November 30, 1993. It terminates at 12:01 a.m., February 15, 1994, or upon completion of dredging by the Army Corps of Engineers and termination by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: ENS S. Montoya at telephone number (512) 888–3195.

SUPPLEMENTARY INFORMATION: Under 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days after **Federal Register** publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to reduce the risk of vessel groundings and potential pollution incidents.

Drafting Information

The drafters of this regulation are ENS S. Montoya, Chief, Waterways Management Section, and CAPT R.J. Reining, Commanding Officer, U.S. Coast Guard Marine Safety Office, Corpus Christi, Texas, and CDR D. Dickman, project attorney, Eighth Coast Guard District, New Orleans, Louisiana.

Discussion of Regulation

The Coast Guard is establishing a safety zone in the Gulf Intracoastal Waterway from mile marker 475 to mile marker 455. Shoaling into the center of the channel has occurred between green buoy 97 and green buoy 105. The safety zone is needed to prevent vessels from grounding on shoal areas near the narrowed channels. Entry into this zone is restricted to singlewide tows only. No oversize or doublewide tows are permitted to transit through the safety zone. All vessels are restricted to one way traffic, between green buoy 89 and green buoy 115.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Security measures, Waterways.

Regulation

In consideration of the foregoing, subpart C of part 165 of title 33, Code of Federal Regulations, is amended as follows:

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1 and 160.5.

2. A temporary section 165.T08–066 is added to read as follows:

§ 165.T08–066 Safety zone: Gulf Intracoastal Waterway.

(a) Safety zone. The waters of the Gulf Intracoastal Waterway from mile marker 475 to mile marker 455 including the entire width of the channel is a stationary safety zone.

(b) Regulations. The Coast Guard is establishing a safety zone in the Gulf Intracoastal Waterway from mile marker 475 to mile marker 455. Shoaling into the center of the channel has occurred

between green buoy 97 and green buoy 105. The safety zone is needed to prevent vessels from grounding on shoal areas near the narrowed channels. Entry into this zone is restricted to singlewide tows only. No oversize or doublewide tows are permitted to transit through the safety zone. All vessels are restricted to one way traffic, between green buoy 89 and green buoy 115.

(c) Effective date. This regulation becomes effective at 12 a.m., November 30, 1993. It terminates at 12:01 a.m., February 15, 1994, or upon completion of dredging by the Army Corps of Engineers and termination by the Captain of the Port.

Dated: November 30, 1993.

Robert J. Reining,

Captain, U.S. Coast Guard, Captain of the Port, Corpus Christi, Texas.

[FR Doc. 94–267 Filed 1–6–94; 8:45 am]

BILLING CODE 4910–14–M

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33 CFR Part 165

[COTP Wilmington, NC Regulation 94–001]

Safety Zone Regulations; Atlantic Intracoastal Waterway, Camp Lejuene, NC

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone in the Atlantic Intracoastal Waterway, Camp Lejuene, NC, between mile boards 235 and 240. The safety zone is needed to protect the public, vessels and property from safety hazards associated with the removal of unexploded military munitions prior to dredging operations on the Atlantic Intracoastal Waterway. Entry into this zone is prohibited during actual operations unless authorized by the Captain of the Port.

EFFECTIVE DATES: This regulation is effective from 8 a.m. on January 10, 1994, and terminates on February 11, 1994 at 5 p.m., unless sooner terminated by the Captain of the Port, Wilmington, NC.

FOR FURTHER INFORMATION CONTACT: ENS K. J. DELOOFF, USCG, c/o U.S. Coast Guard Captain of the Port, suite 500, 272 N. Front Street, Wilmington, NC 28401–3907, Phone: (910) 343–4894.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking (NPRM) was not published for this regulation and good cause exists for making it effective in less than 30 days after **Federal Register** publication. Publishing an NPRM and delaying its effective date would be contrary to the public's interest since immediate action is necessary to prevent possible damage to people, vessels and property in the area.

Drafting Information

The drafters of this regulation are ENS K. J. DELOOFF, project officer for the Captain of the Port, Wilmington, NC, and LCDR C. A. ABEL, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Regulation

The event requiring this regulation will begin on January 10, 1994 and terminate on February 11, 1994. U.S. Navy personnel will be diving in the Atlantic Intracoastal Waterway between the hours of 8 a.m. and 5 p.m. on the dates indicated above. Commercial traffic will not be severely impeded due to a one hour window between 12 p.m. and 1 p.m. in which vessels will be permitted to pass. The diving for unexploded munitions constitutes a potential hazard to the public, vessels and property in the vicinity. This safety zone is needed to protect the public from the hazards associated with this diving operation as well as to protect the diving crews during actual underwater operations.

Regulatory Evaluation

This regulation is not considered a significant regulatory action under Executive Order 12866 and is not significant under Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979).

Federalism Assessment

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 33 CFR 165

Harbors, Marine safety, Navigation (water), Security measures, Waterways.

Regulation

In consideration of the foregoing, subpart F of part 165 of title 33, Code of Federal Regulations, is amended as follows:

PART 165—[AMENDED]

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

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 160.5; 49 CFR 1.46.

2. A temporary § 165.T05–097 is added, to read as follows:

§ 165.T05–097 Safety Zone: Atlantic Intracoastal Waterway, between mile board 235 and 240, Camp Lejuene, North Carolina.

(a) *Location.* The following area is a safety zone:

(1) The waters of the Atlantic Intracoastal Waterway circumscribed by a line drawn from the following navigational points: latitude 34°38′ North, longitude 077°12.0′ West, then south to latitude 34°34.7′ North, longitude 077°15.9′ West, then east to latitude 34°34.7′ North, longitude 077°16.2′ West, then north to latitude 34°38′ North, longitude 077°12.2′ West, thence to the beginning.

(2) The safety zone boundary can be described as follows: the zone will be established between mile boards 235 and 240, Atlantic Intracoastal Waterway, Camp Lejuene, NC.

(b) *Effective Dates.* This regulation becomes effective on January 10, 1994 at 8 a.m., and terminates at 5 p.m. February 11, 1994, unless sooner terminated by the Captain of the Port.

(c) *Regulations.* (1) In accordance with the general regulation in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port.

(2) The Patrol Commander will monitor radio communications on Channel 16.

(3) The operator of any vessel which enters or operates within this zone shall:

(i) Stop the vessel immediately upon being directed to do so by any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard Ensign, or by the U.S. Navy Patrol Commander aboard a U.S. Navy small craft.

(ii) Proceed as directed by any commissioned, warrant, or petty officer on board a vessel displaying a Coast Guard Ensign, or by the U.S. Navy Patrol Commander aboard a U.S. Navy small craft.

Dated: December 21, 1993.

C.F. Eisenbeis,

Captain, U.S. Coast Guard, Captain of the Port, Wilmington, NC.

[FR Doc. 94–266 Filed 1–6–94; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP-300307A; FRL-4747-3]

RIN 2070-AB78

Acetyl Tributyl Citrate; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document exempts from the requirement of a tolerance acetyl tributyl citrate (CAS Reg. No. 77-90-7) when used as an inert ingredient (plasticizer) in pesticide formulations applied to animals. This regulation was requested by Alpha Chemical and Plastics Corp.

EFFECTIVE DATE: This regulation becomes effective January 7, 1994.

ADDRESSES: Written objections, identified by the document control number, [OPP-300307A], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the document control number and submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring copy of objections and hearing request to: Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202. Fees accompanying objections shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

FOR FURTHER INFORMATION CONTACT: By mail: Connie Welch, Registration Support Branch, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 2800 Crystal Drive, North Tower, Arlington, VA 22202, (703)-308-8320.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 10, 1993 (58 FR 59700), EPA reissued a proposed rule that gave notice that Alpha Chemical and Plastics Corp., 1 Jabez St., Newark NJ 07105, had submitted a pesticide petition to EPA requesting that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(e)), propose to amend 40 CFR 180.1001(e) by establishing an exemption from the requirement of a tolerance for acetyl tributyl citrate when used as a component of plastic animal tags in pesticide formulations applied to animals. In the **Federal Register** of August 3, 1988 (53 FR 29244), EPA originally proposed such an exemption, but because of the time elapsed since the oiginal proposal, the proposal was reissued. The basis for the proposed exemption was contained in the original proposal issuance (53 FR 29244). No comments were received in response to either proposal issuance.

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term "inert" is not intended to imply nontoxicity; the ingredient may or may not be chemically active.

The data submitted in the petition and other relevant material have been evaluated and discussed in the proposed rule. Based on the data and information considered, the Agency concludes that the exemption from the requirement of a tolerance will protect the public health. Therefore, the tolerance exemption is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections and/or request a hearing with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(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). 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 issue(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

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

Dated: December 22, 1993.

Douglas D. Campt,
Director, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. Section 180.1001(e) is amended by adding and alphabetically inserting the inert ingredient entry, to read as follows:

§ 180.1001 Exemptions from the requirement of a tolerance.

* * * * *

(e) * * *

Inert ingredients	Limits	Uses
* * *	* * *	* * *
Acetyl tributyl citrate (CAS Reg. No. 77-90-7)		Component of plastic animal tags.
* * *	* * *	* * *

[FR Doc. 94-278 Filed 1-6-94; 8:45 am]

BILLING CODE 6560-50-F

40 CFR Part 180

[OPP-300304A; FRL-4747-2]

RIN 2070-AB78

N,N-Bis 2-(Omega-Hydroxypolyoxyethylene/Polyoxypropylene) Ethyl Alkylamine; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document amends the current exemption from the requirement of a tolerance for residues of *N,N-bis* 2-(*omega*-hydroxypolyoxyethylene/polyoxypropylene) ethyl alkylamine by expanding its use as an inert ingredient (to read "surfactants and related adjuvants of surfactants") and removing the limit on the amount used in pesticide formulations applied to growing crops only. This regulation was requested by Akzo Chemicals, Inc.

EFFECTIVE DATE: This regulation becomes effective January 7, 1994.

ADDRESSES: Written objections, identified by the document control number, [OPP-300304A], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. A copy of any objections and hearing requests filed with the Hearing Clerk should be identified by the document control number and submitted to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring copy of objections and hearing request to: Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202. Fees accompanying objections shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251.

FOR FURTHER INFORMATION CONTACT: By mail: Connie Welch, Registration Support Branch, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 2800 Crystal Drive, North Tower, Arlington, VA 22202, (703)-308-8320.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 10, 1993 (58 FR 59699), EPA issued a proposed rule that gave notice that Akzo Chemicals, Inc., 300 South Riverside Plaza, Chicago, IL 60606, had submitted pesticide petition (PP) 2E4159 to EPA requesting that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(e)), propose to amend 40 CFR 180.1001(d) by amending the current exemption from the requirement of a tolerance for residues of *N,N-bis* 2-(*omega*-hydroxypolyoxyethylene/polyoxypropylene) ethyl alkylamine by expanding its use as an inert ingredient (to read "surfactants and related adjuvants of surfactants") and removing the limit on the amount used in pesticide formulations applied to growing crops only.

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term "inert" is not intended to imply nontoxicity; the ingredient may or may not be chemically active.

There were no comments or requests for referral to an advisory committee received in response to the proposed rule.

The data submitted in the petition and other relevant material have been evaluated and discussed in the proposed rule. Based on the data and information considered, the Agency concludes that the amended exemption from the requirement of a tolerance will protect the public health. Therefore, the amended exemption is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections and/or request a hearing with the Hearing Clerk, at the address given above (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). If a hearing is requested, the objections must include a statement of the factual issue(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). 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 issue(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure,

Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 22, 1993.

Douglas D. Campt,

Director, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 346a and 371.

2. Section 180.1001(d) is amended by adding and alphabetically inserting the inert ingredient entry, to read as follows:

§ 180.1001 Exemptions from the requirement of a tolerance.

* * * * *

(d) * * *

Inert ingredients	Limits	Uses
* * *	* * *	* * *
N,N-bis 2-(*omega*-hydroxypolyoxyethylene/polyoxypropylene) ethyl alkylamine; the reaction product of 1 mole of *N,N-bis*(2-hydroxyethyl alkylamine) and 360 moles of ethylene oxide and propylene oxide; where the alkyl group (C8-C18) is derived from coconut, cottonseed, soya, or tallow acids.	.....	Surfactant, related adjuvants of surfactants
* * *	* * *	* * *

* * * * *

[FR Doc. 94–277 Filed 1–6–94; 8:45 am]

BILLING CODE 6560–50–F

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 201–17 and 201–20

[FIRMR Interim Rule 1]

Energy Efficient Computer Equipment

AGENCY: Information Resources Management Service, GSA.

ACTION: Interim rule with request for comments.

SUMMARY: This amendment implements provisions of Executive Order 12845 requiring agencies to purchase energy efficient computer equipment.

DATES: *Effective Date:* This amendment is effective on January 7, 1994.

Comments are due: February 7, 1994.

ADDRESSES: Comments should be addressed to General Services Administration (KMR), Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: R. Stewart Randall, GSA, Office of Information Resources Management Policy, telephone FTS/Commercial (202) 501–3194 (v) or (202) 501–0657 (tdd).

SUPPLEMENTARY INFORMATION: (1) This change is being made to bring the FIRMR into conformance with Executive Order 12845, dated April 21, 1993. This order recognizes that the Federal Government, the largest purchaser of computer equipment in the world, should set an example in the energy efficient operation of its facilities and the procurement of pollution preventing technologies. The use of energy efficient computers can help achieve this goal and also minimize the Government's operating costs. The order requires, among other things, that the heads of Federal agencies shall ensure that by October 18, 1993, all acquisitions of microcomputers, including personal computers, monitors, and printers, meet the Environmental Protection Agency (EPA) "Energy Star" requirements for energy efficiency. The heads of agencies may grant exemptions, on a case-by-case basis, to this requirement based upon the commercial availability of qualifying equipment, significant cost differential of the equipment, the agency's performance requirements, and the agency's mission. Any exemptions granted must be reported to GSA annually. The FIRMR is revised to require by October 18, 1993, that all agency requirements analyses include requirements for energy efficiency. These requirements must be reflected in request for proposals (RFPs) released after that date. The FIRMR is further revised to require that, at a minimum, agencies acquire microcomputers, monitors and printers equipped with the energy efficient low-power standby feature as defined by the EPA Energy Star computer program. The address where exemptions must be sent is also provided in this change. The first report is due October 18, 1994. FIRMR Bulletin C–35 will be issued in the near future to provide more detailed guidance on energy efficient requirements that should be included in RFPs.

(2) The General Services Administration has determined that this is not a major rule for the purposes of Executive Order 12291 of February 17, 1981. GSA decisions are based on adequate information concerning the need for, and the consequences of the rule. The interim rule is written to ensure maximum benefits to Federal agencies. This Governmentwide regulation will have little or no net cost effect on society. It is certified that this interim rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act 1980 (5 U.S.C. *et seq.*).

(3) The Paperwork Reduction Act does not apply because the proposed changes to the FIRMR do not impose recordkeeping information requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

List of Subjects in 41 CFR Parts 201–17 and 201–20

Archives and records, Computer technology, Telecommunications, Government procurement, Property management, Records management, and Federal information processing activities.

PART 201–17—PREDOMINANT CONSIDERATIONS

1. The authority citation for part 201–17 continues to read as follows:

Authority: 40 U.S.C. 486(c) and 751(f).

2. Section 201–17.001 is amended by revising paragraphs (l) and (m) and adding paragraph (n) to read as follows:

§ 201–17.001 Predominant considerations.

* * * * *

(l) Review and evaluate existing resources and related management and acquisition activities on an ongoing basis;

(m) Replace outdated resources that are no longer the most advantageous alternative for satisfying the agency's requirements; and

(n) Acquire microcomputers, monitors, and printers that are energy efficient.

PART 201-20.1—REQUIREMENTS ANALYSIS

3. The authority citation for part 201-20.1 continues to read as follows:

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-20.1 [Amended]

4. Section 201-20.103-11 is added to read as follows:

§ 201-20.103-11 Energy efficiency requirements for microcomputers.

(a) Agencies shall include requirements for energy efficiency in the requirements analysis. At a minimum, agencies shall require that microcomputers, including personal computers, monitors, and printers, acquired by the agency be equipped with the energy efficient low-power standby feature as defined by the Environmental Protection Agency Energy Star computer program. This feature shall be activated when the equipment is shipped to the agency and shall be capable of entering and recovering from the low-power state, unless the equipment meets the Energy Star requirements at all times. To the extent permitted by law, agencies shall include this specification in all existing contracts, if any additional costs would be offset by the potential energy savings.

(b) Agencies shall consider the guidance contained in FIRMR Bulletin C-35 in developing their requirements and for the specific procedure for reporting exempted acquisitions.

(c) Agencies shall report annually, by October 18 on acquisitions exempted from this requirement. Agencies shall periodically review their exemptions, with the intent of bringing all purchases into compliance. Reports shall be sent to: GSA, Acquisition Reviews Division (KMA), 18th & F Streets, NW., Washington, DC 20405.

(d) Agencies shall ensure that Federal users are made aware of the significant economic and environmental benefits of the low energy efficient power standby feature and its aggressive use by including this information in routine computer training courses.

Dated: October 15, 1993.

Julia M. Stasch,

Acting Administrator of General Services.

[FR Doc. 94-294 Filed 1-6-94; 8:45 am]

BILLING CODE 6820-25-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 10

RIN 3067-AC21

Environmental Considerations/ Categorical Exclusions

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Interim rule.

SUMMARY: This interim rule amends 44 CFR 10 by adding certain purchases of flooded properties to the list of actions that FEMA categorically excludes from reviews under the National Environmental Policy Act (NEPA). Such purchases historically have no significant environmental effects. The intent of the change is to streamline the administrative process associated with implementation of hazard mitigation projects involving the purchase of flooded properties. The change ensures that environmental concerns and issues are still satisfied.

EFFECTIVE DATE: January 7, 1994. We invite comments on the interim rule, which must be received on or before March 8, 1994.

ADDRESSES: Please submit any written comments to the Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, 500 C Street, SW., room 714, Washington, DC 20472, (fax) (202) 646-4536.

FOR FURTHER INFORMATION CONTACT: Laurence Zensinger, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-4240.

SUPPLEMENTARY INFORMATION: FEMA developed this categorical exclusion for property acquisition in response to suggestions for expanding FEMA's existing list of projects warranting categorical exclusions (CATEX) that FEMA lists at 44 CFR 10.8(c)(2). The intent of the change is to streamline the administrative process associated with approving hazard mitigation projects that involve the purchase of properties (and conversion to open space use of the land on which such properties are located) that floods damage. Based on the nature and history of such projects under normal circumstances there will be no significant environmental effects.

FEMA conducted a comprehensive review of its environmental actions before developing this interim rule. The Agency carries out hazard mitigation activities primarily under section 1362 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4103, but also under section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5170c. Our review of environmental actions shows that FEMA's hazard mitigation activities relating to the conversion of property to open space use consistently result in Findings of No Significant Impact. Hazard mitigation relocation projects under normal circumstances do not have a significant environmental impact because they involve acquisition of properties to remove flooded structures from flood-prone areas and to revert the land to open space use. FEMA now adds 44 CFR 10.8(c)(2)(x) to authorize categorical exclusions ("CATEX") covering acquisition of properties that will have no significant environmental effects after acquisition and return of the land to its natural state. The new CATEX will only apply to those actions that involve acquisition of property and will not apply to any project involving the development of another site. The new CATEX will not apply in those situations described under the existing FEMA regulation, 44 CFR 10.8(b)(2), entitled "Actions That Normally Require an Environmental Impact Statement," or in situations involving extraordinary circumstances where FEMA's regulations normally require an Environmental Assessment. See 44 CFR 10.8(e).

In addition, the new CATEX will not affect FEMA's responsibility to comply with other environmental statutes. These include the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Coastal Zone Management Act, the Coastal Barrier Resources Act, the Endangered Species Act, the National Historic Preservation Act, and the Archeological and Historic Preservation Act. Nor will it affect FEMA's responsibilities under Executive Orders 11988 and 11990, or under FEMA's implementing regulations at 44 CFR 9, and FEMA's National Flood Insurance Program regulations at 44 CFR 59 through 77.

This interim rule is immediately effective because States and communities are acquiring properties more frequently than before to resolve public health and safety concerns following the Great Flood of 1993 in

nine midwestern States. Significant numbers of flooded properties must be acquired swiftly to avoid flooding the same properties again soon, with new and additional threats to public health and safety.

National Environmental Policy Act

The requirements of 44 CFR part 10, Environmental Consideration, exclude this rule. FEMA has not prepared an environmental impact assessment.

Regulatory Flexibility Act

I certify 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. The rule adds one category to FEMA's categorical exclusions from reviews under the National Environmental Policy Act, and FEMA does not expect the rule (1) to affect adversely the availability of disaster assistance funding to small entities, (2) to have significant secondary or incidental effects on a substantial number of small entities, or (3) to create any additional burden on small entities.

Regulatory Impact Analysis

This rule is not a major rule for the purposes of Executive Order 12291, Federal Regulation, February 17, 1981, 3 CFR, 1981 Comp., p. 127. FEMA has not prepared a regulatory impact analysis.

Paperwork Reduction Act

This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, October 26, 1987, 3 CFR, 1987 Comp., p. 252.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp., p. 309.

List of Subjects in 44 CFR Part 10

Environmental impact statements

Accordingly, 44 CFR Part 10 is amended to read as follows:

1. The authority citation for Part 10 is revised to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; E.O. 11514 of March 7, 1970, 35 FR 4247, as amended by E.O. 11991, 3 CFR, 1977 Comp., p. 123; Reorganization Plan No. 3 of 1978, 5 U.S.C. App. 1; E.O. 12127, 3 CFR, 1979 Comp., p. 376; and E.O. 12148, 3 CFR, 1979 Comp., p. 412, as amended.

2. Section 10.8(c)(2) is amended by adding a new paragraph (c)(2)(x) to read as follows:

§ 10.8 [Amended]

* * * * *

(c) * * *

(2) * * *

(x) The acquisition of properties under section 1362 of the National Flood Insurance Act of 1968, as amended, under section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and under any other applicable authority when the acquisition is from a willing seller, the buyer coordinated acquisition planning with affected authorities, and the acquired property will be dedicated in perpetuity to uses that are compatible with open space, recreational, or wetlands management practices.

Dated: January 3, 1994.

James L. Witt,

Director.

[FR Doc. 94-356 Filed 1-6-94; 8:45 am]

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FEDERAL MARITIME COMMISSION

46 CFR Part 501

The Federal Maritime Commission—General

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is revising its statement of organization and functions, delegations and other procedures, and incorporating it in the CFR. This provides a current statement which includes all previously published items and preserves it in the CFR for easier public access.

EFFECTIVE DATE: January 7, 1994.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary Federal Maritime Commission 800 N. Capitol St., NW. Washington, DC 20573 (202) 523-5725.

SUPPLEMENTARY INFORMATION: The Federal Maritime Commission is revising the official description of its organization, functions, delegations, and other procedures, and incorporating it in part 501 of title 46, Code of Federal Regulations.

Notice and public procedure are not necessary prior to the issuance of this rule because it deals solely with matters of agency organization and procedure. Neither is a delayed effective date required. 5 U.S.C. 553.

List of Subjects in 46 CFR Part 501

Administrative practice and procedure; Authority delegations; Organization and functions; Seals and insignia.

Therefore, pursuant to 5 U.S.C. 551-557, 701-706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501-520 and 3501-3520; 46 U.S.C. app. 801-848, 876, 1111 and 1701-1720; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961; Pub. L. 89-56, 79 Stat. 195; and 5 CFR part 2638: Part 501 of title 46 of the CFR is revised to read as follows:

PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL

Subpart A—Organization and Functions

Sec.
501.1 Purpose.
501.2 General.
501.3 Organizational components of the Federal Maritime Commission.
501.4 Lines of responsibility.
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501.23 Delegation to the General Counsel.
501.24 Delegation to the Secretary.
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501.26 Delegation to the Director, Bureau of Trade Monitoring and Analysis.
501.27 Delegation to and redelegation by the Director, Bureau of Tariffs, Certification and Licensing.
501.28 Delegation to the Director, Bureau of Hearing Counsel.
501.29 [Reserved]
501.30 Delegation to and redelegation by the Director, Bureau of Administration.
501.31 Delegation to the Director, Bureau of Investigations.

Subpart D—Public Requests for Information

501.41 Public requests for information and decisions.

Appendix A to Part 501—Organization Chart

Authority: 5 U.S.C. 551-557, 701-706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501-520 and 3501-3520; 46 U.S.C. app. 801-848, 876, 1111, and 1701-1720; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961; Pub. L. 89-56, 79 Stat. 195; 5 CFR Part 2638.

Subpart A—Organization and Functions

§ 501.1 Purpose.

This part describes the organization, functions and Official Seal of, and the

delegation of authority within, the Federal Maritime Commission ("Commission").

§ 501.2 General.

(a) *Statutory functions.* The Commission regulates common carriers by water and other persons involved in the foreign and domestic offshore commerce of the U.S. under provisions of the Shipping Act, 1916, (46 U.S.C. app. 801–842); the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 843–848); the Shipping Act of 1984 (46 U.S.C. app. 1701–1720); section 19 of the Merchant Marine Act, 1920 (46 U.S.C. app. 876); the Foreign Shipping Practices Act of 1988 (46 U.S.C. app. 1710a); sections 2 and 3, Public Law 89–777, Financial Responsibility for Death or Injury to Passengers and for Non-Performance of Voyages (46 U.S.C. app. 817d and 817e); and other applicable statutes.

(b) *Establishment and composition of the Commission.* The Commission was established as an independent agency by Reorganization Plan No. 7 of 1961, effective August 12, 1961, and is composed of five Commissioners ("Commissioners" or "members"), appointed by the President, by and with the advice and consent of the Senate. Not more than three Commissioners may be appointed from the same political party. The President designates one of the Commissioners to be the Chairman of the Commission ("Chairman").

(c) *Terms and vacancies.* The term of each member of the Commission is 5 years and begins when the term of the predecessor of that member ends (i.e., on June 30 of each successive year), except that, when the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified. A vacancy in the office of any Commissioner shall be filled in the same manner as the original appointment, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he or she succeeds. Each Commissioner shall be removable by the President for inefficiency, neglect of duty, or malfeasance in office.

(d) *Quorum.* A vacancy in the Commission, so long as there shall be three Commissioners in office, shall not impair the power of the Commission to execute its functions. Any three Commissioners in office constitute a quorum for the transaction of the business of the Commission, and the affirmative votes of any three Commissioners shall be sufficient for the disposition of any matter which may come before the Commission. For purposes of holding a formal meeting for the transaction of the business of the Commission, the actual presence of two Commissioners shall be sufficient, with proxy votes of absent members permitted in order to obtain the required three affirmative votes. See Commission Order No. 84.

(e) *Meetings; records; rules and regulations.* The Commission shall, through its Secretary, keep a true record of all its meetings and the yea-and-nay votes taken therein on every action and order approved or disapproved by the Commission. In addition to or in aid of its functions, the Commission adopts rules and regulations in regard to its powers, duties and functions under the shipping statutes it administers.

§ 501.3 Organizational components of the Federal Maritime Commission.

The major organizational components of the Commission are set forth in the Organization Chart attached as Appendix A to this part. An outline table of the components/functions follows:

(a) Office of the Chairman of the Federal Maritime Commission.
(*Chief Executive and Administrative Officer, and FOIA and Privacy Act Appeals Officer.*)
(1) Information Security Officer.
(2) Designated Agency Ethics Official.
(b) Offices of the Members of the Federal Maritime Commission.
(*Include the Chairman, ADP Committee.*)
(c) Office of the Secretary. (*FOIA and Privacy Act Officer; Federal Register Liaison; Alternative Disputes Resolution Coordinator.*)
(1) Office of Informal Inquiries, Complaints and Informal Dockets.
(d) Office of the General Counsel.
(*Ethics Official.*)
(e) Office of Administrative Law Judges.
(f) Office of Equal Employment Opportunity.
(g) Office of the Inspector General.
(h) Office of the Managing Director.
(*Chief Operating Officer; Senior IRM Official; Senior Procurement Executive and ATFI Contracting Officer; Audit Followup and Management Controls.*)
(i) Bureau of Trade Monitoring and Analysis.
(1) Office of Agreements and Information Management.
(2) Office of Monitoring I.
(3) Office of Monitoring II.
(j) Bureau of Tariffs, Certification and Licensing.
(1) Office of Tariffs.
(2) Tariff Control Center.
(3) Office of Service Contracts and Passenger Vessel Operations.
(4) Office of Freight Forwarders.
(k) Bureau of Hearing Counsel.
(l) Bureau of Investigations; District Offices.
(1) New York District
(2) New Orleans District
(3) Miami District
(4) San Francisco District
(5) Los Angeles District
(6) Puerto Rico District
(7) Houston District
(m) Bureau of Administration.
(*Competition Advocate; Information Security; Principal Management Official on Small Agency Council.*)
(1) Office of Administrative Services.
(*Physical Security; FMC Contracting Officer.*)
(2) Office of Budget and Financial Management. (*Chief Financial Officer.*)
(3) Office of Personnel.
(4) Office of Information Resources Management. (*IRM Manager; Computer Security; Forms Control; Records Management.*)
(n) Boards and Committees.
(1) Executive Resources Board.
(2) Committee on Automated Data Processing.
(3) Performance Review Board.
(4) Incentive Awards Committee.

§ 501.4 Lines of responsibility.

(a) *Chairman.* The Office of the Secretary, the Office of the General Counsel, the Office of Administrative Law Judges, the Office of Equal Employment Opportunity, the Office of the Inspector General, the Office of the Managing Director, and officials performing the functions of Information Security Officer and Designated Agency Ethics Official, report to the Chairman of the Commission.

(b) *Office of the Managing Director.* The Bureau of Trade Monitoring and Analysis; Bureau of Tariffs, Certification and Licensing; Bureau of Hearing Counsel; Bureau of Administration; and Bureau of Investigations report to the Office of the Managing Director. The Offices of Equal Employment Opportunity and of the Inspector General receive administrative assistance from the Managing Director. All other units of the Commission receive administrative guidance from the Managing Director.

(c) *Bureau of Investigations and District Offices.* The District Offices report to the Director, Bureau of Investigations.

§ 501.5 Functions of the organizational components of the Federal Maritime Commission.

As further provided in subpart C of this part, the functions, including the

delegated authority of the Commission's organizational components and/or officials to exercise their functions and to take all actions necessary to direct and carry out their assigned duties and responsibilities under the lines of responsibility set forth in § 501.4, are briefly set forth as follows:

(a) *Chairman.* As the chief executive and administrative officer of the Commission, the Chairman presides at meetings of the Commission, administers the policies of the Commission to its responsible officials, and assures the efficient discharge of their responsibilities. The Chairman provides management direction to the Offices of Equal Employment Opportunity, Inspector General, Secretary, General Counsel, Administrative Law Judges, and Managing Director with respect to all matters concerning overall Commission workflow, resource allocation (both staff and budgetary), work priorities and similar managerial matters; and establishes, as necessary, various committees and boards to address overall operations of the agency. The Chairman serves as appeals officer under both the Freedom of Information Act and the Privacy Act. The Chairman appoints the heads of major administrative units after consultation with other Commissioners. In addition, the Chairman, as "head of the agency," has certain responsibilities under Federal laws and directives not specifically related to shipping. For example, the special offices or officers within the Commission, listed under paragraphs (a)(1) through (a)(4) of this section, are appointed or designated by the Chairman, are under his or her direct supervision and report directly to the Chairman:

(1) Under the direction and management of the Office Director, the Office of Equal Employment Opportunity ("EEO") ensures that statutory and regulatory prohibitions against discrimination in employment and the requirements for related programs are fully implemented. As such, the Office administers and implements comprehensive programs on discrimination complaints processing, affirmative action and special emphasis. The Director, EEO, advises the Chairman regarding EEO's plans, procedures, regulations, reports and other matters pertaining to policy and the agency programs. Additionally, the Director provides leadership and advice to managers and supervisors in carrying out their respective responsibilities in equal employment opportunity. The Office administers and implements these program responsibilities in accordance with Equal Employment Commission ("EEOC") Regulations at 29 CFR part 1614 and other relevant EEOC Directives and Bulletins.

(2) Under the direction and management of the Inspector General, the Office of Inspector General conducts, supervises and coordinates audits and investigations relating to the programs and operations of the Commission; reviews existing and proposed legislation and regulations pertaining to such programs and operations; provides leadership and coordination and recommends policies for activities designed to promote economy, efficiency, and effectiveness in the administration of, and to prevent and detect waste, fraud and abuse in, such programs and operations; and advises the Chairman and the Congress fully and currently about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.

(3) The Information Security Officer is a senior agency official designated under § 503.52 of this chapter to direct and administer the Commission's information security program, which includes an active oversight and security education program to ensure effective implementation of Executive Order 12356.

(4) The Designated Agency Ethics Official and Alternate are appropriate agency employees formally designated under 5 CFR 2638.202 and § 500.105 of this chapter to coordinate and manage the ethics program as set forth in 5 CFR 2638.203, which includes the functions of advising on matters of employee responsibilities and conduct under part 500 of this chapter, and serving as the Commission's designee(s) to the Office of Personnel Management on such matters. They provide counseling and guidance to employees on conflicts of interest and other ethical matters.

(b) *Commissioners.* The members of the Commission, including the Chairman, implement various shipping statutes and related directives by rendering decisions, issuing orders, and adopting and enforcing rules and regulations governing persons subject to the shipping statutes; and perform other duties and functions as may be appropriate under reorganization plans, statutes, executive orders, and regulations.

(c) *Secretary.* Under the direction and management of the Secretary, the Office of the Secretary:

(1) Is responsible for the preparation, maintenance and disposition of the official files and records documenting the business of the Commission. In this regard, the Office:

(i) Prepares and, as appropriate, publishes agenda of matters for action by the Commission, prepares and maintains the minutes with respect to such actions; signs, serves and issues, on behalf of the Commission, documents implementing such actions, and coordinates follow-up thereon.

(ii) Receives and processes formal and informal complaints involving alleged statutory violations, petitions for relief, special dockets applications (including the issuance of decisions therein), applications to correct clerical or administrative errors in service contracts, requests for conciliation service, staff recommendations for investigation and rulemaking proceedings, and motions and filings relating thereto.

(iii) Disseminates information regarding the proceedings, activities, functions, and responsibilities of the Commission to the maritime industry, news media, general public, and other government agencies. In this capacity the Office also:

(A) Administers the Commission's Freedom of Information Act, Privacy Act and Government in the Sunshine Act responsibilities; the Secretary serves as the Freedom of Information Act and Privacy Act Officer.

(B) Authenticates records of the Commission.

(C) Receives and responds to subpoenas directed to Commission personnel and/or records.

(D) Compiles and publishes the bound volumes of Commission decisions.

(E) Coordinates publication of documents, including rules and modifications thereto with the Office of the Federal Register; the Secretary serves as the Federal Register Liaison Officer and Certifying Officer.

(2) Through the Secretary and, in the absence or preoccupation of the Secretary, through the Assistant Secretary, administers oaths pursuant to 5 U.S.C. 2903(b).

(3) Coordinates Alternative Dispute Resolution activities within the Commission.

(4) Through the Office of Informal Inquiries, Complaints and Informal Dockets:

(i) Advises the Commission on significant public interest issues in current and proposed policies, programs, and decisions;

(ii) Receives, coordinates, and responds to informal inquiries, complaints, suggestions, and expressions of concern from the public and contacts carriers, conferences, and other persons to effect solutions;

(iii) Publicizes Commission policies, programs, and activities of interest to the Commission's shipping public; and

(iv) Adjudicates small claims ($10,000 or less) arising from alleged violations of the shipping statutes.

(d) *General Counsel.* Under the direction and management of the General Counsel, the Office of the General Counsel:

(1) Reviews for legal sufficiency all staff memoranda and recommendations that are presented for Commission action and staff actions acted upon pursuant to delegated authority under §§ 501.26(i) and 501.26(k).

(2) Provides written or oral legal opinions to the Commission, to the staff, and to the general public in appropriate cases.

(3) Prepares and/or reviews for legal sufficiency, before service, all final Commission decisions, orders, and regulations.

(4) Monitors, reviews and, as requested by the Committees of the Congress, the Office of Management and Budget, or the Chairman, prepares comments on all legislation introduced in the Congress affecting the Commission's programs or activities, and prepares draft legislation or amendments to legislation; coordinates such matters with the appropriate Bureau, Office or official and advises appropriate Commission officials of legislation which may impact the programs and activities of the Commission. Also prepares testimony for Congressional hearings and responses to requests from Congressional offices.

(5) Serves as the legal representative of the Commission in courts and in administrative proceedings before other Government agencies.

(6) Monitors and reports on international maritime developments, including laws and practices of foreign governments which affect ocean shipping; and identifies potential state-controlled carriers within the meaning of section 3(8) of the Shipping Act of 1984, researches their status, and makes recommendations to the Commission concerning their classification.

(7) Represents the Commission in U.S. Government interagency groups dealing with international maritime issues; serves as a technical advisor on regulatory matters in bilateral and multilateral maritime discussions; and coordinates Commission activities through liaison with other Government agencies and programs and international organizations.

(8) Screens, routes, and maintains custody of U.S. Government and international organization documents, subject to the classification and safekeeping controls administered by the Commission's Information Security Officer.

(9) Reviews for legal sufficiency all adverse personnel actions, procurement activities, Freedom of Information Act and Privacy Act matters and other administrative actions.

(10) Manages the Commission's library and related services.

(e) *Administrative Law Judges.* Under the direction and management of the Chief Administrative Law Judge, the Office of Administrative Law Judges holds hearings and renders initial or recommended decisions in formal rulemaking and adjudicatory proceedings as provided in the Shipping Act, 1916, Shipping Act of 1984, and other applicable laws and other matters assigned by the Commission, in accordance with the Administrative Procedure Act and the Commission's Rules of Practice and Procedure.

(f) *The Office of the Managing Director.* (1) The Managing Director:

(i) As senior staff official, is responsible to the Chairman for the management and coordination of Commission programs managed by the operating Bureaus of Investigations; Hearing Counsel; Administration; Trade Monitoring and Analysis; and Tariffs, Certification and Licensing, as more fully described in paragraphs (g) through (k) of this section, and thereby implements the regulatory policies of the Commission and the administrative policies and directives of the Chairman;

(ii) Provides administrative guidance to all units of the Commission other than the operating bureaus listed in paragraph (f)(1) of this section, except the Offices of Equal Employment Opportunity and the Inspector General, which are provided administrative assistance;

(iii) Is the agency's Senior Procurement Executive under 41 U.S.C. 414(3) and Commission Order No. 112;

(iv) As the Designated Senior Information Resources Management Official under 44 U.S.C. 501–520 and 3501–3520 and Commission Order No. 117, reviews recommendations of the Commission's Committee on Automated Data Processing and submits them to the Chairman under Commission Orders Nos. 98 and 117;

(v) Is the Audit Follow-up and Management (Internal) Controls Official for the Commission under Commission Orders Nos. 103 and 106; and

(vi) Is the agency's Chief Operating Officer, as appointed by the Chairman in response to the President's October 1, 1993, memorandum on management reform.

(2) The Office of Managing Director ensures the periodic review and updating of Commission orders.

(3) A Deputy Managing Director, reporting directly to the Managing Director, supervises the development of, and serves as Contracting Officer for, the Commission's Automated Tariff Filing and Information ("ATFI") System.

(g) *Bureau of Trade Monitoring and Analysis.* Under the direction and management of the Bureau Director, the Bureau of Trade Monitoring and Analysis develops and administers programs in connection with the anticompetitive and cooperative arrangements and practices of common carriers by water, freight forwarders and terminal operators in the foreign and domestic commerce of the U.S., including the filing of common carrier agreements under section 15 of the Shipping Act, 1916, ocean common carrier agreements under section 5 of the Shipping Act of 1984, and the filing of agreements by marine terminal operators under section 15 of the Shipping Act, 1916, and section 5 of the Shipping Act of 1984. The Bureau provides expert economic testimony and support in formal proceedings, particularly regarding unfair foreign shipping practices under section 19 of the Merchant Marine Act, 1920, the Foreign Shipping Practices Act of 1988, and domestic offshore rate-of-return cases under the Intercoastal Shipping Act, 1933.

(h) *Bureau of Tariffs, Certification and Licensing.* Under the direction and management of the Bureau Director, the Bureau of Tariffs, Certification and Licensing plans, develops and administers programs in connection with tariffs filed by common carriers and marine terminal operators; ocean common carrier service contracts; financial responsibility of non-vessel operating common carriers; licensing ocean freight forwarders; certifying the financial responsibility of passenger vessel owners and operators; and financial reporting by ocean common carriers in the domestic offshore trades. These programs carry out provisions of the Shipping Act, 1916; the Intercoastal Shipping Act, 1933; the Shipping Act of 1984; and Pub. L. 89–777, as implemented under Parts 510, 514, 515, 540, 550, 552, 580, 581, 582, and 583 of this chapter. The Bureau maintains tariff data filed in electronic form on the Commission's Automated Tariff Filing and Information System ("ATFI"). The Bureau develops long-range plans, new or revised policies and standards, and rules and regulations with respect to these programs. It also cooperates with other Commission components with

regard to the enforcement of the Commission's regulatory requirements, and provides expert testimony and support in formal proceedings. The Bureau's program activities are carried out by the Office of Tariffs, the Office of Service Contracts and Passenger Vessel Operations and the Office of Freight Forwarders.

(i) *Bureau of Hearing Counsel.* Under the direction and management of the Bureau Director, the Bureau of Hearing Counsel:

(1) Participates as trial counsel in formal Commission proceedings when designated by Commission order, or when intervention is granted;

(2) Initiates, processes and negotiates the informal compromise of civil penalties under § 501.28 of this part and § 502.604 of this chapter, and represents the Commission in proceedings and circumstances as designated;

(3) Acts as staff counsel to the Managing Director and other bureaus and offices; and

(4) Coordinates with the Bureau of Investigations and other bureaus to provide legal advice, attorney liaison, and prosecution, as warranted, in connection with field investigations and other enforcement matters.

(j) *Bureau of Investigations; District Offices.* (1) The mission of the Bureau of Investigations is to secure compliance with the shipping statutes. To fulfill this mission, the Bureau, under the direction and management of the Bureau Director and through its offices located in key locations throughout the United States, conducts investigations leading to enforcement action, advises the Federal Maritime Commission of evolving competitive practices in international and domestic offshore commerce, assesses the practical repercussions of Commission regulations, educates the industry regarding policy and statutory requirements, assists in the resolution of disputes within the industry, and provides liaison, cooperation, and other coordination between the Commission and the maritime industry, shippers, and other government agencies.

(2) The activities performed by the District Offices, under the direction and management of their respective Office Directors, include the following:

(i) Representing the Commission within their respective geographic areas;

(ii) Providing liaison between the Commission and the shipping industry and interested public; conveying pertinent information regarding regulatory activities and problems; and recommending courses of action and solutions to problems as they relate to the shipping public, the affected industry, and the Commission;

(iii) Furnishing to interested persons information, advice, and access to Commission public documents;

(iv) Receiving and resolving informal complaints, in coordination with the Director, Office of Informal Inquiries, Complaints and Informal Dockets;

(v) Investigating potential violations of the shipping statutes and the Commission's regulations;

(vi) Conducting shipping industry surveillance programs to ensure compliance with the shipping statutes and Commission regulations. Such programs include common carrier audits, service contract audits and compliance checks of ocean freight forwarders;

(vii) Upon request of the Bureau of Tariffs, Certification and Licensing, auditing passenger vessel operators to determine the adequacy of performance bonds and the availability of funds to pay liability claims for death or injury, and assisting in the background surveys of ocean freight forwarder applicants;

(viii) Conducting special surveys and studies, and recommending policies to strengthen enforcement of the shipping laws;

(ix) Maintaining liaison with Federal and State agencies with respect to areas of mutual concern; and

(x) Providing assistance to the various bureaus and offices of the Commission as appropriate and when requested.

(k) *Bureau of Administration.* Under the direction and management of the Bureau Director, the Bureau of Administration is responsible for the administration and coordination of the Offices of: Administrative Services; Budget and Financial Management; Information Resources Management; and Personnel. The Bureau provides administrative support to the program operations of the Commission. The Bureau interprets governmental policies and programs and administers these in a manner consistent with Federal guidelines, including those involving information management, procurement, financial management and personnel. The Bureau initiates recommendations, collaborating with other elements of the Commission as warranted, for long-range plans, new or revised policies and standards, and rules and regulations, with respect to its program activities. The Office of the Bureau Director is responsible for directing and administering the Commission's training and development function. The Bureau Director is the Commission's Competition Advocate under 41 U.S.C. 418(a) and Commission Order No. 112, as well as the Commission's representative, as Principal Management Official, to the Small Agency Council. Other Bureau programs are carried out by its Offices, as follows:

(1) The Office of Administrative Services, under the direction and management of the Office Director, directs and administers a variety of management support service functions of the Commission. The Director of the Office is the Commission's principal Contracting Officer under Commission Order No. 112. Programs include communications; audio and voice telecommunications; procurement of and contracting for administrative goods and services, including the utilization of small and disadvantaged businesses; management of property, space, printing and copying; mail and records services; forms and graphic designs; facilities and equipment maintenance; and transportation.

(2) The Office of Budget and Financial Management, under the direction and management of the Office Director, administers the Commission's financial management program, including fiscal accounting activities, fee and forfeiture collections, and payments, and ensures that Commission obligations and expenditures of appropriated funds are proper; develops annual budget justifications for submission to the Congress and the Office of Management and Budget; develops and administers internal controls systems that provide accountability for agency funds; administers the Commission's travel and cash management programs, as well as the Commission's Imprest Funds; ensures accountability for official passports; and assists in the development of proper levels of user fees. The Director of the Office is the Commission's Chief Financial Officer.

(3) Under the direction and management of the Office Director, the Office of Information Resources Management's major function is to administer the information resources management program under the Paperwork Reduction Act. Other functions include: Management studies and surveys; data telecommunications/database management and application development; records management; IRM contract administration; and development of Paperwork Reduction Act clearances for submission to the Office of Management and Budget. The Office is also responsible for the computer security and records and forms management programs. The Director of the Office serves as IRM Manager, Forms Control Officer, Computer Security Officer, Records Management Officer, and ADP Coordinator for the Committee on Automated Data Processing.

(4) The Office of Personnel, under the direction and management of the Office Director, plans and administers a complete personnel management program including: Recruitment and placement; position classification and pay administration; occupational safety and health; employee counseling services; employee relations; workforce discipline; performance appraisal; incentive awards; retirement; and personnel security. The Director of the Office is the Chairman of the Incentive Awards Committee.

(l) *Boards and Committees.* The following boards and committees are established by separate Commission orders ("C.O.") to address matters relating to the overall operations of the Commission:

(1) The Executive Resources Board is comprised of three voting members, chosen from the ranks of those above the grade 15 level, with the majority being career members of the Senior Executive Service. The members serve staggered terms of three years, beginning October 1 of each year; the member serving in the last year of his/her term serves as Chairman. The board meets on an ad hoc basis to discuss, develop and submit recommendations to the Chairman on matters related to the merit staffing process for career appointments in the Senior Executive Service, including the executive qualifications of candidates for career appointment. The board also plans and manages the Commission's executive development programs. Serving the board in a non-voting advisory capacity are the Director, Office of Equal Employment Opportunity, the Training Officer, and the Director, Office of Personnel, who also serves as the board's secretary. C.O. No. 95.

(2) The Committee on Automated Data Processing is chaired by a Commissioner designated by the Chairman, and is comprised of the Directors of the Bureaus of Trade Monitoring and Analysis; Tariffs, Certification and Licensing; Administration; Hearing Counsel; and Investigations; the General Counsel; the Secretary; the Inspector General; the Director, Office of Equal Employment Opportunity; the Chief Administrative Law Judge; a representative from the Chairman's office; the Deputy Managing Director in charge of the Commission's Automated Tariff Filing and Information System; and the Director, Office of Information Resources Management, who serves as Committee Coordinator for the Committee Chairperson. The Committee meets on an ad hoc basis to review, evaluate and recommend to the Chairman, through the Managing Director, policies and actions on the acquisition, management and use of ADP equipment and services. C.O. No. 98.

(3) The Performance Review Board is chaired by a Commissioner designated by the Chairman, and is composed of a standing register of members which is published in the **Federal Register**. Once a year, the PRB Chairman appoints performance review panels from the membership to review individual performance appraisals and other relevant information pertaining to Senior Executives at the Commission, and to recommend final performance ratings to the Chairman. C.O. No. 115.

(4) The Incentive Awards Committee is composed of two permanent voting members: The Director of Personnel, who serves as Chairman; and the Director of Equal Employment Opportunity; and two other voting members approved by the Chairman upon the recommendation of the Managing Director. The committee meets on an ad hoc basis to determine if incentive award nominations meet established criteria, and to review suggestions. C.O. No. 62.

Subpart B—Official Seal

§ 501.11 Official seal.

(a) *Description.* Pursuant to section 201 (c) of the Merchant Marine Act, 1936, as amended (46 U.S.C. app. 1111(c)), the Commission prescribes its official seal, as adopted by the Commission on August 14, 1961, which shall be judicially noticed. The design of the official seal is described as follows:

(1) A shield argent paly of six gules, a chief azure charged with a fouled anchor or; shield and anchor outlined of the third; on a wreath argent and gules, an eagle displayed proper; all on a gold disc within a blue border, encircled by a gold rope outlined in blue, and bearing in white letters the inscription "Federal Maritime Commission" in upper portion and "1961" in lower portion.

(2) The shield and eagle above it are associated with the United States of America and denote the national scope of maritime affairs. The outer rope and fouled anchor are symbolic of seamen and waterborne transportation. The date "1961" has historical significance, indicating the year in which the Commission was created.

(b) *Design.*

Subpart C—Delegation and Redelegation of Authorities

§ 501.21 Delegation of authorities.

(a) *Authority and delegation.* Section 105 of Reorganization Plan No. 7 of 1961, August 12, 1961, authorizes the Commission to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business or matter. In subpart A of this part, the Commission has delegated general functions, and in this subpart C, it is delegating miscellaneous, specific authorities set forth in §§ 501.23, et seq., to the delegatees designated therein, subject to the limitations prescribed in subsequent subsections of this section.

(b) *Deputies.* Where bureau or office deputies are officially appointed, they are hereby delegated all necessary authority to act in the absence or incapacity of the director or chief.

(c) *Redelegation.* Subject to the limitations in this section, the delegatees may redelegate their authorities to subordinate personnel under their supervision and direction; but only if this subpart is amended to reflect such redelegation and notice thereof is published in the **Federal Register**. Under any redelegated authority, the redelegator assumes full responsibility for actions taken by subordinate redelegatees.

(d) *Exercise of authority; policy and procedure.* The delegatees and redelegatees shall exercise the authorities delegated or redelegated in a manner consistent with applicable laws and the established policies of the Commission, and shall consult with the General Counsel where appropriate.

(e) *Exercise of delegated authority by delegator.* Under any authority delegated or redelegated, the delegator (Commission), or the redelegator, respectively, shall retain full rights to exercise the authority in the first instance.

(f) *Review of delegatee's action.* The delegator (Commission) or redelegator of authority shall retain a discretionary right to review an action taken under delegated authority by a subordinate delegatee, either upon the filing of a written petition of a party to, or an intervenor in, such action; or upon the delegator's or redelegator's own initiative.

(1) Petitions for review of actions taken under delegated authority shall be filed within ten (10) calendar days of the action taken:

(i) If the action for which review is sought is taken by a delegatee, the petition shall be addressed to the Commission pursuant to § 502.69 of this chapter.

(ii) If the action for which review is sought is taken by a redelegatee, the petition shall be addressed to the redelegator whose decision can be further reviewed by the Commission under paragraph (f)(1)(i) of this section, unless the Commission decides to review the matter directly, such as, for example, in the incapacity of the redelegator.

(2) The vote of a majority of the Commission less one member thereof shall be sufficient to bring any delegated action before the Commission for review under this paragraph.

(g) *Action—when final.* Should the right to exercise discretionary review be declined or should no such review be sought under paragraph (f) of this section, then the action taken under delegated authority shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Commission.

(h) *Conflicts.* Where the procedures set forth in this section conflict with law or any regulation of this chapter, the conflict shall be resolved in favor of the law or other regulation.

§ 501.22 [Reserved]

§ 501.23 Delegation to the General Counsel.

The authority listed in this section is delegated to the General Counsel: Authority to classify carriers as state-controlled carriers within the meaning of section 3(8) of the Shipping Act of 1984, except where a carrier submits a rebuttal statement pursuant to § 514.4(c)(2)(ii) or § 580.1(e)(3)(i) of this chapter.

§ 501.24 Delegation to the Secretary.

The authorities listed in this section are delegated to the Secretary (and, in the absence or preoccupation of the Secretary, to the Assistant Secretary).

(a) Authority to approve applications for permission to practice before the Commission and to issue admission certificates to approved applicants.

(b) Authority to extend the time to file exceptions or replies to exceptions, and the time for Commission review, relative to initial decisions of administrative law judges and decisions of Special Dockets Officers.

(c) Authority to extend the time to file appeals or replies to appeals, and the time for Commission review, relative to dismissals of proceedings, in whole or in part, issued by administrative law judges.

(d) Authority to establish and extend or reduce the time:

(1) To file documents either in docketed proceedings or relative to petitions filed under part 502 of this chapter, which are pending before the Commission itself; and

(2) To issue initial and final decisions under § 502.61 of this chapter.

(e) Authority to prescribe a time limit less than twenty days from date published in the **Federal Register**, for the submission of written comments with reference to agreements filed pursuant to section 15 of the Shipping Act, 1916, and to prescribe a time limit for the submission of written comments with reference to agreements filed pursuant to section 5 of the Shipping Act of 1984.

(f) Authority, in appropriate cases, to publish in the **Federal Register** notices of intent to prepare an environmental assessment and notices of finding of no significant impact.

(g) Authority to prescribe a time limit less than ten days from date published in the **Federal Register** for filing comments on notices of intent to prepare an environmental assessment and notice of finding of no significant impact and authority to prepare environmental assessments of No Significant Impact.

(h) Authority, after consultation with the Director, Bureau of Trade Monitoring and Analysis, to rule on requests to file amendments or supplements to documents concerning pending section 15 agreements which are filed pursuant to § 560.602(e) of this chapter.

(i) Authority, in the absence or preoccupation of the Managing Director and Deputy Managing Directors, to sign travel orders, nondocketed recommendations to the Commission, and other routine documents for the Managing Director, consistent with the programs, policies, and precedents established by the Commission or the Managing Director.

§ 501.25 Delegation to the Managing Director.

The authorities listed in this section are delegated to the Managing Director.

(a) Authority to adjudicate, with the concurrence of the General Counsel, and authorize payment of, employee claims for not more than $1,000.00, arising under the Military and Civilian Personnel Property Act of 1964, 31 U.S.C. 3721.

(b) Authority to determine that an exigency of the public business is of such importance that annual leave may

not be used by employees to avoid forfeiture before annual leave may be restored under 5 U.S.C. 6304.

§ 501.26 Delegation to the Director, Bureau of Trade Monitoring and Analysis.

The authorities listed in this section are delegated to the Director, Bureau of Trade Monitoring and Analysis.

(a) Authority to approve, pursuant to section 15 of the Shipping Act, 1916, unprotested passenger agency agreements and modifications thereto, and container interchange agreements and modifications thereto between common carriers by water.

(b) Authority to approve modifications to agreements filed under section 15 of the Shipping Act, 1916, when such modifications are filed in accordance with regulations and are clearly in compliance with the criteria and/or intent of such regulations, and require modification of the filed amendment to the extent necessary to conform to such regulations.

(c) Authority to approve those classes of unprotested section 15 agreements, and modifications thereto, which, pursuant to section 35 of the Shipping Act, 1916, are specifically exempted from the approval requirements of that Act, but which, notwithstanding the exemption, have been filed for approval.

(d) Authority to approve, pursuant to section 15 of the Shipping Act, 1916, as amended, unprotested modifications to marine terminal conference agreements and unprotested marine terminal leases, licenses, assignments, or other agreements of a similar character for the use of terminal property or facilities between persons subject to the Shipping Act, 1916, as amended. In instances where an agreement for the use of terminal property or facilities of that character defined herein grants renewal options without providing that the Commission be notified in the event that such options are exercised, this authority extends to the issuance of conditional approval, the condition of approval being that the agreement be modified to provide for notification to the Commission in the event that such options are exercised and refiled with the Commission.

(e) Authority to determine that no action should be taken to prevent an agreement or modification to an agreement from becoming effective under section 6(c)(1), and to shorten the review period under section 6(e), of the Shipping Act of 1984, when the agreement or modification involves solely a restatement, clarification or change in an agreement which adds no new substantive authority beyond that already contained in an effective agreement. This category of agreement or modification includes, for example, the following: a restatement filed to conform an agreement to the format and organization requirements of part 572 of this chapter; a clarification to reflect a change in the name of a country or port or a change in the name of a party to the agreement; a correction of typographical or grammatical errors in the text of an agreement; a change in the title of persons or committees designated in an agreement; or a transfer of functions from one person or committee to another.

(f) Authority to grant or deny applications filed under § 572.404 of this chapter for waiver of the form, organization and content requirements of §§ 572.401, 572.402, 572.403, 572.501 and 572.502 of this chapter.

(g) Authority to determine that no action should be taken to prevent an agreement or modification of an agreement from becoming effective under section 6(c)(1) of the Shipping Act of 1984 for all unopposed agreements and modifications to agreements which will not result in a significant reduction in competition. Agreements which are deemed to have the potential to result in a significant reduction in competition and which, therefore, are not covered by this delegation include but are not limited to:

(1) New agreements authorizing the parties to collectively discuss or fix rates (including terminal rates).

(2) New agreements authorizing the parties to pool cargoes or revenues.

(3) New agreements authorizing the parties to establish a joint service or consortium.

(4) New sailing agreements.

(5) New equal access agreements.

(6) Significant modifications to the above categories of agreements as set forth in § 572.403(a)(3) of this chapter.

(h) Authority to grant or deny shortened review pursuant to § 572.605 of this chapter for agreements for which authority is delegated in paragraph (g) of this section.

(i) Subject to review by the General Counsel, authority to deny, but not approve, requests filed pursuant to § 572.605 of this chapter for a shortened review period for agreements for which authority is not delegated under paragraph (g) of this section.

(j) Authority to issue notices of termination of agreements which are otherwise effective under the Shipping Act, 1916, or the Shipping Act of 1984, after publication of notice of intent to terminate in the **Federal Register**, when such terminations are:

(1) Requested by the parties to the agreement;

(2) Deemed to have occurred when it is determined that the parties are no longer engaged in activity under the agreement and official inquiries and correspondence cannot be delivered to the parties; or

(3) Deemed to have occurred by notification of the withdrawal of the next to last party to an agreement without notification of the addition of another party prior to the effective date of the next to last party's withdrawal.

(k) Authority to determine whether agreements for the use or operation of terminal property or facilities, or the furnishing of terminal services, are within the purview of section 15 of the Shipping Act, 1916, or section 5 of the Shipping Act of 1984.

(l) Authority to request controlled carriers to file justifications for existing or proposed rates, charges classifications, rules or regulations, and review responses to such requests for the purpose of recommending to the Commission that a rate, charge, classification, rule or regulation be found unlawful and, therefore, requires Commission action under section 9(d) of the Shipping Act of 1984.

(m) Authority to recommend to the Commission the initiation of formal proceedings or other actions with respect to suspected violations of the shipping statutes and rules and regulations of the Commission.

§ 501.27 Delegation to and redelegation by the Director, Bureau of Tariffs, Certification and Licensing.

Except where specifically redelegated in this section, the authorities listed in this section are delegated to the Director, Bureau of Tariffs, Certification and Licensing.

(a)(1) Authority to approve for good cause or disapprove special permission applications submitted by common carriers, or conferences of such carriers, subject to the provisions of section 8 of the Shipping Act, 1984, section 18 of the Shipping Act, 1916, or section 2 of the Intercoastal Shipping Act of 1933, for relief from statutory and/or Commission tariff requirements.

(2) The authority under this paragraph is redelegated to the Chief, Office of Tariffs, in the Bureau of Tariffs, Certification and Licensing.

(b)(1) Authority to approve or disapprove special permission applications submitted by a controlled carrier subject to the provisions of section 9 of the Shipping Act of 1984 for relief from statutory and/or Commission tariff requirements.

(2) The authority under this paragraph is redelegated to the Chief, Office of Tariffs, in the Bureau of Tariffs, Certification and Licensing.

(c)(1) Authority contained in Supplemental Report No. 4 and Order in Docket No. 90–23, Notice of Inquiry on Ocean Freight Tariffs in Foreign and Domestic Offshore Commerce—Tariffs and Service Contracts, to grant special permission to deviate from the requirement that electronically-filed tariffs become effective no later than 90 days from the last day of the applicable filing window.

(2) The authority under this paragraph is redelegated to the Chief, Office of Tariffs, in the Bureau of Tariffs, Certification and Licensing.

(d) Authority contained in Part 514 of this chapter to temporarily exempt common carriers from the electronic tariff filing requirements of that part for a period not to exceed 90 days from the filing dates set forth in Supplemental Report No. 4 and Order, served in Docket No. 90–23 on May 28, 1993.

(e)(1) Authority to reject tariff filings of common carriers in the foreign and domestic offshore commerce of the U.S. or conferences of such carriers for failure to meet the requirements of pertinent statutes or the Commission's regulations, for lack of completeness or clarity, or for noncompliance with special permission or other orders of the Commission.

(2) The authority under this paragraph is redelegated to the Chief, Office of Tariffs; Chief, Tariff Control Center and Senior Transportation Specialists in the Bureau of Tariffs, Certification and Licensing.

(f) Authority to issue notices of intent to cancel inactive tariffs of common carriers in the foreign and domestic offshore commerce and marine terminal operators, after a diligent effort has been made to locate the carrier/terminal operator without success, or if the carrier/terminal operator has advised the Commission that it no longer offers a carrier/terminal operator service but refuses to cancel its tariff upon written request; and to cancel such tariff if, within 30 days after publication, the carrier/terminal operator does not furnish reasons why such tariff should not be canceled.

(g) (1) Authority to:

(i) Approve or disapprove applications for ocean freight forwarder licenses; issue or reissue or transfer such licenses; and approve extensions of time in which to furnish the name(s) and ocean freight forwarding experience of the managing partner(s) or officer(s) who will replace the qualified partner or officer upon whose qualifications the original licensing was approved;

(ii) Issue a letter stating that the Commission intends to deny an application, unless within 20 days, applicant requests a hearing to show that denial of the application is unwarranted; deny applications where an applicant has received such a letter and has not requested a hearing within the notice period; and rescind, or grant extensions of, the time specified in such letters;

(iii) Revoke the license of an ocean freight forwarder upon the request of the licensee;

(iv) Upon receipt of notice of cancellation of any bond, notify the licensee in writing that its license will automatically be suspended or revoked, effective on the bond cancellation date, unless a new or reinstated bond is submitted and approved prior to such date, and subsequently order such suspension or revocation for failure to maintain a bond;

(v) Approve changes in an existing licensee's organization; and

(vi) Return any application which on its face fails to meet the requirements of the Commission's regulations, accompanied by an explanation of the reasons for rejection.

(2) The authorities contained in paragraphs (g)(1)(iii) and (g)(1)(iv) of this section are redelegated to the Chief, Office of Freight Forwarders, in the Bureau of Tariffs, Certification and Licensing.

(h) Authority to:

(1) Approve applications for Certificates (Performance) and Certificates (Casualty) evidenced by a surety, insurance or guaranty issued by an approved entity, and issue, reissue, or amend such Certificates;

(2) Issue a written notice to an applicant stating intent to deny an application for a Certificate (Performance) and/or (Casualty), indicating the reason therefor, and advising applicant of the time for requesting a hearing as provided for under § 540.26(c) of this chapter; deny any application where the applicant has not submitted a timely request for a hearing; and rescind such notices and grant extensions of the time within which a request for hearing may be filed;

(3) Issue a written notice to a certificant stating that the Commission intends to revoke, suspend, or modify a Certificate (Performance) and/or (Casualty), indicating the reason therefor, and advising of the time for requesting a hearing as provided for under § 540.26(c) of this chapter; revoke, suspend or modify a Certificate (Performance) and/or (Casualty) where the certificant has not submitted a timely request for hearing; and rescind such notices and grant extensions of time within which a request for hearing may be filed;

(4) Revoke a Certificate (Performance) and/or (Casualty) which has expired, and/or upon request of, or acquiescence by, the certificant; and

(5) Notify a certificant when a Certificate (Performance) and/or (Casualty) has become null and void in accordance with §§ 540.8(a) and 540.26(a) of this chapter.

(i) Authority contained in §§ 514.7(j) and 581.8 of this chapter to notify filing parties of the Commission's intent to reject a service contract and/or statement of essential terms and subsequently reject and return such contracts.

(j) Authority contained in Parts 514 and 581 of this chapter to approve, but not deny, requests for permission to correct clerical or administrative errors in the essential terms of filed service contracts.

(k) Authority contained in parts 514, 580 and 583 of this chapter to cancel the tariffs of NVOCCs who fail to file a surety bond, guaranty or insurance policy or, if required, designate an agent for receipt of process, or whose surety bond or agent designation is canceled.

(l) Authority contained in Parts 514 and 582 of this chapter to cancel the tariff or tariffs of any common carrier, and suspend the license of any ocean freight forwarder, who fails to file an anti-rebate certification.

(m) Authority to approve or disapprove applications as specified in Part 552 of this chapter for extensions of time for filing (§ 552.2(c)), alternative data (§ 552.2(d)) and waiver of detailed filing requirements (§ 552.2(e)).

(n) Authority contained in § 514.8(d)(4)(ii) of this chapter to approve minor changes and additions to transaction set data for the ATFI system. Such minor changes include additions to any of the following term and reference lists: Cities; States and Provinces; Countries; Ports; Container sizes; Container types; Container temperatures; Hazard codes; Inland modes, Packaging types, Rate bases; Service types; Stuffing mode; Stripping mode; and Currencies.

(o) Authority to develop, prescribe, and administer programs to assure compliance with the provisions of the shipping statutes of all persons subject thereto, including without limitations those programs for: The submission of regular and special reports, information, and data; the conduct of a plan for the field audit of activities and practices of

common carriers by water in the domestic offshore trade and the foreign commerce of the U.S., conferences of such carriers, marine terminal operators, ocean freight forwarders, and other persons subject to the shipping statutes; and the conduct of rate studies.

(p) Authority to review and determine the validity of alleged or suspected violations, exclusive of formal complaints, of the shipping statutes and rules and regulations of the Commission by freight forwarders; authority to determine corrective action necessary with respect to violations except where violations involve major questions of policy or major interpretations of statutes, or orders, rules, and regulations of the Commission, or acts having material effect upon the commerce of the U.S.; and authority to recommend to the Commission the initiation of formal proceedings or other actions with respect to such alleged or suspected violations.

§ 501.28 Delegation to the Director, Bureau of Hearing Counsel.

The authority to compromise civil penalty claims has been delegated to the Director, Bureau of Hearing Counsel, by § 502.604(g) of this chapter. See also §§ 501.5(i) and 521.21.

§ 501.29 [Reserved]

§ 501.30 Delegation to and redelegation by Director, Bureau of Administration.

Except where specifically redelegated in this section, the authorities listed in this section are delegated to the Director, Bureau of Administration, and, in the absence or preoccupation of the Director, to the Deputy Director of that Bureau.

(a)(1) Authority under part 514 of this chapter, after consultation with the Bureau of Tariffs, Certification and Licensing, and the Office of the Managing Director, to issue letters notifying applicants for certification of ATFI batch filing capability that their applications have or have not been granted.

(2) The authority under this paragraph is redelegated to the Director, Office of Information Resources Management.

(b)(1) Authority under § 514.21(m)(2) of this chapter, after consultation with the Bureau of Tariffs, Certification and Licensing and the Office of the Managing Director, to evaluate and approve or disapprove by letter the accounting or charging system the applicant intends to use for charging users and remitting to the Commission indirect (subsequent) access user fees under 46 U.S.C. app. 1107a(d)(1)(B)(ii).

(2) The authority under this paragraph is redelegated to the Director, Office of Information Resources Management.

(c)(1) Authority is delegated to the Director, Bureau of Administration, to approve, certify, or otherwise authorize those actions dealing with appropriations of funds made available to the Commission including allotments, fiscal matters, and contracts relating to the operation of the Commission within the laws, rules, and regulations set forth by the Federal Government.

(2) The authority under this paragraph is redelegated to the Director, Office of Budget and Financial Management.

(d)(1) Authority is delegated to the Director, Bureau of Administration, to classify all positions GS–1 through GS–15 and wage grade positions.

(2) The authority under this paragraph is redelegated to the Director, Office of Personnel.

§ 501.31 Delegation to the Director, Bureau of Investigations.

The authority listed in this section is delegated to the Director, Bureau of Investigations: Authority to approve administrative leave for employees in District Offices.

Subpart D—Public Requests for Information

§ 501.41 Public requests for information and decisions.

(a) General. Pursuant to 5 U.S.C. 552(a)(1)(A), there is hereby stated and published for the guidance of the public the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions, principally by contacting by telephone, in writing, or in person, either the Secretary of the Commission at the Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573, or the District Offices listed in paragraph (d) of this section. See also part 503 of this chapter.

(b) The Secretary will provide information and decisions, and will accept and respond to requests, relating to the program activities of the Office of the Secretary and of the Commission, generally. Unless otherwise provided in this chapter, any document, report, or other submission required to be filed with the Commission by statute or the Commission's rules and regulations relating to the functions of the Commission or of the Office of the Secretary shall be filed with or submitted to the Secretary.

(c) The Directors of the following bureaus and offices will provide information and decisions, and will accept and respond to requests, relating to the specific functions or program activities of their respective bureaus and offices as set forth in this chapter; but only if the dissemination of such information or decisions is not prohibited by statute or the Commission's Rules of Practice and Procedure:

(1) Office of the General Counsel;

(2) Office of the Administrative Law Judges;

(3) Office of the Managing Director;

(4) Office of the Inspector General ;

(5) Office of Equal Employment Opportunity;

(6) Bureau of Hearing Counsel;

(7) Bureau of Trade Monitoring and Analysis;

(8) Bureau of Tariffs, Certification and Licensing;

(9) Bureau of Investigations;

(10) Bureau of Administration;

(11) Office of Personnel;

(12) Office of Budget and Financial Management;

(13) Office of Information Resources Management;

(14) Office of Administrative Services; and

(15) Office of Informal Inquiries, Complaints and Informal Dockets.

(d) The Directors of the New York, New Orleans, San Francisco, Puerto Rico, Houston, Los Angeles and Miami District Offices will provide information and decisions to the public within their geographic areas, or will expedite the obtaining of information and decisions from headquarters, relating to the program activities of the District Offices as set forth in this part. The addresses of these offices are as follows:

New York District—Director, New York District, Federal Maritime Commission, 6 World Trade Center, suite 614, New York, New York 10048–0949

New Orleans District—Director, New Orleans District, Federal Maritime Commission, 1 Canal Place Tower, 365 Canal Street, suite 2260 New Orleans, Louisiana 70130–1134

Miami District—Director, Miami District, Federal Maritime Commission, 18441 NW. 2nd Avenue, suite 302, Miami, Florida 33169

San Francisco District—Director, San Francisco District, Federal Maritime Commission, 525 Market Street, suite 3510, San Francisco, California 94105–2743

Los Angeles District—Director, Los Angeles District, Federal Maritime Commission, 11 Golden Shore, suite 270, Long Beach, California 90802

Puerto Rico District—Director, Puerto Rico District, Federal Maritime Commission, U.S. District Courthouse, Federal Office Building, room 762, 150 Carlos Chardon Avenue, Hato Rey, Puerto Rico 00918–1735

Houston District—Director, Houston District, Federal Maritime Commission, 14950

Heathrow Forest Parkway, suite 110, Box 14, Houston, Texas 77032–3842

(e) Any document, report or other submission required to be filed with the Commission by statute or the Commission's rules and regulations relating to the specific functions of the bureaus and offices shall be filed with or submitted to the Director of such Bureau or Office.

By the Commission.

Joseph C. Polking

Secretary.

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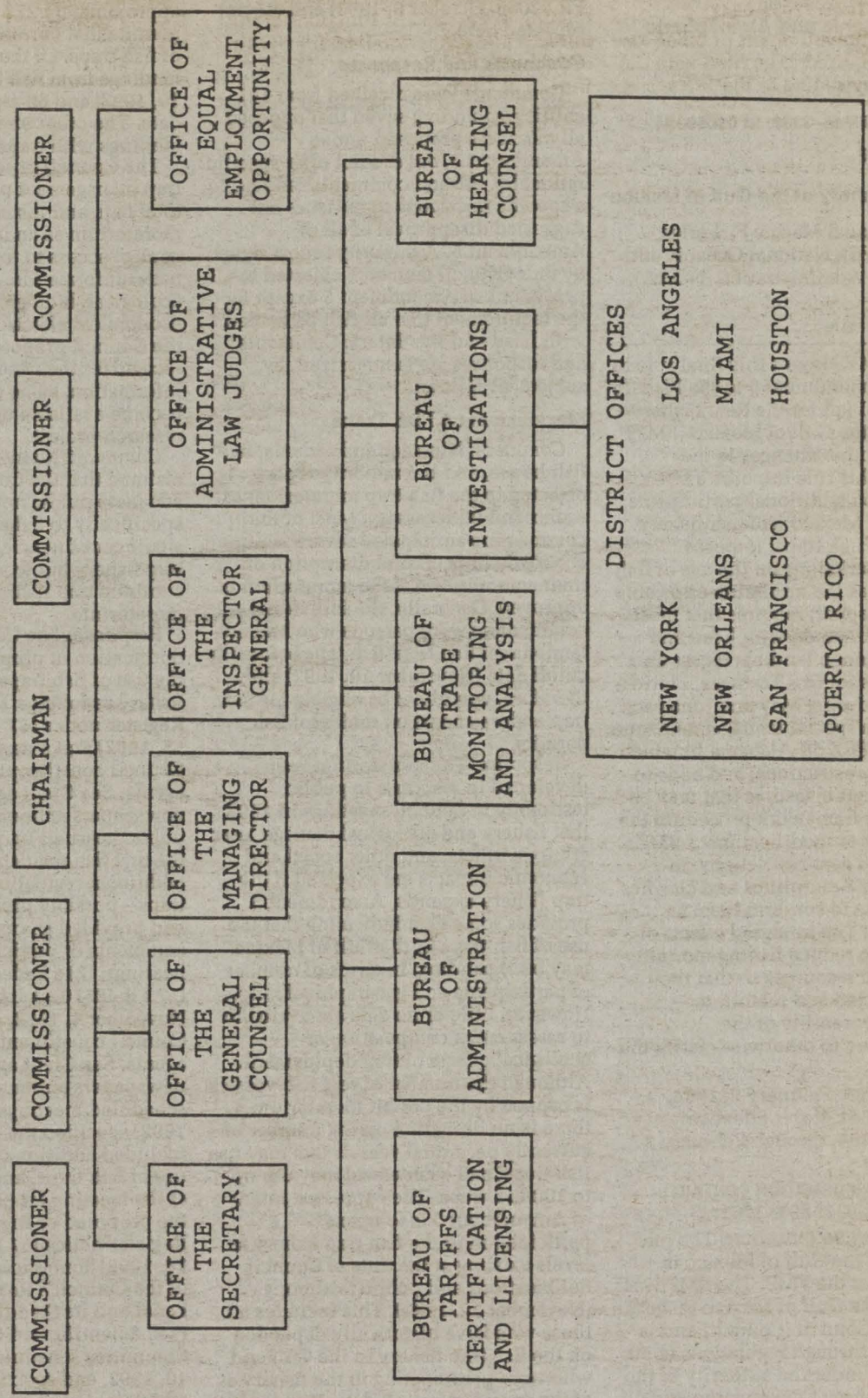
APPENDIX A

FEDERAL MARITIME COMMISSION
ORGANIZATION CHART



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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 641

[Docket No. 930946-3338; ID 090993A]

RIN 0648-AE58

Reef Fish Fishery of the Gulf of Mexico

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 5 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) and to make other changes to the regulations This rule imposes a moratorium on additional participants in the Gulf of Mexico reef fish fishery who may use fish traps; imposes additional restrictions on the use of fish traps; increases the minimum allowable size of red snapper; requires that most finfish be maintained with head and fins intact through landing; closes an area southwest of Dry Tortugas, Florida, to all fishing during May and June each year; creates a special management zone (SMZ) in the EEZ off Alabama in which there are gear restrictions; and adds to the management measures that may be adjusted via a framework procedure the establishment or modification of SMZs and associated gear restrictions. In addition, NMFS simplifies and clarifies the regulations to conform them to current usage. The intended effects of this rule are to reduce fishing mortality of the reef fish resources so that they may be protected and rebuilt, to enhance enforceability of the regulations, and to otherwise clarify the regulations.

EFFECTIVE DATES: February 7, 1994, except that § 641.4(o) is effective February 7, 1994, through February 7, 1997.

FOR FURTHER INFORMATION CONTACT: Robert Sadler, 813-893-3161.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented through regulations at 50 CFR part 641 under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

Detailed descriptions, backgrounds, and rationales for the management measures in Amendment 5 and the additional measures proposed by NMFS were included in the proposed rule (58 FR 52063, October 6, 1993) and are not repeated here.

Comments and Responses

Comments were received from 141 entities (including seven that opposed all measures proposed under Amendment 5, but did not offer specific rationale). Several comments referred to a specific management measure but suggested disapproval of all of Amendment 5. A minority report signed by four Council members objected to all provisions of Amendment 5 except for the requirement that all fish be landed with head and fins intact. Comments and responses are summarized, by subject, as follows.

Moratorium on Fish Traps

Comment: Nineteen individuals, one fish house, and the minority report objected to the fish trap moratorium as unfair and unnecessary. Most of the commenters anticipated severe economic impacts and disruption of their communities if the moratorium is approved. Generally, the individual commenters were persons who had not landed reef fish from fish taps before the cutoff date (November 19, 1992) and, therefore, would not be eligible for fish trap endorsements on their reef fish permits.

Response: The moratorium was developed in response to public testimony at Council meetings in 1992 that fishery and ecological damage, user group conflicts, and other social and economic impacts are expected if the trap fishery expands. Amendment 5 provides some data indicating that the use of fish traps in the Gulf of Mexico may be expanding, in terms of number of participants and geographical range. However, little or no data are available to assess catch composition or ecological effects of trap deployment. Although the number of reef fish vessels is capped by the permit moratorium, there is no limitation on the number of currently permitted vessels that may use fish traps, and each vessel may use up to 100 fish traps. The expressed intent of Amendment 5 is to freeze participation in the fish trap fishery at levels existing at the time of Council deliberations and public testimony (November 19, 1992). This includes all those who have historically depended on the fish trap fishery in the Gulf and who were participating in the fishery as of the specified cut-off date. It excludes only new participants entering after that date.

Since all landings by fish traps are required to be reported, vessel logbook records were selected as the means to verify use of fish traps. There are approximately 273 reef fish vessel permits that currently authorize the use of fish traps. Of these, 120 reported landings from fish traps by November 19, 1992, and 60 reported only after that date. The other 93 reported no reef fish landings with traps from 1991 to date.

The Council rejected more severe fish trap management proposals, including a total ban, and instead proposed the moratorium as an interim measure to control access to the trap fishery until better information could be obtained on ecological, biological, social, and economical effects. NMFS concurs with the Council proposal. Amendment 5 recognizes the need for better information, some of which may become available under a current NMFS research project.

Comment: Many of the comments also claimed that the Council acted without adequate public notification, most specifically to fishermen who made significant financial investments in the trap fishery but would be ineligible to continue trap fishing under the moratorium.

Response: The Council provided notification of proposed limitations on the use of fish traps in the reef fish fishery as follows: (1) A **Federal Register** notice (57 FR 47235, October 15, 1992) and a news release sent to Council constituents, NMFS statistical agents, Sea Grant agents, and newspapers announced upcoming public hearings on proposed changes to the reef fish regulations, including additional regulations on the use of fish traps—possibly prohibiting their use, and provided an opportunity for written comments or participation at the hearings; (2) a **Federal Register** notice (57 FR 48510, October 26, 1992) and a November 4, 1992, news release sent to Council constituents, NMFS statistical agents, Sea Grant agents, and newspapers announced the Council's scheduled meetings of November 16-19, 1992, specified the agenda, which included additional regulations on the use of fish traps, and scheduled a period at the meeting for public testimony on the proposed changes; (3) a **Federal Register** notice (57 FR 48510, October 26, 1992) announced a public meeting of the Council's Reef Fish Advisory Panel and its Standing and Special Reef Fish Scientific and Statistical Committee scheduled for November 9-10, 1992, and specified the agenda, which included additional regulations on the use of fish traps—possibly prohibiting their use; and (4) a newsletter distributed to Council constituents in early December 1992 announced the Council's vote on

November 19, 1992, for the moratorium. Eight public hearings at various locations between Key West, Florida, and Galveston, Texas, were held by the Council prior to the cutoff date, including a hearing attended by a relatively large number of participants at the Council meeting on November 18, 1992.

Comment: One individual suggested a total ban on the use of fish traps in the Gulf of Mexico; another suggested establishing an SMZ to ban fish traps in the Florida Keys, instead of implementing the proposed fish trap moratorium.

Response: A total ban on the use of fish traps was proposed in draft Amendment 5, but later was rejected by the Council in Amendment 5 based on a review of available data and objections raised by the public and NMFS. According to the analyses and data provided in Amendment 5, a fish trap ban would not comply with the Magnuson Act national standards or other applicable law. The moratorium is intended as a temporary control on the range and extent of the fishery, pending collection of additional fishery data (as referenced above).

Require Fish Traps To Be Returned to Port on Each Trip

Comment: Four individuals and the Council minority report opposed this measure as burdensome and unnecessary. Several commenters cited vessel safety problems and stated that their fishing efforts would be limited by the number of traps their vessels could carry. However, one individual supported the proposed requirement.

Response: The current regulations, which do not require that fish traps be returned to shore after each fishing trip, cause problems with locating and inspecting, dock-side or in transit, fish traps for enforcement purposes. Amendment 5 recognizes the costs and limitations associated with returning all traps to port after each trip, particularly for smaller vessels unable to carry safely all the traps they now use. Nonetheless, the Council determined that this measure provides benefits by providing enforcement opportunities for inspection of fish traps for compliance with construction, quantity, and tagging requirements. Moreover, many fish trap fishermen currently utilize this practice, and therefore would not be affected by the requirement. This requirement does not inherently create a vessel safety problem. Vessel owners and operators are encouraged to carry only that number of traps which can be safely carried given the size and weight of the traps, the size and tonnage of the vessel, and applicable weather conditions. Lastly, for these reasons, NMFS concurs with the Council and the individual commenter supporting the measure.

Buoying Requirements for Fish Traps

Comment: An environmental organization supported this measure. The minority report objected to the requirement for surface buoys for each single trap or end traps in a string of traps as increasing the chances of lost traps and ghost fishing in areas of strong currents and frequent ship traffic. The report argues that the presently allowed submerged buoys are sufficient.

Response: The current regulations allow trap buoys to be submerged and released with pop-up devices. This creates an enforcement problem locating fish traps at sea and may lead to increased numbers of lost traps. The requirement for surface buoys for individual traps, or for each end trap of traps that are connected by a line, is needed to enhance spotting of traps from the air or at sea for enforcement purposes. This requirement was not objected to by public comments. No fishermen agreed with the objections raised in the minority report. Since available information indicates a need for more effective regulation of the fish trap fishery, NMFS concurs with the Council and the environmental organization and supports this management measure as an appropriate means of regulating fish traps.

Special Management Zones (SMZs) Off Alabama

Amendment 5 proposes to establish three large SMZs off Alabama, wherein reef fish bag limits and a "no-sale" provision would apply to fishing for reef fish with buoy gear, longlines, or gear with more than three hooks per line. In response to concerns raised about the proposed SMZs, NMFS invited public comment on the proposed rule on the following specific concerns:

(1) What are the effects of establishing areas totaling approximately 820 square miles (2,124 square km) in which fishing under the commercial allocations would be severely limited;

(2) What are the effects of the 3-hook limit on the recreational and commercial user groups;

(3) What are the effects on the rebuilding plan of increasing availability of red snapper to the recreational fishery, particularly those in Alabama; and

(4) Are the Alabama SMZs consistent with the fairness and equity criteria proposed under the proposed framework procedure for adding SMZs and, if not, should they be consistent?

Comment: The minority report objected to the establishment of the SMZs. In addition, a total of 105 entities commented on the proposal, with 74 comments in support and 31 in opposition.

The minority report objected to the SMZs as unfair and therefore in violation of the Magnuson Act. The report also claimed that: (1) The Council acted without adequate public notification; (2) no information was presented on historical uses of the tracts; (3) testimony that commercial reef fish fishermen also had constructed reefs was ignored by the Council; and (4) the size of the tracts is so large that enforcement is impractical. In addition, 26 individuals, two commercial fishing organizations, and two fish houses offered various objections to the proposed SMZ designations and gear restrictions. Several disagreed with a statement in Amendment 5 that pulse and derby fishing on the red snapper resource was concentrated on the proposed SMZs off Alabama starting in April 1992. Additionally, a number of commenters objected to implications in Amendment 5 that the three tracts contained virtually no natural reefs or hard bottom area. Tracts B and C were frequently identified as having significant natural reef fish habitat.

Many of the reef fish fishermen claimed that once the red snapper season closes, bandit gear hook-and-line fishing occurs for vermilion snapper in the tracts. In addition, several fish houses and fishermen commented that the vermilion snapper fishery in tracts B and C typically is separated geographically and in time from the winter fishery for red snapper. Several comments indicated that vermilion snapper are relatively low-valued fish which have to be targeted with large numbers of hooks per line; i.e., they cannot profitably be fished commercially with three hooks or less. According to one dealer, the vermilion snapper fishery in the tracts includes as many as 18 vessels out of Pensacola, Florida, and a similar number from the Destin, Florida, area. Other commenters indicated that up to 150 commercial vessels would be impacted adversely by the 3-hook rule. This information was not available to the Council during debate on Amendment 5.

Several individuals also commented that this proposal, in effect, unfairly allocates part of the total allowable catch to reef fish harvesters who meet the 3-hook limit at the expense of users of longlines, buoy gear, or lines with more than three hooks. In addition, several of the public comments claim that enforcement efforts would be

complicated by allowing harvest of fish other than reef fish with lines having more than three hooks and by the unusually large size of the three tracts. One commenter recommended disapproving tract C; another recommended disapproving both tracts B and C.

An environmental organization indicated general support for the SMZs as a means of offering recreational fishing opportunities, but expressed concern over the resulting impacts on other fisheries once reef fish gear is restricted. The organization also indicated a need to control fishing effort on natural reefs.

Response: Concerning the minority report, NMFS has concluded that the Council provided adequate notification of Council meetings and public hearings on Amendment 5 (as outlined in our response to comments on the fish trap moratorium). Eight public hearings were held by the Council on Amendment 5, including a hearing attended by a relatively large number of participants in the reef fish fishery at the Council meeting on November 18, 1992.

Many of the objections raised by the minority report and individual commenters which contest statements found in Amendment 5 are supportable by available NMFS information. For example, red snapper commercial landings for 1992 totalled only about 130,000 pounds from the statistical grid which includes tracts B and C (statistical grid 10) and were less than previous years. This does not support the contention in Amendment 5 that pulse overfishing occurred in these two tracts, or that the artificial reefs produced additional red snapper which were then taken and landed in commercial quantities. Moreover, these data do not indicate that the short red snapper season caused more persons to take excessive advantage of the artificial reefs in tracts B and C.

The contention of many commenters that the proposed SMZs, particularly tracts B and C, supported a valuable vermilion snapper fishery is also supported by available data. NMFS commercial landing records for 1962–1990 indicate that statistical grid 10 produced the largest landings of vermilion snapper of all the Gulf grids (approximately 12 percent of the Gulf-wide catch). The actual catch from tracts B and C may be higher than 12 percent since 28 percent of the 1962–1990 vermilion snapper landings cannot be traced to any statistical grid, and part of tract C extends seaward of the grid 10 boundary.

Due to its proximity to shore, tract A is more readily available for the harvest of red snapper and could contribute to rapid harvest upon opening of the 1993 red snapper commercial harvest period. Additionally, landings data and several of the public comments indicate that tract A does not support a large fishery for vermilion snapper and as an SMZ would pose less adverse impact on historical fisheries. Therefore, tract A appears to be in greater need of the proposed protection as an SMZ than the other two tracts. The 3-hook rule could slow the rate of red snapper harvest in that tract should those who previously used non-conforming gear choose not to compensate by increasing effort or the number of lines per boat. Tract A also would incur the least amount of at-sea time needed by enforcement staff to verify the number of hooks on each reef fish line being used in the tract.

Tract B (360 square miles (932 square km)) and tract C (360 square miles (932 square km)) are significantly larger than tract A (100 square miles (259 square km)) and, according to public comments, contain natural reefs and substantial hard bottom habitat, which is important for supporting the vermilion snapper fishery. Without additional rationale, tracts B and C do not appear to be appropriate candidates for the proposed SMZ designation and gear restrictions, mainly because of public and NMFS concerns over adverse impacts to the vermilion snapper fishery documented in those areas.

For these reasons, NMFS approves only tract A for the SMZ designation and gear restrictions proposed by the Council. Approval of SMZ tracts B and C is not appropriate given the public comments and landings data which indicate the presence of an important fishery for vermilion snapper that was not addressed in Amendment 5 and that would be unnecessarily eliminated by the 3-hook limit and "no-sale" provision.

Comment: Seventy-two individuals, one wildlife organization, and one recreational fishing organization supported the SMZs and gear restrictions. The individuals included recreational fishermen and a builder of artificial reefs, all of whom indicated as a rationale for their support that artificial reef fish communities (primarily red snapper) are in need of protection from efficient commercial reef fish fishing gear. Other comments covered related topics and noted that the gear restriction would not in itself prohibit commercial fishing but may extend the season. Several commenters suggested management measures outside the scope of the proposed rule (i.e., allow only rod-and-reel fishing in the SMZs). However, many of the 74 comments that supported the SMZs provided little or no detailed rationale regarding the areas of concern listed in the proposed rule.

Response: NMFS acknowledges that SMZ designation of some nearshore artificial reefs may protect the reef fish resources from over exploitation (for the reasons stated above), and therefore has approved tract A.

Landings data from the statistical grid that contains tracts B and C do not support the Council's contention that a significant red snapper fishery in those tracts displaced either persons who constructed the artificial reefs or who traditionally fished with fewer hooks per line. Furthermore, Amendment 5 does not clearly indicate or analyze the extent of the vermilion snapper commercial fishery whose participants rely on those tracts for income year round. Unlike red snapper, vermilion snapper has not been shown to be overfished; moreover, artificial reefs have not been shown to be of specific benefit to vermilion snapper.

In addition to the 3-hook rule, a ban on reef fish commercial longlining (including use of three hooks or less per line) also was proposed for the area within tract C where that gear currently is allowed. Amendment 5 did not adequately address the impacts resulting from the proposed prohibition, particularly on the deepwater grouper longline fishery.

As indicated by some of the comments, the 3-hook rule in itself does not prohibit all commercial fishing. Available information, however, indicates that moving the boundary of the longline and buoy gear restricted area outside tract C, in combination with the 3-hook rule in tracts B and C, would effectively have eliminated the historical fisheries in those tracts.

Framework Procedure for Establishing SMZs

Comment: One environmental organization supported the regulatory amendment procedure as critical to protecting artificial reefs. One individual and the minority report objected to the procedure because they believe it would result in the placement of additional artificial reefs in tracts B and C, which they believe contain economically valuable natural reef or line bottom habitat.

Response: It is conceivable that approving the framework procedure could encourage additional construction of artificial reefs (as acknowledged in Amendment 5). However, the present disapproval of tracts B and C should resolve this issue. Furthermore, the framework procedure is designed to

provide for a thorough scientific evaluation of the benefits and costs and environmental impacts of future proposed SMZs. The framework procedure specifies that each SMZ would have to be extensively reviewed by the Council's advisors, monitoring team, and scientific committee prior to Council review and submittal for abbreviated rulemaking. Moreover, each framework request must comply with the six criteria listed in the procedure, including fairness, equity, and consideration of natural bottom habitat. This would include tracts B and C should the Council choose to resubmit a revised framework proposal addressing these areas. Accordingly, NMFS concurs with the proposed framework procedure for establishing SMZs.

Increases in the Minimum Size Limit for Red Snapper

Comment: Six fishermen contended that additional release mortality and economic impacts of the increased size limit (including elimination of a market size) would outweigh any benefits. These concerns also were contained in the minority report, which noted the potential for imports replacing that size of red snapper in the U.S. market. One commenter also noted text from the regulation amendment prepared by the Council in 1990 that cites impacts of additional mortality in support of the status quo. Several fishermen feared decreased demand by consumers for the larger size fillets. Other comments indicated that red snapper are not in need of additional protection. An environmental organization and a recreational fishing organization commented in favor of the increased size limits.

Response: Although there may be some initial short-term adverse economic impacts associated with the incremental size limit increases, NMFS economic analyses indicate that the longer term economic gains should outweigh short-term revenue losses.

Concerning the comment on an earlier Council document that supported status quo, information is now available that supports the Council's proposal. For example, red snapper price information from the 1993 season indicates that there was a modest price premium paid for the one- to two-pound size in the early part of 1993, but by the end of the season, prices generally were the same for all size categories.

The major advantage of the incremental size increases is that it will allow for harvest of the fish when yield per recruit is maximized. Additionally, it aids in the rebuilding of the stock and reduces the urgency to implement in 1994 the program to reduce bycatch of juvenile red snapper in the shrimp trawl fishery. The FMP calls for a 50 percent bycatch reduction in the shrimp fishery by 1994. However, this goal could not be achieved without significant economic losses to the shrimp fishery. More recent stock assessment analyses assuming implementation of the size limit increases indicate various probabilities of stock recovery by the target year of 2009, based on the following dates for reaching the specified bycatch reduction goal of 50 percent: early 1994–95 percent, 1995—90 percent; or 1996—70 percent. Moreover, a very active research program is underway that potentially will provide bycatch and mortality information leading to the desired bycatch reduction goal without adversely impacting the fisheries for either shrimp or red snapper. For these reasons, NMFS concurs with the proposed increases in the minimum size limit for red snapper.

Mutton Snapper Spawning Aggregation Closure

Comment: The minority report questioned the need for protection of the aggregation, given that mutton snapper have not been shown to be overfished. One individual claimed that no significant bycatch of mutton snapper occurs while fishing for yellowtail snapper, and that closure of the area to all fishing is therefore unnecessary.

Response: Mutton snapper have been shown to be particularly vulnerable to harvest during the spawning season. Species that aggregate for spawning are vulnerable to fishing effort and traditionally are easier to catch at that time. In addition, they may be caught before spawning activity occurs. While the resource may not be overfished Gulf-wide, local overfishing could occur in the aggregation. Moreover, allowing fishing for other species could complicate enforcement of the closure, and vessels targeting mutton snapper could have the opportunity to discard their catch before being boarded by an authorized officer. The benefits of the action could be reduced significantly by mutton snapper release mortality as part of fishing for other species. For these reasons, the proposed closure to all fishing is necessary to protect the spawning individuals during this critical period. Accordingly, NMFS concurs with the spawning aggregation closure.

Finfish Landed With Head and Fins Intact

Comment: An environmental organization supported this proposal.

Response: NMFS concurs with the Council and the commenter.

Changes From the Proposed Rule

Section 641.4(b)(2)(xiii)(C) requires an applicant for a vessel permit to sign a statement that he or she will allow an authorized officer reasonable access to his or her property to examine fish traps for compliance with the regulations. NMFS finds that this requirement is unnecessary. Accordingly, as a technical amendment, this final rule removes § 641.4(b)(2)(xiii)(C).

Section 641.4(o)(1) in the proposed rule specified that a fish trap endorsement will not be issued or renewed unless the vessel for which the endorsement is requested and its current owner have records of landings of reef fish from fish traps in the EEZ of the Gulf of Mexico during 1991 or 1992, as reported on fishing vessel logbooks received by the Science and Research Director on or before November 19, 1992. As a result, persons with the qualifying catch record, but who have sold or transferred the vessel from which reef fish were harvested with fish traps and reported to NMFS, would be ineligible if the current regulations are implemented. NMFS finds that this requirement is inconsistent with the Council's intent, which was to limit the use of fish traps to those persons who had participated in the fish trap fishery and whose reports had been received as of November 19, 1992. Accordingly, § 641.4(o)(1) is re-written to specify that a fish trap endorsement will not be issued or renewed unless the current owner of the vessel for which the endorsement is requested has a record of landings of reef fish from fish traps in the EEZ of the Gulf of Mexico during 1991 or 1992, as reported on fishing vessel logbooks received by the Science and Research Director on or before November 19, 1992.

Changes from the proposed rule to effect implementation of the moratorium have been made at § 641.4 (a)(4) and (o)(2) and § 641.7(y). For the initial implementation of the moratorium on fish trap endorsements, NMFS intends to reissue the permit for each vessel that meets the criteria for the fish trap endorsement. Such reissued permit will have a "Date Issued" of February 7, 1994, the effective date of this final rule, and will be endorsed for the use of fish traps. On and after that date, a fish trap

endorsement is valid only when it is on such a reissued permit. A fish trap endorsement on a permit issued before that date will not be valid. Each owner of a vessel that has a permit that currently authorizes the use of fish traps will receive by January 24, 1994, either a reissued permit with a fish trap endorsement or a letter advising him or her that the current fish trap endorsement on the permit will not be valid as of February 7, 1994.

With removal from the regulations of the specific information that must be included in required reports by fishing vessels, the term "statistical area" is no longer used. Accordingly, this final rule removes the definition of "statistical area" from § 641.2 and removes Figure 2, which depicts the statistical grids, from Appendix A. Depiction of the grids is included with the reporting forms that are provided by the Science and Research Director.

The proposed rule to implement Amendment 5 contained changes to § 641.5(d), the reporting requirements for dealers and processors. The proposed changes were minor, primarily for standardization. More substantive changes to these reporting requirements are contained in Amendment 7 to the FMP, the proposed rule for which was published on October 27, 1993 (58 FR 57771). Accordingly, the proposed changes to § 641.5(d) in the rule to implement Amendment 5 are deleted.

In § 641.22, paragraph (b)(2)(iii)(A) is revised to clarify that untreated jute string may not be wrapped or overlapped when used as degradable material. Wrapping or overlapping overly prolongs the time for the material to degrade.

In §§ 641.6(e) and 641.22(b)(7), language in the proposed rule regarding buoys on each end of a "string" of traps is revised. Trap fishermen refer to traps placed in a line as a "string," even when such traps are not connected. For clarity, this final rule requires buoys for marking individual, separate traps or each end trap of traps that are connected by a line.

In § 641.23(d), for the reasons discussed above, proposed SMZs B and C have been deleted. Concomitantly, in Appendix A, the proposed change to Table 2, and that part of the proposed change to Figure 5 that would have moved the seaward limits of the longline and buoy gear restricted area so that all of proposed SMZ C would be shoreward of the limits, are deleted.

Figures 4 and 5 in Appendix A have been enlarged to more clearly depict the seaward limits of the stressed area and of the longline and buoy gear restricted area, respectively. Figures 3 through 6 now depict each of the limits separately for the eastern and western portions of the Gulf of Mexico.

Partial Disapproval of Amendment 5

On December 16, 1993, the Secretary of Commerce (Secretary) partially disapproved Amendment 5. As discussed above, the provisions that would have established tracts B and C as SMZs were disapproved.

Classification

The Secretary determined that Amendment 5 is necessary for the conservation and management of the reef fish fishery and that it is consistent with the national standards, other provisions of the Magnuson Act, and other applicable law, with the exception of the provisions that would have established SMZs B and C.

The Council prepared a regulatory impact review as part of Amendment 5. A summary of the regulatory impacts was contained in the proposed rule and is not repeated here.

The Council prepared an initial regulatory flexibility analysis (RFA) for this action. The initial RFA has been adopted as final without change. The final RFA concludes that the measures in this final rule, considered individually, would not have a significant economic impact on small entities, but, considered collectively, would have a significant economic impact on a substantial number of small entities.

The Council prepared a final supplemental environmental impact statement (SEIS) for Amendment 5 that discusses the impacts on the environment of the reef fish fishery and the impacts that would result from implementation of the amendment. The final SEIS was filed with the Environmental Protection Agency (EPA). EPA published on October 15, 1993, (58 FR 53512) a notice of availability of the final SEIS for a 30-day comment period.

The Council determined that the proposed rule would be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal zone management programs of Alabama, Florida, Louisiana, and Mississippi. Texas does not have an approved coastal zone management program. These determinations were submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Louisiana and Mississippi agreed with this determination. Alabama and Florida did not respond within the statutory time period; therefore, state agency agreement with the consistency determination is presumed.

This final rule involves, but does not change, collection-of-information requirements subject to the Paperwork Reduction Act, specifically, fishing vessel permits and fishing vessel reports. These requirements were previously approved by the Office of Management and Budget under OMB Control Numbers 0648–0205 and 0648–0016, respectively. The public reporting burdens for these collections of information, estimated to average 15 and 10–18 minutes per response, respectively, are not changed by this rule. Send comments regarding these burdens or any other aspect of these collections of information, including suggestions for reducing the burdens, to Edward E. Burgess, Southeast Regional Office, NMFS, 9450 Koger Boulevard, St. Petersburg, FL 33702, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (Attention: NOAA Desk Officer), Washington, DC 20503.

This rule is not significant and is not subject to review under E.O. 12866.

This final rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects in 50 CFR Part 641

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 30, 1993.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 641 is amended as follows:

PART 641—REEF FISH FISHERY OF THE GULF OF MEXICO

1. The authority citation for part 641 continues to read as follows:

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

2. In § 641.1, paragraph (b) is revised to read as follows:

§ 641.1 Purpose and scope.

* * * * *

(b) This part governs conservation and management of reef fish in the Gulf of Mexico EEZ, except that §§ 641.5 and 641.25 also apply to fish from adjoining state waters. The boundary between the Gulf of Mexico EEZ and the Atlantic Ocean EEZ begins at the intersection of the outer boundary of the EEZ and 83°00′W. longitude, proceeds north to 24°35′N. latitude (near Dry Tortugas),

east to Marquesas Key, then through the Florida Keys to the mainland.

§ 641.2 [Amended]

3. In § 641.2, the definition for "*Statistical area*" is removed.

4. In § 641.4, paragraphs (b)(2)(xiii)(C) and (b)(2)(xiv) are removed; paragraphs (a)(1), (a)(4), (b)(1), (b)(2) introductory text, (b)(2)(xi), (b)(2)(Xiii)(B), (h), (i), and (k) are revised; and new paragraph (o) is added to read as follows:

§ 641.4 Permits and fees.

(a) * * *

(1) As a prerequisite to selling reef fish and to be eligible for exemption from bag the limits specified in § 641.24(b), an owner or operator of a vessel that fishes in the EEZ must obtain an annual vessel permit.

* * * * *

(4) To possess or use a fish trap in the EEZ, an annual vessel permit for reef fish with a valid fish trap endorsement thereon must be issued to the vessel and must be on board the vessel. (See paragraph (o)(2) of this section for information on the validity of a fish trap endorsement.) In addition, a color code for marking the vessel and trap buoys must be obtained from the Regional Director.

* * * * *

(b) * * *

(1) An application for a vessel permit must be submitted and signed by the owner or operator of the vessel. The application must be submitted to the Regional Director at least 30 days prior to the date on which the applicant desires to have the permit made effective.

(2) A permit applicant must provide the following information:

* * * * *

(xi) A sworn statement by the applicant certifying that more than 50 percent of his or her earned income was derived from commercial fishing, that is, sale of the catch, or charter or headboat operations, during either of the two calendar years preceding the application;

* * * * *

(xiii) * * *

(B) The applicant's desired color code for use in identifying his or her vessel and buoys (white is not an acceptable color code).

* * * * *

(h) *Display.* A permit or endorsement issued under this section must be carried on board the fishing vessel and such vessel must be identified as provided for in § 641.6. The operator of a fishing vessel must present the permit or endorsement for inspection upon request of an authorized officer.

(i) *Sanctions and denials.* A permit or endorsement issued pursuant to this section may be revoked, suspended, or modified, and a permit or endorsement application may be denied, in accordance with the procedures governing enforcement-related permit sanctions and denials found at subpart D of 15 CFR part 904.

* * * * *

(k) *Replacement.* A replacement permit or endorsement may be issued. An application for a replacement permit or endorsement will not be considered a new application. A fee, the amount of which is stated with the application form, must accompany each request for a replacement.

* * * * *

(o) *Moratorium on fish trap endorsements.* The provisions of this paragraph (o) are effective through February 7, 1997.

(1) A fish trap endorsement will not be issued or renewed unless the current owner of the permitted vessel for which the endorsement is requested has a record of landings of reef fish from fish traps in the EEZ of the Gulf of Mexico during 1991 or 1992, as reported on fishing vessel logbooks received by the Science and Research Director on or before November 19, 1992. An owner will not be issued fish trap endorsements for vessels in numbers exceeding the number of vessels for which the owning entity had the requisite reported landings in 1991 or 1992.

(2) A fish trap endorsement on a vessel permit issued under this section that has a "Date Issued" of February 7, 1994, or later, is valid. Endorsements on permits issued before that date are not valid.

(3) An owner of a vessel with a fish trap endorsement may transfer the endorsement to another vessel owned by the same entity by returning the existing endorsement with an application for an endorsement for the replacement vessel.

(4) A fish trap endorsement is not transferable upon purchase of a vessel with a fish trap endorsement, the provisions of paragraph (1)(3) of this section regarding purchase of a vessel with a reef fish permit notwithstanding.

(5) A fish trap endorsement that is not renewed or that is revoked will not be reissued.

5. In § 641.5, paragraphs (b), (c), (f), (g), and (i) are revised to read as follows:

§ 641.5 Recordkeeping and reporting.

* * * * *

(b) *Vessels fishing with fish traps.* The owner or operator of a vessel for which a fish trap endorsement has been issued under § 641.4, or the owner or operator of a vessel that uses a fish trap in adjoining state waters, must maintain a fishing record on a form available from the Science and Research Director. These forms must be submitted to the Science and Research Director so as to be received not later than 7 days after the end of each fishing trip. If no fishing occurred during a month, a report so stating must be submitted on one of the forms to be received not later than 7 days after the end of each month. Information to be reported is indicated on the form and its accompanying instructions.

(c) *Vessels not fishing with fish traps.* The owner or operator of a vessel for which a reef fish permit has been issued under § 641.4, or the owner or operator of a vessel that harvests reef fish in adjoining state waters, and who is selected by the Science and Research Director, must maintain a fishing record on a form available from the Science and Research Director. These forms must be submitted to the Science and Research Director on a monthly basis (or more frequently, if requested by the Science and Research Director) so as to be received not later than 7 days after the end of the reporting period. If no fishing occurred during a reporting period, a report so stating must be submitted on one of the forms to be received not later than 7 days after the end of the reporting period. Information to be reported is indicated on the form and its accompanying instructions.

* * * * *

(f) *Charter vessels.* The owner or operator of a charter vessel that fishes for or lands reef fish under the bag limits in the Gulf of Mexico EEZ or in adjoining state waters, and who is selected by the Science and Research Director, must maintain a daily fishing record for each trip on forms provided by the Science and Research Director. These forms must be submitted to the Science and Research Director on a weekly basis so as to be received not later than 7 days after the end of each week (Sunday). Information to be reported is indicated on the form and its accompanying instructions.

(g) *Headboats.* The owner or operator of a headboat that fishes for or lands reef fish under the bag limits in the Gulf of Mexico EEZ or in adjoining state waters, and who is selected by the Science and Research Director, must maintain a daily fishing record for each trip, or a portion of such trips as specified by the Science and Research Director, on forms provided by the Science and Research Director. These forms must be submitted

to the Science and Research Director at least monthly so as to be received not later than 7 days after the end of each month. Information to be reported is indicated on the form and its accompanying instructions.

* * * * *

(i) *Additional data and inspection.* Additional data will be collected by authorized statistical reporting agents, as designees of the Science and Research Director, and by authorized officers. An owner or operator of a fishing vessel and a dealer or processor are required upon request to make reef fish or parts thereof available for inspection by the Science and Research Director or an authorized officer.

6. In § 641.6, the section heading and paragraphs (a) through (e) are revised to read as follows:

§ 641.6 Vessel and gear identification.

(a) *Official number.* A vessel for which a permit has been issued under § 641.4 must display its official number—

(1) On the port and starboard sides of the deckhouse or hull and on an appropriate weather deck so as to be clearly visible from an enforcement vessel or aircraft;

(2) In block arabic numerals in contrasting color to the background;

(3) At least 18 inches (45.7 cm) in height for fishing vessels over 65 feet (19.8 m) in length and at least 10 inches (25.4 cm) in height for all other vessels; and

(4) Permanently affixed to or painted on the vessel.

(b) *Color code.* In addition to its official number, a vessel for which a fish trap endorsement has been issued under § 641.4 must display its color code—

(1) On the port and starboard sides of the deckhouse or hull and on an appropriate weather deck so as to be clearly visible from an enforcement vessel or aircraft;

(2) In the form of a circle at least 20 inches (50.8 cm) in diameter; and

(3) Permanently affixed to or painted on the vessel.

(c) *Duties of operator.* The operator of each fishing vessel specified in paragraph (a) or (b) of this section must—

(1) Keep the official number and color code clearly legible and in good repair; and

(2) Ensure that no part of the fishing vessel, its rigging, fishing gear, or any other material aboard obstructs the view of the official number and color code from an enforcement vessel or aircraft.

(d) *Fish traps.* A valid identification tag, available from the Regional Director, must be affixed to each fish trap used or possessed in the EEZ and to each fish trap aboard a vessel for which a fish trap endorsement has been issued under § 641.4. Such tag shows the specific tag number (normally 1 through 100, or less), the permit number, and the month and year through which the permit and tag are valid.

(e) *Buoys.* Each buoy used to mark a fish trap, or each end trap of traps that are connected by a line, must display the designated color code and permit number so as to be easily distinguished, located, and identified.

* * * * *

7. In § 641.7, paragraphs (a), (b), (g), (i), (k), (l), and (s) are revised and new paragraphs (y) through (cc) are added to read as follows:

§ 641.7 Prohibitions.

(a) Falsify information specified in § 641.4(b)(2) on an application for a vessel permit, or information on an application for an endorsement on a permit.

(b) Fail to display a permit or endorsement, as specified in § 641.4(h).

* * * * *

(g) Possess a finfish without its head and fins intact, as specified in § 641.21(b).

* * * * *

(i) Use or possess in the EEZ a fish trap that does not conform to the requirements for escape windows, panels and access doors with degradable fasteners, mesh sizes, and buoys, as specified in § 641.22 (b)(1), (b)(2), (b)(3), and (b)(7).

* * * * *

(k) Fish or possess in the EEZ more than 100 fish traps per vessel, as specified in § 641.22(b)(5).

(l) Pull or tend a fish trap, except during the hours specified in § 641.22(b)(6)(i); tend, open, pull, or otherwise molest or have in possession another person's fish trap, except as specified in § 641.22(b)(6)(ii); or fail to retrieve all fish traps and return them to port on each trip, as specified in § 641.22(b)(6)(iii).

* * * * *

(s) Purchase, barter, trade, or sell, or attempt to purchase, barter, trade, or sell, a reef fish possessed under the bag limits, as specified in § 641.24(g).

* * * * *

(y) Use or possess in the EEZ a fish trap without a valid fish trap endorsement, as specified in § 641.4(a)(4) and (o)(2).

(z) During May and June, fish in Riley's Hump, as specified in § 641.23(c).

(aa) In a special management zone, fish for reef fish with prohibited or unauthorized fishing gear, or, after having fished in a special management zone for species other than reef fish, exceed the possession and landing limits for reef fish; as specified in § 641.23(d).

(bb) Make any false statement, oral or written, to an authorized officer concerning the taking, catching, harvesting, landing, purchase, sale, possession, or transfer of a reef fish.

(cc) Interfere with, obstruct, delay, or prevent by any means an investigation, search, seizure, or disposition of seized property in connection with enforcement of the Magnuson Act.

8. In § 641.21, paragraphs (a)(1) and (b) are revised to read as follows:

§ 641.21 Harvest limitations.

(a) * * *

(1) Red snapper—

(i) Effective through December 31, 1995—14 inches (35.6 cm) total length;

(ii) Effective January 1, 1996, through December 31, 1997—15 inches (38.1 cm) total length;

(iii) Effective January 1, 1998—16 inches (40.6 cm) total length.

* * * * *

(b) *Head and fins intact.*

(1) Except as specified in paragraphs (b)(2), (b)(3), and (b)(4) of this section, a finfish possessed in the EEZ in the Gulf of Mexico must have its head and fins intact and such finfish taken from the EEZ must have its head and fins intact through landing. Such finfish may be eviscerated, gilled, and scaled but must otherwise be maintained in a whole condition.

(2) Shark, swordfish, and tuna species are exempt from the requirements of paragraph (b)(1) of this section.

(3) Bait is exempt from the requirements of paragraph (b)(1) of this section.

(i) For the purpose of this paragraph (b)(3), bait means—

(A) Packaged, headless fish fillets that have the skin attached and are frozen or refrigerated;

(B) Headless fish fillets that have the skin attached and are held in brine; or

(C) Small pieces no larger than 3 cubic inches (7.6 cubic cm) or strips no larger than 3 inches by 9 inches (7.6 cm by 22.9 cm) that have the skin attached and are frozen, refrigerated, or held in brine.

(ii) Paragraph (b)(3)(i) of this section notwithstanding, a finfish or part thereof possessed in or landed from the EEZ that is subsequently sold, purchased, traded, or bartered or attempted to be sold, purchased, traded, or bartered as a finfish species, rather than as bait, is not bait.

(4) Legal-sized finfish possessed for consumption at sea aboard the harvesting vessel are exempt from the requirements of paragraph (b)(1) of this section provided—

(i) Such finfish do not exceed any applicable bag limit;

(ii) Such finfish do not exceed 1.5 pounds (680 gm) of finfish parts per person on board; and

(iii) The vessel is equipped to cook such finfish on board.

* * * * *

9. In § 641.22, in paragraph (b)(3) introductory text, the reference to "Figure 3" is revised to read "Figure 2"; paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iii) introductory text, (b)(2)(iii)(A), (b)(5) and (b)(6) are revised; and new paragraph (b)(7) is added to read as follows:

§ 641.22 Gear restrictions.

* * * * *

(b) * * *

(2) * * *

(i) A panel or access door must be located opposite each side of the trap that has a funnel.

(ii) The opening covered by each panel or access door must be 144 square inches (929 square cm) or larger, with one dimension of the area equal to or larger than the largest interior axis of the trap's throat (funnel) with no other dimension less than 6 inches (15.2 cm).

(iii) The hinges and fasteners of each panel or access door must be constructed of one of the following degradable materials:

(A) Untreated jute string of 3/16-inch (4.76-mm) diameter or smaller that is not wrapped or overlapped; or

* * * * *

(5) *Effort limitation.* The maximum number of traps that may be assigned to, possessed, or fished in the EEZ by a vessel is 100.

(6) *Tending traps.*

(i) A reef fish trap may be pulled or tended only during the period from official (civil) sunrise to official (civil) sunset.

(ii) Except for inspection of a fish trap by an authorized officer, a reef fish trap may be tended only by a person aboard the vessel for which the fish trap endorsement has been issued under § 641.4 to fish such trap, or aboard another vessel if such vessel has on board written consent of the owner or operator of the vessel with the fish trap endorsement. Such written consent is valid solely for the removal of fish traps from the EEZ, and harvest of fish incidental to such removal, when vessel or equipment breakdown prevents the vessel with the fish trap endorsement from retrieving its traps.

(iii) The operator of a vessel from which a fish trap is deployed in the EEZ must retrieve all the vessel's fish traps and return them to port on each trip. A fish trap that is not returned to port on a trip, and its attached line and buoy, may be disposed of in any appropriate manner by the Secretary (including an authorized officer). If an owner of such trap or the operator of the responsible vessel can be ascertained, the owner and/or operator is subject to appropriate civil penalties.

(7) *Buoys.* A buoy that floats on the surface must be attached to each fish trap, or to each end trap of traps that are connected by a line, used in the EEZ.

10. In § 641.23, in paragraphs (a)(3) and (b)(3), the concluding parenthetical phrases are revised; and new paragraphs (c) and (d) are added to read as follows:

§ 641.23 Area limitations.

(a) * * *

(3) * * * (See also Appendix A, Figures 3 and 4.)

(b) * * *

(3) * * * (See also Appendix A, Figures 5 and 6.)

(c) *Riley's Hump seasonal closure.* From May 1 through June 30 each year, Riley's Hump, southwest of Dry Tortugas, Florida, is closed to all fishing. Riley's Hump is enclosed by rhumb lines joining the following points in the order listed:

Point	Latitude	Longitude
A	24°32.2′ N	83°08.7′ W.
B	24°32.2′ N	83°05.2′ W.
C	24°28.7′ N	83°05.2′ W.
D	24°28.7′ N	83°08.7′ W.
A	24°32.2′ N	83°08.7′ W.

(d) *Special management zones (SMZs).*

(1) The following artificial reef and surrounding area is established as an SMZ: *Alabama—A.* The area is bounded by rhumb lines connecting the following points in the order listed:

Point	Latitude	Longitude
A	30°02.5′ N	88°07.7′ W.
B	30°02.6′ N	87°59.3′ W.
C	29°55.0′ N	87°55.5′ W.
D	29°54.5′ N	88°07.5′ W.
A	30°02.5′ N	88°07.7′ W.

(2) In the SMZ specified in paragraph (d)(1) of this section, fishing for reef fish is limited to hook-and-line gear with three or less hooks per line and spearfishing gear. For the purpose of this paragraph (d)(2), fishing for reef fish means possessing reef fish aboard or landing reef fish from—

(i) A vessel that is operating as a charter vessel or headboat;

(ii) A recreational vessel, that is, a vessel that is not in a commercial fishery; or

(iii) A vessel that has been issued a permit under § 641.4 when the reef fish aboard or landed from the vessel exceed a bag limit specified in § 641.24(b), for a species that has a bag limit, or exceed 5 percent by weight of all fish aboard, for other reef fish.

(3) A person aboard a vessel that uses in an SMZ gear other than hook-and-line gear with three or fewer hooks per line and spearfishing gear to fish for species other than reef fish may not possess reef fish in excess of the bag limits specified in § 641.24(b), for those species that have a bag limit, and in excess of 5 percent by weight of all fish aboard, for other reef fish, and may not land from a trip on which fishing was conducted in an SMZ, reef fish in excess of those limits.

11. In § 641.24, in paragraph (c)(1), the phrase "as required by the U.S. Coast Guard for trips of over 12 hours" is removed; and paragraphs (a) and (g) are revised to read as follows:

§ 641.24 Bag and possession limits.

(a) *Applicability.*

(1) Bag limits apply to a person—

(i) Who fishes from a fixed structure in the EEZ; or

(ii) Aboard a vessel that fishes in the EEZ, or aboard a fishing vessel that possesses reef fish in the EEZ,

(A) Without a permit specified in § 641.4 on board,

(B) With trawl gear or entangling net gear on board,

(C) With a longline or buoy gear on board when such vessel is fishing or has fished on its present trip in the longline and buoy gear restricted area specified in § 641.23(b),

(D) That is operating as a charter vessel or headboat, or

(E) For a species for which the quota specified in § 641.25 has been reached and closure has been effected.

(2) For the purpose of paragraph (a)(1)(ii)(B) of this section, a vessel is considered to have trawl gear on board when trawl doors and a net are on board. Removal from the vessel of all trawl doors or all nets constitutes removal of trawl gear.

(3) For the purpose of paragraph (a)(2)(ii)(C) of this section, a vessel is considered to have a longline on board when a power-operated longline hauler, a cable of diameter and length suitable for use in the longline fishery, and gangions are on board. Removal of any one of these three elements, in its entirety, constitutes removal of a longline.

* * * * *

(g) *Sale.* A reef fish possessed under the bag limits specified in paragraph (b) of this section may not be purchased, bartered, traded, or sold, or attempted to be purchased, bartered, traded, or sold.

§ 641.27 [Amended]

12. In § 641.27, in paragraph (a), the reference to "641.24(a)(2)(ii)" is revised to read "641.24(a)(1)(ii)(B)".

13. Section 641.28 is revised to read as follows:

§ 641.28 Adjustment of management measures.

In accordance with the procedures and limitations of the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, the Regional Director may—

(a) Establish or modify for species or species groups in the reef fish fishery the following: target dates for rebuilding overfished species, total allowable catch, bag limits, size limits, vessel trip limits, closed seasons or areas, gear restrictions, and quotas; and

(b) Establish or modify special management zones and the gear restrictions applicable in each.

Appendix A to Part 641—[Amended]

14. In Appendix A to part 641, Figures 2, 4, Seaward Limits of the Stressed Area, and 5 are removed; Figure 4, Examples of mesh sizes meeting the measurement criteria, is redesignated as Figure 2; and new Figures 3 through 6 are added to read as follows:

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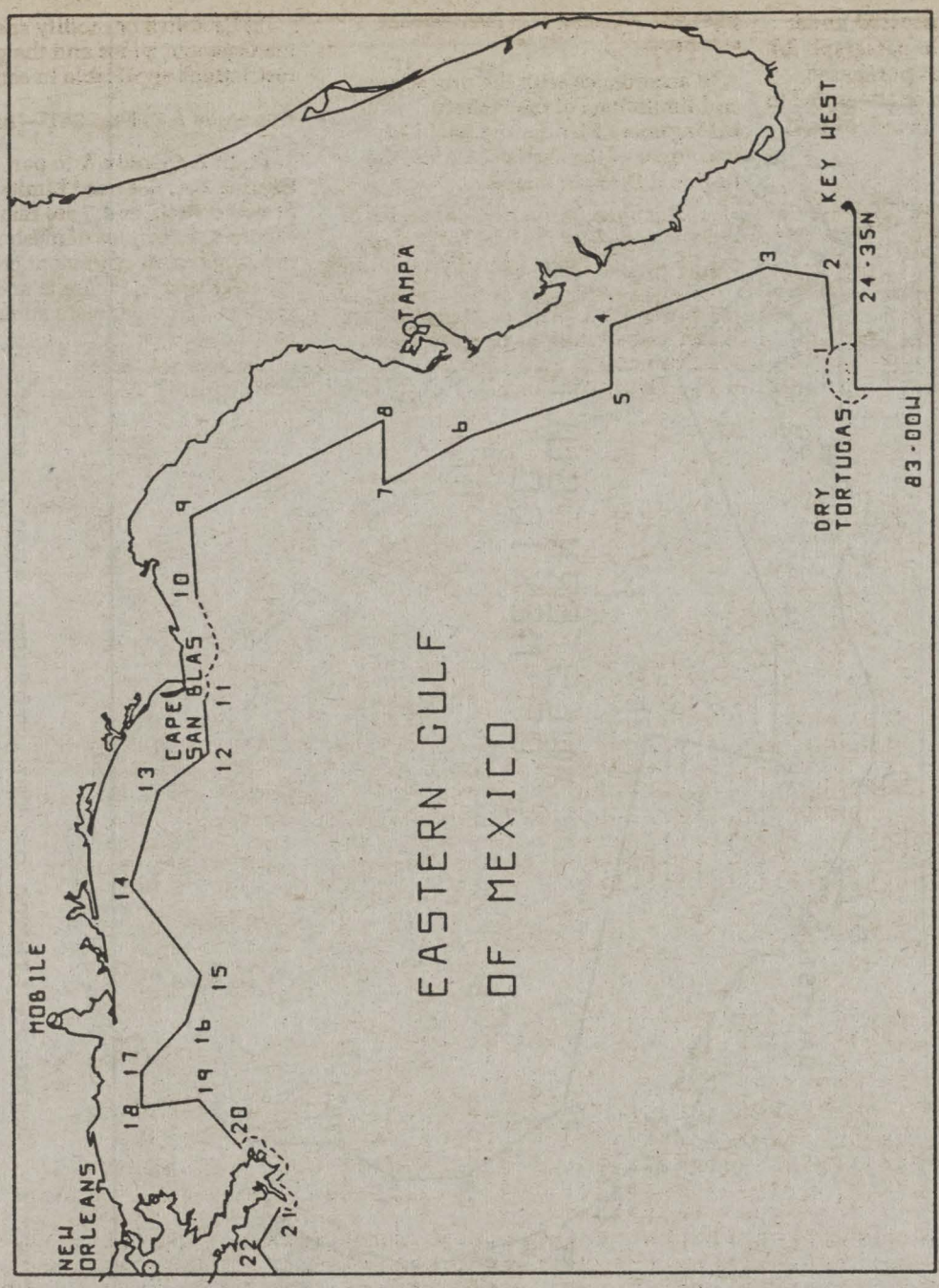

FIGURE 3. SEAWARD LIMITS OF THE STRESSED AREA - EASTERN GULF

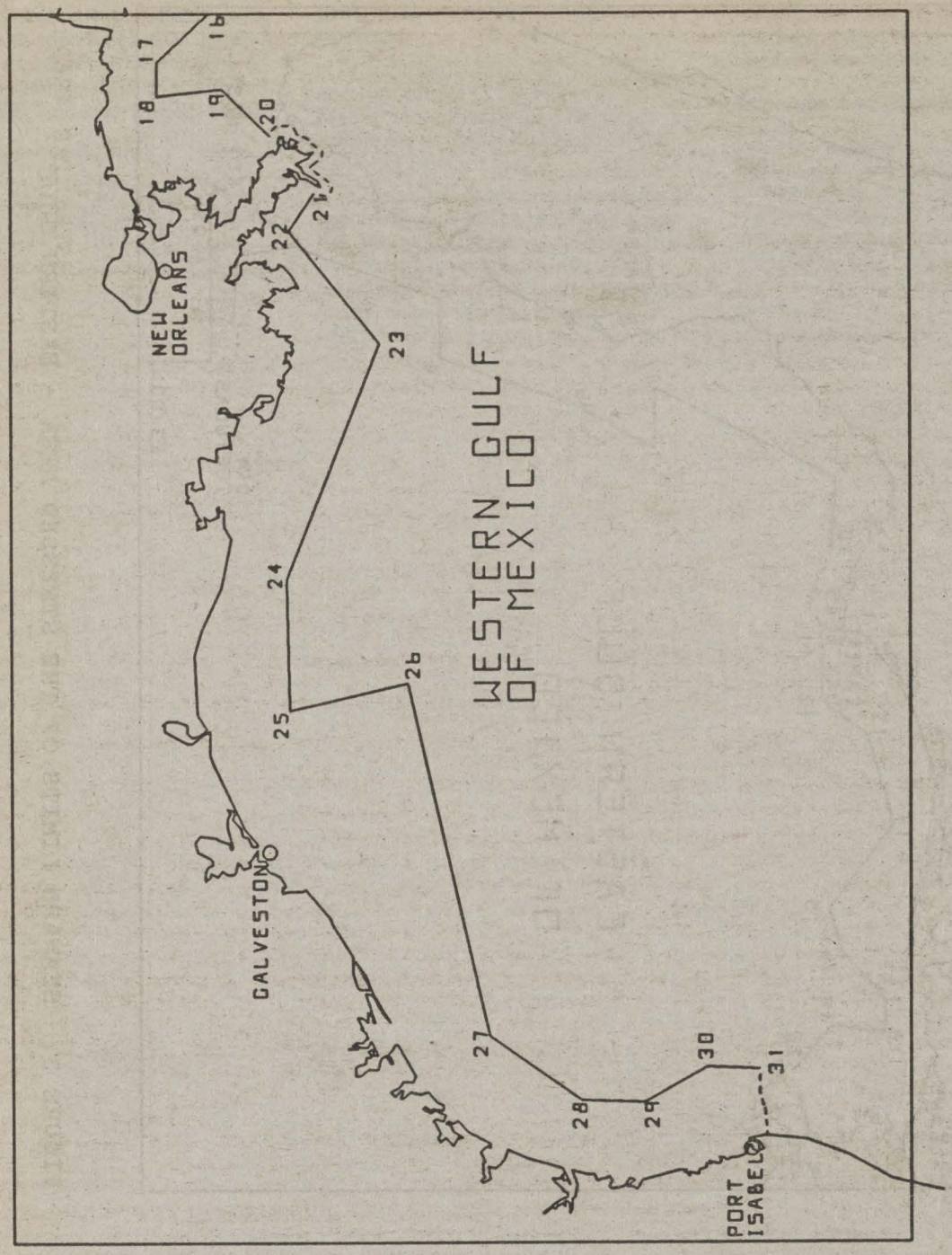

FIGURE 4. SEAWARD LIMITS OF THE STRESSED AREA - WESTERN GULF

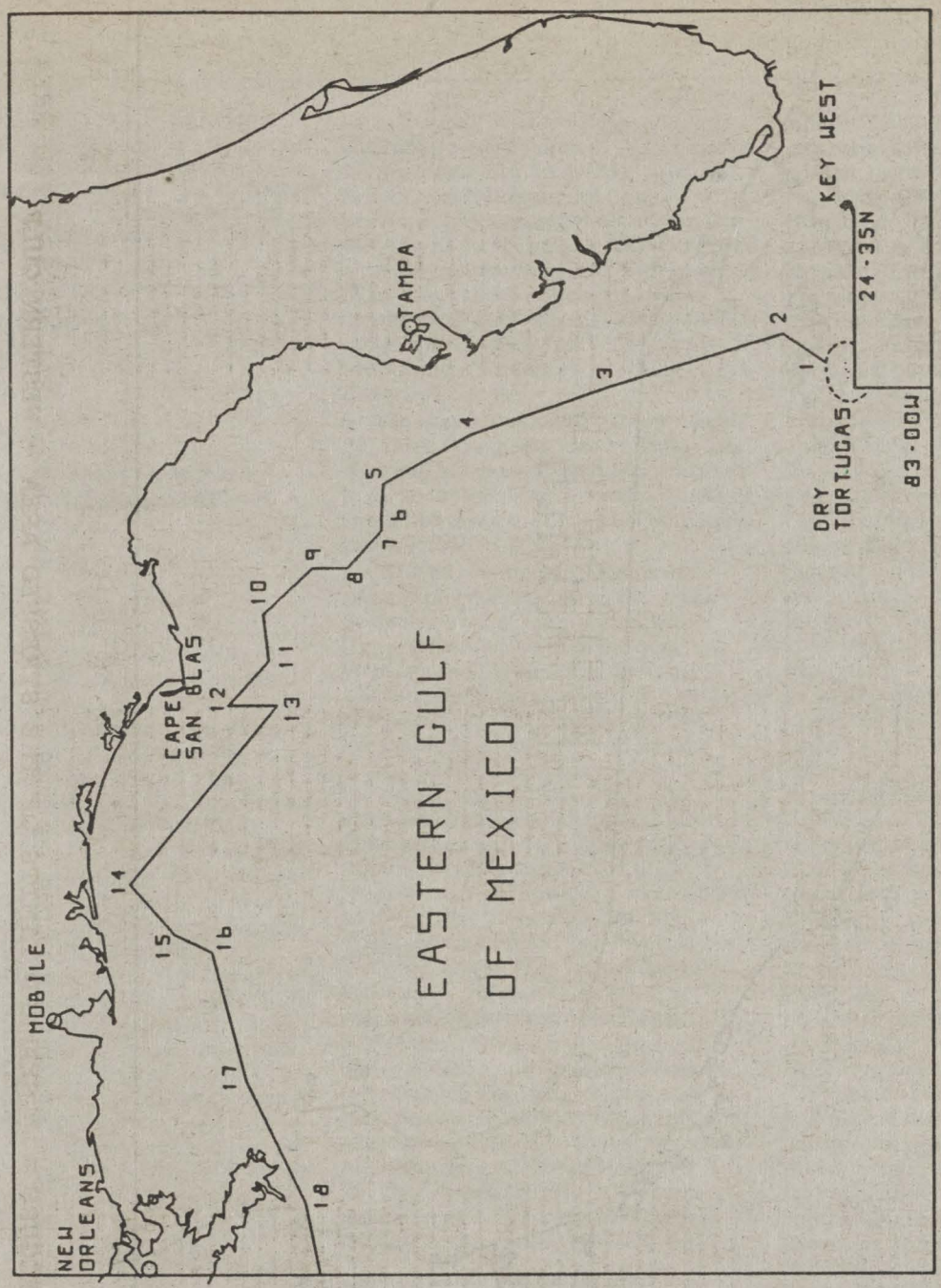

FIGURE 5. SEAWARD LIMITS OF THE LONGLINE AND BUOY GEAR RESTRICTED AREA - EASTERN GULF

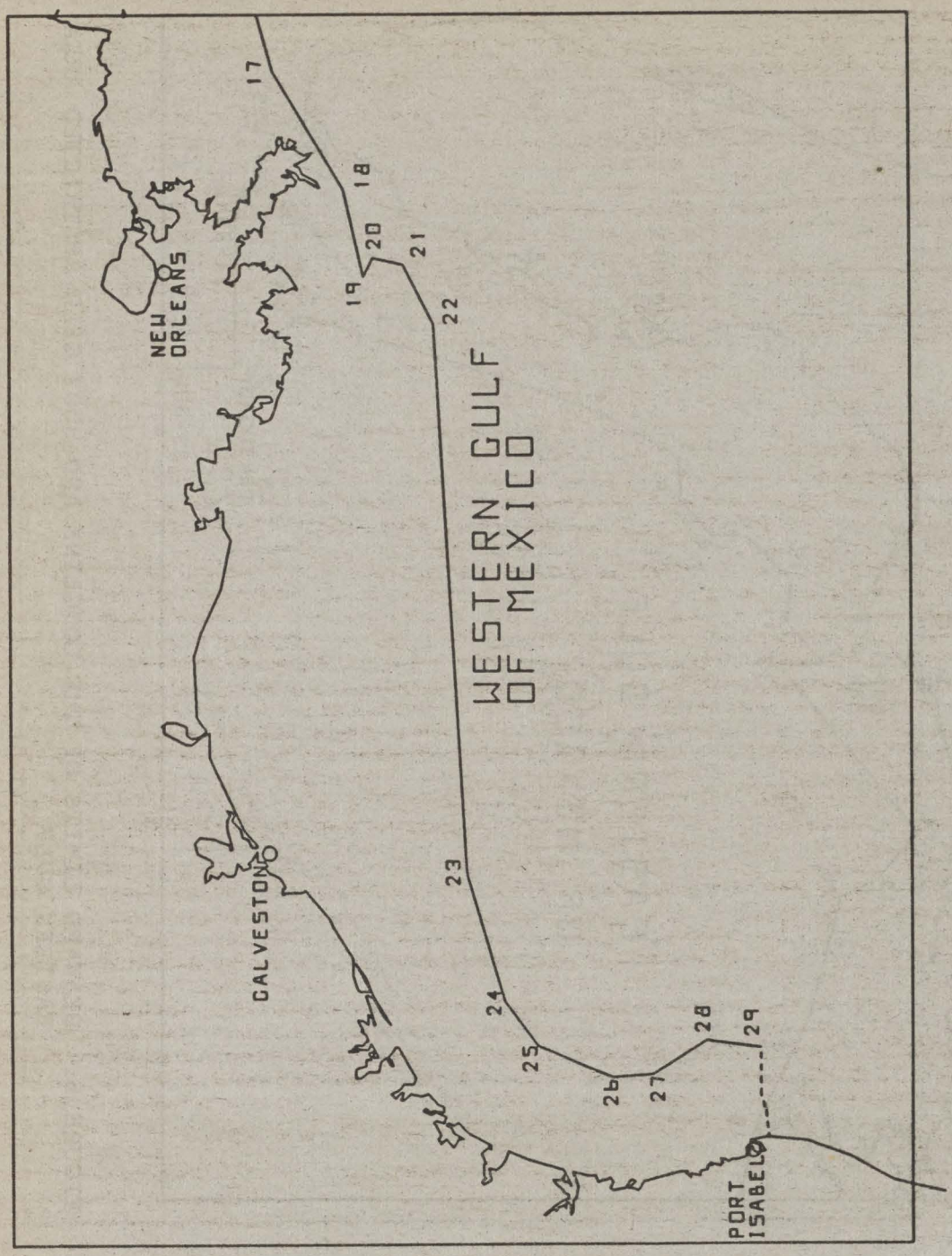

FIGURE 6. SEAWARD LIMITS OF THE LONGLINE AND BUOY GEAR RESTRICTED AREA - WESTERN GULF

[FR Doc. 94–118 Filed 1–6–94; 8:45 am]

BILLING CODE 3510–22–C

Proposed Rules

Federal Register
Vol. 59, No. 5
Friday, January 7, 1994

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150–AC93

Codes and Standards for Nuclear Power Plants; Subsection IWE and Subsection IWL

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) proposes to amend its regulations to incorporate by reference the 1992 Edition with the 1992 Addenda of Subsection IWE, "Requirements for Class MC and Metallic Liners of Class CC Components of Light-Water Cooled Power Plants," and Subsection IWL, "Requirements for Class CC Concrete Components of Light-Water Cooled Power Plants," of Section XI, Division 1, of the American Society of Mechanical Engineers Boiler and Pressure Vessel Code (ASME Code) with specified modifications and a limitation. Subsection IWE of the ASME Code provides rules for inservice inspection, repair, and replacement of Class MC pressure retaining components and their integral attachments and of metallic shell and penetration liners of Class CC pressure retaining components and their integral attachments in light-water cooled power plants Subsection IWL of the ASME Code provides rules for inservice inspection and repair of the reinforced concrete and the post-tensioning systems of Class CC components. Licensees would be required to incorporate Subsection IWE and Subsection IWL into their routine inservice inspection (ISI) program. Licensees would also be required to expedite implementation of the containment examinations and complete the expedited examination in accordance with Subsection IWE and Subsection IWL within 5 years of the effective date of this rule. Provisions have been proposed that would prevent unnecessary duplication of examinations between the expedited examination and the routine 120-month ISI examinations. Subsection IWE and Subsection IWL have not been previously incorporated by reference into the NRC regulations. This proposed amendment would specify requirements to assure that the critical areas of containments are routinely inspected to detect defects that could compromise a containment's pressure-retaining integrity.

DATES: Comment period expires March 23, 1994. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Written comments or suggestions may be submitted to the Secretary of the Commission, U S Nuclear Regulatory Commission, Washington, DC 20555, Attention. Docketing and Service Branch. Deliver comments to: 11555 Rockville Pike, Rockville, MD between 7:45 am and 4.15 pm Federal workdays. Copies of the regulatory analysis, the environmental assessment and finding of no significant impact, the supporting statement submitted to the Office of Management and Budget, and comments received may be examined in the Commission's Public Document Room at 2120 L Street, NW (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr W.E Norris, Division of Engineering, Office of Nuclear Regulatory Research, U S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492–3805, or Mr H.L Graves, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492–3813

SUPPLEMENTARY INFORMATION:

Background

The NRC is taking the proposed action for the purpose of ensuring that containments continue to maintain or exceed minimum accepted design wall thicknesses and prestressing forces as provided for in industry standards used to design containments (e.g., Section III and Section VIII of the ASME Code, and the American Concrete Institute Standard ACI–318), as reflected in license conditions, technical specifications, and licensee commitments (e.g., the Final Safety Analysis Report). The NRC also believes enhanced ISI examinations are needed and are justified to supplement existing requirements specified in General Design Criterion (GDC) 16, and GDC 53, appendix A to 10 CFR part 50, and appendix J to 10 CFR part 50. Appendix J requires a general visual inspection of the containment but does not provide specific guidance on how to perform the necessary containment examinations. This has resulted in a large variation with regard to the performance and the effectiveness of containment inspections. In view of the increasing rate of occurrences of degradation in containments and variability of present containment examinations, the NRC has determined that it is necessary to include more detailed requirements for the periodic examination of containment structures in the regulations to assure that the critical areas of containments are periodically inspected to detect defects that could compromise the containment's pressure-retaining and leak-tight capability Recent changes and additions to the ASME Code include provisions to address the concerns outlined above The NRC proposes to make these provisions mandatory by amending 10 CFR 50.55a to incorporate by reference these additional portions of the ASME Code (Subsection IWE and Subsection IWL). Subsection IWE and Subsection IWL have not been previously incorporated by reference into the NRC's regulations.

The rate of occurrence of corrosion and degradation of containments has been increasing at operating nuclear power plants. Since 1986, twenty-one (21) instances of corrosion in steel containments have been reported. In two cases, thickness measurements of the walls revealed areas where the wall thickness was at or below the minimum design thickness. Since the early 1970s, thirty-one (31) incidents of containment degradation related to post-tensioning systems of concrete containments have been reported. Four recent additional incidents which involved grease leakage from tendons have been investigated. In addition to grease leakage, these incidents showed signs of leaching of the concrete.

Over one-third of the operating containments have experienced corrosion or other degradation. Almost one-half of these occurrences were

found by the NRC through its inspections or audits of plant structures, or by licensees because they were alerted to a degraded condition at another site. Examples of degradation not found by licensees, but initially detected at plants through NRC inspections include: Steel containment shell corrosion in the drywell sand cushion region (wall thickness reduced to below minimum design thickness); steel containment shell torus corrosion (wall thickness at or near minimum design thickness); grease leakage from the tendons of prestressed concrete containments, and water seepage, as well as concrete cracking in concrete containments.

There are several GDC criteria and ASME Code sections which establish minimum requirements for the design, fabrication, construction, testing, and performance of structures, systems, and components important to safety in water-cooled nuclear power plants Criterion 16, "Containment design," requires the provision of reactor containment and associated systems to establish an essentially leak-tight barrier against the uncontrolled release of radioactivity into the environment and to ensure that the containment design conditions important to safety are not exceeded for as long as required for postulated accident conditions Section III and Section VIII of the ASME Code and the American Concrete Institute provide design specifications for minimum wall thicknesses and prestressing forces of containments, and these are reflected in license conditions, technical specifications, and licensee commitments for the operating plants

Criterion 53, "Provisions for containment testing and inspection," requires that the reactor containment design permit: (1) Appropriate periodic inspection of all important areas, such as penetrations; (2) an appropriate surveillance program, and (3) periodic testing at containment design pressure of the leak-tightness of penetrations which have resilient seals and expansion bellows. Appendix J, "Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors," of 10 CFR part 50 contains specific rules for leakage testing of containments. Paragraph V A of appendix J requires that a general inspection of the accessible interior and exterior surfaces of the containment structures and components be performed prior to any Type A test to uncover any evidence of structural deterioration that may affect either the containment structural integrity or leak-tightness. (Type A test means tests intended to measure the primary reactor containment overall integrated leakage rate: (1) After the containment has been completed and is ready for operation, and (2) at periodic intervals thereafter). None of these existing requirements, however, provide specific guidance on how to perform the necessary containment examinations. This lack of guidance has resulted in a large variation in licensee containment examination programs, such that there have been cases of noncompliance with GDC 16. Based on the results of inspections and audits, as well as plant operational experiences, it is clear that many licensee containment examination programs have not detected degradation that could ultimately result in a compromise to the pressure-retaining capability Some containment structures have also been found to have undergone a significant level of degradation that was not detected by these programs

The NRC believes that more specific ISI requirements, which expand upon existing requirements for the examination of containment structures in accordance with GDC 53 and appendix J , are needed and are justified for the purpose of ensuring that containments continue to maintain minimum design wall thicknesses and prestressing forces as provided for in industry standards used to design containments (e.g , Section III and Section VIII of the ASME Code, and the American Concrete Institute Standard ACI–318), as reflected in license conditions, technical specifications, and written licensee commitments (e.g , the Final Safety Analysis Report) There exists a serious concern, based on actual operating experience, regarding continued compliance by the operating plants with existing requirements for ensuring containment minimum design wall thicknesses and prestressing forces if the proposed action is not taken. The NRC also believes that the occurrences of corrosion and other degradation discussed above would have been detected by licensees implementing the comprehensive periodic examinations set forth in Subsection IWE and Subsection IWL of the ASME Code proposed for incorporation by reference into 10 CFR 50.55a.

The Nuclear Management and Resources Council (NUMARC) has developed a number of industry reports to address license renewal issues. Two of them, one for PWR containments and the other for BWR containments, were developed for the purpose of managing age-related degradation of containments on a generic basis. The NUMARC plan for containments relies on the examinations contained in Subsection IWE and Subsection IWL to manage age-related degradation, and this plan assumes that these examinations are "in current and effective use." In the BWR Containment Industry Report, NUMARC concluded that "On account of these available and established methods and techniques to adequately manage potential degradation due to general corrosion of freestanding metal containments, no additional measures need to be developed and, as such, general corrosion is not a license renewal concern if the containment minimum wall thickness is maintained and verified." Similarly, in the PWR Containment Industry Report, NUMARC concluded that potentially significant degradation of concrete surfaces, the post-tensioning system, and the liners of concrete containments could be managed effectively if periodically examined in accordance with the requirements contained in Subsection IWE and Subsection IWL

The five modifications, which are contained in one paragraph of the proposed rule, address two concerns of the NRC The first concern is that certain recommendations for tendon examinations that are included in Regulatory Guide 1.35, Rev 3, are not addressed in Subsection IWL (this involves four of the modifications, (ix)(A)–(D)) The ASME Code has considered these four issues and has adopted them in Subsection IWL These issues will be published in future addenda The second concern is that if there is visible evidence of degradation of the concrete (e.g , leaching, surface cracking) there may also be degradation of inaccessible areas This fifth modification ((ix)(E)) contains a provision which would require an evaluation of inaccessible areas when visible conditions exist that could result in degradation of these areas

The limitation specifies the 1992 Edition with 1992 Addenda of Subsection IWE and Subsection IWL as the earliest version of the ASME Code the NRC finds acceptable. This edition and addenda combination incorporates the concept of base metal examinations and would provide a comprehensive set of rules for the examination of post-tensioning systems As originally published, Subsection IWE preservice examination and inservice examination rules focused on the examination of welds. This weld-based examination philosophy was established in the 1970s as plants were being constructed. It was based on the premise that the welds in pressure vessels and piping were the areas of greatest concern. As containments have aged, degradation of base metal, rather than welds, has been found to be the issue of concern. The

1991 Addenda to the 1989 Edition, the 1992 Edition and the 1992 Addenda to Section XI, Subsection IWE, all have furthered the incorporation of base metal examinations.

The proposed rulemaking incorporates a provision for an expedited examination schedule. This expedited examination schedule is necessary to prevent a delay in the implementation of Subsection IWE and Subsection IWL (Table 4 of Enclosure 2 lists each plant and the delay in implementation which would be encountered without an expedited implementation schedule). Provisions have been incorporated in the proposed rule so that the expedited examination which would be required 5 years after the effective date of the rule and the routine 120-month examinations are not duplicated.

The NRC has reviewed the 1992 Edition with the 1992 Addenda of Subsection IWE and Subsection IWL of Section XI of the ASME Code and has found that with the specified modifications these subsections of Section XI address current experience and provide a sound basis for ensuring the structural integrity of containments. NRC endorsement of Subsection IWE and Subsection IWL in its regulations would provide a method of improving containment examination practices by incorporating rules into the regulatory process that have received industry participation in their development and acceptance by the NRC.

Existing § 50.55a(g), "Inservice inspection requirements," specifies the requirements for preservice and inservice examinations for Class 1 (Class 1 refers to components of the reactor coolant pressure boundary), Class 2 (Class 2 quality standards are applied to water- and steam-containing pressure vessels, heat exchangers (other than turbines and condensers), storage tanks, piping, pumps, and valves that are part of the reactor coolant pressure boundary (e.g., systems designed for residual heat removal and emergency core cooling)), and Class 3 (Class 3 quality standards are applied to radioactive-waste-containing pressure vessels, heat exchangers (other than turbines and condensers), storage tanks, piping, pumps, and valves (not part of the reactor coolant pressure boundary)) components and their supports. Neither Subsection IWE (Class MC—metal containments) nor Subsection IWL (Class CC—concrete containments) is presently incorporated by reference into the NRC regulations.

Proposed § 50.55a(g)(4) specifies the containment components to which the ASME Code Class MC and Class CC inservice inspection classifications incorporated by reference in this proposed rule would apply.

Proposed § 50.55a (g)(4) (v)(A), (v)(B), and (v)(C) specify Subsection IWE and Subsection IWL rules for repairs and replacements of metal and concrete containments. This is consistent with the long-standing intent and ongoing application by NRC and licensees to utilize the rules of Section XI when performing repairs and replacements of applicable components and their supports.

Proposed § 50.55a(b)(2)(vi) would incorporate a limitation specifying the 1992 Edition with 1992 Addenda of Subsection IWE and Subsection IWL as the earliest ASME Code version the NRC finds acceptable. This edition and addenda combination incorporates the concept of base metal examinations and provides a comprehensive set of rules for the examination of post-tensioning systems.

Proposed § 50.55a(b)(2)(ix) would specify five modifications that must be implemented when using Subsection IWL. Four of these issues are identified in Regulatory Guide 1.35, Revision 3, but are not currently addressed in Subsection IWL.

Proposed § 50.55a(g)(4)(v) requires that licensees incorporate containment examinations as part of their routine 120-month inspection program. It is recognized that when this rule becomes effective, plants within 2 years of the end of the 120-month interval may have difficulty developing and completing the containment examination program in a timely manner. Therefore, proposed § 50.55a(b)(2)(x) specifies that licensees with less than 2 years remaining in their present ISI interval may complete the Subsection IWE and the Subsection IWL portions of their ISI update within 2 years from the end of the present ISI interval. This is intended to provide licensees with sufficient time to develop the initial ISI plan and to facilitate maintenance of one ISI plan instead of two separate plans (i.e, the current Section XI ISI plan, and the Subsection IWE and Subsection IWL plan). In order to further reduce the burden on licensees and NRC staff, the Subsection IWE and Subsection IWL portions of the ISI plan will not have to be submitted to the NRC for approval. Licensees may simply retain their initial Subsection IWE and Subsection IWL plans at the site for audit.

Proposed § 50.55a(g)(6)(ii)(B)(*1*) would require that licensees conduct the first containment examinations in accordance with Subsection IWE and Subsection IWL (1992 Edition with the 1992 Addenda), modified by proposed § 50.55a(b)(2)(ix) within 5 years of the effective date of the final rule. This expedited examination schedule is necessary to prevent possible delays in the implementation of Subsection IWE by as much as 20 years and Subsection IWL by as much as 15 years. Subsection IWE, Table IWE–2500–1, permits the deferral of most of the required examinations until the end of the 10-year inspection interval. Adding the ten years that could pass before some utilities are required to update their ISI plans, a period of 20 years could pass before the first examinations would take place. Subsection IWL is based on a 5-year inspection interval. Adding the possible 10 years before update of existing ISI plans, a period of 15 years could pass before the examinations were performed by plants that have not voluntarily adopted the provisions of Regulatory Guide 1.35, Rev. 3. Expediting implementation of the containment examinations is considered necessary because of the problems that have been identified at various plants, the need to establish expeditiously a baseline for each facility, and the need to identify any existing degradation.

Proposed paragraphs (g)(6)(ii)(B)(*2*) and (g)(6)(ii)(B)(*3*) would each provide a mechanism for licensees to satisfy the requirements of the routine containment examinations and the expedited examination without duplication. Paragraph (g)(6)(ii)(B)(*2*) would permit licensees to avoid duplicating examinations required by both the periodic routine and expedited examination programs. This provision is intended to be useful to those licensees that would be required to implement the expedited examination during the first periodic interval that routine containment examinations are required. Paragraph (g)(6)(ii)(B)(*3*) would allow licensees to use a recently performed examination of the post-tensioning system to satisfy the requirements for the expedited examination of the containment post-tensioning system. This situation would occur for licensees who perform an examination of the post-tensioning system using Regulatory Guide 1.35 between the effective date of this rule and the beginning of the expedited examination.

Submission of Comments in Electronic Format

The comment evaluation process will be improved if each comment is identified with document title, section heading, and paragraph number addressed. In addition to the original paper copy, submitters are encouraged to provide a copy of their letter in an electronic format on IBM PC compatible

3.5- or 5.25-inch diskettes. Data files should be provided as WordPerfect documents. ASCII text is also acceptable or, if formatted text is required, data files should be provided in IBM Revisable-Form Text/Document Content Architecture (RFT/DCA) format. The format and version should be identified on the diskette's external label.

Finding of No Significant Environmental Impact

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in subpart A of 10 CFR part 51, that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and therefore an environmental impact statement is not required.

This proposed rule is one part of a regulatory framework directed to ensuring containment integrity. Therefore, in the general sense, the proposed rule would have a positive impact on the environment. The proposed rule would incorporate by reference in the NRC regulations requirements contained in the ASME Code for the inservice inspection of the containments of nuclear power plants. Actions required of applicants and licensees to implement the proposed rule are of a routine nature that should not increase the potential for a negative environmental impact.

The environmental assessment and finding of no significant impact on which this determination is based are available for inspection at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. Single copies of the environmental assessment and the finding of no significant impact are available from Mr. W.E. Norris, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492–3805, or Mr. H.L. Graves, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492–3813.

Paperwork Reduction Act Statement

This proposed rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq). This rule has been submitted to the Office of Management and Budget for review and approval of the paperwork requirements.

The public reporting burden for this collection of information is estimated to average 4,000 hours per response for development of an initial inservice inspection plan and 10,000 hours per response for the update of the plan and periodic examinations, including 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 collection of information, including suggestions for reducing this burden, to the Information and Records Management Branch (MNBB–7714), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB–3019, (3150–0011), Office of Management and Budget, Washington, DC 20503.

Documented Evaluation

The Commission has prepared a draft summary of documented evaluation on this proposed regulation. The draft evaluation is available for inspection in the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. Single copies of the analysis may be obtained from Mr. W.E. Norris, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301)492–3805, or from Mr. H.L. Graves, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301)492–3813.

The Commission requests public comment on the draft summary of documented evaluation. Comments on the draft evaluation may be submitted to the NRC as indicated under the ADDRESSES heading.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only the operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR part 121. Since these companies are dominant in their service areas, this proposed rule does not fall within the purview of the Act.

Backfit Statement

The NRC is taking the proposed action for the purpose of ensuring that containment structures continue to maintain or exceed minimum accepted design wall thicknesses and prestressing forces as provided for in industry standards used to design containment structures, as reflected in license conditions, technical specifications, and licensee commitments. Therefore, under 10 CFR 50.109(a)(4)(i) a backfit analysis need not be prepared for this rule. A summary of the documented evaluation required by § 50.109(a)(4) to support this conclusion is set forth below.

GDC 16, "Containment design," requires the provision of reactor containment and associated systems to establish an essentially leak-tight barrier against the uncontrolled release of radioactivity into the environment and to ensure that the containment design conditions important to safety are not exceeded for as long as required for postulated accident conditions.

Criterion 53, "Provisions for containment testing and inspection," requires that the reactor containment design permit: (1) Appropriate periodic inspection of all important areas, such as penetrations; (2) an appropriate surveillance program; and (3) periodic testing at containment design pressure of the leak-tightness of penetrations which have resilient seals and expansion bellows. Appendix J, "Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors," of 10 CFR part 50 contains specific rules for leakage testing of containments. Paragraph V. A. of appendix J requires that a general inspection of the accessible interior and exterior surfaces of the containment structures and components be performed prior to any Type A test to uncover any evidence of structural deterioration that may affect either the containment structural integrity or leak-tightness (Type A test means tests intended to measure the primary reactor containment overall integrated leakage rate: (1) After the containment has been completed and is ready for operation, and (2) at periodic intervals thereafter). None of these existing requirements, however, provide specific guidance on how to perform the necessary containment examinations. This lack of guidance has resulted in a large variation in licensee containment examination programs, such that there have been cases of noncompliance with GDC 16. Based on the results of inspections and audits, and plant operational experiences, it is clear that many licensee containment examination

programs have not detected degradation that could result in a compromise of pressure-retaining capability. The location and extent of corrosion or degradation in a containment can be critical to the containment's behavior during an accident.

The metal containment structure of operating nuclear power plants were designed in accordance with either Section III, Subsection NE, "Class MC Components," or Section VIII, of the ASME Code. These subsections contain provisions for the design and construction of metal containment structures, including methods for determining the minimum required wall thicknesses. The minimum wall thickness is determined so that the metal containment structure will continue to maintain its structural integrity under the various stressors and degradation mechanisms which act on it.

The American Concrete Institute Standard ACI-318 contains provisions for designing and constructing the post-tensioning systems of concrete containment structures, including methods for determining the prestressing forces. The post-tensioning system is designed so that the concrete containment structure will continue to maintain its structural integrity under the various stressors and degradation mechanisms which act on it.

These requirements for minimum design wall thicknesses and prestressing forces as provided in these industry standards used to design containment structures are reflected in license conditions, technical specifications, and licensee commitments (e.g., the Final Safety Analysis Report).

The rate of occurrence of corrosion and degradation of containment structures has been increasing at operating nuclear power plants. Over one-third of operating containment structures have experienced corrosion or other degradation. Almost one-half of the occurrences were first identified by the NRC through its inspections or structural audits, or by licensees because they were alerted to a degraded condition at another site. Examples of degradation not found by licensees, but initially detected at plants through NRC inspections include (1) corrosion of steel containment shells in the drywell sand cushion region, resulting in wall thickness reduced to below the minimum design thickness; (2) corrosion of the torus of the steel containment shell (wall thickness at or near minimum design thickness); (3) grease leakage from the tendons of prestressed concrete containments; and (4) water seepage, as well as concrete cracking in concrete containments.

The NRC believes that more specific ISI requirements, that expand upon existing requirements for the examination of containment structures in accordance with GDC 53, and appendix J are needed and are justified to ensure that containment structures continue to maintain or exceed minimum accepted design wall thicknesses and prestressing forces as reflected in license conditions, technical specifications, or licensee commitments. Based on actual operating experience, a serious concern exists regarding continued compliance by the operating plants with existing requirements for ensuring containment minimum design wall thicknesses and prestressing forces if the proposed action is not taken. The NRC also believes that the occurrences of corrosion and other degradation discussed above would have been detected by licensees when conducting the comprehensive periodic examinations set forth in Subsection IWE and Subsection IWL of the ASME Code, as proposed for incorporation by reference into 10 CFR 50.55a.

Recent changes and additions to the ASME Code include provisions to address the concerns outlined above; and the staff proposes to make these provisions mandatory by amending 10 CFR 50.55a to incorporate by reference these additional portions of the ASME Code (Subsection IWE and Subsection IWL). The Commission concludes that this proposed backfit is necessary to ensure compliance with GDCs 16 and 53, appendix J, minimum design wall thicknesses in metal containments, and the prestressing forces of concrete containments, which are applicable to all licensees through license conditions, technical specifications, and licensee commitments

List of Subjects in 10 CFR Part 50

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

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 533, the NRC is proposing to adopt the following amendments to 10 CFR part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd) and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138) Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat 955 (42 U.S.C. 2235) Sections 50.33a, 50.55a and Appendix Q also issued under sec 102, Pub. L. 91-190, 83 Stat 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec 204, 88 Stat 1245 (42 U.S C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub L 97-415, 96 Stat 2073 (42 U.S.C 2239) Section 50.78 also issued under sec 122, 68 Stat. 939 (42 U S C 2152). Sections 50.80-50.81 also issued under sec 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec 187 68 Stat 955 (42 U.S.C. 2237)

2. Section 50.55a is amended by adding paragraphs (b)(2)(vi), (b)(2)(ix), (b)(2)(x), (g)(4)(v), and (g)(6)(ii)(B), and revising the introductory text of paragraph (g)(4) to read as follows:

§ 50.55a Codes and standards.

* * * * *

(b) * * *

(2) * * *

(vi) *Effective edition and addenda of Subsection IWE and Subsection IWL, Section XI* When using Subsection IWE and Subsection IWL, the 1992 Edition with the 1992 Addenda is the only acceptable Edition and Addenda.

* * * * *

(ix) *Examination of concrete containments.*

(A) All grease caps that are accessible must be visually examined to detect grease leakage or grease cap deformations Grease caps must be removed for this examination when there is evidence of grease cap deformation that indicates deterioration of anchorage hardware.

(B) An Engineering Evaluation Report must be prepared as prescribed in IWL-3300(a), (b), (c), and (d) when evaluation of consecutive surveillances of prestressing forces for the same tendon or tendons in a group indicates a trend of prestress loss such that the tendon

force(s) would be less than the minimum design prestress requirements before the next inspection interval.

(C) When the elongation corresponding to a specific load (adjusted for effective wires or strands) during retensioning of tendons differs by more than 10 percent from that recorded during the last measurement, an evaluation must be performed to determine whether the difference is related to wire failures or slip of wires in anchorages. A difference of more than 10 percent must be identified in the ISI Summary Report.

(D) The licensee shall identify the following conditions, if they occur, in the ISI Summary Report:

(*1*) The sampled sheathing filler grease contains chemically combined water exceeding 10 percent by weight or the presence of free water;

(*2*) The absolute difference between the amount removed and the amount replaced may not exceed 10 percent of the tendon net duct volume.

(*3*) Grease leakage is detected during general visual examination of the containment surface.

(E) The licensee shall evaluate the acceptability of inaccessible areas when conditions exist in accessible areas that could indicate the presence of or result in degradation to such inaccessible areas. For each inaccessible area identified, the licensee shall provide the following in the ISI Summary Report.

(*1*) A description of the type and estimated extent of degradation, and the conditions that led to the degradation,

(*2*) An evaluation of each area, and the result of the evaluation, and,

(*3*) A description of necessary corrective actions.

(x) *Subsection IWE and Subsection IWL inservice inspection plans*

Licensees that have less than 2 years remaining in their present 120-month inservice inspection interval on (*effective date of the final rule*) may defer completion of the Subsection IWE and Subsection IWL portions of the inspection plan for the next 120-month inspection interval for up to 2 years from the end of the present interval.

* * * * *

(g) * * *

(4) Throughout the service life of a boiling or pressurized water-cooled nuclear power facility, components (including supports) which are classified as ASME Code Class 1, Class 2, and Class 3 must meet the requirements, except design and access provisions and preservice examination requirements, set forth in Section XI of editions of the ASME Boiler and Pressure Vessel Code and Addenda that become effective subsequent to editions specified in paragraphs (g)(2) and (g)(3) of this section and are incorporated by reference in paragraph (b) of this section, to the extent practical within the limitations of design, geometry and materials of construction of the components. Components which are classified as Class MC pressure retaining components and their integral attachments, and components which are classified as Class CC pressure retaining components and their integral attachments must meet the requirements, except design and access provisions and preservice examination requirements, set forth in Section XI of the ASME Boiler and Pressure Vessel Code and Addenda that are incorporated by reference in paragraph (b), subject to the limitation listed in paragraph (b)(2)(vi) and the modifications listed in paragraphs (b)(2)(ix) and (b)(2)(x) of this section, to the extent practical within the limitations of design, geometry and materials of construction of the components.

* * * * *

(v) For a boiling or pressurized water-cooled nuclear power facility whose construction permit was issued after January 1, 1956:

(A) Metal containment pressure retaining components and their integral attachments must meet the inservice inspection, repair, and replacement requirements applicable to components which are classified as ASME Code Class MC,

(B) Metallic shell and penetration liners which are pressure retaining components and their integral attachments in concrete containments must meet the inservice inspection, repair, and replacement requirements applicable to components which are classified as ASME Code Class CC, and

(C) Concrete containment pressure retaining components and their integral attachments, and the post-tensioning systems of concrete containments must meet the inservice inspection and repair requirements applicable to components which are classified as ASME Code Class CC.

* * * * *

(6) * * *

(ii) * * *

(B) *Expedited examination of containment*

(*1*) Licensees of all operating nuclear power plants shall implement the examinations specified for the first inspection interval in Subsection IWE and Subsection IWL of the 1992 Edition with the 1992 Addenda in conjunction with the modifications specified in § 50.55a (b)(2)(ix) by (*a date will be inserted that is 5 years later than the effective date of the final rule*).

(*2*) The expedited examination may be used to satisfy the requirements of routinely scheduled examinations of Subsection IWE subject to IWA–2430(c) when the expedited examination occurs during the first containment inspection interval.

(*3*) The requirement for the expedited examination of the containment post-tensioning system may be satisfied by written commitments that are in place before (*the effective date of the final rule*) for examinations of the post-tensioning system.

* * * * *

Dated at Rockville, Maryland, this 3d day of January 1994.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission

[FR Doc 94–341 Filed 1–6–94; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 33

[Docket No. 93–ANE–65; Notice No. 33–ANE–04]

Special Conditions; Rolls-Royce Model(s) RB211–Trent–875–17/–877–17/–884–17 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT

ACTION: Notice of proposed special conditions

SUMMARY: This notice proposes special conditions for the Rolls-Royce Model(s) RB211–Trent–875–17, –877–17, and –884–17 turbofan engines The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from medium and large bird ingestion This notice proposes the additional safety standards which the Administrator considers necessary to establish a level of safety equivalent to that established by the airworthiness standards of Part 33 of the Federal Aviation Regulations (FAR).

DATES: Comments must be submitted on or before February 22, 1994

ADDRESSES: Comments on this proposal may be submitted in triplicate to: Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attn: Rules Docket No. 93–ANE–65, 12 New England Executive Park, Burlington,

Massachusetts 01803–5299. Comments must be marked: Docket No. 93–ANE–65. Comments may be inspected at this location between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John Golinski, Engine and Propeller Standards Staff, ANE–110, Engine and Propeller Directorate, Aircraft Certification Service, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803–5229; telephone (617) 238–7119; fax (617) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed special conditions by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under **ADDRESSES**. All communications received on or before the closing date for comments, specified under **DATES**, will be considered by the Administrator before taking action on the proposal. The proposal contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed special conditions. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this proposal will be filed in the docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 93–ANE–65." The postcard will be date stamped and returned to the commenter.

Background

On August 4, 1992, Rolls-Royce applied for type certification of Rolls-Royce Model(s) RB211–Trent–870–17, –877–17, and –884–17 turbofan engines. The application for type certification of the Model RB211–Trent–870–17 turbofan engine was withdrawn and a new application for type certification of the Model RB211–Trent–875–17 was made on April 6, 1993. The FAA has determined that the current foreign object ingestion requirements of § 33.77(a) for four pound birds; and § 33.77(b) for one and one-half pound flocking birds, do not adequately represent the bird threat encountered in service. A study of in-service bird ingestion events has indicated a need to modify the bird ingestion requirements of this section to ensure design integrity and demonstrate an adequate level of safety.

The FAA has concluded that additional safety standards must be applied to Rolls-Royce Model(s) RB211–Trent–875–17, –877–17, and –844–17 turbofan engines to demonstrate that they are capable of acceptable operation after medium and large bird ingestion. The applicable airworthiness requirements do not contain adequate or appropriate safety standards for type certification with respect to the new design criteria. This new design criteria assumes the actual bird threat encountered in service.

Type Certification Basis

Under the provisions of § 21.101 of the FAR, Rolls-Royce must show that the Rolls-Royce Model(s) RB211–Trent–875–17, –877–17, and –884–17 turbofan engines meet the requirements of the applicable regulations in effect on the date of the application. Those Federal Aviation Regulations are § 21.21 and Part 33, effective February 1, 1965, as amended through August 10, 1990, Amendment 33–14.

The Administrator finds that the applicable airworthiness regulations in part 33, as amended, do not contain adequate or appropriate safety standards for the Rolls-Royce Model(s) RB211–Trent–800 series turbofan engine because of its unique design criteria. Therefore, the Administrator proposes these special conditions under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice and opportunity for comment, as required by §§ 11.28 and 11.29(b), and become part of the type certification basis in accordance with § 21.101(b)(2).

Conclusion

This action affects only Rolls-Royce Model(s) RB211–Trent–875–17, –877–17, and –884–17 turbofan engines. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these new design criteria on the engine.

List of Subjects in 14 CFR Part 33

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for these special conditions continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421, 1423; 49 U.S.C. 106(g); 14 CFR 21 16, and 14 CFR 11.28.

The Proposed Special Conditions

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type certification basis for the Rolls-Royce Model(s) RB211–Trent–875–17, –877–17, and –884–17 turbofan engines.

In lieu of the requirements of FAR § 33.77(a) and (b), the following tests and analyses must be conducted, unless compliance can be shown by alternate methods acceptable to the Administrator:

(a) It must be shown that the ingestion of a single large bird, under the conditions prescribed in Appendix A, will not cause the engine to:

(1) catch fire;

(2) release hazardous fragments through the engine casing;

(3) generate loads greater than those ultimate loads specified under § 33.23(a);

(4) lose the ability to be shut down; or

(5) generate other conditions hazardous to the aircraft.

(b) Alternatively, if compliance with the bird ingestion requirements of paragraph (a) of this special condition is not established, the applicant must demonstrate that compliance with the containment requirements of § 33.94(a) constitutes a more severe demonstration than the requirements of paragraph (a) of this special condition. The engine type certification documentation will then be endorsed to reflect this alternative compliance method.

Appendix A—Large Bird Ingestion Test Procedures

(a) The test shall be conducted with the engine stabilized at rated takeoff thrust for the test day ambient conditions prior to the ingestion.

(b) The test shall be conducted using one eight-pound bird targeted at the most critical location and ingested at a bird speed of 200 knots.

(c) Power lever movement is not permitted within 15 seconds following the ingestion event.

End of Appendix A

(c) It must be shown that the ingestion of medium birds, under the conditions prescribed in Appendix B, will not cause the engine to:

(1) Sustain more than a 25 percent thrust loss;

(2) Be shut down during the required run-on demonstration prescribed in Appendix B;

(3) Exceed any engine operating limitations to the extent that the engine cannot comply with this section; or

(4) Generate other conditions hazardous to the aircraft.

Appendix B—Medium Bird Ingestion Test Procedures

(a) The ingestion test shall be conducted with the engine stabilized at rated takeoff thrust for the test day ambient conditions prior to the ingestion.

(b) The test shall be conducted to simulate a flock encounter, with all birds ingested within approximately one second, and using the more severe of the following bird weight/quantity combinations:

(1) Six 1.5-pound and one 2.5-pound birds.

(2) Four 2.5-pound birds.

(c) Bird targeting shall be one 2.5-pound bird at the core primary flow path, and the remaining birds targeted at critical fan rotor locations.

(d) Bird ingestion velocity shall be the most critical velocity between V1 minimum through 250 knots.

(e) Power lever movements between stages must occur in 10 seconds or less. The following test schedule will be used as the post-ingestion run-on demonstration:

(1) Two minutes with no power lever movement.

(2) Three minutes at 75 percent of takeoff thrust.

(3) Six minutes at 75 percent of maximum continuous thrust.

(4) Six minutes at 50 percent of maximum continuous thrust.

(5) One minute at approach idle.

(6) Two minutes at 75 percent of takeoff thrust.

(7) Retard throttle to idle.

(8) Shut down the engine.

(f) An analysis or component/engine test(s) acceptable to the Administrator shall be conducted to determine the critical ingestion parameters for medium bird ingestion that relates to airspeeds from V1 minimum through 250 knots. The analysis or test(s) must also show satisfactory engine operation for medium bird ingestion at the most severe ambient operating condition approved for the engine that may be experienced in service.

End of Appendix B

(d) It must be shown that engine spinner impact by one large bird and by the single largest medium bird, under the respective conditions prescribed in Appendices A and B, will not affect the engine to the extent that it cannot comply with the requirements of paragraphs (a) and (b) of this special condition.

Issued in Burlington, Massachusetts, on December 29, 1993.

Jay J. Pardee,

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

[FR Doc. 94–363 Filed 1–6–94; 8:45 am]

BILLING CODE 4910–13–M

Coast Guard

33 CFR Part 117

[CGD02 93–003]

RIN 2115–AE47

Drawbridge Operation Regulations, Illinois River, IL

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes amending a drawbridge regulation to add a new regulation which will allow the remote operation of the Chicago and Northwestern Transportation Company railway bridge at Pekin, Illinois. This action is being proposed at the request of the Chicago and Northwestern Transportation Company of Chicago, Illinois. The change to remote operation will provide for more efficient operation of the railway bridge.

DATES: Comments must be received on or before February 22, 1994.

ADDRESSES: Comments may be mailed to Commander (ob), Second Coast Guard District, 1222 Spruce Street, St. Louis, MO 63103–2832, Attention: Docket CGD02 93–003. Comments may also be delivered to room 2.107B at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. For information concerning comments, the telephone number is (314) 539–3724.

The Bridge Branch, Second Coast Guard District, maintains the public docket for this rulemaking. Comments will become part of the public docket and the docket will be available for inspection or copying in room 2.107B at the above address.

FOR FURTHER INFORMATION CONTACT: Roger K. Wiebusch, Bridge Administrator, Second Coast Guard District, (314) 539–3724.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking, CGD02 93–003, identify the specific section of this proposal to which each comment applies, and give the reason for each comment. Each person who wants an acknowledgment of the receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period. The Coast Guard may change the proposal in view of the comments.

The Coast Guard does not plan to hold a public hearing. Persons may request a public hearing by writing to the Docket Clerk at the address under **ADDRESSES**. If the Coast Guard determines that the opportunity to make oral presentations will aid the rulemaking process, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register.**

Drafting Information

The principal persons involved in drafting this document are Wanda G. Renshaw, Project Officer, Bridge Branch, and Lieutenant Commander Arne O. Denny, Project Attorney, Second Coast Guard District Legal Office.

Background and Purpose

The Chicago and Northwestern Transportation Company (C&NW) has requested Coast Guard approval to change the method of operating their railway bridge at Pekin, Illinois. The draw of the Chicago and Northwestern railway bridge, Mile 151.2 Illinois River, is presently maintained in the open-to-navigation position, and closed by an on-site bridge tender upon the approach of a train. On average, six to eight trains cross the bridge daily. Communication between the bridge tender and vessel operators is conducted on marine radio.

C&NW proposes to install remote operating equipment and a control system, including radar, infrared boat detectors, high intensity lights and communications equipment, that would permit operation of the draw from the Chicago and Northwestern office in Chicago, Illinois. The equipment would indicate any malfunction in the bridge operation and enable the remote operator to ascertain the position of the lift span at any time. The marine radio system will receive and transmit on the VHF marine frequencies authorized by the Federal Communications Commission. The bridge could also be operated at the bridge site, at either portal, by authorized railroad personnel. Radio-telephone equipment would also be provided to permit direct communications with vessels when the bridge is operated at the bridge site. A radar antenna will be installed on the fixed portion of the bridge structure, and the received signal will be transmitted by fixed lines and a microwave link to the Chicago and Northwestern office in Chicago. The radar system will be designed to scan upstream and downstream of the bridge. Infrared scanners will be located on the upstream and downstream ends of the channel span piers to detect vessels in

the channel span. If an obstruction is detected beneath the lift span during the closing cycle before the span is seated and locked, the lift span will be automatically stopped and immediately raised to the fully open position until the channel is clear.

During the bridge closing cycle, an automatic, synthesized-voice announcement will be broadcast. At the appropriate times in the closing cycle, the broadcast will announce that the bridge will close to navigation, that the bridge is closed to navigation, or that the bridge has reopened to navigation.

Discussion of Proposed Amendments

The proposed regulation will impose operating and equipment requirements on Chicago and Northwestern which will ensure the safe and timely operation of the railroad bridge. To do this, title 33 CFR part 117 needs to be amended. The present text of the existing subsection 117.393, Illinois River will be redesignated as subparagraph (a). This subsection regulates the Burlington Northern's railroad bridge at mile 88.8 of the Illinois River, at Beardstown, Illinois. Except for being renumbered, the regulation covering the operation of the Burlington Northern railroad bridge will not be changed. The proposed regulation will be numbered as subparagraph (b).

The proposed regulation will provide information about remote operation of the Chicago and Northwestern railroad bridge. The Chicago and Northwestern railroad bridge presently operates with an on-site bridge tender and is normally in the open position or opens on demand if it should be closed as a vessel approaches. If the Coast Guard approves operation from a remote site, the railroad bridge will continue to operate as a normally open span. However, the Coast Guard will require the use of additional sound, voice, and light signals to coincide with the various stages of the opening and closing of the span.

Regulatory Evaluation

This proposal is not considered a significant regulatory action under Executive Order 12866 and is not significant under the Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this proposal to be so minimal that a Regulatory Evaluation is unnecessary. A sample group of Illinois River users have expressed no objection to the proposal.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal will have a significant impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632).

The proposed change to the method for opening and closing the Chicago and Northwestern railroad bridge is not significantly different from the existing method which uses an on-site bridge tender. It does not appear to impose any new burdens or delays on vessel operators. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposal, if adopted, will not have a significant impact on a substantial number of small entities. If, however, you think that your business qualifies as a small entity and that this proposal will have a significant economic impact on your business, please submit a comment (see **ADDRESSES**) explaining why you think your business qualifies and in what way and to what degree this proposal will economically affect your business.

Collection of Information

This proposal contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this proposal in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this proposal does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Environment

The Coast Guard has reviewed the environmental impact of this proposal and concluded that under section 2.B.2 of the NEPA Implementing Procedures, COMDTINST M16475.1B this proposal is categorically excluded from further environmental documentation because promulgation of changes to drawbridge regulations have been found to not have a significant effect on the human environment. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 117

Bridges.

PART 117—DRAWBRIDGE OPERATION REGULATIONS

For the reasons set out in the preamble, the Coast Guard proposes to amend part 117 of title 33, Code of Federal Regulations, as follows:

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g).

2. In § 117.393, paragraphs (a), (b), (c), (d), and (e) are redesignated as (a)(1) through (a)(5), respectively, the introductory paragraph of § 117.393 is redesignated as the introductory text of paragraph (a) and a new paragraph (b) is added to read as follows:

§ 117.393 Illinois River.

* * * * *

(b) The draw of the Chicago and Northwestern railroad bridge, Mile 151.2, at Pekin, Illinois, is operated by a remote operator located at the Chicago and Northwestern offices in Chicago, Illinois, as follows:

(1) The draw is normally maintained in the fully open position, displaying green midchannel lights to indicate that the span is fully open.

(2) The draw is equipped with the following:

(i) A radiotelephone link direct to the remote operator,

(ii) A horn for sound signals,

(iii) Eight high intensity amber warning lights, oriented upstream and downstream, with two secured to the uppermost chord and two secured to the lowermost chord of the drawspan,

(iv) A radar antenna on the lower portion of the drawspan capable of scanning one mile upstream and one mile downstream, and

(v) Infrared scanners located on the upstream and downstream ends of the channel span piers, to detect vessels or other obstructions under the bridge.

(3) The remote operator shall maintain a radiotelephone watch for mariners to establish contact as they approach the bridge to ensure that the draw is open or that it remains open until passage is complete.

(4) When a train approaches the bridge and the draw is in the open position, the remote operator initiates a ten minute warning period before closing the bridge. During this warning period, the amber lights begin flashing and a signal of four short blasts sounds on a horn. The four-blast signal will repeat after a five second interval. A synthesized-voice message is broadcast over the radiotelephone as follows: "The Chicago and Northwestern railroad bridge at Mile 151.2, Illinois River, will close to navigation in ten

minutes." The announcement is repeated every two minutes, counting down the time remaining until closure.

(5) At the end of the ten minute warning period, the remote bridge operator scans under the bridge using infrared detectors and the upstream and downstream approaches to the bridge using radar to determine whether any vessels are under or are approaching the bridge. If any vessels are under or are approaching the bridge within one mile as determined by infrared or radar scanning or by a radiotelephone response, the remote operator shall not close the bridge until the vessel or vessels have cleared the bridge.

(6) If no vessels are under or approaching the bridge, the midchannel navigation lights will change from green to red, the horn signal of four short blasts will sound, twice, and the radiotelephone message will change to: "The Chicago and Northwestern Railroad Bridge at Mile 151.2, Illinois River, is closed to navigation." The message will repeat every two minutes and the amber lights will continue to flash until the bridge is fully reopened.

(7) If the infrared scanners detect a vessel or other obstruction under the bridge before the drawspan is fully lowered and locked, the closing sequence is stopped, automatically, and the drawspan is raised to its fully open position until the channel is clear. When obstruction has cleared the navigation span, the remote operator confirms that the channel is clear, and reinitiates the ten-minute warning cycle.

(8) After the train has cleared the bridge, the remote operator initiates the lift span raising cycle. When the draw is raised to its full height and locked in place, the flashing lights stop and the midchannel navigation lights change from red to green. The synthesized voice announcement broadcasts at two minutes intervals for ten minutes that the bridge is reopened to navigation.

Dated: December 27, 1993.

Paul M. Blayney,

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

[FR Doc. 94-271 Filed 1-6-94; 8:45 am]

BILLING CODE 4910-14-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[WV 5-1-5149 A1-FRL-4823-2]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia: Limited Approval and Disapproval of PM-10 Implementation Plan for the Follansbee Area

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: EPA today proposes limited approval and limited disapproval of the State Implementation Plan (SIP) submitted by the State of West Virginia for the purpose of bringing about the attainment of the national ambient air quality standard (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM-10). The implementation plan was submitted by the State to satisfy certain federal requirements for an approvable nonattainment area PM-10 SIP for a portion of the Follansbee area, Brooke County, West Virginia. The Act required that States make certain submittals by November 15, 1991 for those areas designated nonattainment and classified as moderate for PM-10 upon enactment (the "initial moderate nonattainment areas"). By today's action, EPA is proposing limited approval and limited disapproval of the PM-10 SIP for the Follansbee, West Virginia area.

DATES: Comments must be received in writing on or before February 7, 1994. Public comments on this document are requested and will be considered before taking final action on this SIP revision.

ADDRESSES: Comments may be mailed to Thomas J. Maslany, Director, Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107. Copies of the documents relevant to this notice are available for public inspection during normal business hours at the following locations: Air, Radiation and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, PA 19107; Public Information Reference Unit, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and West Virginia Department of Environmental Protection, Office of Air Quality, 1558 Washington Street, East, Charleston, West Virginia, 25311.

FOR FURTHER INFORMATION CONTACT: Thomas A. Casey, U.S. Environmental Protection Agency, Region III (3AT14), 841 Chestnut Building, Philadelphia, PA 19107, (215) 597-2746.

SUPPLEMENTARY INFORMATION:

Background

The air quality planning requirements for moderate PM-10 nonattainment areas are set out in subparts 1 and 4 of Title I of the Act. The EPA has issued a "General Preamble" describing EPA's preliminary views on how EPA intends to review SIP's and SIP revisions submitted under Title I of the Act, including those State submittals containing moderate PM-10 nonattainment area SIP requirements (see generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992)).

The Follansbee area of Brooke County, along with a portion of Jefferson County, Ohio near Steubenville, was classified as a Group I area on the basis of monitored PM-10 violations in Mingo Junction, Ohio. Upon enactment of the CAAA, all Group I areas (and Group II areas that had monitored violations before January 1, 1989) were designated nonattainment by operation of law. A list of these initial nonattainment areas, including the Follansbee area, was published on March 15, 1991 (56 FR 11101) with corrections on May 20, 1991 (56 FR 23105).[1]

Those States containing initial moderate PM-10 nonattainment areas were required to submit, among other things, the following provisions by November 15, 1991:

1. Provisions to assure that reasonably available control measures (RACM) (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology—RACT) shall be implemented no later than December 10, 1993;

2. Either a demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 1994 or a demonstration that attainment by that date is impracticable;

3. Quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress (RFP) toward attainment by December 31, 1994; and

[1] The Follansbee, West Virginia nonattainment area was defined in this notice as the area bounded on the north by the Market Street Bridge, on the east by West Virginia Route 2, on the south by the extension of the southern boundary of Steubenville Township, Jefferson County, Ohio, and on the West by the Ohio/West Virginia border.

4. Provisions to assure that the control requirements applicable to major stationary sources of PM–10 also apply to major stationary sources of PM–10 precursors except where the Administrator determines that such sources do not contribute significantly to PM–10 levels which exceed the NAAQS in the area. See sections 172(c), 188, and 189 of the Act.

Some provisions are due at a later date. States with initial moderate PM–10 nonattainment areas were required to submit a permit program for the construction and operation of new and modified major stationary sources of PM–10 by June 30, 1992 (see section 189(a)). Such States also must submit contingency measures by November 15, 1993 which become effective without further action by the State or EPA, upon a determination by EPA that the area has failed to achieve RFP or to attain the PM–10 NAAQS by the applicable statutory deadline. See section 172(c)(9) and 57 FR 13543–44.

Responsibility for fulfilling the air quality planning requirements for the Follansbee and Steubenville areas lies in different states: West Virginia is responsible for the Follansbee area and Ohio is responsible for the Steubenville area. The plans are linked in that, according to their attainment demonstrations, emissions reductions in both states are necessary to effect attainment in either area. (West Virginia and Ohio corroborated on parts of the attainment demonstration; West Virginia prepared much of the emissions inventory, and Ohio performed the modeling analyses.) The submitted SIP revision of each State, however, stands alone. Today's proposed rulemaking applies only to West Virginia's SIP; EPA will act on Ohio's SIP separately.

While this notice proposes limited disapproval and limited disapproval of West Virginia's SIP revision, EPA will fully approve the State's submittal without further notice, if the unapprovable aspects of the State's submittal are corrected. The rationale for this proposal is set out both in this notice and in the supporting Technical Support Document (TSD) which is available at the address indicated below.

Summary of the SIP Revision and Criteria for Proposed Action

1. Procedural Background

The Act requires States to observe certain procedural requirements in developing implementation plans and plan revisions for submission to EPA. Section 110(a)(2) of the Act provides that each implementation plan submitted by a State must be adopted after reasonable notice and public hearing.[2] Section 110(l) of the Act similarly provides that each revision to an implementation plan submitted by a State under the Act must be adopted by such State after reasonable notice and public hearing.

EPA also must determine whether a submittal is complete and therefore warrants further EPA review and action (see section 110(k)(1) and 57 FR 13565). EPA's completeness criteria for SIP submittals are set out at 40 CFR part 51, appendix V (1991), as amended by 57 FR 42216 (August 26, 1991). EPA attempts to make completeness determinations within 60 days of receiving a submission. However, a submittal is deemed complete by operation of law if a completeness determination is not made by EPA 6 months after receipt of the submission.

The State of West Virginia held a public hearing on October 30, 1991 to solicit public comment on the implementation plan for the Follansbee nonattainment area. Following the public hearing, the plan was adopted by the State and signed by the Honorable John M. Ranson, Secretary, Department of Commerce, Labor & Environmental Resources on November 12, 1991, and submitted to EPA on November 15, 1991 as a formal request for revision to the SIP.

The State submittal revision was reviewed by EPA to determine completeness, in accordance with the completeness criteria set out at 40 CFR part 51, appendix V (1991), as amended by 57 FR 42216 (August 26, 1991). The submittal was determined to be complete, and a letter dated January 22, 1992 was forwarded to the Governor of West Virginia indicating the completeness of the submittal and the next steps to be taken in the review process.

2. Emissions Inventory

Section 172(c)(3) of the Clean Air Act requires that nonattainment plan provisions include a comprehensive, accurate, current inventory of actual emissions from all sources of relevant pollutants in the nonattainment area. This section of the notice describes the adequacy of West Virginia's inventory of actual emissions as required by section 172(c)(3). The adequacy of the State's inventory of allowable emissions used as input to the demonstration of attainment (as required by section 189(a)) is discussed in a subsequent section of this notice.

West Virginia submitted an emissions inventory for base year 1990. The West Virginia submittal shows that activities related to steel making and shaping dominate the Follansbee area's emissions inventory.

There were some deficiencies related to the estimation of PM–10 emissions from coke oven batteries. Specifically, the calculations relating emissions of benzene soluble organics (BSO) to emissions of PM–10 are in error. The estimation of BSO-related PM–10 emissions effects estimates of both actual and SIP allowable emissions (and, consequently, the attainment demonstration). The error in BSO emissions notwithstanding, the inventory of actual emissions is generally comprehensive, accurate, and current, and therefore approvable as meeting the requirements of sections 172(c)(3) and 110(a)(2)(K) of the Act.[3] Therefore, EPA is proposing approval of the SIP for the purpose of satisfying the section 172(c)(3) requirement for an emissions inventory. A more detailed discussion of the shortcomings in the inventory of SIP allowable emissions used as input to dispersion models is presented in section II.C.4 of the TSD.[4]

3. RACM (Including RACT)

As noted, the initial moderate PM–10 nonattainment areas must submit provisions to assure that RACM (including RACT) are implemented no later than December 10, 1993 (see sections 172(c)(1) and 189(a)(1)(C)). The General Preamble contains a detailed discussion of EPA's interpretation of the RACM (including RACT) requirement (see 57 FR 13540–45 and 13560–61). Guidance on identifying RACT is found in the supplement to the General Preamble (57 FR 18074); "Procedures for Identifying Reasonably Available Control Technology for Stationary Sources of PM–10" (EPA 450–R–93–001); and an August 7, 1980 memorandum from Edward E. Reich, Director, Stationary Source Enforcement Division to the regional air enforcement directors entitled "Steel Technical Support Options and Documents," (with the attached table entitled "Particulate

[2] Also section 172(c)(7) of the Act requires that plan provisions for nonattainment areas meet the applicable provisions of section 110(a)(2).

[3] The EPA issued guidance on PM–10 emissions inventories prior to the enactment of the Clean Air Act Amendments in the form of the 1987 PM–10 SIP Development Guideline. The guidance provided in this document appears to be consistent with the Act.

[4] Calculations of emissions from leaking doors were also in error. However, the error in the calculation of emissions from leaking doors only affects the inventory of SIP allowable emissions and has no bearing on the section 172(c)(3) requirement for an inventory of actual emissions.

Emission Limitations Generally Achievable on a Retrofit Basis").

West Virginia submitted six Consent Orders for incorporation into West Virginia's State Implementation Plan (SIP). By entering into the Consent Orders, Wheeling-Pittsburgh Steel Corporation; Standard Lafarge; Follansbee Steel Corporation; Koppers Industries, Incorporated; International Mill Service, Incorporated; and Starvaggi Industries, Incorporated have agreed to comply with reduced allowable emission rates for PM–10. Table 1 presents a summary of the controls required by the Consent Orders; more detail is provided by Tables 2 through 7. Consent orders with International Mill Service, Koppers Industries, Standard Lafarge, Starvaggi Industries, and Wheeling-Pittsburgh Steel provide for new or improved, specific dust control measures. Consent orders with Follansbee Steel and Koppers Industries require "add-on" control equipment.

TABLE 1

Company	Process	Control
Follansbee Steel	Terne Metal Coaters No. 1,2	Process control (probably an electrostatic precipitator).
International Mill	Sinter Receiving Hopper	Partial Enclosure & Spray.
	Sinter Hopper & Sinter Screens	Full Enclosure & Spray.
	Sinter Storage Piles	Water Spray.
	Unpaved Areas	Dust Control Plan.
Koppers	Pitch Dryer	Baghouse.
Standard Lafarge	Slag Processing Plant	Reduce Fugitives 95%.
	Slag Receiving Hopper	Increase Wet Suppression.
	Paved & Unpaved Roads	Dust Control Plan.
Starvaggi	Unpaved Areas	Dust Control Plan.
Wheeling-Pitt Steel	Coal Crusher	Full Enclosure.
	Coke Sizing No. 1,2	Full Enclosure.
	Coke Pushing No. 1,2,3	Mass limit on baghouse.
	Coke Underfiring No. 1,2,3,8	Mass limit on combustion stacks.
	Paved & Unpaved Roads	Dust Control Plan.

TABLE 2.—NEW LIMITS FOR FOLLANSBEE STEEL

Process	Control	Limit(s)		
		Unit	TSP (lb/hr)	PM–10 (lb/hr)
Terne Coaters No. 1, 2.	Company has flexibility. Will probably require a new pollution control device such as a commercial precipitator.	No. 1 ...	2.00 (approx. 53% control)	1.80 (approx. 53% control)
		No. 2 ...	1.80 (approx. 71% control)	1.66 (approx. 71% control)

TABLE 3.—NEW LIMITS FOR INTERNATIONAL MILL SERVICES

Process	Control	Limit(s)
Sinter Receiving Hopper	Partial Enclosure & Spray	TSP ≤ 0.092 lb/hr, PM–10 ≤ 0.046 lb/hr, 5% opacity, 95% control efficiency.
Sinter Hopper	Full Enclosure & Spray	Hopper—TSP (lb/hr) 0.092; PM–10 (lb/hr) 0.046.
Sinter Screens		Screening—TSP (lb/hr) 1.84; PM–10 (lb/hr) 0.938. 10% opacity, 95% control.
Sinter Storage Piles	Water Spray	TSP ≤ 0.682 lb/hr; PM–10 ≤ 0.596 lb/hr; 5% opacity; 75% control of TSP & PM–10.
Unpaved Areas	Dust Control Plan	Program is the responsibility of Wheeling-Pittsburgh Steel Company under its consent order with WVAPCC. International Mill Service is also responsible should Wheeling-Pitt, for any reason, not implement the program. (See Table 7.)

TABLE 4.—NEW LIMITS FOR KOPPERS

Process	Control	Limit(s)
Pitch Dryer	Baghouse	TSP ≤1.86 lb/hr (0.93 lb/ton). PM–10 ≤0.59 lb/hr (0.30 lb/ton).

TABLE 5.—NEW LIMITS FOR STANDARD LAFARGE

Process	Control	Limit(s)
Slag Processing Plant	Company has flexibility	TSP ≤19.13 lb/hr. PM–10 ≤8.15 lb/hr. 10% opacity, 95% control.

TABLE 5.—NEW LIMITS FOR STANDARD LAFARGE—Continued

Process	Control	Limit(s)
Slag Receiving Hopper	Increase Web Suppression	TSP ≤0.07 lb/hr. PM–10 ≤0.06 lb/hr. 5% opacity, 80% control.
Paved & Unpaved Roads	Chemical Dust Suppressant	90% control.

TABLE 6.—NEW LIMITS FOR STARVAGGI INCORPORATED

Process	Control	Limit(s)
Unpraved Roads & Parking Lots	Chemical Suppressant	90% control.

TABLE 7.—NEW LIMITS FOR WHEELING-PITTSBURGH STEEL

Process	Control	Limit(s)		
Coal Crushing	Full Enclosure	TSP ≤ 1.0 lb/hr; PM–10 ≤ 0.51 lb/hr; No visible emissions; 90% Control (PM–10).		
Coal Sizing No. 1, 2	Full Enclosure	TSP ≤ 1.48 lb/hr; PM–10 ≤ 0.76 lb/hr; 5% opacity; 90% Control (PM–10).		
Coke Pushing No. 1, 2, 3	Existing Baghouse	2.14 lb/hr (approx. 0.022 lb/ton coal charged at maximum operating rate).		
		Battery Stack	(lb/hr)	Approx. lb/ton of coal charged at maximum capacity
Coke Underfiring No. 1, 2, 3, 8	None	TSP		
		No. 1	1.40	0.044
		No. 2	1.40	0.044
		No. 3	1.58	0.046
		No. 8	6.93	0.048
		PM–10		
		No. 1	1.35	0.043
		No. 2	1.35	0.043
		No. 3	1.52	0.046
		No. 8	6.65	0.047
Unpaved & Irregular Paved Surfaces	Chemical Suppression	95% Control.		
Paved Roads	Flushing and Vacuum Sweeping.	95% Control.		

EPA's longstanding definition of RACT is the lowest emission limitation or percent reduction that a particular source is capable of achieving by the application of control technology that is reasonably available considering technological and economic feasibility (see 57 FR 13541). Thus, EPA recommends that available control technology be applied to those existing sources in the area that are reasonable to control in light of the attainment needs of the area and the feasibility of controls.

In addition to determining that the requirements of the consent orders meet this definition of RACT, EPA also reviewed the requirements of the six consent orders and found them consistent with the EPA guidance documents on RACM referenced earlier in the notice. All of the requirements identified by EPA in the previously referenced August 7, 1980 memorandum as being normally achievable for iron and steel sources are in fact required by West Virginia. Although EPA has not developed such specific PM–10 RACM guidance for other applicable point sources, but the applicable control measures in the State's plan was found by EPA to require the implementation of RACM for other sources in the area.[5] In addition, the plan requires implementation of RACM in all cases by December 10, 1993. Consequently, West Virginia's plan is judged to satisfy the RACM requirement in Section 189(a)(1)(C).

4. Attainment Demonstration [6]

As noted, the initial moderate PM–10 nonattainment areas must submit a demonstration (including air quality modeling) showing that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 1994 (See section 189(a)(1)(B) of the Act). The 24-hour PM–10 NAAQS is 150 micrograms/cubic meter (μg/m³), and the standard is attained when the expected number of days per calendar year with a 24-hour average concentration above 150 μg/m³ is equal to or less than one. The annual PM–10 NAAQS is 50 μg/m³, and the standard is attained when the expected annual arithmetic mean concentration is less than or equal to 50 μg/m³ (see 40 CFR 50.6). Alternatively, the State must show that attainment by December 31, 1994 is impracticable.

West Virginia performed dispersion modeling for the Follansbee area; this modeling is described in detail is

[5] The EPA has issued technological and economic parameters that should be considered in determining RACT for a particular source (see 57 FR 18073–74).

[6] It should be noted that the modeling techniques used in the attainment demonstration are based on the modeling guidelines in place at the time the analysis was performed. EPA approval of this analysis will not automatically apply to any other analysis of Follansbee to support any further regulatory action.

section II.C.4 of the TSD. The modeling is unapprovable as a demonstration of attainment because of deficiencies in estimating emissions from coke oven batteries, the lack of an approvable analysis of intermediate terrain, and the nonguideline use of the RAM dispersion model in a meteorologically rural area.

As described in the section of this notice entitled "Emissions Inventories," estimates of emissions from coke oven doors are in error. Calculations of emissions from leaking coke oven doors were based on an estimate of actual percent leaking doors leak rather than the allowable leak rate, and the calculation of the relation between BSO emissions and PM–10 emissions is in error.

EPA modeling guidance and policy require that receptors between stack height and plume height must be modeled with both an appropriate simple terrain model and an appropriate complex terrain model (see EPA's Guideline on Air Quality Models (EPA–450/2–78–027R), and June 8, 1989 Memorandum from Joseph Tikvart to Alan Cimorelli). No implementation of the intermediate terrain policy was included in the State's submittal.

The State employed the Gaussian Plume Multiple Source Air Quality Algorithm (RAM) to estimate the impacts of area sources such as agricultural tilling and residential heating. The use of RAM in a meteorologically rural area, such as the Steubenville, Ohio/Follansbee West Virginia area, is inconsistent with the recommendations of the Guideline on Air Quality Models.

Because of these deficiencies, EPA is proposing to disapprove the SIP revision for the limited purpose of fulfilling the section 189(a) requirement for a demonstration of attainment. For a more detailed description of the attainment demonstration and the control strategy used, see the Technical Support Document accompanying this notice. The TSD also provides EPA's detailed rationale for determining that the demonstration, as submitted, does not meet the criteria for approval.

5. PM–10 Precursors

The control requirements which are applicable to major stationary sources of PM–10, also apply to major stationary sources of PM–10 precursors unless EPA determines such sources do not contribute significantly to PM–10 levels in excess of the NAAQS in that area (see section 189(e) of the Act).

An analysis of air quality and emissions data for the Follansbee nonattainment area demonstrates that violations of the NAAQS are attributable chiefly to direct particulate matter emissions from industrial sources, and that sources of particulate matter precursors SO_2, and NO_x contribute less than 8 μg/m³. Consequently, EPA is proposing to find that major sources of precursors of PM–10 do not contribute significantly to PM–10 levels in excess of the NAAQS. The consequences of this finding are to exclude these sources from the applicability of PM–10 nonattainment area control requirements. Further discussion of the analyses and supporting rationale for EPA's finding are contained in the Technical Support Document accompanying this notice. Note that while EPA is making a general finding for this area, today's finding is based on the current character of the area including, for example, the existing mix of sources in the area. It is possible, therefore, that future growth could change the significance of precursors in the area. EPA intends to issue future guidance addressing such potential changes in the significance of precursor emissions in PM–10 nonattainment areas.

6. Quantitative Milestones and Reasonable Further Progress (RFP)

The PM–10 nonattainment area plan revisions demonstrating attainment must contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate RFP, as defined in section 171(l), toward attainment by December 31, 1994 (see section 189(c) of the Act). Reasonable further progress is defined in section 171(l) as such annual incremental reductions in emissions of the relevant air pollutant as are required by Part D or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable NAAQS by the applicable date.

As stated previously, PM–10 plan revisions were due November 15, 1991, and RACM must be implemented no more than two years, 25 days later, by December 10, 1993. It would be unreasonable, and therefore not constitute RACT, to require a stationary source to install successive, incremental controls during this short period. In implementing RFP for the Follansbee area, EPA has reviewed the attainment demonstration and control strategy for the area to determine whether reductions different from those provided in the SIP should be required in order to ensure attainment of the PM–10 NAAQS by December 31, 1994 (see section 171(l)). Each of the Consent Orders submitted by West Virginia includes compliance dates for the various measures within each order. While these dates vary, none are later than December 10, 1993 and many measures are required well before that date. EPA, therefore, intends to approve West Virginia's submittal as fulfilling the part D requirements for quantitative milestones and reasonable further progress.

7. Enforceability Issues

All measures and other elements in the SIP must be enforceable by the State and EPA (see sections 172(c)(6), 110(a)(2)(A) of the CAAA and 57 FR 13556). The EPA criteria addressing the enforceability of SIP's and SIP revisions were stated in a September 23, 1987 memorandum (with attachments) from J. Craig Potter, Assistant Administrator for Air and Radiation, et al. (see 57 FR 13541). Nonattainment area plan provisions must also contain a program that provides for enforcement of the control measures and other elements in the SIP (see section 110(a)(2)(C)).

The particular control measures contained in the SIP are addressed above under the section headed "RACM (including RACT)." These control measures apply to the types of activities identified in Table 1 of that section including reduced emission limits on both stack and fugitive emissions. Through consent orders, the SIP provides applicable control measures on a source-by-source basis.

Consistent with the attainment demonstration described above, the submittal requires that all affected activities must be in full compliance with the applicable provisions by, in the latest case, December 10, 1993. In addition to the control measures, the submittal includes record-keeping requirements which are specified in the consent orders. In addition, the submittal (specifically, each consent agreement) sets out compliance schedules that include dates by which the source(s) must, for example, purchase and install equipment and commence dust suppression programs.

The State of West Virginia has a program that will ensure that the measures contained in the submittal are adequately enforced. The compliance schedules and associated test methods are described in detail in the consent orders. Each consent order specifically describes or references test methods or other means of determining compliance.

8. Contingency Measures

As provided in section 172(c)(9) of the Act, all moderate nonattainment area SIP's that demonstrate attainment must include contingency measures (see generally 57 FR 13543–44). These measures must be submitted by

November 15, 1993 for the initial moderate nonattainment areas. Contingency measures should consist of other available measures that are not part of the areas's control strategy. These measures must take effect without further action by the State or EPA, upon a determination by EPA that the area has failed to make RFP or attain the PM-10 NAAQS by the applicable statutory deadline. In their consent orders, Wheeling-Pittsburgh Steel, International Mill Services, and Follansbee Steel committed to develop contingency plans (by July 1, 1992) to reduce mass emissions by quantities specified in the consent orders. These companies agreed to the inclusion of these plans into consent orders to be approved by the WVAPCC by December 31, 1992. Koppers Industries, which shares the use of some property with Wheeling-Pittsburgh Steel, agreed to comply with such contingency plans in its consent order.

In the General Preamble to Title I of the CAAA, EPA established a November 15, 1993 deadline for state submittal of contingency plans. Consequently, West Virginia will have until November 15, 1993 to submit a detailed contingency plan necessary to satisfy section 172(c)(9) of the Act. This discussion of the contingency measures included in the Follansbee SIP will not be grounds for disapproval in whole or in part of the Follansbee SIP submittal.

Proposed Action

EPA is proposing to grant a limited approval and limited disapproval of the plan revision for the Follansbee, West Virginia area.

While the submittal does not meet specific provisions of Part D, it does contain some provisions (enforceable consent orders) which advance the NAAQS-related air quality protection goals of the Act. Thus, EPA is proposing a limited approval of the submittal to approve the consent agreements and make them part of the SIP. EPA has evaluated the consent agreements of West Virginia's SIP revision submittal for consistency with the Act and EPA regulations and has found that the submittal provides State and federally enforceable provisions to decrease PM-10 emissions in the nonattainment area. These measures, together with the existing SIP, constitute RACM, including RACT.

Because the submittal does not meet the section 189(a)(1)(B) requirement of Part D for an attainment demonstration and the section 172(c)(3) requirement for an accurate inventory of actual emissions (for the reasons described previously in this notice) EPA cannot grant full approval of this submittal under section 110(k)(3) and Part D of the Act. Also, because the submitted revision is not composed of separable parts which meet all the applicable requirements of the Act, EPA cannot grant partial approval of the submittal under section 110(k)(3). However, EPA may grant a limited approval of the submitted rule(s) under section 110(k)(3) in light of EPA's authority pursuant to section 301(a) to adopt regulations necessary to further air quality improvement by strengthening the SIP.

If finalized, this limited disapproval would constitute a disapproval under section 179(a)(2) of the Act (see generally 57 FR 13566–67). As provided under section 179(a) of the Act, the State of West Virginia would have up to 18 months after a final SIP disapproval to correct the deficiencies that are the subject of the disapproval before EPA is required to impose either the highway funding sanction or the requirement to provide two-to-one new source review offsets. If the State has not corrected its deficiency within 6 months thereafter, EPA must impose the second sanction. Any sanction EPA imposes must remain in place until EPA determines that the State has come into compliance. Note also that any final disapproval would trigger the requirement for EPA to impose a federal implementation plan within 24 months as provided under section 110(c)(1) of the Act.

While this action proposes limited approval and limited disapproval of West Virginia's SIP revision, EPA will fully approve the State's submittal without further notice, if the unapprovable aspects of the State's submittal are corrected.

EPA is proposing no action on the contingency measures with respect to the requirements of section 172(c)(9) of the Act at this time.[7] In the General Preamble to Title I of the CAAA, EPA established a November 15, 1993 deadline for state submittal of contingency plans. Consequently, West Virginia will have until November 15, 1993 to submit a detailed contingency plan necessary to satisfy section 172(c)(9) of the Act.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under sections 110 and 301 and subchapter I, part D of the Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the federal SIP-approval does not impose any new requirements, EPA certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the federal-state relationship under the Act, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The Act forbids EPA to base its actions concerning SIP's on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S.Ct 1976); 42 U.S.C. 7410(a)(2).

EPA's disapproval of the State request under section 110 and subchapter I, Part D of the Act does not affect any existing requirements applicable to small entities. Any pre-existing federal requirements remain in place after this disapproval. Federal disapproval of the State submittal does not affect its state-enforceability. Moreover, EPA's disapproval of the submittal does not impose any new federal requirements. Therefore, EPA certifies that this proposed disapproval action does not have a significant impact on a substantial number of small entities because it does not impose any new federal requirements.

Under Executive Order 12866, this action is not "significant." It has been submitted to OMB for review.

The Administrator's decision to approve or disapprove West Virginia's PM-10 SIP revision for the Follansbee nonattainment area will be based on whether it meets the requirements of Section 110(a)(2)(A)–(K), 110(a)(3), and Part D of the Clean Air Act, as amended, and EPA regulations in 40 CFR Part 51.

List of Subjects in 40 CFR Part 52

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

Authority: 42 U.S.C. 7401–7671.

Dated: July 13, 1993.

Stanley L. Laskowski,

Acting Regional Administrator.

[FR Doc. 94–275 Filed 1–6–94; 8:45 am]

BILLING CODE 6560–50–P

[7] As noted above, EPA is proposing to incorporate by reference all of the submitted consent orders into the SIP in their entirety.

40 CFR Part 55

[FRL-4822-1]

Outer Continental Shelf Air Regulations

AGENCY: Environmental Protection Agency ("EPA").

ACTION: Notice of proposed rulemaking ("NPR")—consistency update.

SUMMARY: EPA is proposing to update a portion of the Outer Continental Shelf ("OCS") Air Regulations. Requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area ("COA"), as mandated by section 328(a)(1) of the Clean Air Act ("the Act"), the Clean Air Act Amendments of 1990. The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources for which the San Luis Obispo County Air Pollution Control District (San Luis Obispo County APCD), the Santa Barbara County Air Pollution Control District (Santa Barbara County APCD), and the Ventura County Air Pollution Control District (Ventura County APCD) are the designated COAs. The OCS requirements for the above Districts, contained in the Technical Support Document, are proposed to be incorporated by reference into the Code of Federal Regulations and are listed in the appendix to the OCS air regulations.

DATES: Comments on the proposed update must be received on or before February 7, 1994.

ADDRESSES: Comments must be mailed (in duplicate if possible) to: EPA Air Docket (A-5), Attn: Docket No. A-93-16, Environmental Protection Agency, Air and Toxics Division, Region 9, 75 Hawthorne St., San Francisco, CA 94105.

Docket: Supporting information used in developing the proposed notice and copies of the documents EPA is proposing to incorporate by reference are contained in Docket No. A-93-16 (Section III). This docket is available for public inspection and copying Monday—Friday during regular business hours at the following locations: EPA Air Docket (A-5), Attn: Docket No. A-93-16, Environmental Protection Agency, Air and Toxics Division, Region 9, 75 Hawthorne St., San Francisco, CA 94105. EPA Air Docket (LE-131), Attn: Air Docket No. A-93-16, Environmental Protection Agency, 401 M Street SW, Room M-1500, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Christine Vineyard, Air and Toxics Division (A-5-3), U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105. (415) 744-1195.

SUPPLEMENTARY INFORMATION:

Background

On September 4, 1992, EPA promulgated 40 CFR part 55,[1] which established requirements to control air pollution from OCS sources in order to attain and maintain federal and state ambient air quality standards and to comply with the provisions of part C of title I of the Act. Part 55 applies to all OCS sources offshore of the States except those located in the Gulf of Mexico west of 87.5 degrees longitude. Section 328 of the Act requires that for such sources located within 25 miles of a state's seaward boundary, the requirements shall be the same as would be applicable if the sources were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

Pursuant to § 55.12 of the OCS rule, consistency reviews will occur (1) at least annually; (2) upon receipt of a Notice of Intent (NOI) under § 55.4; and (3) when a state or local agency submits a rule to EPA to be considered for incorporation by reference in part 55. This NPR is being promulgated in response to the submittal of rules by three local air pollution control agencies. Public comments received in writing within 30 days of publication of this notice will be considered by EPA before promulgation of the final updated rule.

Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. This limits EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all of EPA's state implementation plan (SIP) guidance or certain requirements of the Act. Consistency updates may result in the inclusion of state or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the Act for SIP approval, nor does it imply that the rule will be approved by EPA for inclusion in the SIP.

EPA Evaluation and Proposed Action

In updating 40 CFR part 55, EPA reviewed the state and local rules submitted for inclusion in part 55 to ensure that they are rationally related to the attainment or maintenance of federal or state ambient air quality standards or part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure they are not arbitrary or capricious. 40 CFR 55.12 (e). In addition, EPA has excluded administrative or procedural rules.[2]

A. After review of the rules submitted by the San Luis Obispo County APCD against the criteria set forth above and in 40 CFR part 55, EPA is proposing to make the following rules applicable to OCS sources for which the San Luis Obispo County APCD is designated as the COA. None of the existing OCS requirements were deleted. The following rules were submitted as amendments to existing requirements:

Rule 105 Definitions (Adopted 10/6/93)
Rule 204 Requirements, except B.3 and C. (Adopted 8/10/93)
Sections B.3 and C conflict with the language of part 55.
Rule 213 Calculations, except E.4 and F. (Adopted 8/10/93)
Sections E.4 and F are District administrative procedures.
Rule 305 Fees for Major Non-Vehicular Sources (title change—Adopted 9/15/92)
Rule 417 Control of Fugitive Emissions of Volatile Organic Compounds (Adopted 2/9/93)

B. After review of the rules submitted by the Santa Barbara County APCD against the criteria set forth above and in 40 CFR part 55, EPA is proposing to make the following rule applicable to OCS sources for which the Santa Barbara County APCD is designated as the COA. None of the existing OCS requirements were deleted.

[1] The reader may refer to the Notice of Proposed Rulemaking, December 5, 1991 (56 FR 63774), and the preamble to the final rule promulgated September 4, 1992 (57 FR 40792) for further background and information on the OCS regulations.

[2] Upon delegation the onshore area will use its administrative and procedural rules as onshore. In those instances where EPA does not delegate authority to implement and enforce part 55, EPA will use its own administrative and procedural requirements to implement the substantive requirements. 40 CFR 55.14 (c)(4).

The following new rule was submitted by the District to be added:

Rule 212 Emission Statements (Adopted 10/20/92)

C. After review of the rules submitted by Ventura County APCD against the criteria set forth above and in 40 CFR part 55, EPA is proposing to make the following rules applicable to OCS sources for which Ventura County APCD is designated as the COA. None of the existing OCS requirements were deleted.

The following rules were submitted as amendments to existing requirements:

Rule 23 Exemptions from Permit (Adopted 6/8/93)
Rule 71 Crude Oil and ROC Liquids (Adopted 6/8/93)
Rule 71.4 Petroleum Sumps, Pits, Ponds and Well Cellars (Adopted 6/8/93)
Rule 72 NSPS (Adopted 7/13/93)
Rule 74.9 Stationary Internal Combustion Engines (Adopted 12/3/91)
Rule 74.15 Boilers, Steam Generators and Process Heaters (5MM BTUs and greater) (Adopted 12/3/91)

The following new rules were submitted by the District to be added:

Rule 74.15.1 Boilers, Steam Generators and Process Heaters (1–5MM BTUs) (Adopted 5/11/93)
Rule 74.20 Adhesives and Sealants (Adopted 6/8/93)

The following rule was submitted by the District but will not be included:

Rule 42.M Air Toxics "Hot Spots" Program Fees (Adopted 5/4/93)

This is an administrative rule for requirements that are not related to the attainment and maintenance of ambient air quality standards or part C of title I of the Act and will not be incorporated into part 55.

Administrative Requirements

A. Executive Order

The Office of Management and Budget exempted this rule from the requirements of Section 3 of Executive Order 12291. This exemption continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires each federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a "significant impact on a substantial number of small entities." Small entities include small businesses, organizations, and governmental jurisdictions.

As was stated in the final regulation, the OCS rule does not apply to any small entities, and the structure of the rule averts direct impacts and mitigates indirect impacts on small entities. This consistency update merely incorporates onshore requirements into the OCS rule to maintain consistency with onshore regulations as required by section 328 of the Act and does not alter the structure of the rule.

The EPA certifies that this notice of proposed rulemaking will not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in the final OCS rulemaking dated September 4, 1992 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0249. This consistency update does not add any further requirements.

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedures, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer Continental Shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 14, 1993.

John Wise,

Acting Regional Administrator.

Title 40 of the Code of Federal Regulations, part 55, is proposed to be amended as follows:

PART 55—[AMENDED]

1. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Clean Air Act (42 U.S.C. 7401, *et seq.*) as amended by Public Law 101–549.

2. Section 55.14 is proposed to be amended by revising paragraphs (e)(3)(ii)(E), (e)(3)(ii)(F), and (e)(3)(ii)(H) to read as follows:

§ 55.14 Requirements that apply to OCS sources located within 25 miles of states' seaward boundaries, by state.

* * * * *

(e) * * *

(3) * * *

(ii) * * *

(E) *San Luis Obispo County Air Pollution Control District Requirements Applicable to OCS Sources.*

(F) *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources.*

* * * * *

(H) *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources.*

* * * * *

4. Appendix A to 40 CFR part 55 is proposed to be amended by revising paragraphs (b)(5), (b)(6), and (b)(8) under the heading California to read as follows:

Appendix A to 40 CFR Part 55—Listing of State and Local Requirements Incorporated by Reference Into Part 55, by State

* * * * *

(California) * * *

(b) * * *

(5) The following requirements are contained in *San Luis Obispo County Air Pollution Control District Requirements Applicable to OCS Sources:*

Rule 103 Conflicts Between District, State and Federal Rules (Adopted 8/6/76)
Rule 104 Action in Areas of High Concentration (Adopted 7/5/77)
Rule 105 Definitions (Adopted 10/6/93)
Rule 106 Standard Conditions (Adopted 8/6/76)
Rule 108 Severability (Adopted 11/13/84)
Rule 113 Continuous Emissions Monitoring, except F. (Adopted 7/5/77)
Rule 201 Equipment not Requiring a Permit, except A.1.b. (Adopted 11/5/91)
Rule 202 Permits, except A.4. and A.8. (Adopted 11/5/91)
Rule 203 Applications, except B. (Adopted 11/5/91)
Rule 204 Requirements, except B.3. and C. (Adopted 8/10/93)
Rule 209 Provision for Sampling and Testing Facilities (Adopted 11/5/91)
Rule 210 Periodic Inspection, Testing and Renewal of Permits to Operate (Adopted 11/5/91)
Rule 213 Calculations, except E.4. and F. (Adopted 8/10/93)
Rule 302 Schedule of Fees (Adopted 9/15/92)
Rule 305 Fees for Major Non-Vehicular Sources (title change—Adopted 9/15/92)
Rule 401 Visible Emissions (Adopted 8/6/76)
Rule 403 Particulate Matter Emissions (Adopted 8/6/76)
Rule 404 Sulfur Compounds Emission Standards, Limitations and Prohibitions (Adopted 12/6/76)
Rule 405 Nitrogen Oxides Emission Standards, Limitations and Prohibitions (Adopted 11/13/84)
Rule 406 Carbon Monoxide Emission Standards, Limitations and Prohibitions (Adopted 11/14/84)
Rule 407 Organic Material Emission Standards, Limitations and Prohibitions (Adopted 1/10/89)
Rule 411 Surface Coating of Metal Parts and Products (Adopted 1/10/89)
Rule 416 Degreasing Operations (Adopted 6/18/79)

Rule 417 Control of Fugitive Emissions of Volatile Organic Compounds (Adopted 2/9/93)
Rule 422 Refinery Process Turnarounds (Adopted 6/18/79)
Rule 501 General Burning Provisions (Adopted 1/10/89)
Rule 503 Incinerator Burning, except B.1.a. (Adopted 2/7/89)
Rule 601 New Source Performance Standards (Adopted 9/4/90)

(6) The following requirements are contained in *Santa Barbara County Air Pollution Control District Requirements Applicable to OCS Sources:*

Rule 102 Definitions (Adopted 7/30/91)
Rule 103 Severability (Adopted 10/23/78)
Rule 201 Permits Required (Adopted 7/2/79)
Rule 202 Exemptions to Rule 201 (Adopted 3/10/92)
Rule 203 Transfer (Adopted 10/23/78)
Rule 204 Applications (Adopted 10/23/78)
Rule 205 Standards for Granting Applications (Adopted 7/30/91)
Rule 206 Conditional Approval of Authority to Construct or Permit to Operate (Adopted 10/15/91)
Rule 207 Denial of Application (Adopted 10/23/78)
Rule 210 Fees (Adopted 5/7/91)
Rule 212 Emission Statements (Adopted 10/20/92)
Rule 301 Circumvention (Adopted 10/23/78)
Rule 302 Visible Emissions (Adopted 10/23/78)
Rule 304 Particulate Matter-Northern Zone (Adopted 10/23/78)
Rule 305 Particulate Matter Concentration-Southern Zone (Adopted 10/23/78)
Rule 306 Dust and fumes-Northern Zone (Adopted 10/23/78)
Rule 307 Particulate Matter Emission Weight Rate-Southern Zone (Adopted 10/23/78)
Rule 308 Incinerator Burning (Adopted 10/23/78)
Rule 309 Specific Contaminants (Adopted 10/23/78)
Rule 310 Odorous Organic Sulfides (Adopted 10/23/78)
Rule 311 Sulfur Content of Fuels (Adopted 10/23/78)
Rule 312 Open Fires (Adopted 10/2/90)
Rule 317 Organic Solvents (Adopted 10/23/78)
Rule 318 Vacuum Producing Devices or Systems-Southern Zone (Adopted 10/23/78)
Rule 321 Control of Degreasing Operations (Adopted 7/10/90)
Rule 322 Metal Surface Coating Thinner and Reducer (Adopted 10/23/78)
Rule 323 Architectural Coatings (Adopted 2/20/90)
Rule 324 Disposal and Evaporation of Solvents (Adopted 10/23/78)
Rule 325 Storage of Petroleum and Petroleum Products (Adopted 12/10/91)
Rule 326 Effluent Oil Water Separators (Adopted 10/23/78)
Rule 327 Organic Liquid Cargo Tank Vessel Loading (Adopted 12/16/85)
Rule 328 Continuous Emission Monitoring (Adopted 10/23/78)
Rule 330 Surface Coating of Miscellaneous Metal Parts and Products (Adopted 11/13/90)
Rule 331 Fugitive Emissions Inspection and Maintenance (Adopted 12/10/91)
Rule 332 Petroleum Refinery Vacuum Producing Systems. Wastewater Separators and Process Turnarounds (Adopted 6/11/79)
Rule 333 Control of Emissions from Reciprocating Internal Combustion Engines (12/10/91)
Rule 342 Control of Oxides of Nitrogen (NOx from Boilers, Steam Generators and Process Heaters) (03/10/92)
Rule 505 Breakdown Conditions Sections A., B.1., and D. only (Adopted 10/23/78)
Rule 603 Emergency Episode Plans (Adopted 6/15/81)

* * * * *

(8) The following requirements are contained in *Ventura County Air Pollution Control District Requirements Applicable to OCS Sources:*

Rule 2 Definitions (Adopted 12/15/92)
Rule 5 Effective Date (Adopted 5/23/72)
Rule 6 Severability (Adopted 11/21/78)
Rule 7 Zone Boundaries (Adopted 6/14/77)
Rule 10 Permits Required (Adopted 7/5/83)
Rule 11 Application Contents (Adopted 8/15/78)
Rule 12 Statement by Application Preparer (Adopted 6/16/87)
Rule 13 Statement by Applicant (Adopted 11/21/78)
Rule 14 Trial Test Runs (Adopted 5/23/72)
Rule 15 Permit Issuances (Adopted 7/5/83)
Rule 16 Permit Contents (Adopted 12/2/80)
Rule 18 Permit to Operate Application (Adopted 8/17/76)
Rule 19 Posting of Permits (Adopted 5/23/72)
Rule 20 Transfer of Permit (Adopted 5/23/72)
Rule 21 Expiration of Applications and Permits (Adopted 6/23/81)
Rule 23 Exemptions from Permits (Adopted 6/8/93)
Rule 24 Source Recordkeeping, Reporting, and Emission Statements (Adopted 09/15/92)
Rule 26 New Source Review (Adopted 10/22/91)
Rule 26.1 New Source Review—Definitions (Adopted 10/22/91)
Rule 26.2 New Source Review—Requirements (Adopted 10/22/91)
Rule 26.3 New Source Review—Exemptions (Adopted 10/22/91)
Rule 26.6 New Source Review—Calculations (Adopted 10/22/91)
Rule 26.8 New Source Review—Permit To Operate (Adopted 10/22/91)
Rule 26.10 New Source Review—PSD (Adopted 10/22/91)
Rule 28 Revocation of Permits (Adopted 7/18/72)
Rule 29 Conditions on Permits (Adopted 10/22/91)
Rule 30 Permit Renewal (Adopted 5/30/89)
Rule 32 Breakdown Conditions: Emergency Variances, A., B.1., and D. only. (Adopted 2/20/79)
Appendix II–A Information Required for Applications to the Air Pollution Control District
Appendix II–B Best Available Control Technology (BACT) Tables
Rule 42 Permit Fees (Adopted 12/22/92)
Rule 44 Exemption Evaluation Fee (Adopted 1/8/91)
Rule 45 Plan Fees (Adopted 6/19/90)
Rule 45.2 Asbestos Removal Fees (Adopted 8/4/92)
Rule 50 Opacity (Adopted 2/20/79)
Rule 52 Particulate Matter—Concentration (Adopted 5/23/72)
Rule 53 Particulate Matter—Process Weight (Adopted 7/18/72)
Rule 54 Sulfur Compounds (Adopted 7/5/83)
Rule 56 Open Fires (Adopted 5/24/88)
Rule 57 Combustion Contaminants—Specific (Adopted 6/14/77)
Rule 60 New Non-Mobile Equipment—Sulfur Dioxide, Nitrogen Oxides, and Particulate Matter (Adopted 7/8/72)
Rule 62.7 Asbestos—Demolition and Renovation (Adopted 6/16/92)
Rule 63 Separation and Combination of Emissions (Adopted 11/21/78)
Rule 64 Sulfur Content of Fuels (Adopted 7/5/83)
Rule 66 Organic Solvents (Adopted 11/24/87)
Rule 67 Vacuum Producing Devices (Adopted 7/5/83)
Rule 68 Carbon Monoxide (Adopted 6/14/77)
Rule 71 Crude Oil and Reactive Organic Compound Liquids (Adopted 6/8/93)
Rule 71.1 Crude Oil Production and Separation (Adopted 6/16/92)
Rule 71.2 Storage of Reactive Organic Compound Liquids (Adopted 9/26/89)
Rule 71.3 Transfer of Reactive Organic Compound Liquids (Adopted 6/16/92)
Rule 71.4 Petroleum Sumps, Pits, Ponds, and Well Cellars (Adopted 6/8/93)
Rule 72 New Source Performance Standards (NSPS) (Adopted 7/13/93)
Rule 74 Specific Source Standards (Adopted 7/6/76)
Rule 74.1 Abrasive Blasting (Adopted 11/12/91)
Rule 74.2 Architectural Coatings (Adopted 08/11/92)
Rule 74.6 Surface Cleaning and Degreasing (Adopted 5/8/90)
Rule 74.6.1 Cold Cleaning Operations (Adopted 9/12/89)
Rule 74.6.2 Batch Loaded Vapor Degreasing Operations (Adopted 9/12/89)
Rule 74.7 Fugitive Emissions of Reactive Organic Compounds at Petroleum Refineries and Chemical Plants (Adopted 1/10/89)
Rule 74.8 Refinery Vacuum Producing Systems, Waste-water Separators and Process Turnarounds (Adopted 7/5/83)
Rule 74.9 Stationary Internal Combustion Engines (Adopted 12/3/91)
Rule 74.10 Components at Crude Oil Production Facilities and Natural Gas Production and Processing Facilities (Adopted 6/16/92)

Rule 74.11 Natural Gas-Fired Residential Water Heaters—Control of NOx (Adopted 4/9/85)
Rule 74.12 Surface Coating of Metal Parts and Products (Adopted 11/17/92)
Rule 74.15 Boilers, Steam Generators and Process Heaters (5MM BTUs and greater) (Adopted 12/3/91)
Rule 74.15.1 Boilers, Steam Generators and Process Heaters (1–5MM BTUs) (Adopted 5/11/93)
Rule 74.16 Oil Field Drilling Operations (Adopted 1/8/91)
Rule 74.20 Adhesives and Sealants (Adopted 6/8/93)
Rule 75 Circumvention (Adopted 11/27/78)
Appendix IV–A Soap Bubble Tests
Rule 100 Analytical Methods (Adopted 7/18/72)
Rule 101 Sampling and Testing Facilities (Adopted 5/23/72)
Rule 102 Source Tests (Adopted 11/21/78)
Rule 103 Stack Monitoring (Adopted 6/4/91)
Rule 154 Stage 1 Episode Actions (Adopted 9/17/91)
Rule 155 Stage 2 Episode Actions (Adopted 9/17/91)
Rule 156 Stage 3 Episode Actions (Adopted 9/17/91)
Rule 158 Source Abatement Plans (Adopted 9/17/91)
Rule 159 Traffic Abatement Procedures (Adopted 9/17/91)

* * * * *

[FR Doc. 94–276 Filed 1–6–94; 8:45 am]

BILLING CODE 6050–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 426

[RIN: 1006–AA31]

Acreage Limitation Reporting Threshold

AGENCY: Bureau of Reclamation, Interior.

ACTION: Withdrawal of notice of intent to propose rulemaking.

SUMMARY: The Bureau of Reclamation (Reclamation) is withdrawing its intention to conduct rulemaking to revise the threshold that exempts landholders from the information requirements of the Reclamation Reform Act of 1982 (RRA). The notice of intent was published in 57 FR 47437, Oct. 16, 1992. Instead, the threshold issue will be included in an upcoming, proposed westwide rulemaking. This action eliminates the need for a separate rulemaking for threshold changes, thereby allowing for a more economical, comprehensive westwide rulemaking.

FOR FURTHER INFORMATION CONTACT: Mr. Terry Lynott, Director, Policy and Programs, Bureau of Reclamation, Denver Office, P.O. Box 25007, Denver CO 80225.

SUPPLEMENTARY INFORMATION: The RRA and 43 CFR part 426 require landholders to submit forms annually in order to be eligible to receive irrigation water from Reclamation projects. Landholders disclose the Reclamation project land in their holdings on forms known as "certification and reporting forms" and provide other information pertinent to their compliance with Reclamation law. Currently, 43 CFR 426.10(g) exempts landholders from the forms requirements if the total of their direct and indirect interests in Reclamation project landholdings is 40 acres or less. Reclamation's preliminary review indicated that an exemption threshold higher than 40 acres may improve Reclamation's ability to administer the law while reducing the reporting burden on the public. Therefore, Reclamation published a notice of intent in 57 FR 47437 on October 16, 1992, to conduct rulemaking to revise the 40-acre reporting threshold.

Reclamation is presently undertaking a westwide EIS and rulemaking to revise the regulations for implementing the RRA as a term of a settlement agreement. The settlement agreement, filed with the 9th Circuit Court on September 17, 1993, in the case *Natural Resources Defense Council, et al.* v. *Beard*, requires the draft EIS and rules to be prepared by December 1994, and the final EIS and rules, by August 1995. Revising the 40-acre reporting threshold, found in 43 CFR part 426, will be addressed in the above westwide EIS and rulemaking. It will be more economical to include the reporting threshold issue in the westwide EIS and rulemaking rather than address it separately and will also result in a more comprehensive westwide EIS and rulemaking.

Dated: December 28, 1993.

Donald R. Glaser,

Deputy Commissioner.

[FR Doc. 94–348 Filed 1–6–94; 8:45 am]

BILLING CODE 4310–94–M

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB73

Endangered and Threatened Wildlife and Plants; Extension of Comment Period and Notice of Rescheduling of Public Hearing on Proposed Endangered Status and Designation of Critical Habitat for the Alabama Sturgeon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Extension of comment period and notice of rescheduling of public hearing.

SUMMARY: The Fish and Wildlife Service (Service) gives notice that the second public hearing scheduled for January 13, 1994 (59 FR 288), on the proposed rule to determine endangered status and designate critical habitat for the Alabama sturgeon, *Scaphirhynchus suttkusi*, has been canceled and rescheduled for January 31, 1994. The comment period is extended until February 15 to accommodate the public hearing.

DATES: The public hearing that was scheduled to be held from 6 p.m. to 10 p.m. on January 13, 1994, in Montgomery, Alabama, has been canceled. The hearing has been rescheduled and now will be held on January 31, 1994, in Montgomery, Alabama. The public comment period is further extended through February 15, 1994.

ADDRESSES: The rescheduled public hearing will be held at South Hall # 1, Montgomery Civic Center, 300 Bibb Street, Montgomery, Alabama. Written comments and materials should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Suite A, Jackson, Mississippi 39213, or may be submitted at the public hearing. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: James H. Stewart, at the above address (601/965–4900).

SUPPLEMENTARY INFORMATION: The hearing announced in the **Federal Register** of January 4, 1994 (59 FR 288), is being canceled and rescheduled in order to provide more ample notice of the hearing to the public. The hearing is now scheduled to be held on January 31, 1994.

The Service proposed to determine the Alabama sturgeon, *Scaphirhynchus*

suttkusi, to be an endangered species and to designate its critical habitat on June 15, 1993 (58 FR 33148). The Alabama sturgeon, a small sturgeon with a maximum length of about 30 inches, is endemic to the Mobile River system, Alabama and Mississippi. Its current range is restricted to the lower Alabama River and the Cahaba River in Alabama. Both of these areas and the free flowing portion of the lower Tombigbee River are proposed as critical habitat. Factors in the strugeon's decline include dams, and possible adverse effects from altered water flows, channel maintenance and gravel dredging.

A public hearing on the proposed rule was announced in the **Federal Register** of September 13, 1993 (58 FR 47851) and was held on October 4, 1993 near Mobile, Alabama. The capacity of the facility selected for the public hearing was not sufficient for all the individuals that wished to attend. A second hearing was then announced in the **Federal Register** on October 25, 1993 (58 FR 55036). The second public hearing was originally scheduled for November 15, 1993, in Montgomery, Alabama, to allow additional oral statements to be presented and to receive comment on a scientific report prepared by experts on the taxonomy and on the likelihood of existence of the Alabama sturgeon.

The November 15 hearing was canceled in response to a preliminary injunction issued on November 9, 1993, that restrained the Service and others from: (1) Disseminating the scientific report to the public; and, (2) utilizing or relying upon the scientific report or any product of the experts' deliberations in connection with the decision-making process on the proposal to list the Alabama sturgeon and to designate its critical habitat. Because the notice announcing the November 15 hearing specifically addressed the availability of the scientific report and the Service's intent to receive comments on it, the Service decided to postpone the hearing until a revised notice could be published to announce the limitations imposed by, and to thereby avoid inadvertent violations of, the court order.

On December 22, 1993, the court that issued the November 9 order issued another order providing, in most relevant part, as follows:

> Federal defendants and defendant-intervenor, and those acting in active concert with them, are hereby PERMANENTLY ENJOINED from publishing, employing and relying upon the Advisory Committee report * * * for any purpose whatsoever, directly or indirectly, in the process of determining whether to list the Alabama sturgeon as an endangered species.

In order to give more ample notice than a January 13, 1994, hearing would have allowed, the second public hearing is rescheduled for January 31, 1994. The hearing will allow additional oral statements to be presented (of course, written comments will also be accepted and will be given equal consideration). The time allocated for individual oral statements may be limited if the number of parties present at the hearing, or if the conduct of the individual commenter, necessitate such a limitation. There is no limit, however, on the length or volume of written comments or materials presented at the hearing or mailed to the Service office in the **ADDRESSES** section.

In keeping with the court restrictions issued in *Alabama-Tombigbee Rivers Coalition* v. *Fish and Wildlife Service*, Civ. No. 93–AR–2322–S, the Service considers itself compelled to enforce the following constraints on the submission of oral and written comments while the court restrictions remain in effect:

> (1) Individuals or organizations cannot refer to the scientific report, issued on November 5, 1993, or to any drafts or other product derived from the preparation of that report, in presenting any oral statement or written comment; and,
>
> (2) Individuals or organizations cannot attempt to bolster their oral or written comments or opinions by reference to the scientific report as authority.

The Departmental hearing officer at the hearing on January 31, 1994, will be authorized to terminate the opportunity to speak of any person making a statement if, in the judgment of the hearing officer, that person disregards the instructions not to address the scientific report or its contents. Written comments or materials that contain information that violates the above restrictions will be marked and thereafter excluded from the administrative record while the court restrictions remain in effect.

The Service intends that any final action resulting from the proposed rule will be as accurate and as effective as possible. Except for the court-imposed restrictions set out above, the Service encourages the submission of all individual scientific opinions, biological data, and other relevent scientific data that will assist in arriving at the "best scientific and commercial data available," as mandated by section 4 of the Endangered Species Act.

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Dated: January 5, 1994.

Richard N. Smith,

Acting Director, Fish and Wildlife Service.

[FR Doc. 94–520 Filed 1–6–94; 8:45 am]

BILLING CODE 4310–55–M

Notices

Federal Register
Vol. 59, No. 5
Friday, January 7, 1994

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Meeting

AGENCY: Advisory Council on Historic Preservation.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Advisory Council on Historic Preservation will meet on Wednesday, January 12, 1994. The meeting will be held in Room M09 at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC, beginning at 8:30 a.m.

The Council was established by the National Historic Preservation Act of 1966 (16 U.S.C. 470) to advise the President and the Congress on matters relating to historic preservation and to comment upon Federal, federally assisted, and federally licensed undertakings having an effect upon properties listed in or eligible for inclusion in the National Register of Historic Places. The Council's members are the Architect of the Capitol; the Secretaries of the Interior, Agriculture, and Transportation; the Administrators of the Environmental Protection Agency and the General Services Administration; the head of an additional Federal agency; the Chairman of the National Trust for Historic Preservation; the President of the National Conference of State Historic Preservation Officers; a Governor; a Mayor; a Native American or Native Hawaiian; and eight non-Federal members appointed by the President.

The agenda for the meeting includes the following:

I. Chairman's Welcome/Opening
II. Opportunities for Leadership: A Discussion of the Role of the Council in the Clinton Administration
III. Revision of the Council's Section 106 Regulations
IV. Historic Preservation Legislation
V. Executive Director's Report
VI. Section 106 Cases
VII. New Business
VIII. Adjourn

Note: The meetings of the Council are open to the public. If you need special accommodations due to a disability, please contact the Advisory Council on Historic Preservation, 1100 Pennsylvania Ave., NW., room 809, Washington, DC 202–606–8503, at least seven (7) days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the meeting is available from the Executive Director, Advisory Council on Historic Preservation, 1100 Pennsylvania Ave., NW., #809, Washington, DC 20004.

Dated: January 4, 1994.

Robert D. Bush,

Executive Director.

[FR Doc. 94–399 Filed 1–6–94; 8:45 am]

BILLING CODE 4310–10–M

DEPARTMENT OF AGRICULTURE

Forest Service

Oregon Creek Ecosystem Management Project, Tahoe National Forest, Yuba and Sierra Counties, CA

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The U.S. Department of Agriculture, Forest Service will prepare an environmental impact statement (EIS) for proposed timber harvest, plantation thinning, fuels reduction, and wildlife habitat improvement projects for areas in the Oregon Creek Watershed and an area in part of the North Yuba watershed in accordance with the requirements of 36 CFR 219.19. The project areas are located within portions of T.18N., R.8, 9, & 10E., T.19N., R.9 & 10E., MDB&M.

The agency invites comments and suggestions on the scope of the analysis. In addition, the agency gives notice of the full environmental analysis and decision-making process that will occur on the proposal so that interested and affected people are aware of how they may participate and contribute to the final decision.

DATES: Comments should be made in writing and received by February 22, 1994.

ADDRESSES: Written comments concerning the project should be directed to Jean Masquelier, District Ranger, Downieville Ranger District, North Yuba Ranger Station, 15924 Hwy 49, Camptonville, CA 95922.

FOR FURTHER INFORMATION CONTACT: Bob Willour, Resource Officer, Downieville Ranger District, Camptonville, CA 95922, telephone (916) 478–6253.

SUPPLEMENTARY INFORMATION: The Oregon Creek Analysis Area is about 25,000 acres in size. It incorporates the land in the Oregon Creek Watershed and is located two miles southwest of Comptonville and east to the junction of Pliocene and Henness Pass roads. The area is dominated by vast, uniform ponderosa pine plantations and brush fields that were a result of the 17,000-acre Mountain House Fire of 1959.

This project was chosen by the Forest Service's Regional Office (Region 5) to be conducted as an Ecosystem Management Project. It was selected due to the opportunities and challenges that this area has for multiple resource management. There exists an opportunity to increase the diversity within the many young pine plantations; this would improve wildlife habitat and derive needed wood fiber. Watershed problems, fire hazards within a mixed land ownership landscape, range problems, and wildlife habitat conditions represent some of the challenges and opportunities for improvements that will be looked at during this analysis.

In preparing the environmental impact statement, the Forest Service will identify and analyze a range of alternatives for treatment of the dense stands of young trees that address the issues developed for these sites. One of the alternatives will be no treatment. Other alternatives will consider differing levels of plantation thinning, timber harvest, new road construction and reconstruction, fuel hazard reduction, and wildlife habitat improvement projects. An ecological approach will be used to achieve multiple-use management of the Oregon Creek area. It also means that the needs of people and environmental values will be blended in a such way that the Oregon Creek area would represent a diverse, healthy, productive, and sustainable ecosystem.

Public participation will be important during the analysis, especially during the review of the Draft Environmental Impact Statement. The Forest Service is

seeking information, comments, and assistance from Federal, State, and local agencies and other individuals or organizations who may be interested in or affected by the proposed action. This input will be used in preparation of the draft environmental impact statement (DEIS). The scoping process includes:

1. Identifying potential issues.
2. Identifying issues to be analyzed in depth.
3. Eliminating insignificant issues or those which have been covered by a relevant previous environmental analysis.
4. Exploring additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e., direct, indirect, and cumulative effects and connected actions).
6. Determining potential cooperating agencies and task assignments.

The following list of issues has been identified through initial scoping:

(1) To what extent will future options for the management of California spotted owls be maintained?

(2) To what extent can the potential for large catastrophic wildfires, like the 17,000-acre Mountain House Fire of 1959, be reduced within the project area?

(3) To what extent can the forest health be improved in the Oregon Creek project area? In addition, what level of timber commodities could result from forest health improvement projects and other timber management proposals?

(4) To what extent will long-term transportation management objectives be met for the area?

(5) To what extent will the views from North Yuba River, Middle Yuba River, Oregon Creek, and Highway 49 be affected? What visual character will result from the proposed activities, and to what extent will these activities affect views from private land within the study area?

(6) To what extent will the outstandingly remarkable historical values that made Oregon Creek eligible as a Wild and Scenic River and classified as a recreation river be affected by the proposed activities with the study area?

(7) To what extent will water quality in the Oregon Creek and the Humbug Creek watersheds be affected by the proposed activities?

(8) To what extent will air quality in the Oregon Creek and North Yuba River drainages, and in the towns of Camptonville, Forest City, Pike, and Alleghany, be affected by proposed activities?

(9) To what extent will long-term productivity be affected by proposed activities?

Comments from other Federal, State, and local agencies, organizations, and individuals who may be interested in, or affected by the decision, are encouraged to identify other significant issues. Public participation has been previously solicited through mailing letters to mining claim owners, private land owners, and special use permittees within the Downieville Ranger District boundaries; posting information in local towns; and mailing letters to local timber industries, politicians, school boards, country supervisors, and environmental groups. Written comments that have already been received will still be considered when analyzing alternatives and impacts. Continued participation will be emphasized through individual contacts. No public meetings are scheduled.

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by approximately the middle of March, 1994. The comment period on the draft EIS will be 45 days from the date the EPA publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp* v. *NRDC, 435 U.S. 519, 553 (1978).* Also, environmental objections that could be raised at the draft EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of the court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is helpful if comments refer to specific pages or chapters of the draft EIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

The final EIS is expected to be available by the middle of June, 1994. The responsible official, who is the Tahoe National Forest Supervisor, will document the decision and reasons for the decision in the Record of Decision.

Dated: December 20, 1993.

Judie L. Tartaglia,

Deputy Forest Supervisor.

[FR Doc. 93–355 Filed 1–6–93; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Plant and Equipment Expenditures Survey.

Form Number(s): PE–1, PE–2, PE–3, PE–4(P), PE–5, PE–6.

Agency Approval Number: 0607–0641.

Type of Request: Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.

Burden: 27,175 hours.

Number of Respondents: 15,000.

Avg Hours Per Response: 42 minutes.

Needs and Uses: The Bureau of the Census conducts the Plant and Equipment Expenditures Survey (P&E) on a quarterly and annual basis to obtain data on planned and actual investment in new plant and equipment from nonagricultural business firms. We collect data quarterly from most respondents and annually from small companies and from chronic non–respondents to the quarterly forms. These estimates are one of the most important indicators used by business and public officials in assessing near–term economic activity.

Affected Public: Businesses or other for–profit organizations, Non–profit institutions, Small businesses or organizations.

Frequency: Quarterly and Annually.

Respondent's Obligation: Quarterly forms–voluntary, Annual and counterpart forms–mandatory.

OMB Desk Officer: Maria Gonzalez, (202) 395–7313.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, room 5312, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Maria Gonzalez, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: January 3, 1994.

Edward Michals,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 94–396 Filed 1–6–94; 8:45 am]

BILLING CODE 3510–07–F

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of application.

SUMMARY: The Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, has received an application for an Export Trade Certificate of Review. This notice summarizes the conduct for which certification is sought and requests comments relevant to whether the Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Friedrich R. Crupe, Acting Director, Office of Export Trading Company Affairs, International Trade Administration, (202) 482–5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether a Certificate should be issued. An original and five (5) copies should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, room 1800H, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Comments should refer to this application as "Export Trade Certificate of Review, application number 93–00003." A summary of the application follows.

Summary of the Application

Applicant: American Trade Partners, Inc., P.O. Box 165501, Miami, Florida 33116–5501, Contact: Morris Kessler, President, Telephone: (305) 266–1276.

Application No.: 93–00003.

Date Deemed Submitted: December 30, 1993.

Members (in addition to applicant): None.

American Trade Partners, Inc. seeks a Certificate to cover the following specific Export Trade, Export Markets, and Export Trade Activities and Methods of Operations.

Export Trade

1. Products

All products.

2. Services

All services.

3. Technology Rights

All technology rights.

4. Export Trade Facilitation Services

All export trade facilitation services.

Export Markets

The Export Markets include all parts of the world except the United States (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

Export Trade Activities and Methods of Operation

American Trade Partners, Inc. may:

a. Export specific Products and or Services in response to specific orders and contact individual suppliers as to competitive prices, quality, and availability;

b. Provide and arrange for Export Trade Facilitation Services;

c. Exchange information only in one-on-one discussions with specific suppliers on specific orders or market conditions;

d. Enter into exclusive licensing and distributorship agreements with suppliers for the export of Products, Services, and Technology Rights to the Export Markets;

e. Allocate export sales or divide the Export Markets among suppliers for the sale, licensing or distribution of Products, Services, and Technology Rights;

f. Establish the price of Products, Services, and Technology Rights for sale, licensing or distribution in the Export Markets;

g. Negotiate and manage licensing agreements for the export of Technology Rights; and

h. Collect information on trade opportunities in the Export Markets and distribute such information to clients.

Dated: January 4, 1994.

Friedrich R. Crupe,

Acting Director, Office of Export Trading Company Affairs.

[FR Doc. 94–395 Filed 1–6–94; 8:45 am]

BILLING CODE 3510–DR–P

National Oceanic and Atmospheric Administration

Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Modification No. 3 to permit No. 628, Indianapolis Zoo (P409).

SUMMARY: Notice is hereby given that Permit No. 628, issued to the Indianapolis Zoological Society, Inc., Indianapolis, Indiana, has been modified.

ADDRESSES: Documents pertaining to the permit and modification are available for review by appointment in the following offices:

Office of Protected Resources, NMFS, NOAA, 1315 East-West Highway, room 13130, Silver Spring, MD 20910 (301/713–2289);

Director, Northeast Region, NMFS, NOAA, One Blackburn Drive, Gloucester, MA 01930 (508/281–9300); and

Director, Southeast Region, NMFS, NOAA, 9450 Koger Boulevard, St. Petersburg, FL 33702 (813/893–3141).

SUPPLEMENTARY INFORMATION: Notice is hereby given that pursuant to the provisions of §§ 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), Public Display Permit No. 628, issued to the Indianapolis Zoological Society, Inc., Indianapolis, Indiana 46222, on April 13, 1988 (53 FR 12801), modified October 5, 1989 (54 FR

42321) and October 28, 1993 (58 FR 58686), is further modified as follows:

Section B.6, the first sentence is changed to read:

"6. The authority to acquire the *Pseudorca crassidens* authorized herein shall extend from date of issuance through February 28, 1994."

All other conditions currently contained in the permit remain in effect.

This modification is effective on January 1, 1994.

Dated: December 30, 1993.

William W. Fox, Jr.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94-351 Filed 1-6-94; 8:45 am]

BILLING CODE 3510-22-M

National Oceanic and Atmospheric Administration.

Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

SUMMARY: Notice is hereby given that a request for modification of Scientific Research Permit No. 810 submitted by the University of Hawaii at Manoa, 96-043 Ala Ike, Pearl City, HI 96782, has been granted.

ADDRESSES: The modification and related documents are available for review upon written request or by appointment in the following office(s): Office of Protected Resources, NMFS, NOAA, 1315 East-West Hwy., Room 13130, Silver Spring, MD 20910 (301/713-2289); Coordinator, Pacific Area Office, Southwest Region, NMFS, NOAA, 2570 Dole Street, Honolulu, HI 96822-2396 (808/955-8831); and, Director, Southwest Region, NMFS, NOAA, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802-4213 (310/980-4016).

SUPPLEMENTARY INFORMATION: On November 18, 1993, notice was published in the **Federal Register** (58 FR 60850) that a modification of Permit No. 810, issued January 12, 1993, had been requested by the above-named organization . The requested modification has been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the provisions of sections 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the provisions of § 222.25 of the regulations governing the taking, importing, and exporting of endangered fish and wildlife (50 CFR part 222).

Permit No. 810 is modified to include Hawaiian monk seals (*Monachus schauinslandi*) and several odontocete species indigenous to Hawaii.

Issuance of this Modification as required by the ESA of 1973 was based on a finding that such Permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of the endangered species which is the subject of this permit; and (3) is consistent with the purposes and policies set forth in Section 2 of the ESA.

Dated: December 28, 1993.

William W. Fox, Jr.,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 94-350 Filed 1-6-94; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from procurement list.

SUMMARY: The Committee has received proposals to add to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete commodities previously furnished by such agencies.

COMMENTS MUST BE RECEIVED ON OR BEFORE: February 7, 1994.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202-3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman, (703) 603-7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

Additions

If the Committee approves the proposed addition, all entities of the Federal Government (except as otherwise indicated) will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the services.

3. The action will result in authorizing small entities to furnish the services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

It is proposed to add the following services to the Procurement List for production by the nonprofit agency listed:

Services

Grounds Maintenance for the following U.S. Army Corps of Engineers Reservations:
- Bayou Boeuf Lock, Berwick Lock, East Calumet Floodgate, West Calumet Floodgate, Charenton Floodgate
- Morgan City Vicinity, Louisiana
- Nonprofit Agency: Bayou Industrial Maintenance Services, Inc., Berwick, Louisiana

Janitorial/Grounds Maintenance
- Child Development Center, U.S. Coast Guard Academy, New London, Connecticut
- Nonprofit Agency: Constructive Workshops, Inc., New Britain, Connecticut

Repair and Distribution of Government-owned Shoe Lasts
- Defense Personnel Support Center, Philadelphia, Pennsylvania
- Nonprofit Agency: Cleveland Skilled Industries, Cleveland, Ohio at its facility in Elyria, Ohio

Deletions

It is proposed to delete the following commodities from the Procurement List:

Paper, Teletypewriter
- 7530-00-262-9178
- 7530-00-721-9691
- 7530-00-223-7969

Beverly L. Milkman,

Executive Director.

[FR Doc. 94-352 Filed 1-6-94; 8:45 am]

BILLING CODE 6820-33-P

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to procurement list.

SUMMARY: This action adds to the Procurement List a commodity, military resale commodities and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: February 7, 1994.

ADDRESSES: Committee for Purchase from People Who Are Blind or Severely Disabled, Crystal Square 3, suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: On October 1, November 15 and 19, 1993, the Committee for Purchase from People Who Are Blind or Severely Disabled published notices (58 FR 51319, 60181 and 61073) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodity, military resale commodities and service, fair market price, and impact of the additions on the current or most recent contractors, the Committee has determined that the commodity, military resale commodities and service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodity, military resale commodities and service to the Government.

2. The action will not have a severe economic impact on current contractors for the commodity, military resale commodities and service.

3. The action will result in authorizing small entities to furnish the commodity, military resale commodities and service to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodity, military resale commodities and service proposed for addition to the Procurement List.

Accordingly, the following commodity, military resale commodities and service are hereby added to the Procurement List:

Commodity

Stake, Vehicle Body, Rack Assembly
2510–01–180–1099

Military Resale Commodities

Cutlery, Heavy Duty
M.R. 532 (Place Settings)
M.R. 533 (Knife)
M.R. 534 (Fork)
M.R. 535 (Spoon)

Service

Janitorial/Custodial
Riverside National Cemetery, 22495 Van Buren Boulevard, Riverside, California.

This action does not affect current contracts awarded prior to the effective date of this addition or options exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 94–353 Filed 1–6–94; 8:45 am]

BILLING CODE 6820–33–P

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and Applicable OMB Control Number: Statement of witness/suspect/complainant; AF Form 1168.

Type of Request: Existing collection in use without an OMB control number.

Average Burden Hours/Minutes per Response: 20 Minutes.

Responses per Respondent: 1.

Number of Respondents: 168,000.

Annual Burden Hours: 55,400.

Annual Responses: 168,000.

Needs and Uses: This form is used to collect vital information from witnesses, suspects, and complainants in reference to criminal activity, disturbances, and other law enforcement matters on military installations. The affected public includes retirees, dependents, other Federal agency personnel, civilian contractors, businesses, and other Government representatives.

Affected Public: Individuals or households, State and local governments, Federal agencies or employees, small businesses or organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. William P. Pearce. Written requests for copies of the information collection proposal should be sent to Mr. Pearce, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202–4302.

Dated: January 3, 1994.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–373 Filed 1–6–94; 8:45 am]

BILLING CODE 5000–04–M

Office of the Secretary

Establishment of the Department of Defense (DoD) Historical Advisory Committee

ACTION: Notice.

SUMMARY: The DoD Historical Advisory Committee is being established in consonance with the public interest, and in accordance with the provisions of Public Law 92–463, the "Federal Advisory Committee Act." This Committee will replace three historical advisory committees of the military departments which were terminated September 30, 1993 in response to Executive Order 12838, Office of Management and Budget Bulletin 93–10, "Termination and Limitation of Federal Advisory Committees."

The DoD Historical Advisory Committee will provide advice to the Secretary of Defense, the secretaries of the military departments, and the heads of other DoD components who participate, regarding the professional standards, historical methodology, program priorities, liaison with professional groups and institutions, and adequacy of resources connected with the various historical programs and associated activities of the DoD. These include historical, archival, museum, library, art, curatorial, and related programs.

The Committee will be composed of a diverse group of experts in historical disciplines, numbering 35 to 40 members who represent academic and professional institutions, and other historical fields of endeavor. Efforts will

be made to ensure a balanced membership, considering the functions to be performed and the interest groups represented.

For further information regarding the DoD Historical Advisory Committee, contact: Dr. Alfred Goldberg, the OSD Historian, (703) 697–4216.

Dated: January 3, 1994.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–372 Filed 1–6–94; 8:45 am]

BILLING CODE 5000–04–M

Defense Environmental Response Task Force

AGENCY: Office of the Deputy Under Secretary of Defense (Environmental Security).

ACTION: Notice of business meeting and hearing.

SUMMARY: Pursuant to Public Law 92–463, notice is hereby given of a business meeting and hearing of the Defense Environmental Response Task Force. The purpose of the meeting is to follow up on the September 23, 1993, meeting and to present and discuss three draft issue papers on the environmental baseline survey, leasing, and the implementation of fast-track cleanup. The task force also will discuss ways to expedite and improve environmental response actions at military installations that are being closed or realigned pursuant to Public Law 100–536 and Public Law 101–510. The business meeting and hearing will be open to the public. Public witnesses desiring to speak before the Task Force should contact LTC William Andrews, USA, Task Force Executive Secretary, and prepare a written statement that can be summarized orally before the Task Force at the time to be fixed for public witnesses. Written statements must be received by the close of business, January 19, 1993, at the Office of the Deputy Under Secretary of Defense (Environmental Security).

DATES: January 26, 1993, 8 a.m.–5:30 p.m.

ADDRESSES: San Francisco Hilton & Towers, 333 O'Farrell Street, San Francisco, CA 94102–2189, Telephone (415) 771–1400.

FOR FURTHER INFORMATION, CONTACT: LTC William Andrews, USA, Task Force Executive Secretary, Office of the Deputy Under Secretary of Defense (Environmental Security), RM–3C771, the Pentagon, Washington, DC, 20301–8000, telephone (703) 697–7475 or (703) 697–9793.

Dated: January 2, 1994.

L. M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 94–303 Filed 1–6–94; 8:45 am]

BILLING CODE 5000–04–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0090]

Clearance Request for Rights in Data and Copyrights

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance (9000–0090).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3051), 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 Rights in Data and Copyrights.

FOR FURTHER INFORMATION CONTACT: Beverly Fayson, Office of Federal Acquisition Policy, GSA (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Purpose

Rights in Data is a regulation which concerns the rights of the Government, and organizations with which the Government contracts, to information developed under such contracts. The delineation of such rights is necessary in order to protect the contractor's rights to not disclose proprietary data and to insure that data developed with public funds is available to the public.

The information collection burdens and recordkeeping requirements included in this regulation fall into the following four categories.

(a) A provision which is to be included in solicitations where the proposer would identify any proprietary data he would use during contract performance in order that the contracting officer might ascertain if such proprietary data should be delivered.

(b) Contract provisions which, in unusual circumstances, would be included in a contract and require a contractor to deliver proprietary data to the Government for use in evaluation of work results, or is software to be used in a Government computer. These situations would arise only when the very nature of the contractor's work is comprised of limited rights data or restricted computer software and if the Government would need to see that data in order to determine the extent of the work.

(c) A technical data certification for major systems, which requires the contractor to certify that the data delivered under the contract is complete, accurate and compliant with the requirements of the contract. As this provision is for major systems only, and few civilian agencies have such major systems, only about 30 contracts will involve this certification.

(d) The Additional Data Requirements clause, which is to be included in all contracts for experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less). The clause requires that the contractor keep all data first produced in the performance of the contract for a period of three years from the final acceptance of all items delivered under the contract. Much of this data will be in the form of the deliverables provided to the Government under the contract (final report, drawings, specifications, etc.). Some data, however, will be in the form of computations, preliminary data, records of experiments, etc., and these will be the data that will be required to be kept over and above the deliverables. The purpose of such recordkeeping requirements is to insure that the Government can fully evaluate the research in order to ascertain future activities and to insure that the research was completed and fully reported, as well as to give the public an opportunity to assess the research results and secure any additional information. All data covered by this clause is unlimited rights data paid for by the Government.

Paragraph (d) of the Rights in Data—General clause outlines a procedure whereby a contracting officer can challenge restrictive markings on data delivered. Under civilian agency contracts, limited rights data or restricted computer software is rarely, if ever, delivered to the Government. Therefore, there will rarely be any challenges. Thus, there is no burden on the public.

Under the procedures established for development of the FAR, agency and public comments were solicited and each comment was addressed before

finalization of the text. The comments which were received were for the most part from educational institutions, which stated that requiring their investigators to keep records of unlimited rights data for three years after acceptance of deliverables was unreasonable, in that such investigators in reality do not segregate their research by contract, but rather combine it with other data in order to continue their research. In light of this, the proposed rule was changed to state that the Additional Data Requirements clause would not be placed in contracts for basic or applied research with educational institutions where the value was $500,000 or less. The $500,000 threshold was adopted after surveying the major civilian research and development (R&D) agencies, whose data suggested that an average R&D contract was $250,000 to $300,000; commensurate with other clause thresholds (*e.g.*, small business subcontracting), the $500,000 threshold was chosen. Thus, for most R&D contracts with universities, no recordkeeping is required.

B. Annual Reporting Burden

The annual reporting burden is estimated as follows: Respondents, *1,100*; responses per respondent, *1*; total annual responses, *1,100*; preparation hours per response, *2,7*; and total response burden hours, *2,970*.

C. Annual Recordkeeping Burden

The annual recordkeeping burden is estimated as follows: Recordkeepers, *9,000*; hours per recordkeeper, *3*; and total recordkeeping burden hours, *27,000*

OBTAINING COPIES OF PROPOSALS: Requester may obtain copies of OMB applications or justifications from the General Services Administration, FAR Secretariat (VRS), room 4037, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0090, Right in Data and Copyrights, in all correspondence.

Dated: December 28, 1993.

Beverly Fayson,

FAR Secretariat.

[FR Doc. 94–361 Filed 1–6–94; 8:45 am]

BILLING CODE 6820–34–M

Office of the Secretary

Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: The Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation will meet in open session on January 27–28, 1994 at the Pentagon, Room 3E869, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense.

Persons interested in further information should call Ms. Amy Jeffress at (703) 697–7228.

Dated: January 3, 1994.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–369 Filed 1–6–94; 8:45 am]

BILLING CODE 5000–04–M

Defense Science Board Task Force on Readiness

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board Task Force on Readiness will meet in closed session on January 7, 14, and 19, 1994 at the Pentagon, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense (Acquisition and Technology) on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings the Task Force will provide advice, recommendations, and supporting rationale on the components of a Readiness Early Warning System to insure that our forces do not become "hollow," and, where deficiencies may begin to emerge, to suggest corrective actions.

In accordance with section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended (5 U.S.C. App. II, (1988)), it has been determined that these DSB Task Force meetings, concerns matters listed in 5 U.S.C. 552b(c)(1) (1988), and that accordingly these meetings will be closed to the public.

L. M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–370 Filed 1–6–94; 8:45 am]

BILLING CODE 5000–04–M

Office of the Secretary of Defense

Department of Defense Wage Committee; Notice of Closed Meetings

Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that a meeting of the Department of Defense Wage Committee will be held on Tuesday, February 1, 1994; Tuesday, February 8, 1994; Tuesday, February 15, 1994; and Tuesday, February 22, 1994, at 2 p.m. in room 800, Hoffman Building #1, Alexandria Virginia.

The Committee's primary responsibility is to consider and submit recommendations to the Assistant Secretary of Defense (Personnel and Readiness) concerning all matters involved in the development and authorization of wage schedules for federal prevailing rate employees pursuant to Public Law 92–392. At this meeting, the Committee will consider wage survey specifications, wage survey data, local wage survey committee reports and recommendations, and wage schedules derived therefrom.

Under the provisions of section 10(d) of Public Law 92–463, meetings may be closed to the public when they are "concerned with matters listed in 5 U.S.C. 552b." Two of the matters so listed are those "related solely to the internal personnel rules and practices of an agency," (5 U.S.C. 552b.(c)(2)), and those involving "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. 552b.(c)(4)).

Accordingly, the Deputy Assistant Secretary of Defense (Civilian Personnel Policy/Equal Opportunity) hereby determines that all portions of the meeting will be closed to the public because the matters considered are related to the internal rules and practices of the Department of Defense (5 U.S.C. 552b.(c)(2)), and the detailed wage data considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence (5 U.S.C. 552b(c)(4)).

However, members of the public who may wish to do so are invited to submit material in writing to the chairman concerning matters believed to be deserving of the Committee's attention.

Additional information concerning this meeting may be obtained by writing the Chairman, Department of Defense Wage Committee, room 3D264, The Pentagon, Washington, DC. 20310.

Dated: January 3, 1994.

L.M. Bynum,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–371 Filed 1–6–94; 8:45 am]

BILLING CODE 5000–04–M

Department of the Air Force

Addendum to the Environmental Impact Statement for the Modification of Military Special Use Airspace To Support the 140th Fighter Wing, Colorado Air National Guard Buckley Air National Guard Base, Aurora, Colorado; Notice of Intent

The United States Air Force and the Air National Guard are announcing an addendum to the Colorado Airspace Initiative Environmental Impact Statement (EIS).

The addendum modifies proposed actions and alternatives to the Colorado Airspace Initiative Environmental Impact Statement as a result of the recently enacted Colorado Wilderness Act of 1993 and the Air National Guard's policy regarding aircraft overflight of Wilderness and Wild & Scenic River Areas.

The Air Force and Air National Guard are planning to conduct a Scoping meeting at the Blanca/Fort Garland Community Center, Fort Garland, Colorado, February 1, 1994, 5 p.m. ending at approximately 10 p.m. Additional nights will be scheduled depending upon attendance and will be announced at the meeting.

The purpose of this meeting is to present information concerning the addendum and to solicit public input with respect to issues to be addressed, effort to be expended, and alternatives that should be addressed in the EIS. Questions or clarifications concerning the proposal or any other information presented will be answered as they relate to the scope of the effort anticipated.

The Scoping meeting will include opportunities for clarification of the addendum and statements from representatives of government agencies and the public. To ensure the maximum opportunity for public participation, initial presentations and questions by individuals will be limited to a maximum of five minutes until all those desiring an opportunity to speak have been accommodated. Additional presentations and questions will be accepted at the end of the meeting. Submission of written comments and questions will be accepted. Submission of written comments is encouraged but is not required. Written comments and questions of any length submitted at the meeting or during the public comment period will be considered in their entirety.

To ensure the Air Force and the Air National Guard have sufficient time to consider public input on issues and alternatives in the preparation of the Draft EIS, comments should be submitted to the address below by February 28, 1994. The Air Force and Air National Guard will accept comments at the address below at any time during the environmental impact analysis process.

For further information concerning the addendum, preparation of the EIS for the Colorado Airspace Initiative, or to provide written comment, contact:

Environmental Support, Air National Guard Readiness Center, ANGRC/CEVS, Attention: Mr. Harry A. Knudsen, Jr., 3500 Fetchet Avenue, Mail Stop 18, Andrews Air Force Base, MD 20331–5157, Telephone: (301) 981–8143.

List of Subjects

Environmental Protection, Environmental Impact Statement, US Air Force-Air National Guard, Buckley ANGB, Colorado, Notice of Intent Addendum to the Environmental Impact Statement for the Modifications of Military Special Use Airspace to Support the 140th Fighter Wing, Colorado Air National Guard Buckley Air National Guard Base, Aurora, Colorado.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 94–302 Filed 1–6–94; 8:45 am]

BILLING CODE 3910–01–W

Department of the Navy

Record of Decision for Construction of Element II Breakwater/Pier at Naval Station Puget Sound, Everett, WA

Pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 and the Council on Environmental Quality Regulations (40 CFR part 1500–1508), the Department of the Navy announces its decision to construct a breakwater/pier at Naval Station Puget Sound, Everett, Washington. This action was identified as the preferred alternative in the Draft and Final Supplemental Environmental Impact Statements (DSEIS/FSEIS) distributed to the public in March and November, 1993, respectively. The process leading to the SEIS and this decision are consistent with a Settlement Agreement with the Friends of the Earth, *et al.* concerning homeporting actions at Everett.

Comments received from the public on the DSEIS and during a public hearing held in April 1993 were concerned primarily with potential impacts from dredging and breakwater/pier physical obstruction/shading of salmonid migrations. These concerns were responded to in the FSEIS and there were no public comments on the FSEIS. The Navy is not aware of any remaining unresolved environmental issues.

The Element II breakwater/pier project consists of dredging and construction of a pile-supported breakwater/pier. The breakwater/pier will allow berthing for the currently planned ship-mix which cannot be adequately accommodated at the Element I facilities, and will provide wave attenuation for ships berthed at the Carrier Pier. The breakwater/pier will also provide for fish passage. Element II projects will not increase the number of vessels or personnel to be stationed at Everett, over those planned for in Element I.

The project will require dredging and disposal of about 150,000 cubic yards of marine sediments, construction of a baffle-wall breakwater structure, and, at a later date, conversion of the structure into a breakwater pier capable of berthing Navy ships. Dredging and construction of the breakwater component is expected to begin in Fiscal Year (FY) 1994. Construction of the pier component is scheduled to begin in FY 1997. The material to be dredged has been determined to be acceptable for disposal at the Port Gardner, Puget Sound Dredged Disposal site. Dredging will be scheduled to avoid the out-migration of juvenile salmon from the Snohomish River from March 15 to July 1.

The no action alternative was dismissed from further consideration because it would make it impracticable for the Navy to safely complete its mission at an established home port. Alternative designs and concepts for wave attenuation and berthing were evaluated in the SEIS and were rejected in preference to the proposed action for environmental, operational, and safety reasons that were described in detail in the DSEIS/FSEIS. The FSEIS incorporates the DSEIS by reference and the two must be used in conjunction.

The proposed action will not impact federally protected wetlands or endangered species. The proposed action conforms with the Washington State Implementation Plan for meeting ambient air quality standards. The proposed action will not impact

archaeological, cultural, or historic resources listed, or determined eligible for listing, on the National Register of Historic Places. The Navy has determined that the proposed action is consistent with the maximum extent practicable with the Washington State Coastal Zone Management Plan.

Questions regarding the SEIS prepared for this action may be directed to the Engineering Field Activity Northwest, Naval Facilities Engineering Command, (Attn: Mr. Don Morris), 3505 NW Anderson Hill Road, Silverdale, Washington, telephone (206) 396–5976.

Dated: January 3, 1994.

Elsie L. Munsell,

Deputy Assistant Secretary of the Navy (Environment and Safety).

Dated: January 4, 1994.

Michael P. Rummel,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 94–368 Filed 1–6–94; 8:45 am]

BILLING CODE 3810–AE–M

Department of the Army

Advance Notice of Intent To Implement Changes in DOD Airlift Procurement Responsibilities

AGENCY: Military Traffic Management Command, DOD.

ACTION: Notice of intent.

SUMMARY: Headquarters, Military Traffic Management Command (HQMTMC) will transfer its airlift procurement responsibilities to Headquarters, Air Mobility Command (HQAMC) effective 1 January 1994. The decision to transfer these responsibilities responds to Commander-in-Chief, United States Transportation Command memorandum, September 27, 1993, subject: USTRANSCOM Single Points of Contact (POC) for Airlift—Action Memorandum. The current procedures for airlift procurement, agreement, and process responsibilities: Air Carrier Qualification; Air Carrier Service Evaluation; Air Freight Voluntary Tenders; General Services Administration (GSA) Small Package Program; Uniform Passenger Tender for Air; Group Passenger Movements; Military Air Transport Agreement (MATA); and the Carrier Review Board (air carrier only) process. The effect of this transfer will be to consolidate airlift procurement functions with HQAMC. HQMTMC will continue to be the traffic management interface with DOD customers for transportation requirements and the procurement of CONUS land transportation.

EFFECTIVE DATES: Effective dates of transfer of responsibilities are provided in supplementary information.

ADDRESSES: Headquarters, Military Traffic Management Command, ATTN: MTOP–T–M/LTC Moore, 5611 Columbia Pike, Falls Church, VA 22041–5050.

FOR FURTHER INFORMATION CONTACT: LTC John Moore, (703) 756–1196.

SUPPLEMENTARY INFORMATION: HQAMC will assume responsibilities for the following functions as indicated and become USTRANSCOM's single POC for airlift procurement to the air carrier industry. Summaries of the changes are as follows:

a. Air Carrier Qualification and Service Evaluation. HQAMC assumes responsibility for these functions effective January 1, 1994. This includes service evaluations under pre-January 1, 1994 solicitations. HQMTMC's airlift qualification and service evaluation authority expire as of midnight, December 31, 1993. HQAMC will publish new air carrier qualification and evaluation instructions.

b. Air Freight Voluntary Tenders. Air carriers will submit voluntary tenders in accordance with (IAW) HQAMC instructions effective January 1, 1994. HQAMC will process the tenders and, when approved, forward the tenders to MTMC Eastern Area Command for inclusion into the CONUS Freight Management System. HQMTMC will continue to provide the single POC for traffic management interface with the shipper. HQMTMC's air freight voluntary tender authority expires as of midnight, December 31, 1993. HQAMC will publish new voluntary tender instructions.

c. The GSA Small Package Program. HQAMC becomes the USTRANSCOM POC with GSA on January 1, 1994. Military services will continue to submit their requirements to HQMTMC in accordance with the Defense Traffic Management Regulation (DTMR). HQMTMC will forward requirements to HQAMC which will provide DOD requirements to GSA. GSA will award traffic and inform HQAMC and HQMTMC of the carriers and rates. HQMTMC will continue to provide the single POC for traffic management interface with the shipper. HQMTMC's POC responsibilities with GSA expire as of midnight, December 31, 1993.

d. Uniform Passenger Tender for Air. HQAMC will solicit uniform passenger tenders for air services starting January 1, 1994. Military services will continue to submit their requirements to HQMTMC IAW the DTMR. HQMTMC will forward requirements to HQAMC which will solicit the air industry for rates. HQAMC will process air carrier tenders and, when approved, forward tenders to HQMTMC for inclusion into the group move and recruit passenger systems. HQMTMC will continue to provide the single POC for traffic management and land procurement services with the shipper. HQMTMC's passenger tender authority expires as of midnight, December 31, 1993. HQAMC will publish new air passenger tender instructions.

e. Group Passenger Movements. HQAMC will procure air carrier services for group movements starting January 1, 1994. Military services will continue to submit their requirements to HQMTMC IAW the DTMR. HQMTMC will forward requirements to HQAMC which will process the solicitation and resulting air offers of service and forward the offers of service to HQMTMC via the Groups Operational Passenger system for evaluation. HQAMC will make air carrier awards. HQMTMC will continue to be the single POC for DOD passenger requirements and traffic management. HQMTMC's responsibilities regarding bus and rail carriers do not change. HQMTMC's passenger airlift procurement authority expires as of midnight, December 31, 1993. HQAMC will publish new airlift procurement instructions.

f. Direct Procurement Method (DPM) Air (Personal Property) Procedures. Military services will continue to submit their requirements to HQMTMC IAW the Personal Property Traffic Management Regulation. HQMTMC will forward requirements to HQMAMC which will solicit rates from the air industry. HQAMC will process air carrier rates and, when approved, forward the rates to HQMTMC for inclusion into the personal property systems. HQMTMC will continue to provide the single POC for traffic management interface with the shipper. HQMTMC's airlift DPM procurement authority expires with the solicitation of the International Winter Cycle—94 (Estimated—May 1994). HQAMC will publish new airlift procurement instructions.

g. Military Air Transport Agreement (MATA). HQAMC will publish a new MATA for comment and implementation on March 1, 1994.

h. Carrier Review Board process. HQAMC will publish new carrier review board (nonuse and disqualification) procedures for comment and implementation on January 1, 1994. Carrier review boards in process as of December 31, 1993 will continue under the authority of HQMTMC until the boards are finalized

or board findings expire. Long term board findings may be transferred to HQAMC.

Existing solicitations and traffic awards will continue under the authority of HQMTMC until they expire or are assumed by HQAMC.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 94–489 Filed 1–6–94; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF EDUCATION

National Assessment Governing Board Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of Teleconference Meetings.

SUMMARY: This notice sets forth the schedule and proposed agenda of forthcoming meetings of the Executive Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

Dates: January 25, 1994 and February 15, 1994.

Time: 11 a.m. (e.t.) to 1 p.m. (e.t.).

Location: National Assessment Governing Board, 800 North Capitol Street, NW., suite 825, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mary Ann Wilmer, Operations Officer, National Assessment Governing Board, suite 825, 800 North Capitol Street, NW., Washington, DC 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by section 3403 of the National Assessment of Educational Progress Improvement Act (NAEP Improvement Act), Title III–C of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100–297), (20 U.S.C. 1221e–1).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, and establishing standards and procedures for interstate and national comparisons.

The Executive Committee of the National Assessment Governing Board will meet on January 25, 1994 from 11 a.m. until 1 p.m. and on February 15, 1994 from 11 a.m. until 1 p.m. Because these are teleconference meetings, facilities will be provided so the public will have access to the Committee's deliberations. There are two agenda items for the meeting on January 25, 1994, (1) discussion of issues related to reporting results of the Reading assessment, and (2) a briefing of the NCES/NAGB joint conference on standard-setting.

The meeting scheduled for February 15, 1994 will be held from 11 a.m. to 1 p.m. The Committee will review and approve the agenda for the March meeting of the Board.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, suite 825, 800 North Capitol Street, NW., Washington, DC from 8:30 a.m. to 5 p.m.

Dated: January 5, 1994.

Roy Truby,

Executive Director, National Assessment Governing Board.

[FR Doc. 94–343 Filed 1–6–94; 8:45 am]

BILLING CODE 4000–01–M

Office of Postsecondary Education

Federal Perkins Loan, Federal Work-Study, and Federal Supplemental Educational Opportunity Grant Programs

AGENCY: Department of Education.

ACTION: Notice of the closing date for institutions to submit a request for a waiver of the allocation reduction for the underuse of funds under the Federal Perkins Loan, Federal Work-Study (FWS), or Federal Supplemental Educational Opportunity Grant (FSEOG) programs (known collectively as the campus-based programs).

SUMMARY: The Secretary gives notice to institutions of higher education of the deadline for an institution to submit a written request for a waiver of the allocation reduction being applied to its Federal Perkins Loan, FWS, or FSEOG allocation for the 1994–95 award year (July 1, 1994 through June 30, 1995) because the institution returned more than 10 percent of its allocation for that program for the 1992–93 award year (July 1, 1992 through June 30, 1993).

DATES: Closing Date for Submitting a Waiver Request and any Supporting Information or Documents. For an institution that returned more than 10 percent of its Federal Perkins Loan, FWS, or FSEOG allocation for the 1992–93 award year to be considered for a waiver of the allocation reduction for its 1994–95 award year allocation, it must mail or hand-deliver its waiver request and any supporting information or documents on or before February 18, 1994. The Department will not accept a waiver request submitted by facsimile transmission. The waiver request must be submitted to the Campus-Based Programs Financial Management Division at one of the addresses indicated below.

ADDRESSES: Waiver Request and any Supporting Information or Documents Delivered by Mail. The waiver request and any supporting information or documents delivered by mail must be addressed to Gloria Easter, Chief, Fund Control Branch, Campus-Based Programs Financial Management Division, Accounting and Financial Management Service, Student Financial Assistance Programs, U.S. Department of Education, room 4621, Regional Office Building 3, 400 Maryland Avenue, SW., Washington, DC 20202–5452. An applicant must show proof of mailing consisting of one of the following: (1) A legibly dated U.S. Postal Service postmark; (2) a legible mail receipt with the date of mailing stamped by the U.S. Postal Service; (3) a dated shipping label, invoice, or receipt from a commercial carrier; or (4) any other proof of mailing acceptable to the Secretary of Education.

If a waiver request is sent through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service.

An institution should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an institution should check with its local post office.

An institution is encouraged to use registered or at least first class mail. Institutions that submit waiver requests and any supporting information or documents after the closing date will not be considered for a waiver of the allocation reduction being applied to its allocation under any of the campus-based programs for award year 1994–95.

Waiver Requests and any Supporting Information or Documents Delivered by Hand. A waiver request and any supporting information or documents delivered by hand must be taken to Gloria Easter, Chief, Fund Control Branch, Campus-Based Programs Financial Management Division, Accounting and Financial Management

Service, Student Financial Assistance Programs, U.S. Department of Education, room 4621, Regional Office Building 3, 7th and D Streets, SW., Washington, DC. Hand-delivered waiver requests will be accepted between 8 a.m. and 4:30 p.m. (Eastern time) daily, except Saturdays, Sundays, and Federal holidays. A waiver request for the 1994–95 award year that is delivered by hand will not be accepted after 4:30 p.m. on the closing date.

SUPPLEMENTARY INFORMATION: Under sections 413D(e)(2), 442(e)(2), and 462(j)(4) of the Higher Education Act of 1965, as amended, if an institution returns more than 10 percent of its Federal Perkins Loan, FWS, or FSEOG allocation for an award year, the institution will have its allocation for the next fiscal year for that program reduced by the dollar amount returned. The Secretary may waive this requirement for a specific institution if the Secretary finds that enforcement of the requirement would be contrary to the interest of the affected campus-based program.

The institution must provide a written waiver request and any supporting information or documents by the established February 18, 1994 closing date. The waiver request must be signed by an appropriate institutional official and above the signature the official must include the statement: "I certify that the information the institution provided in this waiver request is true and accurate to the best of my knowledge. I understand that the information is subject to audit and program review by representatives of the Secretary of Education." If the institution submits a waiver request and any supporting information or documents after the closing date, the request will not be considered.

Applicable Regulations

The following regulations apply to the campus-based programs:

(1) Student Assistance General Provisions, 34 CFR part 668.

(2) Federal Perkins Loan Program, 34 CFR part 674.

(3) Federal Work-Study Program, 34 CFR part 675.

(4) Federal Supplemental Educational Opportunity Grant Program, 34 CFR part 676.

(5) Institutional Eligibility Under the Higher Education Act of 1965, as amended, 34 CFR part 600.

(6) New Restrictions on Lobbying, 34 CFR part 82.

(7) Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 34 CFR part 85.

(8) Drug-Free Schools and Campuses, 34 CFR part 86.

FOR FURTHER INFORMATION CONTACT: For technical assistance concerning the waiver request or other operational procedures of the campus-based programs, contact: Gloria Easter, Chief, Fund Control Branch, Campus-Based Programs Financial Management Division, Accounting and Financial Management Service, Student Financial Assistance Programs, U.S. Department of Education, room 4621, Regional Office Building 3, 400 Maryland Avenue, SW., Washington, DC 20202–5452, Telephone (202) 708–7741. 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.

Program Authority: 20 U.S.C. 1087aa *et seq.*; 42 U.S.C. 2751 *et seq.*; and 20 U.S.C. 1070b *et seq.*

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program)

Dated: December 30, 1993.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 94–315 Filed 1–6–94; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Determination To Renew the Secretary of Energy Advisory Board

Pursuant to section 14(a)(2)(A) of the Federal Advisory Committee Act and in accordance with title 41 of the Code of Federal Regulations, § 101–6.1015, and following consultation with the Committee Management Secretariat of the General Services Administration, notice is hereby given that the Secretary of Energy Advisory Board (the Board) has been renewed for an additional two years.

The committee will continue to provide expert advice to the Secretary of Energy on the Department's research, development, and technology activities; energy and national security responsibilities; economic issues relating to energy; and expert guidance in other activities and operations of the Department at the Secretary's request.

The Board members are selected to assure well-balanced representation from all sections of the country and on the basis of their professional experience and broad competence in areas relating to energy policy, science and technology, environmental science and policy, economics and other broad societal interests. Membership and representation of all interests will continue to be determined in accordance with the requirements of the Federal Advisory Committee Act, section 624(b) of the Department of Energy Organization Act (Pub. L. 95–91), and implementing regulations.

The renewal of the Board has been determined essential to the conduct of the Department's business and in the public interest in connection with the performance of duties imposed upon the Department of Energy by law. The Board will operate in accordance with the provisions of Federal Advisory Committee Act (Pub. L. 92–463), the Department of Energy Organization Act (Pub. L. 95–91), the General Services Administration Final Rule on Federal Advisory Committee Management, and other directives and instructions issued in implementation of those acts.

Further information regarding this advisory committee can be obtained from Rachel M. Samuel at (202) 586–3279.

Issued in Washington, DC on: January 3, 1994.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 94–386 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–M

Financial Assistance: Aluminum Company of America (ALCOA); Cooperative Agreement

AGENCY: U.S. Department of Energy (DOE).

ACTION: Notice of intent.

SUMMARY: The U.S. Department of Energy, Idaho Operations Office, announces that pursuant to the DOE Financial Assistance Rules 10 CFR 600.14(e), it intends to award a new start Cooperative Agreement Number DE–FC07–94ID13237 to the Aluminum Company of America (ALCOA). The objective of this project is the development of an advanced fluidized bed pressure calciner. The project consists of two phases and is aimed at development of an advanced, energy efficient-pressure mineral calciner for the processing of bauxite to smelting grade alumina (SGA). The objective of this agreement is to provide funds for the work performed under Phase I; the design, fabrication, and test of a three-tube pilot plant (100 kg/hr). The Federal Domestic Catalog Number is 81.078.

FOR FURTHER INFORMATION CONTACT: Linda A. Hallum, U.S. Department of Energy, Idaho Operations Office, 785 DOE Place, MS 1221, Idaho Falls, Idaho 83401–1562, (208) 526–5545.

SUPPLEMENTARY INFORMATION: The statutory authority for the proposed award is the Steel and Aluminum Energy Conservation and Technology Competitiveness Act of 1988 (Pub. L. 100–680). The proposal meets the criteria for "unsolicited applications" for financial assistance as set forth in 10 CFR 600.14(e). The application is meritorious based on the general evaluation and the proposed project represents a unique approach to addressing a process in an energy intensive industry which would not be eligible for financial assistance under a recent, current, or planned solicitation. The anticipated total project period to be awarded is (6) years. The funds for this cooperative agreement are to be shared by DOE for 70% and ALCOA for 30% for a total estimated project cost of 13,798,100.

David W. Newnam,

Acting Director, Procurement Services Division.

[FR Doc. 94–383 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–M

Chicago Operations Office; Financial Assistance Award; Purdue Research Foundation

AGENCY: U.S. Department of Energy.

ACTION: Intent to award based on an unsolicited application.

SUMMARY: The Department of Energy announces that pursuant to the provisions of 10 CFR 600.14, it intends to renew Grant No. DE–FG02–85CE40772 based on an unsolicited application received from Purdue Research Foundation for research and development in the Production of Higher Value Chemicals from Food Process Wastes Using a Novel Fermentor-Separator. The determination to renew this grant is based on the following information: A technical evaluation of the proposed project was performed pursuant to 10 CFR 600.14 (d) and (e). It is determined that the proposed project is meritorious based on the fact that it will provide value to all food processing companies with similar product waste streams. The probability of achieving the anticipated objectives are extremely high. The facilities and qualifications of the key personnel are appropriate. DOE knows of no other entity which is conducting or planning to conduct such an effort. This effort is not considered suitable for competitive financial assistance. The DOE share of funding is estimated at $589,000 for the three year project period and shall be used to pay for salaries and wages, fringe benefits, equipment, travel, direct and indirect costs. The anticipated term of the renewal period is March 1, 1994 through February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Frederick T. Sienko, U.S. Department of Energy, Chicago Operations Office, Contracts Division, 9800 South Cass Avenue, Argonne, IL 60439, (708) 252–2115. Ms. Kerry Cullerton, U.S. Department of Energy, Chicago Operations Office, Contracts Division, 9800 South Cass Avenue, Argonne, IL 60439, (708) 252–2107.

Issued in Chicago, Illinois on December 20, 1993.

Timothy S. Crawford,

Assistant Manager for Human Resources and Administration.

[FR Doc. 94–381 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–M

Office of Energy Research

Energy Research Financial Assistance Program Notice 94–08; Microbial Genome Initiative

AGENCY: U.S. Department of Energy (DOE).

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Health and Environmental Research (OHER) of the Office of Energy Research, U.S. Department of Energy (DOE), hereby announces its interest in receiving applications for a cooperative agreement in support of the Microbial Genome Initiative. This new initiative will focus on developing a microbial genome sequencing capability that will provide genomic sequence and mapping information: (i) On microorganisms with environmental or energy relevance; (ii) of phylogenetic relevance; and (iii) of potential commercial importance and application. One to five awards are anticipated, from a total of approximately $3 million, subject to the availability of appropriated funds.

DATES: Formal applications in response to this notice should be received by 4:30 p.m., E.D.T., April 21, 1994, to be accepted for merit review and funding in FY 1994.

ADDRESSES: Formal applications referencing Program Notice 94–08 should be forwarded to: U.S. Department of Energy, Office of Energy Research, Acquisition and Assistance Management Division, ER–64, Washington, DC 20585, ATTN: Program Notice 94–08. The following address must be used when submitting applications by U.S. Postal Service Express Mail or any commercial mail delivery service, or when hand-carried by the applicant: U.S. Department of Energy, Acquisition and Assistance Management Division, ER–64, 19901 Germantown Road, Germantown, MD 20874.

FOR FURTHER INFORMATION CONTACT: Dr. D. Jay Grimes, Environmental Sciences Division, ER–74, Office of Health and Environmental Research, Office of Energy Research, U.S. Department of Energy, Washington, DC 20585, telephone 301–903–4183.

SUPPLEMENTARY INFORMATION: Molecular biological research on industrially important microorganisms and on microorganisms which live in extreme environments (including the deep subsurface, geothermal environments, and toxic waste sites) is a developing area of great scientific promise which will impact many DOE missions and U.S. industry. This new Microbial Genome Initiative will support diverse DOE program objectives, by providing microbial DNA sequence information that will further the understanding of microbial phylogeny, physiology and structural biology, and that will facilitate the exploitation of opportunities which have considerable direct industrial utility. This new thrust in exploring microbial genomic sequence diversity is a natural outgrowth of current OHER sponsored programs, including chromosome mapping and DNA sequencing technologies from the Human Genome Program, structural biology studies utilizing OHER-supported facilities and synchrotrons located at DOE laboratories, and molecular microbiological research supported by the Subsurface Science and Ocean Margins Programs. Conversely, this Microbial Genome Initiative could benefit directly from capabilities at DOE national laboratories, DOE and National Institutes of Health Human Genome Centers, and university capabilities, including the DOE-sponsored Subsurface Microbial Culture Collection. It could also be enriched by protein engineering efforts coupled with rapid structure determination using intense x-ray sources and powerful Nuclear Magnetic Resonance (NMR) technology. Thus, this initiative represents a considerable interdisciplinary effort and will contribute to, and draw from, a wide variety of public and private programs.

Applicants must demonstrate that they can apply the most recent, cost-effective technology to the production of sequence data and that they can adequately and efficiently accumulate and store those data for future interpretation and application. A plan for making the sequence data publicly available must be included in the application's description of work portion. Preference will be given to those applicants that demonstrate well developed plans for selecting candidate microorganisms for DNA sequencing. Candidate groups of microorganisms include, but are not limited to, eukaryotes, prokaryotes, and archaebacteria. The plan should include the creation of an advisory board (the Microbial Genome Advisory Board, MGAB) that will: (i) Oversee the program, and; (ii) approve proposed candidates for sequence development. Priorities regarding what to sequence would be made by the MGAB with direction from DOE. One model for a Microbial Genome Project would be a centralized sequencing facility that interacts with a changing consortium of other institutions. Applicants are encouraged to create process- and cost-effective partnerships that will maximize sequence data production, data dissemination, and progress towards understanding basic biological mechanisms that can further development of biotechnology. Joint support with industry is encouraged. The recipient of an award will be peer reviewed toward the end of the second year of the award and subsequently as needed to ensure high quality work.

Potential applicants are strongly encouraged to submit a brief preapplication, in accordance with 10 CFR 600.10(d)(2), which consists of two to three pages of narrative describing the research objectives and method of accomplishment. Preapplications will be reviewed relative to the scope and research needs of the OHER Microbial Genome Initiative, as outlined in the above **SUMMARY** paragraph to determine the suitability of an applicant's submitting a formal application. Preapplications referencing Program Notice 94–08 should be received by February 18, 1994, and sent to the following address: Dr. D. Jay Grimes, Office of Health and Environmental Research, ER–74, Office of Energy Research, U.S. Department of Energy, Washington, DC 20585, 301–903–4183, FAX 301–903–8519; electronic mail is acceptable for preapplications, although e-mail preapplicants should confirm an e-mail transmission by telephone (Internet address is darrell.grimes@mailgw.er.doe.gov). Principal investigator telephone and FAX numbers are required as part of the preapplication. A response to each preapplication discussing the potential programmatic relevance of a formal application will be communicated to the Principal Investigator within 30 days of receipt.

It is anticipated that approximately $3 million will be available for this award contingent on availability of appropriated funds. Multiple year funding is expected for the Microbial Genome Initiative, also contingent on availability of funds.

Information about development and submission of applications, eligibility, limitations, evaluation, selection processes, and other policies and procedures may be found in the Application Guide for the Office of Energy Research Financial Assistance Programs and 10 CFR part 605. The Office of Energy Research (ER), as part of its grant regulations, requires at 10 CFR 605.11(b) that a grantee funded by ER and performing research involving recombinant DNA molecules shall comply with the National Institutes of Health "Guidelines for Research Involving Recombinant DNA Molecules" (51 FR 16958, May 7, 1986), or such later guidelines as may be published in the **Federal Register**.

The technical portion of the application should not exceed thirty (30) pages, exclusive of attachments.

The Application Guide is available from the U.S. Department of Energy, Office of Health and Environmental Research, ER–74, Washington, DC 20585. Telephone requests may be made by calling 301–903–4902.

The Catalog of Federal Domestic assistance Number for this program is 81.049.

Issued in Washington, DC, on December 22, 1993.

D. D. Mayhew,

Director, Office of Management, Office of Energy Research.

[FR Doc. 94–384 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–P

Advisory Committee To Develop On-Site Innovative Technologies for Environmental Restoration and Waste Management; Open Meeting

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Federal Advisory Committee to Develop On-Site Innovative Technologies for Environmental Restoration and Waste Management (FAC–DOIT).

DATES: Monday, January 31, 1994: 4:30 p.m.–5:45 p.m.

ADDRESSES: J.W. Marriott at National Place, 1331 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Dr. Clyde Frank, Deputy Assistant Secretary, Technology Development, EM–50, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–6382.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee

The FAC–DOIT serves as the primary vehicle for implementing a Memorandum of Understanding (MOU) regarding cooperative technology development for environmental restoration and waste management in the western states. This MOU was signed in 1991 by representatives of the Department of Defense, Interior, Energy, the Environmental Protection Agency and the Western Governors' Association (WGA), the latter representing twenty western states and territorial governors. The DOIT Committee's purpose is to improve Federal environmental restoration and waste management efforts by identifying technology needs at Federal facilities in western states; identifying and assessing emerging technologies within the Federal and private sectors; identifying regulatory, institutional or other governmental barriers to technology development; and identifying workforce planning and education requirements.

Tentative Agenda

Monday, January 31, 1994

4:30 p.m. Introductory remarks by Governor Miller of Nevada, Chairman of the WGA; remarks by Dr. Clyde Frank, Designated Federal Official for the Advisory Committee

4:40 p.m. Overview of working group fact finding reports by Jim Souby, Executive Director, WGA; Discussion and announcements by Federal agencies and states; Recommendations of the Advisory Committee; Charge to the Advisory Committee by the sponsoring agency

5:30 p.m. Open time for public comment

5:45 p.m. Adjourn

A final agenda will be available at the meeting.

Public Participation

The meeting is open to the public. Written statements may be filed with

the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Dr. Clyde Frank's office at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Executive summaries of reports presented and recommendations made will be available at the meeting.

Minutes

The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday–Friday, except Federal holidays.

Issued at Washington, DC, on January 3, 1994.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 94–388 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–M

Federal Fleet Conversion Task Force; Meeting

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of Executive Order 12844, notice is hereby given of a meeting of the Federal Fleet Conversion Task Force.

DATES: January 24, 1994: 1 p.m.–4 p.m.

ADDRESSES: Sheraton Gateway, 1900 Sullivan Road, College Park, GA 30337.

FOR FURTHER INFORMATION CONTACT: Tom P. Foltz, Assistant to the Assistant Secretary for Policy, Planning and Program Evaluation, PO–1, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–4264.

SUPPLEMENTARY INFORMATION: The Federal Fleet Conversion Task Force, established by Executive Order 12844, has been charged with developing and recommending a coordinated public and private sector plan for accelerating the commercialization, production and market acceptance of alternatively fueled vehicles nationwide. Along with this plan, the task force has also recommended an implementation strategy to carry out this plan. The Task Force's First Interim Report was presented to the Secretary of Energy on October 8, 1993 and to the President on December 9, 1993.

The Secretary of Energy, has overall responsibility for carrying out the mandates set forth in the Energy Policy Act concerning the use of alternatively fueled vehicles in the Federal fleet of automobiles to alternative fuels.

Tentative Agenda

Monday, January 24, 1994

1 p.m. Welcome and opening remarks

Garry Mauro—Chairman, Texas Land Commissioner

Susan Tierney—Vice Chair, Assistant Secretary for Policy, Planning & Program Evaluation, United States Department of Energy

1:15 p.m. Olympics Presentation

1:30 p.m. Discussion of Implementation Strategy and Final Recommendations of Federal Fleet Conversion Task Force

2:30 p.m. Break

2:45 p.m. Re-convene for further discussion of Implementation Strategy and Final Recommendations of Federal Fleet Conversion Task Force

3:45 p.m. Period of Public Comment

4 p.m. Adjourn

A final agenda will be available at the meeting.

Public Participation

The meeting is open to the public. Written statements may be filed with the Task Force Staff either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Tom Foltz at the address and telephone number listed above. Request must be made 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda. Depending on the number of requests, comments may be limited to five minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Transcript and Minutes

A transcript and minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Copies of the minutes will also be available by request.

Issued at Washington, DC, on January 3, 1994.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 94–385 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–M

Office of Energy Research

High Energy Physics Advisory Panel; Open Meeting

Purusant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), notice is hereby given of the following meeting:

Name: High Energy Physics Advisory Panel (HEPAP).

Date and Time: Friday, January 28, 1994, 9 a.m.–5 p.m.; Saturday, January 29, 1994, 9 a.m.–4 p.m.

Place: Brookhaven National Laboratory, Berkner Hall, room B, Upton, New York 11973.

Contact: Dr. Enloe T. Ritter, Executive Secretary, High Energy Physics Advisory Panel, U.S. Department of Energy, ER–221, GTN, Washington, DC 20585, Telephone: (301) 903–4829.

Purpose of Panel: To provide advice and guidance on a continuing basis with respect to the high energy physics research program.

Tentative Agenda

Friday, January 28, 1994, and Saturday, January 29, 1994

—Discussion of National Science Foundation (NSF) Elementary Particle Physics Programs

—Discussion of Department of Energy (DOE) High Energy Physics Programs

—Discussion of Department of Energy Superconducting Super Collider (SSC) Project Closeout Activities

—Presentation and Discussion of the Brookhaven National Laboratory High Energy Physics Program

—Report on Subpanel Activities

—Reports on and Discussions of Topics of General Interest in High Energy Physics

—Public Comment (10 minute rule)

Public Participation: The meeting is open to the public. The Chairperson of the Panel is empowered to conduct the meeting in a fashion that will, in his judgment, facilitate the orderly conduct of business. Any member of the public who wishes to make oral statements pertaining to agenda items should contact the Executive Secretary at the address or telephone number listed above. Requests must be received at least 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda.

Minutes: Available for public review and copying at the Public Reading Room, room 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on January 3, 1994.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 94-387 Filed 1-6-94; 8:45 am]

BILLING CODE 6450-01-M

Alaska Power Administration

Snettisham Surplus Power Marketing Plan

AGENCY: Alaska Power Administration, Department of Energy.

ACTION: Draft Surplus Power Marketing Plan.

SUMMARY: Alaska Power Administration (APA) is publishing its Draft Surplus Power Marketing Plan—Snettisham Project to start the process to establish allocations of surplus energy and surplus power sales contracts for the Snettisham Project. APA is publishing the draft plan to provide an opportunity for public review and comment. The Surplus Power Marketing Plan is fully compatible with the Department of Energy legislative proposal on APA divestiture which was submitted to Congress in November 1993.

DATES: Written comments must be submitted on or before February 7, 1994.

A public information and comment forum will be held January 18, 1994, at 7 p.m., at the office of Alaska Power Administration, 2770 Sherwood Lane, suite #2B, Juneau, Alaska.

ADDRESSES: Written comments should be submitted to Mr. Michael A. Deihl, Alaska Power Administration, 2770 Sherwood Lane, suite #2B, Juneau, AK 99801.

FOR FURTHER INFORMATION CONTACT: Mr. Scott Willis, Alaska Power Administration, P.O. Box 020889, Juneau, AK 99802-0889, (907) 586-6963.

SUPPLEMENTARY INFORMATION:

Draft Surplus Marketing Plan—Snettisham Project

A. Background

Alaska Power Administration (APA) has established new long-term power sales agreements for the Snettisham Project. As part of the process of establishing new contracts, APA published a Marketing Plan for the Snettisham Project (57 FR 53320). According to the provisions in the Marketing Plan, if there was additional energy left over after the initial allocations, it would be offered for allocation in another round. The initial allocations are complete, a contract for firm energy deliveries has been negotiated and there is surplus energy available from the Snettisham Project. An Environmental Assessment was prepared for these power marketing activities and a Finding of No Significant Impact was issued by the Department of Energy.

B. Conditions for Allocation

Allocations of surplus energy will be made in accordance with the provisions of the Marketing Plan. These provisions include:

1. No energy will be allocated for export outside the Juneau market area (that is, the Alaska Electric Light & Power (AEL&P) service territory) without firm plans and commitment to finance and build the necessary transmission facilities.

2. In allocating surplus energy, APA will give preference to public bodies and cooperatives who conduct utility-type operations.

3. Surplus energy not allocated to preference customers may be available to serve major industrial loads. For this marketing plan, a major industrial load is one which is not currently a firm customer of AEL&P, does not conduct utility-type operations, and which has the capability to meet its own energy requirement in the absence of Snettisham energy. Major industrial loads are encouraged to work directly with AEL&P so that AEL&P can request an allocation to serve their needs. In this case, allocations will be made to AEL&P. APA will consider requests for direct service of major industrial loads only if it is demonstrated that service through the utility is infeasible.

C. Contract Provisions

Entities receiving an allocation of Snettisham resources will be offered an electric service contract which will include the following provisions:

1. Contracts will be for a period of 20 years or less beginning at contract execution. Contracts for less than 20 years may include an option to extend the period up to a total length of 20 years. Contracts will be compatible with the proposed APA divestiture. Contracts will contain language guaranteeing the continuation of the allocation after divestiture.

2. Surplus energy will be marketed at the Snettisham firm rate. The rate is presently 3.21 cents/kwh and is subject to periodic review and adjustment.

3. The contractor will be required to sign a contract within 270 days of APA's letter granting an allocation.

4. In order to reserve the allocation, the contractor will be required to deposit 10% of the expected cost of the following year's energy with APA. If the allocated energy is taken during the year the deposit will be credited toward the cost of the energy. If the allocation is not completely taken the deposit is non-refundable. In any year, energy reserved in this way but not taken by the contractor may be marketed by APA. In any case, an applicant must be ready, willing, and able to take initial delivery of power by January 1, 1997 or the allocation will be withdrawn and the energy reallocated.

5. If the contractor has not committed to a 20-year contract, the contractor will be required to pay a one-time, non-refundable payment within 30 days after contract execution. This payment will be based on 3% of the average estimated annual energy delivery during the years between the end of the contract period and the 20 year period times each year less than 20 years.

D. Amount Available for Allocation

Firm energy output (energy available 9 years out of 10) from the Snettisham Project is estimated at 275 gwh/year. Secondary energy is estimated to vary from 0 to 100 gwh/year and average around 50 gwh/year. This invitation is for requests for allocation for energy that is surplus to the needs of the Juneau community. An *estimate* of that need is shown in the table below. Applicants must be aware that these are only estimates and that the amount of energy required by the community may vary from these projections. In the event that there are competing requests from qualified applicants, the surplus energy will be divided equally among the applicants up to their maximum request.

Water year	Estimated community energy surplus requirement	Estimated available
1994	232	93
1995	242	83
1996	250	75
1997	255	70
1998	258	67
1999	259	66
2000	260	65
2001	263	62
2002	264	61
2003	266	59
2004	267	58
2005	270	55
2006	271	54
2007	274	51
2008	275	50
2009	277	48
2010	278	47
2011	281	44

Water year	Estimated community energy surplus requirement	Estimated available
2012	282	43
2013	285	40

Issued at Juneau, Alaska; December 13, 1993.

Michael A. Deihl,

Administrator.

[FR Doc. 94–382 Filed 1–6–94; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. EG94–10–000, et al.]

Keystone Energy Service Company, L.P., et al.; Electric Rates and Corporate Regulation Filings

December 27, 1993.

Take notice that the following filings have been made with the Commission:

1. Keystone Energy Service Company, L.P.

[Docket No. EG94–10–000]

On December 20, 1993, Keystone Energy Service Company, L.P. ("Keystone") filed an application for a determination by the Commission that Keystone is an exempt wholesale generator. Keystone is a Delaware limited partnership with its principal place of business at 7500 Old Georgetown Road, Bethesda, MD, 20814–6161. Keystone states in its application that it is the operator of a 202 MW (net) clean coal-fired cogeneration facility (the "Facility") to be located adjacent to the Delaware River chemical plant of Monsanto Corporation ("Monsanto") in Logan Township, New Jersey. Keystone states that construction of the Facility commenced in May 1992 and that the facility is expected to commence commercial operation in the first quarter of 1995. Keystone further states that it will operate the Facility pursuant to a thirty-year lease agreement between Keystone and Keystone Urban Renewal Limited Partnership, its affiliate.

Comment date: January 14, 1994, in accordance with Standard Paragraph E at the end of this notice.

2. Keystone Urban Renewal Limited Partnership

[Docket No. EG94–9–000]

On December 20, 1993, Keystone Urban Renewal Limited Partnership ("KUR") filed an application for a determination by the Federal Energy Regulatory Commission that KUR is an exempt wholesale generator. KUR is a Delaware limited partnership with its principal place of business at 7500 Old Georgetown Road, Bethesda, MD 20814–6161. KUR further states that it is the owner of a 202 MW (net) clean coal-fired cogeneration facility (the "Facility") to be located adjacent to the Delaware River chemical plant of Monsanto Corporation in Logan Township, New Jersey. KUR further states that construction of the Facility commenced in May 1992 and that the Facility is expected to commence commercial operation in the first quarter of 1995.

Comment date: January 14, 1994, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol 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 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. 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. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–317 Filed 1–6–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. CP94–144–000, et al.]

Trunkline Gas Company, et al.; Natural Gas Certificates Filings

December 28, 1993.

Take notice that the following filings have been made with the Commission:

1. East Tennessee Natural Gas Company

[Docket No. CP94–144–000]

Take notice that on December 20, 1993, East Tennessee Natural Gas Company (East Tennessee), P.O. Box 2511, Houston, Texas 77252–2511, filed in Docket No. CP94–144–000 a request pursuant to § 157.205 of the Commission's Regulations to increase the capacity of an existing delivery point in Hamilton County, Tennessee for Chattanooga Gas Company (Chattanooga), an existing transportation customer, under East Tennessee's blanket certificate issued in Docket No. CP82–412–000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

East Tennessee proposes to replace the existing two 2-inch meter tubes with 6-inch meter tubes and install electronic gas measurement equipment on the Chattanooga Volunteer Ordinance Delivery Point (Ordinance point) in Hamilton County, Tennessee to increase its capacity to approximately 35,000 dth of natural gas per day for delivery of natural gas to Chattanooga under Rate Schedule FT–A. Chattanooga has agreed to reimburse East Tennessee for the cost of these facilities which are estimated to cost $90,487, it is stated. East Tennessee states that the total quantities to be delivered to Chattanooga after the construction of these facilities to increase capacity would not exceed the total authorized quantities and the changes proposed are not prohibited by East Tennessee's tariff. East Tennessee has sufficient capacity in its system to accomplish the increased delivery of natural gas at the Ordinance point without detriment or disadvantage to any of East Tennessee's other customers, it is stated.

Comment date: February 11, 1994, in accordance with Standard Paragraph G at the end of this notice.

2. Avoca Natural Gas Storage

[Docket No. CP94–161–000]

Take notice that on December 23, 1993, Avoca Natural Gas Storage (Avoca), a general partnership with an office at One Bowdoin Square, Boston, Massachusetts 02114, filed an application in Docket No. CP94–161–000 pursuant to section 7 of the Natural Gas Act and part 157 and subpart G of part 284 of the Commission's Regulations. The part 157 application requests a certificate of public convenience and necessity authorizing Avoca to develop, construct and operate natural gas storage and related facilities. Avoca also seeks a blanket certificate, under part 284, authorizing self-implementing firm and interruptible storage services, with pregranted abandonment authority.

Avoca is a general partnership formed for the purpose of developing, constructing and operating a natural gas storage facility. Avoca is composed of four partners, including:

(1) JMC Avoca, Inc., a wholly-owned subsidiary of J. Makowski Company, a developer of gas-fired power generation, natural gas supply, transportation and storage projects;

(2) ET Storage, Inc., a wholly-owned subsidiary of Equitrans, Inc., the interstate pipeline subsidiary of Equitable Resources, Inc.;

(3) NGC Storage, Inc., a wholly-owned subsidiary of Natural Gas Clearinghouse, an independent gas marketer and an owner and operator of numerous gas gathering and processing facilities; and,

(4) Trillium Gas Storage, Inc., a subsidiary of Union Gas Limited, an integrated natural gas company in Southwestern Ontario, Canada, providing storage, distribution and transmission service.

Avoca proposes to develop several storage caverns by leaching underground salt deposits. The storage caverns will be located near Avoca, New York. Avoca's facilities will be connected to the H–C or 400 Line of Tennessee Gas Pipeline Company.

The Avoca facility will offer a total storage capacity of 6.72 Bcf and 5.0 Bcf of working gas capacity. The storage capacity is proposed to be made available in three phases:

(1) Phase I—2 Bcf will be available beginning January 1, 1996;

(2) Phase II—an additional 2 Bcf will be available beginning January 1, 1997; and,

(3) Phase III—an additional 1 Bcf will be available beginning January 1, 1998.

Avoca says that it has been marketing its proposed project to the general natural gas industry since June 1993. It notes that one customer, Orange and Rockland Utilities, Inc., has signed a Firm Storage Precedent Agreement for 550,000 Dth (.55 Bcf) of the Phase I capacity. Avoca proposes to offer the remaining 1.45 Bcf of the Phase I capacity during an open season. The open season will be between January 31, 1994 and February 28, 1994. Additional open seasons are proposed for Phases II and III.

Avoca filed a *pro forma* tariff containing the terms and conditions for firm and interruptible storage services. Avoca will allow customers to inject their maximum contract quantities over any consecutive twenty-day period and withdraw their maximum contract quantity over any consecutive ten-day period.

Avoca is proposing market-based pricing for its storage services. Bids for capacity will be evaluated on a net present value formula as described in the *pro forma* tariff. Avoca says that because it lacks market power, the Commission should allow it to negotiate market-based rates with its customers.

Finally, Avoca has filed an Applicant-Prepared Environmental Assessment covering the development of the storage caverns and the construction of the related facilities.

Comment date: January 18, 1994, in accordance with Standard Paragraph F at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or to make any protest with reference to said application should on or before the comment date, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest 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 Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate and/or permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 94–321 Filed 1–6–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket Nos. EC92–21–000, ER92–806–000 and EL94–13–000]

Entergy Services, Inc. and Gulf States Utilities Co.; Initiation of Proceeding and Refund Effective Date

December 30, 1993.

Take notice that on December 15, 1993, the Commission issued an order in the above-indicated dockets initiating an investigation in Docket No. EL94–13–000 under section 206 of the Federal Power Act.

The refund effective date in Docket No. EL94–13–000 will be 60 days after publication of this notice in the **Federal Register.**

Lois D. Cashell,

Secretary.

[FR Doc. 94–316 Filed 1–6–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–89–000]

Northern Natural Gas Co.; Proposed Changes in FERC Gas Tariff

January 3, 1994.

Take notice that Northern Natural Gas Company (Northern) on December 23, 1993, tendered for filing to become part of Northern's FERC Gas Tariff Fifth Revised Volume 1, the following tariff sheets, proposed to be effective January 22, 1994:

First Revised Sheet No. 143
First Revised Sheet No. 144
First Revised Sheet No. 147
First Revised Sheet No. 446

Northern states that such tariff sheets are being submitted to revise Interruptible Deferred Delivery service, Rate Schedule IDD, to allow Shippers to withdraw quantities from their IDD accounts before the quantities are injected.

Northern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211). All such petitions or protests must be filed on or before January 10, 1994. 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 petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94-319 Filed 1-6-94; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. EL93-28-000; EL93-40-000; ER93-465-000, ER93-507-000, ER93-922-000 and EL94-12-000]

Seminole Electric Cooperative, Inc. v. Florida Power & Light Co., Florida Municipal Power Agency v. Florida Power & Light Co., Florida Power & Light Co.; Initiation of Proceeding and Refund Effective Date

January 3, 1994.

Take notice that on December 27, 1993, the Commission issued an order in the above-indicated dockets initiating an investigation in Docket No. EL94-12-000 under section 206 of the Federal Power Act.

The refund effective date in Docket No. EL94-12-000 will be 60 days after publication of this notice in the **Federal Register.**

Lois D. Cashell,

Secretary.

[FR Doc. 94-318 Filed 1-6-94; 8:45 am]

BILLING CODE 6717-01-M

[Cushman Relicense FERC Project No. 460]

Tacoma Public Utilities; Tacoma, WA; Public Conference

January 3, 1994.

Please take notice that on January 27, 1994 from 10 a.m. until 3 p.m. the Commission will convene at Commission Offices, 825 North Capitol Street, NE., Commission Meeting Room 9306, Washington, DC, a public conference regarding the relicense of the Cushman Hydroelectric Project.

Representatives from the U.S. Department of the Interior, Tacoma Public Utilities (license applicant), Intervenors, Indian Tribes and interested parties are invited to attend to discuss the following:

—Implementation of the Congressionally authorized land exchange between the Applicant and the National Park Service.

—Implementation of the Programmatic Cultural Resources Agreement for the Cushman Project.

—Completion of the Commission's ongoing Environmental Impact Statement for the Cushman Project.

—Other subjects that may arise regarding the relicense of the Cushman Project.

This is an open forum chaired by the Commission. Please notify the Commission by January 19 whether you will be attending. The telephone number is (202) 219-2781; please reference the Cushman Conference; give your name and affiliation.

Lois D. Cashell,

Secretary.

[FR Doc. 94-320 Filed 1-6-94; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-4707-3]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared December 20, 1993 through December 24, 1993 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 260-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 10, 1993 (58 FR 18392).

Draft EISs

ERP No. D-AFS-L65212-ID Rating EO2, Prichard Creek Analysis Area, Land and Resource Management Plan, Implementation, Idaho Panhandle National Forests, Wallace Ranger District, Coeur d'Alene River, ID.

Summary: EPA had environmental objections with alternatives 1, 2 & 5 based on the potential for continued and increased adverse impacts on water quality and fisheries. EPA expressed environmental concerns with alternatives 2 and 6 due to potential impacts to water quality and fisheries. Additional information is needed on baseline water quality, cumulative impacts and monitoring.

ERP No. D-UAF-E11032-FL Rating EC2, Homestead Air Force Base (AFB) Disposal and Reuse, Implementation, Dade County, FL.

Summary: EPA had environmental concerns with the impact due to the uncertainty associated with this proposal and the need for additional information. Depending on the particular alternative and/or mix of options which eventuate, additional NEPA evaluation may be necessary.

ERP No. D-USA-L11019-WA Rating EO2, Fort Lewis and Yakima Training Center, Stationing of Mechanized or Armored Combat Forces, COE Section 10 and 404 Permits, Pierce, Thurston, Yakima and Kittitas Counties, WA.

Summary: EPA had environmental objections based on the potential for adverse effects on air quality, the potential for further degradation of water bodies that are already water quality impaired, the potential for destruction of wetlands, and potential adverse effects on sage grouse. EPA requested additional analysis of air quality, water quality and wetland impacts. In addition the final EIS should discuss the effectiveness of the proposed mitigation measures and describe in detail the monitoring plan.

Dated: January 3, 1994

William D. Dickerson,

Deputy Director, Office of Federal Activities

[FR Doc. 94-390 Filed 1-6-94; 8:45 am]

BILLING CODE: 6560-50-P

[ER-FRL-4707-2]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 260-5076 OR (202) 260-5075. Weekly receipt of Environmental Impact Statements Filed December 27, 1993 Through December 31, 1993 Pursuant to 40 CFR 1506.9.

EIS No. 930458, FINAL EIS, BLM, CA, Fort Cady Minerals Solution Mining Project, Construction and Operation, Associated Right-of-Way Grants and Mineral Material Sales Permits, San Bernardino County, CA, Due February 07, 1994, Contact: Ms Edy Seehafer (619) 256-3591.

EIS No. 930459, DRAFT EIS, AFS, MT, Helena National Forest and Elkhorn Mountain portion of the Deerlodge National Forest, Land and Resources Management Plan, Oil and Gas Leasing, Implementation, Several Counties, MT, Due: March 01, 1994.

Contact: Thomas J. Anderson (406) 449–5201.

EIS No. 930460, FINAL EIS, FHW, CA, CA–87/Guadalupe Parkway Upgrading, between Julian Street and US 101 in the City of San Jose, Funding and COE Section 404 Permit, Santa Clara County, CA , Due: February 22, 1994, Contact: John R. Schultz (916) 551–1314.

EIS No. 930461, DRAFT EIS, SFW, IN, Patoka River Wetlands Project, Land Acquisition for Fish and Wildlife Protection and Management, Funding and COE Section 404 Permit, Gibson and Pike Counties, IN, Due: March 08, 1994, Contact: Jeanne Holler (612) 725–3306.

EIS No. 930462, DRAFT EIS, AFS, CO, Sheep Flats, Grove Creek and Valley View Timber Sales, Harvesting Timber and Road Constructions, Grand Mesa, Uncompahgre and Gunnison National Forests, Collban District, Mesa County, CO, Due: February 22, 1994, Contact: Stan Turley (303) 487–3534.

EIS No. 930463, FINAL EIS, AFS, MT, Upper Camp-Duncie Timber Sale, Harvesting Timber and Road Construction, Implementation, Deerlodge National Forest, Phillipsburg Ranger District, Granite County, MT, Due: February 07, 1994, Contact: Thomas W. Heintz (406) 859–3211.

EIS No. 930464, DRAFT EIS, AFS, OR, Newberry National Volcanic Monument Comprehensive Management Plan, Implementation, Deschutes National Forest, Deschutes County, OR, Due: February 28, 1994, Contact: Carolyn Wisdom (503) 383–4702.

Dated: January 3, 1994.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 94–389 Filed 1–6–94; 8:45 am]

BILLING CODE: 6560–50–P

[PF–584; FRL–4740–8]

E.I. DuPont de Nemours & Co., Inc., et al.; Notice of Initial Filing, Amendments, and Withdrawals of Pesticide Petitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces an initial filing of a food/feed additive petition, amended filings and withdrawals of pesticide petitions and a food/feed additive petition, and a correction to a previously published petition that propose establishing regulations for residues of certain pesticide chemicals in or on certain agricultural commodities.

ADDRESSES: By mail, submit written comments to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 1128, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

Information submitted and any comment(s) concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment(s) 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 to the submitter. Information on the proposed test and any written comments will be available for public inspection in Rm. 1128 at the Virginia address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Registration Division (7505W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC. In person, contact the PM named in each petition at the following office location/telephone number:

Product Manager	Office location/telephone number	Address
George LaRocca (PM-13).	Rm. 202, CM #2, 703-305-6100.	1921 Jefferson Davis Hwy., Arlington, VA.
Cynthia Giles-Parker (PM-22).	Rm. 229, CM #2, 703-305-5540.	Do.
Joanne Miller (PM-23).	Rm. 237, CM #2, 703-305-7830.	Do.
Robert Taylor (PM-25).	Rm. 241, CM #2, 703-305-6800.	Do.

SUPPLEMENTARY INFORMATION: EPA has received an initial filing of a food/feed additive petition, amended filings and withdrawals of petitions, and a correction to a previously issued petition as follows:

Initial Filing

1. *FAP 4H5683*. E.I. du Pont de Nemours & Co., Inc., Agricultural Products, P.O. Box 80038, Wilmington, DE 19880-0038, has submitted the food/feed additive petition proposing to amend 40 CFR parts 185 and 186 to establish food/feed additive tolerances for residues of the herbicide hexazinone, 3-cyclohexyl-6-(dimetylamino)-1-methyl-1,3,5-triazine-2,4(1H,3H)-dione, as follows: food additive tolerance for sugarcane molasses at 5 parts per million (ppm) and feed additive tolerances for sugarcane bagasse at 0.5 ppm and sugarcane molasses at 5.0 ppm. (PM 23)

Amended Filings

2. *PP 2F4107*. In the **Federal Register** of June 10, 1992 (57 FR 24644), EPA issued notice of the petition submitted by the Ciba-Geigy Corp., P.O. Box 18300, Greensboro, NC 27419-8300, proposing to amend 40 CFR part 180 by establishing a regulation to permit residues of difenoconazole, 1-(2-[4-chlorophenoxy)-2-chlorophenyl]-4-methyl-1,3-dioxolan-2-yl-methyl)-1H-1,2,4-triazole, in or on wheat forage at 0.1 ppm, wheat straw at 0.1 ppm, barley forage at 0.1 ppm, and barley straw at 0.1 ppm. Ciba-Geigy has submitted an amendment to the petition, proposing to establish additional tolerances as follows: cattle, fat, meat, and meat byproducts (mbyp) at 0.05 ppm; eggs at 0.05 ppm; milk at 0.05 ppm; goats, fat, meat, and mbyp at 0.05 ppm; hogs, fat, meat, and mbyp at 0.05 ppm; horses, fat, meat, and mbyp at 0.05 ppm; poultry, fat, meat, and mbyp at 0.05 ppm; barley grain at 0.1 ppm; and wheat grain at 0.1 ppm. The proposed analytical method for determining residues is gas chromatography with nitrogen/phosphorous detection. (PM 22)

3. *PP 5F3251*. This petition, submitted by Rhone-Poulenc Ag Co., P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle, NC 27709, is a reproposal to amend 40 CFR 180.415 to establish a tolerance for residues of the fungicide aluminum tris (*O*-ethyl phosphonate) in or on hops at 45.0 ppm. Original notice of this petition appeared in the **Federal Register** of May 24, 1985 (50 FR 21503) and proposed amending 40 CFR 180.415 by establishing tolerances for residues of the fungicide in or on the commodities dried hops at 20.0 ppm and fresh or green hops at 10.0 ppm. The proposed analytical method for determining residues is gas chromatography. (PM 22)

4. *PP 7F3530*. In the **Federal Register** of June 17, 1987 (52 FR 23077), EPA issued notice of filing of the petition by

Janssen Pharmaceutica, 40 Kingsbridge Rd., Piscataway, NJ 08854, proposing to amend 40 CFR 180.413 by establishing a regulation to permit the residues of the fungicide imazalil (1-(2-(2,4-dichlorophenyl)-2-(2-propenyloxy)ethyl)-1H-imidazole) and its metabolite 1-(2,4-dichlorophenyl)-2-(1H-imidazole-1-yl)-1-ethanol in or on melons (whole) at 5.0 ppm; melons (pulp) at 0.7 ppm; corn, sweet, kernels and cobs at 0.05 ppm; corn, sweet, forage at 0.05 ppm; citrus (whole) at 10.0 ppm citrus (pulp) at 0.2 ppm; citrus (peel) at 10.0 ppm; and imazalil (1-(2-(2,4-dichlorophenyl)-2-(2-propenyloxy)ethyl)-1H-imidazole, its metabolite 1-(2,4-dichlorophenyl)-2-(1H-imidazole-1-yl)-1-ethanol, and (3-(1-(2,4-dichlorophenyl)-2-(1H-imidazole-1-yl)ethoxy)-1,2-propane diol) in or on milk and meat, fat, and meat byproducts (except liver) of cattle, goats, hogs, horses, and sheep at 0.02 ppm and liver of cattle, goats, hogs, horses, and sheep at 1.5 ppm. Janssen Pharmaceutica has submitted an amended petition proposing to establish additional tolerances for the combined residues of the fungicide imazalil, 1-(2-(2,4-dichlorophenyl)-2-(2-propenyloxy)ethyl)-1H-imidazole and its metabolite 1-(2,4-dichlorophenyl)-2-(1H-imidazole-1-yl)-1-ethanol in or on the following raw agricultural commodities: melons (post-harvest) at 5.0 ppm; corn, fresh (including sweet kernels plus corn with husk removed) at 0.2 ppm; corn, forage at 0.2 ppm; and corn, fodder at 0.2 ppm. The proposed method for determining residues is liquid gas chromatography. (PM 22)

Withdrawn Petitions

5. *PP 4F3021*. Notice of the petition, originally filed by Shell Oil Co. and appearing in the **Federal Register** of February 23, 1984 (49 FR 6795), proposed to amend 40 CFR 180.379 by establishing tolerances for residues of the insecticide cyano (3-phenoxyphenyl) methyl-4-chloro-alpha-(1-methylethyl) benzeneacetate in or on the following commodities: barley, forage at 40.0 ppm; barley, grain at 5.0 ppm; barley, hay at 40.0 ppm; barley, straw at 40.0 ppm; wheat, forage at 25.0 ppm; wheat, grain at 1.0 ppm; wheat, hay at 25.0 ppm; and wheat, straw at 25.0 ppm. This petition was also listed in a notice, "Pesticide Petitions For Which No Correspondence Has Been Received" (56 FR 43764, Sept. 4, 1991). The petition was originally filed by Shell, and DuPont Agricultural Products, Walker's Mill, Barley Mill Plaza, P.O. Box 80038, Wilmington, DE 19880-0038, was to provide bridging residue data between esfenvalerate and fenvalerate. However, DuPont has decided not to add this data and has requested that the petition be withdrawn without prejudice to future filing. (PM 13)

6. *FAP 4H5423*. Notice of the petition, originally filed by Shell Oil Co. and appearing in the **Federal Register** of February 23, 1984 (49 FR 6795), proposed to amend 21 CFR part 561 (later redesignated as 40 CFR part 186) by establishing a tolerance for residues of the insecticide cyano (3-phenoxyphenyl) methyl-4-chloro-alpha-(1-methylethyl) benzeneacetate in or on wheat milled products (except flour) at 5.0 ppm. This petition was also listed in a notice, "Pesticide Petitions For Which No Correspondence Has Been Received" (56 FR 43765, Sept. 4, 1991). The petition was originally filed by Shell, and DuPont Agricultural Products, Walker's Mill, Barley Mill Plaza, P.O. Box 80038, Wilmington, DE 19880-0038, was to provide bridging residue data between esfenvalerate and fenvalerate. However, DuPont has decided not to add this data and has requested that the petition be withdrawn without prejudice to future filing. (PM 13).

Correction

7. *PP 3F4238*. Notice appearing in the **Federal Register** of October 21, 1993 (58 FR 54355) is corrected to read as follows: Zeneca AG Products, Concord Pike and New Murphy Rd., P.O. Box 751, Wilmington, DE 19897, proposes to amend 40 CFR part 180 by establishing a regulation to permit the residues of Touchdown Herbicide (containing glyphosate-trimesium (formerly SC-0224 of sulfonate)) in or on stone fruit at .05 ppm. (PM-25)

List of Subjects

Environmental protection, Agricultural commodities, Pesticides and pests.

Authority: 7 U.S.C. 136a.

Dated: December 21, 1993.

Stephen L. Johnson,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 94–279 Filed 1–6–94; 8:45 am]

BILLING CODE 6560–50–F

[OPP–180913; FRL 4750–7]

Receipt of Application for Emergency Exemption to Use Imidacloprid Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the Texas Department of Agriculture (hereafter referred to as the "Applicant") to use the pesticide imidacloprid (CAS 105827–78–9) to treat up to 38,000 acres of cucurbits (cucumbers, melons, and squash) to control the sweet potato whitefly *Bemesia tabaci*. The Applicant proposes the use of a new chemical; therefore, in accordance with 40 CFR 166.24, EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before January 24, 1994.

ADDRESSES: Three copies of written comments, bearing the identification notation "OPP–180913," should be submitted by mail to: Public Docket and Freedom of Information Section, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain Confidential Business Information must be provided by the submitter for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments filed pursuant to this notice will be available for public inspection in Rm. 1132, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Andrea Beard, Registration Division (7505W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Floor 6, Crystal Station #1, 2800 Jefferson Davis Highway, Arlington, VA, (703) 308–8791.

SUPPLEMENTARY INFORMATION: Pursuant to section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), the Administrator may, at her discretion, exempt a state agency from any registration provision of FIFRA if she determines that emergency conditions exist which require such exemption. The Applicant has requested the Administrator to issue a specific

exemption for the use of imidacloprid on cucurbits to control the sweet potato whitefly (SPWF). Information in accordance with 40 CFR part 166 was submitted as part of this request.

The SPWF is common on many wild and cultivated crops such as tomatoes, cotton, cucurbits and solanaceae. The SPWF was first confirmed in Texas in 1987. The Applicant states that in 1990, cotton growers in the Lower Rio Grande Valley began to experience significant crop losses due to infestation by the SPWF. The sweet potato whitefly (SPWF) is a relatively new pest on cucurbits. The SPWF has caused severe economic damage to several other commodities nationwide including cotton, lettuce, squash, beans, peanuts, and ornamentals. The Applicant states that in 1991, SPWF severely infested many more fields of cotton and caused severe devastation to fall vegetable crops upon harvesting of the cotton. According to the Applicant, SPWF populations for this season are expected to be widespread, and heavy enough to cause serious economic loss to the cucurbit crop. SPWF causes damage through feeding activities, and also indirectly through the production of a honeydew, which encourages growth of sooty mold and other fungi. The Applicant claims that adequate control of the SPWF is not being achieved with the currently registered compounds. The Applicant estimates that losses in Texas cucurbit production could reach $18.6 million in net revenue if the SPWF is not adequately controlled, and is requesting the use of imidacloprid to control the SPWF.

Along with this request, the Applicant has also requested a specific exemption for use of a different chemical (bifenthrin) on cucurbits, also for control of the SPWF. The Applicant justifies requests for two chemicals, by stating that the imidacloprid would be applied at or near planting/transplanting, as a soil-incorporated treatment; since imidacloprid is a systemic, it would be taken up by the small seedlings, and protect them from SPWF feeding during this early stage of development. The Applicant states that bifenthrin, being nonsystemic, is only of use as a foliar spray, which is of little value during the early phase of development, when there is limited leaf area. Thus the Applicant proposes that use of bifenthrin be allowed later in the crop season, as a foliar treatment, to maintain season-long control. The Applicant indicates that imidacloprid would not be of use as both a soil treatment and a foliar spray, because its mode of action is such that resistance development is a concern. The Registrant of imidacloprid will not support the use of this chemical further into the growing season for this reason.

The Applicant proposes to apply imidacloprid at a maximum rate of 0.25 lb. (dry) active ingredient (16 fluid oz. of product) per acre with a maximum of one application per crop season on a total of 38,000 acres of cucurbits. It is possible to produce two cucurbit crops per calendar year on a given acre, and therefore, the acreage could potentially receive two applications of imidacloprid per calendar year. Therefore, use under this exemption could potentially amount to a maximum total of 19,000 lbs. of active ingredient, or 9,500 gal. of product. This is the first time that the Applicant has applied for the use of imidacloprid on cucurbits. However, the Applicant requested, and was granted, specific exemptions for the use of bifenthrin for SPWF control in cucurbits for the past two years (this is the third consecutive year for the request for bifenthrin).

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 require publication of a notice of receipt of an application for a specific exemption proposing use of a new chemical (i.e., an active ingredient not contained in any currently registered pesticide). Such notice provides for opportunity for public comment on the application. Accordingly, interested persons may submit written views on this subject to the Field Operations Division at the address above.

The Agency, accordingly, will review and consider all comments received during the comment period in determining whether to issue the emergency exemption requested by the Texas Department of Agriculture.

List of Subjects

Environmental protection, Pesticide and pests, Crisis exemptions.

Dated: December 20, 1993.

Stephen L. Johnson,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 94–379 Filed 1–6–94; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 1993]

Petitions for Reconsideration and Clarification of Actions in Rulemaking Proceedings

January 3, 1994.

The petition for reconsideration published on December 28, 1993, 58 FR 68649, is withdrawn because of an incorrect subject matter and is replaced with the following:

Petitions for reconsideration and clarification have been filed in the Commission rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of these documents are available for viewing and copying in room 239, 1919 M Street, NW., Washington, DC or may be purchased from the Commission's copy contractor ITS, Inc. (202)857–3800. Opposition to these petitions must be filed January 24, 1994. See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Simplification of the Depreciation Prescription Process (CC Docket No. 92–296).

Petitons for Reconsideration: Number of Petitions Filed: 10.

Federal Communications Commission.

LaVera F. Marshall,

Acting Secretary.

[FR Doc. 94–332 Filed 1–6–94; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1006–DR]

Missouri; Amendment to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Missouri, (FEMA–1006–DR), dated December 1, 1993, and related determinations.

EFFECTIVE DATE: December 16, 1993.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3606.

SUPPLEMENTARY INFORMATION: The notice of a major disaster for the State of Missouri dated December 1, 1993, is

hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of Missouri:

Bulter, Crawford, Dent, Franklin, Perry, Stoddard, Texas, and Washington Counties for Individual Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Frank H. Thomas,

Deputy Associate Director, Response and Recovery Directorate.

[FR Doc. 94–358 Filed 1–6–94; 8:45 am]

BILLING CODE 6718–02–M

[FEMA–1007–DR]

Virginia; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Virginia (FEMA–1007–DR), dated December 22, 1993, and related determinations.

EFFECTIVE DATE: December 22, 1993.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 22, 1993, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), as follows:

I have determined that the damage in certain areas of the Commonwealth of Virginia, resulting from severe storms and tornadoes on August 6, 1993, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("the Stafford Act"). I, therefore, declare that such a major disaster exists in the Commonwealth of Virginia.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated area. Public Assistance may be designated at a later date, if warranted. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Robert Gunter of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Virginia to have been affected adversely by this declared major disaster:

The city of Petersburg for Individual Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

James Lee Witt,

Director.

[FR Doc. 94–357 Filed 1–6–94; 8:45 am]

BILLING CODE 6718–02–M

GENERAL ACCOUNTING OFFICE

Notice of Transmittal of the United States General Accounting Office Compliance Report to the President and the Congress Covering Reports Issued During the Session of Congress Ending November 26, 1993

Pursuant to the Omnibus Budget Reconciliation Act of 1990, section 254(b), the United States General Accounting Office hereby reports that it has submitted its Compliance Report covering reports issued during the session of Congress ending November 26, 1993 to the President of the United States, the President of the Senate, and the Speaker of the House of Representatives.

Paul L. Posner,

Director, Budget Issues, Accounting and Information Management Division.

[FR Doc. 94–402 Filed 1–6–94; 8:45 am]

BILLING CODE 1610–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disabilities Prevention Program Project; Workshop

The National Center for Environmental Health (NCEH) of the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disabilities Prevention Program Project Workshop.

Times and dates: 10 a.m.–5 p.m., January 23, 1994, 8:30 a.m.–4 p.m., January 24, 1994, 8:30 a.m.–12:30 p.m., January 25, 1994.

Place: Swissotel Atlanta, 3391 Peachtree Road, NE., Atlanta, Georgia 30326.

Status: The meeting will be open to the public for observation, participation, and comment, limited only by the space available.

Purpose: The project workshop will provide a forum for presentations and discussions about primary and secondary disabilities, public health methods for prevention of disabilities, and current and future program priorities. In addition, individualized technical assistance related to project issues will be available to grantees upon request.

Matters to be discussed: The workshop will include discussions of secondary conditions, surveillance for developmental disabilities, surveillance for head and spinal cord injuries, community interventions, State strategic plans, and project management issues.

Contact person for further information: Larry Burt, Program Manager, Disabilities Prevention Program, NCEH, CDC, 4770 Buford Highway, Mailstop F–29, Atlanta, Georgia 30341, telephone (404) 488–7080 or FAX (404) 488–7075.

Dated: January 3, 1994.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 94–408 Filed 1–6–94; 8:45 am]

BILLING CODE 4160–18–M

Health Care Financing Administration

[OPA–009–N]

Medicare Program; Request for Nominations for Members for the Practicing Physicians Advisory Council

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice.

SUMMARY: In accordance with section 1868(a) of the Social Security Act, this notice requests nominations from medical organizations representing physicians for individuals to serve on the Practicing Physicians Advisory Council. Four vacancies will occur on February 28, 1994.

DATES: Nominations from medical organizations will be considered if we

receive them at the appropriate address, as provided below, no later than 5 p.m. on February 7, 1994.

ADDRESSES: You may mail or deliver nominations for membership to the following address: Health Care Financing Administration, Office of the Administrator, Attention: Martha DiSario, room 314–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Martha DiSario, Executive Director, Practicing Physicians Advisory Council, (202) 690–7874.

SUPPLEMENTARY INFORMATION: Section 4112 of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) (Pub. L. 101–508), enacted on November 5, 1990, added a new section 1868 to the Social Security Act (the Act), which established the Practicing Physicians Advisory Council (the Council). The Council advises the Secretary of the Department of Health and Human Services (the Secretary) on proposed regulations and manual issuances related to physicians' services. An advisory committee created by the Congress, such as this one, is subject to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), and, since this committee advises the Secretary, it is also subject to our regulations in 45 CFR part 11—Committee Management.

Section 1868(a) of the Act provides that the Council must consist of 15 physicians, each of whom must have submitted at least 250 claims for physicians' services under Medicare in the previous year. At least 11 Council members must be physicians as defined in section 1861(r)(1) of the Act, that is, State-licensed physicians of medicine or osteopathy. The other four Council members may include dentists, podiatrists, optometrists, and chiropractors. The Council must include both participating and nonparticipating physicians, and physicians practicing in rural and underserved urban areas.

In addition, section 1868(a) of the Act provides that nominations to the Secretary for Council membership must be made by medical organizations representing physicians. This is an invitation to all medical organizations representing physicians to submit nominees for membership on the Council. Current members whose terms expire in 1994 will be considered for reappointment. Final selection from among qualified candidates for each vacancy will be determined by the expertise required to meet specific agency needs and in a manner to ensure appropriate balance of membership. From these nominations, the Secretary will appoint the members of the Council. Each nomination must state that the nominee has expressed a willingness to serve as a Council member and has provided a short resume or description of the nominee's experience. To permit evaluation of possible sources of conflict of interest, potential candidates will be asked to provide detailed information concerning financial holdings, consultant positions, research grants, and contracts.

Section 1868(b) of the Act provides that the Council meet once each calendar quarter, as requested by the Secretary, to discuss proposed changes in regulations and manual issuances that relate to physicians' services.

Section 1868(c) of the Act provides for payment of expenses and a per diem allowance for Council members at a rate equal to payment provided to members of other advisory committees. In addition to making these payments, the Department of Health and Human Services provides management and support services to the Council.

(Section 1868 of the Social Security Act (42 U.S.C. 1395ee); 5 U.S.C. App. 2; and 45 CFR part 11)

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program.)

Dated: December 20, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

[FR Doc. 94–335 Filed 1–6–94; 8:45 am]

BILLING CODE 4120–01–P–M

[OPHC–030–N]

Health Maintenance Organizations: Qualification Determinations and Compliance Actions During the Period July 1, 1993, through September 30, 1993

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice.

SUMMARY: This notice sets forth the names, addresses, service areas or modified service areas, and dates of qualification or expansion of entities determined to be Federally qualified health maintenance organizations (FQHMOs) during the period July 1, 1993 through September 30, 1993. Additionally, this notice sets forth compliance actions taken by the Office of Prepaid Health Care Operations and Oversight for the period July 1, 1993 through September 30, 1993. This notice is being published in accordance with our regulations at 42 CFR 417.144 and 417.163, which require publication in the **Federal Register** of certain determinations relating to FQHMOs.

FOR FURTHER INFORMATION CONTACT: Christine Boesz (202) 619–0840.

SUPPLEMENTARY INFORMATION:

A. Qualification Determinations

As part of our evaluation and determination of whether an entity qualifies as a Federally qualified health maintenance organization (FQHMO), our regulations set forth at 42 CFR 417.144(e), promulgated under title XIII of the Public Health Service Act (the Act) (42 U.S.C. 300e), require publication in the **Federal Register** of the names, addresses and descriptions of the service areas of new FQHMOs. We interpret this requirement as applying to revisions of service areas of currently approved FQHMOs, as well. Our last notice containing this information was published on October 5, 1993 (58 FR 51833).

There are three categories of FQHMOs: operational, transitionally qualified, and preoperational. Definitions of these terms are set forth at 42 CFR 417.141.

The Office of Prepaid Health Care Operations and Oversight has determined that the following entities are operational FQHMOs under section 1310(d) of the Act (42 U.S.C. 300e–9(d)) or have expanded their previously qualified service areas:

Expansions and Additions of Service Area Regional Components by Existing FQHMOs

1. *FHP, Inc. (Arizona)* (Group Model, Requirements are set forth at section 1310(b)(1) of the Act), P.O. Box 52078, Phoenix, Arizona 85072–2078. FHP's Federally qualified service area has been expanded to include the following counties: Maricopa, Pima, Pinal.

Date of qualification for service area expansion: July 27, 1993.

2. *National Med, Inc. (NM)* (Group Model; Requirements are set forth at section 1310(b)(1) of the Act), 1005 West Orangebury, suite B, Modesto, CA 95350. NM's Federally qualified service area has been expanded to include—

a. Stanislaus County.

b. The following zip codes in portions of Merced and San Joaquin counties:

Merced

95303	95324
95312	95334
95315	95374
95322	

San Joaquin

95230	95336
95231	95376
95320	95385
95330	

Date of qualification for service area expansion: August 27, 1993.

3. *PacifiCare* (Group Model; Requirements are set forth at section 1310(b)(1) of the Act), 4000 Civic Center Dr., suite 201, San Rafael, CA 94903–4133. PacifiCare's Federally qualified service area has been expanded to include—

a. The following counties: Alameda, Contra Costa, Sacramento, San Francisco.

b. The following zip codes in Santa Clara County:

Santa Clara

95002	95008	95009	95013	95014	95015
95016	95020	95021	95026	95030	95031
95032	95035	95036	95037	95038	95042
95044	95046	95050	95051	95052	95054
95055	95056	95070	95071	95100	95101
95102	95103	95106	95108	95109	95110
95111	95112	95113	95114	95115	95116
95117	95118	95119	95120	95121	95122
95123	95124	95125	95126	95127	95128
95129	95130	95131	95132	95133	95134
95135	95136	95137	95138	95139	95140
95141	95142	95148	95150	95151	95152
95153	95154	95155	95156	95157	95158
95159	95160	95161	95164	95170	95171
95172	95173				

Date of qualification for service area expansion: September 15, 1993.

B. Compliance Actions

The Office of Prepaid Health Care Operations and Oversight gives notice of the following compliance actions affecting FQHMOs for the period July 1, 1993, through September 30, 1993:

1. *Notice of Reestablished Compliance:*

Organization	Date re-estab-lished
Kaiser Foundation Health Plan of Georgia, Inc., Atlanta, GA	9/2/93

C. Availability of Additional Information

A cumulative list of FQHMOs and additional information may be obtained by writing to the following address: Office of Prepaid Health Care Operations and Oversight, Health Care Financing Administration, Room 4406 Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201.

The list also may be obtained by visiting that office between the hours of 8:30 a.m. and 4:30 p.m. Monday through Friday, except for Federal holidays. Interested persons may contact Margie Sharif for an appointment by telephoning (202) 619–0845.

Authority: Title XIII of the Public Health Service Act (42 U.S.C. 300e).

Dated: December 29, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

[FR Doc. 94–336 Filed 1–6–94; 8:45 am]

BILLING CODE 4120–01–P–M

National Institutes of Health

National Eye Institute; Meeting of the Board of Scientific Counselors

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, National Eye Institute (NEI), January 10 and 11, 1994, in the NEI Conference Room, Building 31, Room 6A35, National Institutes of Health, Bethesda, Maryland.

This meeting will be open to the public on January 10 from 9 a.m. until approximately 4 p.m. for general remarks by the Institute's Director, Intramural Research Programs, on matters concerning the intramural programs of the NEI. Attendance by the public will be limited to space available.

In accordance with provisions set forth in sec. 552b(c)(6), Title 5, U.S.C. and sec. 10(d) of Public Law 94–463, the meeting will be closed to the public on January 10 from approximately 4 p.m. until recess and on January 11 from 8:30 a.m. until adjournment for the review, discussion, and evaluation of individual projects conducted by the Laboratory of Retinal Cell and Molecular Biology. These evaluations and discussions could reveal personal information concerning individuals associated with the projects, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Consequently, this meeting is concerned with matters exempt from mandatory disclosure.

Ms. Lois DeNinno, Committee Management Officer, NEI, EPS/350, Bethesda, Maryland 20892, (301) 496–5301, will provide a summary of the meeting, roster of committee members, and substantive program information upon request. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. DeNinno in advance of the meeting.

This notice is being published later than fifteen days prior to the meeting due to difficulty of coordinating the members' schedules.

(Catalog of Federal Domestic Assistance Program No. 93.867, Vision Research; National Institutes of Health.)

Dated: January 4, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–521 Filed 1–6–94; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N–93–1917; FR–3350–N–65]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: January 7, 1994.

ADDRESSES: For further information, contact Mark Johnston, Department of Housing and Urban Development, room 7262, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–4300; TDD number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: December 30, 1993.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 94–1 Filed 1–6–94; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Operation of Glen Canyon Dam, Colorado River Storage Project, Arizona

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability and notice of public hearings on the draft environmental impact statement; INT–DES–94–01.

SUMMARY: In response to a July 27, 1989, directive from the Secretary of the Interior and pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, and in accordance with the Grand Canyon Protection Act of 1992, the Bureau of Reclamation (Reclamation) has prepared a draft environmental impact statement (DEIS) on the operation of Glen Canyon Dam, Colorado River Storage Project in Arizona. The DEIS evaluates nine alternatives, including no action, and analyzes their impacts on downstream environmental and cultural resources and Native American interests in Glen and Grand Canyons. Seven public hearings will be held to receive comments from interested organizations and individuals on the environmental impacts of the proposal.

DATES AND LOCATIONS: A 90-day public review period begins with the publication of this notice. Written comments on the DEIS should be submitted to the Colorado River Studies Office by April 11, 1994.

Public hearings on the DEIS will be held on the following dates at the locations indicated. Address requests to speak at the hearings to the Colorado River Studies Office at the address provided on the following page.

- March 7, 1994, Los Angeles, California: Burbank Airport Hilton, 2500 Hollywood Way, Burbank CA 91505, 7 to 9:30 p.m.
- March 9, 1994, San Francisco, California: Fort Mason Center, Golden Gate National Recreation Area, San Francisco CA 94123, 7 to 9:30 p.m.
- March 14, 1994, Phoenix, Arizona: YWCA, 9440 North 25th Avenue, Phoenix AZ 91505, 7 to 9:30 p.m.
- March 15, 1994, Flagstaff, Arizona: Little America, 2515 East Butler Avenue, Flagstaff AZ 86003, 7 to 9:30 p.m.
- March 17, 1994, Salt Lake City, Utah: Salt Lake Hilton, 150 West 500 South, Salt Lake City UT 84101, 7 to 9:30 p.m.
- March 21, 1994, Denver, Colorado: Marriott Denver West, 1717 Denver West Marriott Boulevard, Golden CO 80401, 7 to 9:30 p.m.
- March 24, 1994, Washington, DC: Dirksen Senate Office Building, room 562, 2 to 4:30 p.m.; Stouffer Concourse (Crystal City), 2399 Jefferson Davis Highway, Arlington VA 22202, 7 to 9:30 p.m.

ADDRESSES: Written comments on the DEIS, requests for copies, and requests to testify should be addressed to: Mr. Lee J. McQuivey, Colorado River Studies Office, Bureau of Reclamation, Attention: UC–1500, PO Box 11568, 125 South State Street, Salt Lake City UT 84147; telephone: (801) 524–5479.

Copies of the DEIS are available for inspection at the address above and also at the following locations:

- Office of the Commissioner, Bureau of Reclamation, Technical Liaison Division, 1849 C Street, NW., Washington DC 20240.
- Denver Office, Bureau of Reclamation, Library, room 167, Building 67, Denver Federal Center, Denver CO 80225.
- Upper Colorado Regional Office, Bureau of Reclamation, Library, room 7101, 125 South State Street, Salt Lake City UT 84147.
- Center for Environmental Studies, Arizona State University, 905 South Mill Avenue, Tempe AZ 85287–3211.
- Glen Canyon Environmental Studies Office, Security Bank Building, 121 East Birch, room 307, Flagstaff AZ 86002.

Libraries

Arizona

Arizona Department of Water Resources Library, Phoenix.
Arizona State Library, Department of Library, Archives and Public Records, Phoenix.
Arizona State Regional Library for the Blind and Physically Handicapped, Phoenix.
Arizona State University, Noble Science and Engineering Library, Tempe.
Arizona State University, Hayden Library, Tempe.
Flagstaff City-Coconino County Public Library, Flagstaff.
Grand Canyon Community Library, Grand Canyon.
Maricopa County Library, Phoenix.
Mesa Public Library, Mesa.
Mohave County Library/Kingman Public Library, Kingman.
Northern Arizona University, Cline Library, Flagstaff.
Page Public Library, Page.
Phoenix City Library, Phoenix.
Scottsdale Public Library, Scottsdale.
Tempe Public Library, Tempe.
Tucson Public Library, Tucson.
University of Arizona Library, Tucson.

California

California State Library, Sacramento.
California State University, Hayward Library, Hayward.
California State University, University Library, Los Angeles.
Colorado River Board of California Library, Glendale.
Environmental Protection Agency, Regional IX Library, San Francisco.
Los Angeles Public Library, Los Angeles.
Los Angeles Public Library, Water and Power Section, Los Angeles.
San Francisco Public Library, San Francisco.
Stanford University Libraries, Stanford.
University of California, General Library, Berkeley.
University of California, University Research Library, Los Angeles.
University of California, Shields Library, Davis.
University of Southern California, Doheny Memorial Library, Los Angeles.

Colorado

Colorado State University Libraries, Fort Collins.
Denver Central Library, Denver.
University of Colorado at Boulder, Norlin Library, Boulder.
University of Denver, Penrose Library, Denver.
U.S. Air Force Academy, Academy Library, Colorado Springs.

Nevada

Boulder City Library, Boulder City.
Clark County Library District, Las Vegas.
Nevada State Library, Carson City.
University of Nevada, Reno Library, Reno.
University of Nevada at Las Vegas, James Dickinson Library, Las Vegas.

New Mexico

Albuquerque Public Library, Albuquerque.
New Mexico State Library, Santa Fe.
New Mexico State University, Las Cruces.
University of New Mexico, Albuquerque.

Utah

Brigham Young University, Harold B. Lee Library, Provo.
Cedar City Public Library, Cedar City.
Kanab City Library, Kanab.
Moab Public Library, Moab.
Salt Lake City Public Library, Salt Lake City.
Salt Lake County Library System, Salt Lake City.
Southern Utah State University Library, Cedar City.

University of Utah, Marriott Library, Salt Lake City.

Utah State University, Merrill Library, Logan.

Utah State Library, Salt Lake City.

Washington County Library, St. George.

Weber State University Stewart Library Ogden.

Wyoming

Laramie County Library System, Cheyenne.

Rock Springs Public Library, Rock Springs.

University of Wyoming, Coe Library, Laramie.

Wyoming State Library, Cheyenne.

Washington, DC

District of Columbia Public Library.

Library of Congress.

Natural Resources Library, Department of the Interior.

Other States—any U.S. Government Regional Depository Library.

FOR FURTHER INFORMATION CONTACT: Mr. Lee J. McQuivey, Colorado River Studies Office, Bureau of Reclamation, PO Box 11568, Salt Lake City UT 84147; telephone: (801) 524–5479.

SUPPLEMENTARY INFORMATION: The Secretary of the Interior called for a reevaluation of dam operations to determine specific options that could be implemented, consistent with law, to minimize adverse impacts on the downstream environmental and cultural resources and Native American interests in Glen and Grand Canyons.

In accordance with the National Environmental Policy Act and the Grand Canyon Protection Act of 1992, Reclamation has prepared a DEIS in cooperation with other Interior agencies—Bureau of Indian Affairs, Fish and Wildlife Service, and National Park Service. Other cooperating agencies are the Department of Energy's Western Area Power Administration, Arizona Game and Fish Department, Hopi Tribe, Hualapai Tribe, Navajo Nation, Pueblo of Zuni, San Juan Southern Paiute Tribe, and the Southern Utah Paiute Consortium.

The DEIS presents analyses of the impacts of nine alternatives for operating Glen Canyon Dam. Two alternatives, including no action, would allow unrestricted hourly fluctuations in riverflow; four would provide various levels of restricted fluctuating flows; and three would provide steady flows. Additional measures have been combined with the alternative operations, where appropriate, to provide additional resource protection or enhancement. The preferred alternative is the Modified Low Fluctuating Flow Alternative.

Hearing Process Information

Those wishing to request time to make comments at the public hearing should write or call the Bureau of Reclamation Regional Office in Salt Lake City, Utah. The address and telephone number are listed above. Requests should be received on or before February 28, 1994, and should indicate where the speaker wishes to appear. Speakers will be called upon to present their comments in the order in which their requests were received. Requests to speak also may be made at each hearing. These commentors will be called on after the advance request speakers. Oral comments will be limited to 5 minutes per individual.

For inclusion in the hearing record, written comments from those unable to attend the hearing or wishing to supplement their oral presentation should be received at the Bureau of Reclamation Regional Office in Salt Lake City by April 11, 1994.

Dated: January 3, 1994.

Jonathan Deason,

Director, Office of Environmental Policy and Compliance.

[FR Doc. 94–306 Filed 1–6–94; 8:45 am]

BILLING CODE 4310–94–M

Fish and Wildlife Service

Notice of Availability of Draft Environmental Impact Statement for the Proposed Patoka River National Wetlands Project, Pike and Gibson Counties, Indiana

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service (Service) has prepared a Draft Environmental Impact Statement (DEIS), which is available for public review. The DEIS evaluates a proposal to establish the Patoka River National Wetlands Project (Project) in Pike and Gibson Counties in southwest Indiana. Four alternatives, including a No Action alternative are being considered. The three action alternatives are aimed at protecting and enhancing the valuable resources of the Patoka River valley. The Project encompasses one of the last remaining stretches of bottomland forest in Indiana and the Midwest. It provides some of the best wood duck production habitat in the state and is used by endangered species including bald eagles. Alternative 4 is the Service's preferred alternative. It proposes to acquire 22,083 acres of land from willing sellers. Full acquisition may take 20 years or more. About 6,800 acres would be purchased as the Patoka River National Wildlife Refuge. Additionally, wildlife management areas would be purchased from within an adjacent 15,283-acre selection area. Project lands would be managed to protect and enhance bottomland hardwood forests, other wetland habitat, and complementary uplands. The goal would be to provide essential food, cover and resting areas for migratory birds, threatened and endangered species, and resident fish and wildlife; and to improve outdoor recreation and education opportunities.

DATES: Public comment on the DEIS is solicited pursuant to National Environmental Policy Act regulations (40 CFR 1503.1). All agencies and individuals are urged to provide comments and suggestions for improving this DEIS. The formal comment period extends for a 60-day period from the date of distribution of the DEIS. All comments received by March 8, 1994, will be considered in preparation of the Final EIS.

Formal comments will be received at any time during this 60-day period in person or by mail at the Project and Regional Offices as well as at the scheduled public open house and meeting. The Project Office in Oakland City, Indiana, is open weekdays from 8 a.m. to 4:30 p.m. The Regional Office in the Twin Cities, Minnesota, is open weekdays from 7:30 a.m. to 4 p.m. In addition, the Service will hold a public open house on Friday, February 11, 1994, from 9 a.m. to 7 p.m. and Saturday, February 12, 1994, from 8 a.m. to 12 m. (noon) at the Wirth Park Community Building on the west side of Oakland City, Indiana, for general information. A public meeting will be held on Saturday, February 12, 1994, starting at 1:30 p.m. in the East Gibson School cafeteria in Oakland City to receive verbal and written comments.

WRITTEN COMMENTS SHOULD BE ADDRESSED TO: Project Manager, U.S. Fish and Wildlife Service, Patoka River National Wetlands Project, 510½ West Morton, Box 217, Oakland City, Indiana 47660.

FOR FURTHER INFORMATION CONTACT: William McCoy, Project Manager, Patoka River National Wetlands Project, at the above address, telephone (812) 749–3199; or Jeanne Holler, Wildlife Biologist, U.S. Fish and Wildlife Service, Bishop Henry Whipple Federal Building, 1 Federal Drive, Fort Snelling, Minnesota 55111–4056, telephone (612)

725–3306. Individuals wishing copies of this DEIS for review should contact Mr. McCoy or Ms. Holler. Copies have been sent to all landowners and renters within the proposed Project boundaries; to Federal, state and local government officials; interested parties; and to all individuals, agencies, and organizations who requested copies.

Dated: December 22, 1993.

Sam Marler,

Regional Director.

[FR Doc. 94–207 Filed 1–6–94; 8:45 am]

BILLING CODE 4310–55–M

National Park Service

Missouri National Recreational River Advisory Group Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice sets the schedule for the forthcoming meeting of the Missouri National Recreational River Advisory Group. Notice of this meeting is required under the Federal Advisory Committee Act (Pub. L. 92–463).

Meeting Date and Time: Wednesday, February 2, 1994; 1:30 p.m. until 4:30 p.m.

ADDRESS: City Hall Meeting Room, 106 Sheridan Street, Wagner, South Dakota.

(Inclement weather date: February 10, 1994, same time and location.) The agenda for the meeting consists of discussion of the advisory group's response to the draft management alternatives and draft boundary alternatives which were presented to the group at the last meeting (12/8/93); an update on the status of the Missouri Recreational River general management plan presented by the National Park Service noting any changes since the previous meeting; additional public comment received from the newsletter; the opportunity for public comment; and a proposed agenda, date, time, and location for the next meeting.

The meeting is open to the public. Interested persons may make oral/written presentation to the Commission or file written statements. Requests for time for making presentations may be made to the Superintendent prior to the meeting or to the Chair at the beginning of the meeting.

The meeting will be recorded for documentation and a summary in the form of minutes will be transcribed for dissemination. Minutes of the meeting will be made available to the public after approval by the Commission members. Copies of the minutes may be requested by contacting the Superintendent. An audio tape of the meeting will be available at the headquarters office of the Niobrara/Missouri National Scenic Riverways in O'Neill, Nebraska.

SUPPLEMENTARY INFORMATION: The advisory commission was established by the law that established the Missouri National Recreational River, Public Law 102–50. The purpose of the group, according to its charter, is to advise the Secretary of the Interior on matters pertaining to the development of a management plan, and management and operation of the recreational river. The Missouri National Recreational River is the 39-mile, free-flowing segment of the Missouri from Fort Randall Dam to the vicinity of Springfield in South Dakota.

FOR FURTHER INFORMATION CONTACT: Warren Hill, Superintendent, Niobrara/Missouri National Scenic Riverways, P.O. Box 591, O'Neill, Nebraska 68763–0591, (402)–336–3970.

Dated: December 27, 1993.

David N. Given,

Acting Regional Director, Midwest Region.

[FR Doc. 94–405 Filed 1–6–94; 8:45 am]

BILLING CODE 4310–70–P

Mississippi River Coordinating Commission Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth changes in the meeting schedule for the Mississippi River Coordinating Commission. Notice of this meeting is required under the Federal Advisory Committee Act (Pub. L. 92–463).

Meeting Date and Time: Friday, February 25, 1994, 8 a.m. until 5 p.m.

ADDRESS: Metropolitan Council Chambers, Mears Park Centre, 230 East Fifth Street, Saint Paul, Minnesota.

The agenda for the meeting consists of Commission review and discussion of a revised draft comprehensive management plan for the Mississippi National River and Recreation Area. The discussion continues the Commission's deliberation on public input received on the previously released draft comprehensive management plan and draft environmental impact statement.

SUPPLEMENTARY INFORMATION: The Mississippi River Coordinating Commission was established by Public Law 100–696, November 18, 1988.

FOR FURTHER INFORMATION CONTACT: Superintendent, Mississippi National River and Recreation Area, 175 East Fifth Street, Suite 418, St. Paul, Minnesota 55101, (612)–290–4160.

Dated: December 22, 1993.

William W. Schenk,

Acting Regional Director, Midwest Region.

[FR Doc. 94–406 Filed 1–6–94; 8:45 am]

BILLING CODE 4310–70–P

Native American Graves Protection and Repatriation Review Committee; Meeting

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of meeting of the Native American Graves Protection and Repatriation Review Committee.

Notice is hereby given in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. appendix (1988), that a meeting of the Native American Graves Protection and Repatriation Act Review Committee will be held on January 23, 24, and 25, 1994, in Phoenix, AZ.

The Committee will meet on Sunday, January 23, and Monday, January 24, at the Heard Museum, 22 East Monte Vista Road, Phoenix. The Committee will meet on Tuesday, January 25, in the multi-purpose room at the Salt River Pima-Maricopa Recreation Center, 10000 East McDowell Road, Scottsdale. Meetings will begin each day at 8:30 a.m. and conclude not later than 5 p.m.

The Native American Graves Protection and Repatriation Act Review Committee was established by Public Law 101–601 to monitor, review, and assist in implementation of the inventory and identification process and repatriation activities required under the statute.

The matters to be discussed at this meeting include development of regulations implementing the statute, particularly sections reserved for civil penalties, a sample inventory, and sample memoranda of understanding regarding repatriation and intentional excavation. The Committee also is soliciting recommendations from members of the public regarding the disposition of culturally identifiable human remains in museum or Federal collections, the disposition of unclaimed human remains and cultural items from Federal or tribal lands, and the future applicability of the statute.

The meeting will be open to the public. However, facilities and space for accommodating members of the public are limited. Persons will be accommodated on a first-come, first-served basis. Any member of the public may file a written statement concerning the matters to be discussed with Dr. Francis P. McManamon, Departmental Consulting Archeologist.

Persons wishing further information concerning this meeting, or who wish to submit written statements may contact Dr. Francis P. McManamon, Departmental Consulting Archeologist, Archeological Assistance Division, National Park Service, P.O. Box 37127–suite 210, Washington, DC 20013–7127, Telephone (202) 343–4101. Draft summary minutes of the meeting will be available for public inspection about eight weeks after the meeting at the office of the Departmental Consulting Archeologist, room 210, 800 North Capital Street, Washington, DC.

Dated: December 22, 1993.

Francis P. McManamon,

Departmental Consulting Archeologist and Chief, Archeological Assistance Division.

[FR Doc. 94-329 Filed 1-6-94; 8:45 am]

BILLING CODE 4310-70-F

Niobrara Scenic River Advisory Commission Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice sets the schedule for the forthcoming meeting of the Niobrara Scenic River Advisory Commission. Notice of this meeting is required under the Federal Advisory Committee Act (Public Law 92–463).

Meeting Date and Time: February 9, 1993 1 p.m.

Address: American Legion Club meeting room, 201 E. Buchanan Street, Bassett, Nebraska.

(In the event of inclement weather, the meeting will be held the following week, February 16, 1993, at 1 p.m. at the same location. Cancellation notice will be communicated over the local radio stations.)

Agenda topics include: an update and discussion on the status of the draft management plan for the Niobrara Scenic River by the National Park Service planning team (including boundary alternatives, and meeting with landowners); the opportunity for public comment, and a proposed agenda, date, time, and location for the next meeting.

The meeting is open to the public. Interested persons may make oral/written presentation to the Commission or file written statements. Requests for time for making presentations may be made to the Superintendent prior to the meeting or to the Chair at the beginning of the meeting. In order to accomplish the agenda for the meeting the Chair may want to limit or schedule public presentations.

The meeting will be recorded for documentation and a summary in the form of minutes will be transcribed for dissemination. Minutes of the meeting will be made available to the public after approval by the Commission members. Copies of the minutes may be requested by contacting the Superintendent. An audio tape of the meeting will be available at the headquarters office of the Niobrara/Missouri National Scenic Riverways in O'Neill, Nebraska.

SUPPLEMENTAL INFORMATION: The Commission was established pursuant to Public Law 102–50, section 5. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, on matters pertaining to the development of a management plan, and on the management and operation of the 40-mile and 30-mile segments of the Niobrara River designated by section 2 of Public Law 102–50 which lie outside the boundary of the Fort Niobrara National Wildlife Refuge and that segment of the Niobrara River from its confluence with Chimney Creek to its confluence with Rock Creek.

FOR FURTHER INFORMATION CONTACT: Warren Hill, Superintendent, Niobrara/Missouri National Scenic Riverways, P.O. Box 591, O'Neill, Nebraska 68763–0591, (402) 336–3970.

Dated: December 22, 1993.

William W. Schenk,

Acting Regional Director, Midwest Region.

[FR Doc. 94–403 Filed 1–6–94; 8:45 am]

BILLING CODE 4310-70-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–677; Preliminary]

Coumarin From the People's Republic of China

AGENCY: United States International Trade Commission.

ACTION: Institution and scheduling of a preliminary antidumping investigation.

SUMMARY: The Commission hereby gives notice of the institution of preliminary antidumping investigation No. 731–TA–677 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from the People's Republic of China of coumarin,[1] provided for in subheading 2932.21.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value. The Commission must complete preliminary antidumping investigations in 45 days, or in this case by February 14, 1994.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Douglas Corkran (202–205–3177), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

SUPPLEMENTARY INFORMATION:

Background

This investigation is being instituted in response to a petition filed on December 30, 1993, by Rhone-Poulenc Specialty Chemicals Company, Cranbury, NJ.

Participation in the Investigation and Public Service List

Persons (other than petitioners) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven (7) days after publication of this notice in the **Federal Register**. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon expiration of the period for filing entries of appearance.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this preliminary investigation available to authorized applicants under the APO issued in the investigation, provided that the application is made not later than seven (7) days after the publication of this

[1] The chemical coumarin is a lactone with the formula $C_9H_6O_2$.

notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference

The Commission's Director of Operations has scheduled a conference in connection with this investigation for 9:30 a.m. on January 20, 1994, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact Douglas Corkran (202–205–3177) not later than January 18, 1994, to arrange for their appearance. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written Submissions

As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before January 25, 1994, a written brief containing information and arguments pertinent to the subject matter of the investigation. Parties may file written testimony in connection with their presentation at the conference no later than three (3) days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed.

The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to section 207.12 of the Commission's rules.

Dated: January 3, 1994.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–400 Filed 1–6–94; 8:45 am]

BILLING CODE 7020–02–P

[Investigations Nos. 731–TA–678 through 682; Preliminary]

Stainless Steel Bar From Brazil, India, Italy, Japan, and Spain

AGENCY: United States International Trade Commission.

ACTION: Institution and scheduling of preliminary antidumping investigations.

SUMMARY: The Commission hereby gives notice of the institution of preliminary antidumping investigations Nos. 731–TA–678 through 682 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Brazil, India, Italy, Japan, and Spain of stainless steel bar, provided for in subheadings 7220.11.00, 7220.12.50, 7222.10.00, 7222.20.00, and 7222.30.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value.[1] The Commission must complete preliminary antidumping investigations in 45 days, or in this case by February 14, 1994.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Jonathan Seiger (202–205–3183), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

SUPPLEMENTARY INFORMATION:

Background

These investigations are being instituted in response to a petition filed on December 30, 1993, by Al Tech Specialty Steel Corp., Dunkirk, NY; Carpenter Technology Corp., Reading, PA; Republic Engineered Steels, Inc., Massillon, OH; Slater Steels Corp., Fort Wayne, IN; Talley Metals Technology, Inc., Hartsville, SC; and the United Steelworkers of America, AFL–CIO/CLC.

Participation in the Investigations and Public Service List

Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven (7) days after publication of this notice in the **Federal Register**. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these preliminary investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made not later than seven (7) days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference

The Commission's Director of Operations has scheduled a conference in connection with these investigations for 9:30 a.m. on January 20, 1994, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Parties wishing to participate in the conference should contact Jonathan Seiger (202–205–3183) not later than January 18, 1994, to arrange for their appearance. Parties in support of the imposition of antidumping duties in these investigations and parties in opposition to the imposition of such

[1] For purposes of these investigations, the term "stainless steel bar" means articles of stainless steel in straight lengths that have been either hot-rolled, forged, turned, cold-drawn, cold-rolled, or otherwise cold-finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other convex polygons, as well as hot-rolled flat-rolled products from 6.35 to 254 mm (inclusive) in width and 3.18 mm and over in thickness. Except as specified above, the term does not include stainless steel flat-rolled products, wire, angles, shapes, or sections. Stainless steel bar includes cold-finished stainless steel bars that are turned or ground in straight lengths, whether produced from hot-rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written Submissions

As provided in §§ 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before January 25, 1994, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three (3) days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to section 207.12 of the Commission's rules.

Dated: January 4, 1994.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–401 Filed 1–6–94; 8:45 am]

BILLING CODE 7020–02–P

INTERSTATE COMMERCE COMMISSION

[Docket No. AB–167 (Sub-No. 1134X)]

Consolidated Rail Corporation—Abandonment Exemption—In Crawford County, PA; Notice of Exemption

Consolidated Rail Corporation (Conrail) has filed a notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon its approximately 1.1-mile line of railroad known as the Vallonia Branch from milepost 0.0 to milepost 1.1 in Meadville, Crawford County, PA.

Conrail has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) no overhead traffic has moved over the line for at least 2 years; (3) no formal complaint filed by a user of rail service on the line (or by a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in complainant's favor within the 2-year period; and (4) it has met the notice requirements at 49 CFR 1105.7(b) (service of environmental report on agencies), 49 CFR 1105.8(c) (service of historic report on State Historic Preservation Officer), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to government agencies).

As a condition to use of this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

This exemption will be effective on February 6, 1994, unless stayed or a formal expression of intent to file an offer of financial assistance (OFA) is filed. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 18, 1994.[3] Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 27, 1994, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any pleading filed with the Commission should be sent to Conrail's representative: Robert S. Natalini, Consolidated Rail Corporation, Two Commerce Square, 2001 Market Street, P.O. Box 41416, Philadelphia, PA 19101–1416.

If the notice of exemption contains false or misleading information, the exemption is void *ab initio*.

Conrail has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Energy and Environment (SEE) will issue an environmental assessment (EA) by January 12, 1994. Interested persons may obtain a copy of the EA by writing to SEE (room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief of SEE, at (202) 927–6248. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: December 29, 1993.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 94–285 Filed 1–6–94; 8:45 am]

BILLING CODE 7035–01–P

[1] A stay will be issued routinely by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Commission's Section of Energy and Environment in its independent investigation) cannot be made before the effective date of the exemption. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any entity seeking a stay on environmental concerns is encouraged to file its request as soon as possible in order to permit the Commission to review and act on the request before the effective date of the exemption.

[2] See *Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

[3] The Commission will accept late-filed trail use requests as long as it retains jurisdiction to do so.

[Finance Docket No. 32405]

The Kansas City Southern Railway Company—Merger Exemption—MidSouth Corporation, MidSouth Rail Corporation, SouthRail Corporation, MidLouisiana Rail Corporation, and TenRail Corporation; Notice of Exemption

On December 20, 1993, The Kansas City Southern Railway Company (KCSR), a class I common rail carrier, and MidSouth Corporation (MSC), a noncarrier, and its common carrier rail subsidiaries described below, jointly filed a notice of exemption under 49 CFR 1180.2(d)(3), for: (1) The merger of MSC and its subsidiaries [1], with MSC being the surviving entity and (2) the subsequent merger of MSC and KCSR, with KCSR being the surviving entity.

KCSR, a class I carrier, and MSC, a regional railroad holding company that provides freight transportation through its common carrier subsidiaries, are both wholly owned subsidiaries of Kansas City Southern Industries, Inc. (KCSI).[2]

MSR, a class II carrier, and TR, a class III carrier, are wholly owned subsidiaries of MSC. MLR, a class III carrier, is a wholly owned subsidiary of MSR. SR is a class II carrier with all of

[1] MidSouth Rail Corporation (MSR), SouthRail Corporation (SR), MidLouisiana Rail Corporation (MLR), and TenRail Corporation (TR).

[2] On June 7, 1993, K&M Newco., Inc. (K&M), a wholly owned subsidiary of KCSI, acquired all of the outstanding stock of MSC.

its stock owned by MSC (25 shares) and MSR (15 shares).

The parties intend to consummate the proposed merger transactions on January 4, 1994.[3]

Because the parties are members of the same corporate family, and apparently the mergers will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers operating outside the corporate family, the transaction qualifies for the class exemption at 49 CFR 1180.2(d)(3). The purpose of the transactions is to eliminate duplicative recordkeeping, filing, and reporting requirements and to render more efficient current billing and car reporting processes.

To ensure that all employees who may be affected by the transactions are given no less than the minimum protection under 49 U.S.C. 10505(g)(2) and 11347, the labor conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) are imposed.

Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: Robert K. Dreiling, The Kansas City Southern Railway Company, 114 West 11th Street, Kansas City, MO 64105.

Decided: December 29, 1993.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland Jr.,

Secretary.

[FR Doc. 94–287 Filed 1–6–94; 8:45 am]

BILLING CODE 7035–01–P

[3] As stated in the agreements attached as exhibits to the notice, the effective date of the merger of MSC with its subsidiaries will be December 31, 1993, and the effective date of the merger of MSC into KCSR will be January 4, 1994.

DEPARTMENT OF JUSTICE

Federal Bureau of Prisons

Notice of Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the Conversion of the Former University of Minnesota Technical College in Waseca, MN

AGENCY: U.S. Department of Justice, Federal Bureau of Prisons.

ACTION: Notice of intent to prepare a Draft Environmental Impact Statement (DEIS).

SUMMARY:

Proposed Action

The United States Department of Justice, Federal Bureau of Prisons has determined that a Federal Correctional Institution (FCI) is needed in its system.

The Federal Bureau of Prisons has preliminarily evaluated the former technical college for conversion potential and proposes to convert the existing campus to correctional use to house 1,100 sentenced low-security male inmates. The facility appears to be technically suitable for use as a correctional institution, and the EIS will address the environmental consequences of converting the facility to correctional use.

The proposed site is approximately 90 acres located in the Southwest corner of the City of Waseca, Waseca County, Minnesota. The property is bound on the North by Seventh Avenue SW., on the South by County Road 57, on the East by Sixth Street SW., and on the West by College Parkway.

It is anticipated that the former campus buildings and grounds are of sufficient size to provide space for housing, programs, services and support areas as well as administration, parking and staff training.

The Process

In the process of evaluating the site, several aspects will receive detailed examination including: utilities, traffic patterns, noise levels, visual intrusion, threatened and endangered species, cultural resources and socio-economic impacts.

Alternatives

The Bureau's plans are site specific, in that the former campus has been offered to the Federal Bureau of Prisons via donation. Thus, alternatives other than the Waseca Technical College buildings and grounds are not being evaluated or considered. In development of the DEIS, the option of "no action" is being fully and thoroughly examined.

Scoping Process

During the preparation of the DEIS, there will be opportunities for public involvement in order to determine the issues to be examined. A Scoping Meeting will be held at 7 p.m. on Thursday, January 20, 1994 at the Waseca High School Little Theater. The meeting will be well publicized and will be held at a time which will make it possible for the public and interested agencies or organizations to attend. In addition, public information meetings have been held by representatives of the Bureau of Prisons with interested citizens, officials and community leaders.

DEIS Preparation

Public notice will be given concerning the availability of the DEIS for public review and comment.

ADDRESSES: Questions concerning the proposed action and the DEIS can be directed to: K. Bradley Wiggins, Site Selection and Environmental Review Specialist, Federal Bureau of Prisons, 320 First Street, NW., Washington, DC 20534, (202) 514–8697.

Dated: January 3, 1994.

Patricia K. Sledge,

Chief, Site Selection and Environmental Review Branch.

[FR Doc. 94–308 Filed 1–6–94; 8:45 am]

BILLING CODE 4410–5–M

DEPARTMENT OF LABOR

Employment Standards Administration

All-Agency Memorandum No. 174 Under the Davis-Bacon and Related Acts

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is publishing All Agency Memorandum No. 174, which was forwarded to Federal contracting agencies on December 2, 1993. This memorandum provides guidance concerning the suspension of "helper" regulations under the Davis-Bacon and related Acts in Fiscal Year 1994, and is being published to inform the public on policies and procedures now in effect as a result of the suspension.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Acting Assistant Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S–3028, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 219–8353. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: On Thursday, October 21, 1993, President Clinton signed the FY 1994 Appropriations Act for the Department of Labor, Health and Human Services, and Education, and related agencies (Pub. L. 103–112). Section 104 of this act contains a provision that prohibits the Department of Labor (Department) from expending funds appropriated under the act to implement or administer the Davis-Bacon "helper"

regulations at 29 CFR sections 1.7(d), 5.2(n)(4) and 5.5(a)(1)(ii). As a result, these regulations were suspended and former rules concerning conformance procedures were reinstated at 29 CFR 5.5(a)(1)(v). (See **Federal Register** 58 FR 58954, (November 5, 1993).) The Wage and Hour Division routinely uses an "All Agency Memoranda" procedure to advise procurement agencies of applicable policies and procedures in the administration and enforcement of the labor standards requirements of the Davis-Bacon and related Acts. In this regard, All Agency Memorandum No. 174 provides guidance to procurement agencies on the suspension of "helper" regulations during FY 1994. Because of the interest in the use of helpers under the Davis-Bacon and related Acts, All Agency Memorandum No. 174 is published for general information.

Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

Signed in Washington, DC, on this 30th day of December, 1993.

Maria Echaveste,

Wage and Hour Administrator.

U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division.

December 2, 1993.

Memorandum No. 174

Memorandum for All Contracting Agencies of the Federal Government and the District of Columbia

From: Maria Echaveste, Administrator

Subject: Prohibition on Department of Labor Implementation/Administration of Davis-Bacon Helper Regulations Pursuant to Fiscal Year (FY) 1994 Appropriation Act

On Thursday, October 21, 1993, President Clinton signed the FY 1994 Appropriations Act for the Department of Labor, Health and Human Services, and Education, and related agencies (Pub. L. 103–112). Section 104 of this act contains a provision that prohibits the Department of Labor (Department) from expending funds appropriated under the act to implement or administer the Davis-Bacon "helper" regulations that were previously codified at 29 CFR 1.7(d), 5.2(n)(4) and 5.5(a)(1)(ii). (See **Federal Register**, 54 FR 4234, 55 FR 50148, and 57 FR 28776). Those regulations have therefore been suspended and the former rules reinstated. (See Notice of suspension of regulations and reinstatement of former regulation published in the **Federal Register** on November 5, 1993 (58 FR 58954), copy attached.

As of October 21, the Department of Labor ceased activities that were related to the administration and implementation of suspended helper regulations. The discontinued activities included:

- Issuing classifications and wage rates for helpers in wage determinations based on data yielded by new surveys.
- Processing survey data to determine whether the use of helpers is prevailing on construction in areas where Davis-Bacon surveys are being conducted to determine prevailing wage rates for any particular type of construction.
- Processing requests for the approval of additional classifications and wage rates for helpers pursuant to the suspended conformance procedures formerly set forth in 29 CFR 5.5(a)(1)(ii).
- Processing requests for the reconsideration of rulings or final determinations concerning the use of helper classifications and/or wage rates.

Guidance regarding the effect of the newly enacted prohibition on contracts at various stages of the procurement process follows.

Contracts awarded on or after October 21, 1993.[1]

Contractors and subcontractors may not employ "helpers" as that term was defined in § 5.2(n)(4) of the suspended regulations on any Davis-Bacon covered contract awarded on or after October 21, 1993. Semi-skilled helper classifications and wage rates that were issued in wage determinations pursuant to the suspended regulations and that have been included in contracts awarded on or after October 21, 1993, are not valid. Moreover, the regulatory provision that allowed the consideration of additional classification actions for helpers is suspended; therefore, the Department will not consider any additional classification requests that would permit the use of helpers as defined in the suspended regulations on such contracts. Davis-Bacon general wage determinations are being modified to omit those helper classifications and wage rates that were issued pursuant to the suspended regulations.

In accordance with its prior practice, the Department will, however, recognize helper classifications that are separate and distinct classes of workers performing duties distinguished from those of journey-level workers or other classifications listed on the wage determination; whose use prevails in an area; and who are not employed in an informal apprenticeship or training capacity. As detailed in the November 5, 1993, notice, the Department will issue such helpers on wage determinations or consider additional classification requests for such helpers where these criteria are met and a specific description of duties is associated with the particular helper class. Helpers may be employed on contracts awarded after October 21, 1993, only if a definition of the helper's duties establishing the helper as a separate and distinct classification is set forth in the wage determination or on the additional classification approval documents.

Contracts awarded prior to October 21, 1993 where the contract contains the newly-suspended helper clauses and the contract wage determination contains a helper classification or a helper classification has been approved for use on the project.

Contractors and subcontractors may continue to employ individuals in helper classifications that were issued for application to contracts or approved for use on contracts awarded prior to the suspension of the regulations. The workers must, however, be employed in accordance with the regulatory definition set forth in § 5.2(n)(4) of regulations, part 5, which was applicable at the time the contract was awarded, and the workers must be paid at least the corresponding wage rate for the helper classification in which they are performing.

The Department will continue to take action to ensure that workers erroneously classified as helpers are reclassified as journey-level workers or laborers in accordance with the work performed (those cases, for example, where employees perform work solely of a skilled nature, where individuals do not work under the supervision and direction of a journey-level classification, or where workers perform duties beyond the duties performed by helpers pursuant to the practice in the area). The Department will also take enforcement action against any contractor or subcontractor that fails to compensate its helpers according to the applicable wage determination rate or approved conformance wage rate. Contracting agencies are also reminded of their enforcement responsibilities under Reorganization Plan No. 14 of 1950 and encouraged to take action as may be necessary to ensure compliance in such situations.

[1] In the case of projects assisted under the National Housing Act, the applicable date is the start of construction or the initial endorsement of the mortgage, whichever occurs first. Similarly, in the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, the applicable date is the beginning of construction or the date the housing assistance payment contract is executed, whichever occurs first.

Contracts awarded prior to October 21, 1993 where the contract contains the newly-suspended helper clauses but the contract wage determination does not contain a helper classification and a helper classification has not yet been approved for use on this project.

Contractors and subcontractors may not employ any classification, including helpers, on a Davis-Bacon covered project unless the wage determination contains the classification or the classification is approved pursuant to the Department's additional classification procedures. The regulations provide that the wage rates determined for unlisted classifications under the additional classification procedures shall be paid to all workers performing work in that classification from the first day on which work was performed. This regulatory provisions permits retroactive application of approved additional classifications and wage rates and, at the same time, also allows for retroactive enforcement action against a contractor or subcontractor whose proposed additional classification and/or wage rate is denied by the Department.

Clearly, the Department cannot act on conformance requests for helpers or requests for reconsideration of such conformance actions given the Congressional action. Thus, contractors or subcontractors who classify and pay individuals as helpers with the expectation that the Department will approve an additional classification request at some future point place themselves at risk of subsequent enforcement action, including the withholding of contract funds. Under these circumstances, agencies should use their enforcement discretion in determining whether withholding action is appropriate to protect the interest of employees where contractors pay individuals less than the journey-level rate during the period of the prohibition. Agencies clearly should withhold contract funds where the Department has denied a conformance request, even through the contractor or subcontractor may have or may intend to request reconsideration of the additional classification denial. Agencies should also withhold contract payments on any contracts completed or nearing completion during the suspension of the helper regulations so that any back wages potentially due employees are not lost because the contract was closed and contract funds paid out.

Contracts awarded prior to October 21, 1993 where the contract does not contain the revised helper clauses.

In implementing the helper regulations after the lifting of the prohibition imposed by section 303 of the 1991 Dire Emergency Supplement Appropriation Act, the Department suggested that contracting agencies modify existing contracts to include the revised helper contract clauses, thereafter permitting the addition of helper classifications through the additional classification procedures in § 5.5(a)(1)(ii) of regulations, part 5. However, in light of the Congressional action, that option no longer exists for contracts that were awarded without the helper contract clauses and which have not yet been modified. Contractors and subcontractors performing on such contracts may not employ helpers as those classifications were defined by § 5.2(n)(4) of regulations, part 5.

Prior background concerning the regulations in question is contained in All Agency Memoranda Nos. 154, 161, 163 and 165, issued on January 2, 1991, January 29, 1992, June 22, 1992, and July 24, 1992, respectively. Application of these All-Agency Memoranda is also suspended.

Agencies are reminded of the need to make appropriate changes in the procurement regulations (see especially 48 CFR 22.406–3, 52.222–6(b) and 52.222–9) and related contract documents to conform to the revised regulations.

[FR Doc. 94–328 Filed 1–6–94; 8:45 am]
BILLING CODE 4510–27–M

Employment Standards Administration Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersede as decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing in encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution

Avenue, NW., room S–3014, Washington, DC 20210.

New General Wage Determination Decisions

The numbers of the decisions added to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" are listed by Volume and State.

Volume I:

Maryland, MD930048 (Jan. 7, 1994), MD930049 (Jan. 7, 1994)
Virginia, VA930104 (Jan. 7, 1994), VA930105 (Jan. 7, 1994), VA930106 (Jan. 7, 1994), VA930107 (Jan. 7, 1994)

Modification to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I:

District of Columbia, DC930001 (Feb. 19, 1993)
Maine, ME930026 (Dec. 10, 1993)
West Virginia, WV930003 (Feb. 19, 1993)

Volume II:

Iowa, IA930001 (Feb. 12, 1993)
Ohio, OH930001 (Feb. 12, 1993), OH930002 (Feb. 12, 1993), OH930003 (Feb. 12, 1993), OH930028 (Feb. 12, 1993), OH930029 (Feb. 12, 1993), OH930034 (Feb. 12, 1993)
Texas, TX930027 (Feb. 12, 1993), TX930028 (Feb. 12, 1993), TX930029 (Feb. 12, 1993), TX930030 (Feb. 12, 1993), TX930031 (Feb. 12, 1993), TX930036 (Feb. 12, 1993), TX930043 (Feb. 12, 1993), TX930045 (Feb. 12, 1993), TX930047 (Feb. 12, 1993), TX930048 (Feb. 12, 1993), TX930051 (Feb. 12, 1993)

Volume III:

Colorado, CO930001 (Feb. 19, 1993), CO930002 (Feb. 19, 1993), CO930005 (Feb. 19, 1993), CO930006 (Feb. 19, 1993), CO930007 (Feb. 19, 1993), CO930010 (Feb. 19, 1993), CO930011 (Feb. 19, 1993), CO930014 (Feb. 19, 1993)
Hawaii, HI930001 (Feb. 19, 1993)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783–3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 30th day of December 1993.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 94–167 Filed 1–6–94; 8:45 am]

BILLING CODE 4510–27–M

Employment and Training Administration

[TA–W–28,672]

Allied Signal Automotive Friction Materials, Troy, NY; Negative Determination Regarding Application for Reconsideration

By an application dated October 21, 1993, the company requested administrative reconsideration of the subject petition for trade adjustment assistance, TAA. The denial notice was published in the **Federal Register** on September 22, 1993 (58 FR 49321).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

Investigation findings show that the workers produce automotive and truck friction materials.

The Department's denial was based on the fact that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act was not met. The "contributed importantly" test is generally demonstrated through a survey of the firm's major customers. The Department's survey of the subject firm major declining customers shows that none of the respondents imported automotive or truck friction materials in the relevant period.

Your petition indicates approximately 100 workers were laid off on October 8, 1990. These workers are covered under the certification the Department issued on July 3, 1991, TA–W–25,766.

Investigation findings show that the worker separations in 1993 involved the Engineering Department. However, that Department is being consolidated with an affiliate plant in Ohio. A domestic transfer of operations would not form a basis for a worker group certification.

Further, your amended sales data shows either increased or constant sales and production of drum segments and cerametalix in 1992 compared to 1991 and in the first six months of 1993 compared to the same period in 1992. All manufacturing on medium and heavy truck disc brakes ceased in October, 1992. Worker separations resulting from the cessation of production on truck disc brakes in 1992 would have been covered under TA–W–25,766.

Domesitc production from a foreign owned plant (transplant production) would not form a basis for a worker group certification. Such production is not considered an import.

With respect to Allied Signal's lost bids, most occurred when the plant was under a worker group certification. Further, by the company's own admission, there were some company imports of friction materials but these were products which either were not available at Troy or for which retooling in the U.S. would be uneconomic.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 27th day of December 1993.

Robert O. Deslongchamps,

Director, Office of Legislation & Actuarial Service, Unemployment Insurance Service.

[FR Doc. 94–324 Filed 1–6–94; 8:45 am]

BILLING CODE 4510–30–M

[TA–W–28,911]

Honeywell Keyboard Division, El Paso, TX; Negative Determination Regarding Application for Reconsideration

By an application dated November 4, 1993, the company requested administrative reconsideration of the subject petition for trade adjustment assistance, TAA. The denial notice was published in the **Federal Register** on October 21, 1993 (58 FR 54377).

Pursuant to 29 CFR 90.18(c) consideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

Investigation findings show that the workers produced keyboards.

The Department's denial was based on the fact that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act was not met. Worker separations on July 30, 1993 resulted from the purchase of the plant by Key-Tronic of Spokane, Washington. No customer survey was conducted because there were no sales declines in 1992 compared to 1991 and in the first six months of 1993 compared to the same period in 1992. The findings also show that there were no company imports during the period of the investigation.

The company states that the Honeywell workers should be certified eligible to apply for TAA because Key-Tronic which purchased the Honeywell plant in August 1993 also produces keyboards and was certified for TAA in 1992.

Each petition is investigated on its own merits and in the time frame in which it was filed. Key-Tronic increased its reliance on company imports of keyboard and computer peripherals while decreasing production and employment during the investigation period. Accordingly, Key-Tronic met all three of the Group Eligibility Requirements of the Trade Act and a worker group certification was issued on January 17, 1992.

If after August 1, 1993, the El Paso plant experiences company imports that adversely affect sales or production and employment declines, the Department would entertain a new petition.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 27th day of December 1993.

Robert O. Deslongchamps,

Director, Office of Legislation & Actuarial Service, Unemployment Insurance Service.

[FR Doc. 94–325 Filed 1–6–94; 8:45 am]

BILLING CODE 4510–30–M

[TA–W–28,999]

Phillips Petroleum Co., Lafayette, LA; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18 an application for administrative reconsideration was filed with the Director of the Office of Trade Adjustment Assistance for workers at Phillips Petroleum Company, Lafayette, Louisiana. The review indicated that the application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–28,999; Phillips Petroleum Company, Lafayette, Louisiana (December 27, 1993)

Signed at Washington, DC this 30th day of December, 1993.

Marvin M. Fooks,

Director, Office of Adjustment Assistance.

[FR Doc. 94–326 Filed 1–6–94; 8:45 am]

BILLING CODE 4510–30–M

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221 (a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under title II, chapter 2 of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 18, 1994.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 18, 1994.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC this 27th day of December, 1993.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner (Union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Tomorrow Today Corp. (Wkrs)	Westfield, MA	Dec. 27, 1993	Nov. 23, 1993	29,349	Giftware and ornaments.
Sundown Operating, Inc. (Wkrs)	Sundown, TX	Dec. 27, 1993	Dec. 18, 1993	29,350	Oil and gas.
Imperial Wallpaper, Inc. (UPIU)	Plattsburgh, NY	Dec. 27, 1993	Dec. 9, 1993	29,351	Wallcoverings.
Hasbro, Inc. (Wkrs)	El Paso, TX	Dec. 27, 1993	Dec. 14, 1993	29,352	Children's toys.

APPENDIX—Continued

Petitioner (Union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
General Electric Co. (Co)	Cincinnati, OH	Dec. 27, 1993	Dec. 7, 1993	29,353	Rotating parts and turbine mid frame.
General Motors Corp, Delco Chassis (UAW).	Livonia, MI	Dec. 27, 1993	Dec. 13, 1993	29,354	Bumpers, suspension springs.
Data Integrators (Wkrs)	Houston, TX	Dec. 27, 1993	Dec. 15, 1993	29,355	Seismic data.
Cooper Industries/Connectron (IBEW).	Laurence Harbor, NJ.	Dec. 27, 1993	Dec. 9, 1993	29,356	Circuit breakers, fuse holders.
Aerovox Aero M (Wkrs)	Glasgow, KY	Dec. 27, 1993	Dec. 13, 1993	29,357	Aluminum electrolytic capacitors.
White Rodgers (Wkrs)	Logansport, IN	Dec. 27, 1993	Dec. 8, 1993	29,358	Automotive electrical equipment.
Atlas of Boston (LGPN)	Philadelphia, PA	Dec. 27, 1993	Dec. 17, 1993	29,359	Leather attache cases.
Flint Ink (GCIU)	Lodi, NJ	Dec. 27, 1993	Dec. 14, 1993	29,360	Printing ink, solvents, driers.
Bailey Controls Co. (Wkrs)	Williamsport, PA	Dec. 27, 1993	Dec. 17, 1993	29,361	Circuit boards.
The American Olean Tile Co. (URW).	Lansdale, PA	Dec. 27, 1993	Dec. 10, 1993	29,362	Ceramic wall tile and trim tile.
Accessories by Pearl (Wkrs)	New York, NY	Dec. 27, 1993	Dec. 15, 1993	29,363	Leather goods.
First Base, Inc. (Wkrs)	Bayshore, NY	Dec. 27, 1993	Dec. 10, 1993	29,364	Miss sportwear.
Mitoro Industries (Wkrs)	Bayshore, NY	Dec. 27, 1993	Dec. 10, 1993	29,365	Jrs sportswear.
General Seafood (Wkrs)	Magnolia, MA	Dec. 27, 1993	Dec. 10, 1993	29,366	Frozen seafood.
Waco, Inc (Wkrs)	Danvers, MS	Dec. 27, 1993	Dec. 10, 1993	29,367	Frozen crab meat.

[FR Doc. 94–327 Filed 1–6–94; 8:45 am]

BILLING CODE 4510–30–M

LEGAL SERVICES CORPORATION

Solicitation for Proposals for the Provision of Civil Legal Services to the Fort Apache Area of Arizona

AGENCY: Legal Services Corporation.

ACTION: Solicitation for proposals.

SUMMARY: The Legal Services Corporation (LSC) is soliciting proposals to provide effective, efficient, and high quality civil legal services in 1994 to the LSC-eligible Native American client population in the Fort Apache Indian Reservation Area.

DATES: Proposals must be received by 5 p.m., February 17, 1994.

ADDRESSES: A solicitation package, containing the grant application guidelines, proposal content requirements, and specific selection criteria, is available from the Grants and Budget Division, Office of Program Services, Legal Services Corporation, 750 First Street, NE, 11th Floor, Washington, DC 20002–4250.

FOR FURTHER INFORMATION CONTACT: Phyllis Doriot, Manager, Grants and Budget Division, Office of Program Services, (202) 336–8825.

SUPPLEMENTARY INFORMATION: The Legal Services Corporation is the national organization charged with administering federal funds provided for civil legal service to the poor. LSC is seeking applicants from the private bar and other organizations (including currently funded LSC grantees) with a demonstrated sensitivity and commitment to deliver services to low-income persons, to provide civil legal services to the Native Americans in the Fort Apache area.

The grant amount, $104,468, is nine-twelfths of the Native American funds for this area mandated by the 1994 LSC Appropriations Act.

The selected applicant will be awarded a one-time, nonrecurring grant that will begin no earlier than April 1, 1994, and will end on December 31, 1994. This one-time grant will be awarded pursuant to authority conferred by sections 1006(a)(1)(B) of the Legal Services Corporation Act of 1974 (LSC Act), as amended.

Dated: January 3, 1994.

Ellen J. Smead,

Director, Office of Program Services.

[FR Doc. 94–307 Filed 1–6–94; 8:45 am]

BILLING CODE 7050–01–P

INTERNATIONAL BOUNDARY AND WATER COMMISSION UNITED STATES AND MEXICO

Rio Grande American Canal Extension Project, El Paso, Texas; Availability of Final Environmental Assessment and Finding of No Significant Impact

AGENCY: U.S. International Boundary and Water Commission.

ACTION: Notice of availability of final environmental assessment and finding of no significant impact.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Final Regulations (40 CFR parts 1500 through 1508); and the U.S. Section's Operational Procedures for Implementing section 102 of NEPA, published in the **Federal Register** September 2, 1981 (46 FR 44083–44094); the U.S. Section hereby gives notice that the Final Environmental Assessment and Final Finding of No Significant Impact for the proposed action of constructing an extenstion to the existing American Canal is available. A Notice of Finding of No Significant Impact dated October 21, 1993, provided a thirty day review and comment period before making the Finding final. The Notice was published in the Federal Register November 1, 1993 (58 FR 58377–58379).

FOR FURTHER INFORMATION CONTACT: Dr. Conrad G. Keyes, Jr., Principal Engineer, Planning; U.S. Section, International Boundary and Water Commission, United States and Mexico, 4171 North Mesa Street, building C–310, El Paso, Texas 79902–1422. Telephone: 915/534–6703.

SUPPLEMENTARY INFORMATION:

Proposed Action

The proposed Rio Grande American Canal Extension (RGACE), with or without the immediate participation of Mexico, involves the rehabilitation and enlargement of segments of the existing Franklin Canal; the construction of a new, reinforced concrete-lined canal; and other associated works. The United States Section (U.S. Section) of the International Boundary and Water Commission, United States and Mexico (Commission) is authorized under the Rio Grande American Canal Extension Act of 1990 (the Act of 1990), Public Law 101–438, dated October 15, 1990, to construct, operate, and maintain an extension of the existing American

Canal in El Paso, Texas. The Act of 1990 also allows for the participation of Mexico in the proposed action for the purpose of conveying their 1906 Convention waters.

In the Act of 1990, the United States Congress authorized the negotiation of international agreements for use of the proposed RGACE to convey Mexican waters. The government of Mexico considers there is merit in conveying its 1906 Convention waters in the proposed RGACE in view of the conveyance losses and safety issues inherent in Mexico's existing canal system. The Act of 1990 makes possible the immediate or future participation by Mexico in financing the proposed RGACE capacity improvements and other works and measures necessary to convey Mexican waters in the canal, including future restoration of the internatonal grade control structure located at Riverside Diversion Dam.

As stated in section 2(6) of the Act of 1990, "(t)he construction and operation of an extension of the American Canal which would lie wholly in the United States would provide for a more equitable distribution of waters between the United States and Mexico, reduce water losses, and minimize many hazards to public safety." This would hold true for both America and Mexico since both countries currently experience unauthorized diversions of water, water losses, and public health and safety hazards associated with their respective conveyance systems. The canal extension and associated facilities would be located adjacent to the Rio Grande Rectification Flood Control Project within the City of El Paso, El Paso County, Texas.

Water for domestic and irrigation use is diverted into the American Canal at the American Dam located on the Rio Grande upstream from downtown El Paso. The diversion dam and canal were constructed completely within United States territory to divert United States waters away from the Rio Grande and to permit the discharge into the international reach of the Rio Grande only those waters assigned to the Republic of Mexico under the Convention of 1906. This ensured that United States waters diverted at the American Dam area completely retained within the United States to a point downstream of the location where the United States delivers the 1906 Convention waters near International Dam. Depending on the schedule submitted by Mexico, up to 8.5 cubic meters per second (cms) or 300 cubic feet per second (cfs) of water is released into the Rio Grande channel downstream from American Dam for delivery to the Republic of Mexico in the bed of the river near the head works of the Acequia Madre, Mexico's principal canal, immediately upstream of International Dam. As provided in the 1906 Convention, a total of 74.009 thousand cubic meters (60,000 acre-feet) of water is delivered to Mexico annually.

United States Rio Grande Project waters assigned to water districts are currently in part conveyed in the international reach of the Rio Grande from International Dam to Riverside Diversion Dam. A significant amount of these waters (an estimated 39,471 thousand cubic meters or 32,000 acre-feet annually) is lost through seepage, evaporation, transpiration, and by unauthorized diversion or collection as they are conveyed in the international reach of the Rio Grande. A significant amount of these water losses (an estimated 25,900 to 37,000 thousand cubic meters or 21,000 to 30,000 acre-feet annually) could be salvaged by conveying them in the proposed concrete-lined canal extension.

Alternatives Considered

Four alternatives, including the Proposed Action Alternative and the No Action Alternative, were considered during the preparation of the environmental assessment. The alternatives are summarized here:

1. No Action Alternative

Under this alternative, there would be no construction of an extension to the existing American Canal. United States waters in the international reach of the Rio Grande from International Dam to Riverside Diversion Dam would continue to be susceptible to unauthorized diversion or withdrawal and would continue to be lost through seepage, evaporation, and transpiration while flowing in the Rio Grande and the unlined canals. There would be no change in existing facilities or conditions under this alternative, and existing hazards to public health and safety would remain the same.

2. Proposed Action Alternative

This Alternative contains three distinct options:

(1) Construction of the proposed RGACE without immediate Mexican participation;

(2) Construction of the proposed RGACE with immediate Mexican participation; and

(3) Construction of the proposed RGACE with a regulating reservoir located near the canal terminus to facilitate project operations. Any one of the options under this Alternative would ensure the equitable distribution of United States and Mexican waters, reduce water losses that would otherwise occur within the unlined canals and the river channel, and eliminate many hazards to public safety and health.

The proposed RGACE is composed of both reconstruction and new construction of a concrete lined channel. Even though work has not yet been authorized for the existing American Canal upstream of International Dams, it is possible that some rehabilitation will be necessary throughout its 3.2 kilometers (1.98 miles) length to make it compatible with the design capacity for the proposed action of 42.5 cms (1,500 cfs) and could be accomplished by the construction of parapet walls. An existing portion of the Franklin Canal from International Dam to the Leon Street Wasteway will be reconstructed throughout its 2.4 kilometers (1.48 miles) length as a trapezoidal or rectangular concrete lined channel to convey the design capacity. The existing Wasteway No. 1 in this segment will also be upgraded. The deteriorated, unreinforced concrete lining in the existing Franklin Canal from the Leon Street Wasteway to the Second Street Lateral will be replaced with reinforced concrete. This 2.7 kilometers (1.69 miles) segment will be designed to convey the design capacity. The new construction segment extends for 19.4 kilometers (12.1 miles) from the Second Street Lateral to Riverside Canal at Riverside Diversion Dam. It will obliterate the portion of the Playa Lateral which is located between Loop 375 (Border Highway) and the United States Levee of the Rio Grande Rectification Project, and incorporate a turnout for the Playa Lateral at the point where it deviates from the proposed RGACE alignment. The existing Playa Intercepting Drain will be relocated or abandoned. The constructed extension will be an open, concrete lined channel designed to convey 42.5 cms (1,500 cfs).

Although funds have not been appropriated in sufficient amounts to construct the proposed action with a regulating reservoir near the terminus of the proposed RGACE, it is possible that it could be constructed by an interested entity in the future. The reservoir would have a design capacity of 1.233 million cubic meters (1,000 acre-feet) at a maximum water depth of 3 meters (10 feet).

3. Extension of Existing Canal to Ascarate Wasteway Alternative

This alternative would involve a 12 kilometer (7.5 mile) extension of the American Canal to Ascarate Wasteway.

Water would be delivered to the Franklin Canal through the Ascarate Lateral by a pump station or other means and excess flows returned to the Rio Grande for subsequent diversion at Riverside Diversion Dam. This alternative would not accomplish the authorized purpose of keeping United States waters totally out of the Rio Grande between International Dam and Riverside Diversion Dam. Unauthorized diversion or withdrawal of United States waters would continue to occur below Ascarate Lateral. Construction of this alternative would not significantly reduce water losses since seepage losses would continue to accrue in the Rio Grande below Ascarate Lateral. Though the 12 kilometers (7.5 miles) extension would be fenced, existing public health and safety hazards would not be significantly reduced.

4. Franklin Canal Reconstruction Alternative

Under this alternative, the existing Franklin Canal would be reconstructed to convey 42.5 cms (1,500 cfs) to the heading of the Southside Feeder Canal at Ysleta. The feeder canal would transmit water to the Riverside Canal at a point downstream from the Riverside Diversion Dam. The Southside Feeder Canal would be reconstructed, a 4.8 kilometers (3 miles) section of the Riverside Canal would require excavation, and the Riverside Wasteway No. 1 would be reconstructed to accommodate the design capacity of 42.5 cms (1,500 cfs). Even though this alternative meets the criteria of the authorizing legislation, evaluation has shown that it would greatly exceed the design and construction costs of the proposed action. For this reason it is considered the least favored alternative to the proposed RGACE.

Availability

Single copies of the Final Environmental Assessment and Final Finding of No Significant Impact may be obtained at the above address.

Dated: December 29, 1993.

Suzette Zaboroski,

Staff Counsel.

[FR Doc. 94–359 Filed 1–6–94; 8:45 am]

BILLING CODE 4710–03–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 94–001]

NASA Advisory Council (NAC), Aeronautics Advisory Committee (AAC); Meeting on Aerodynamics

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a NAC, Aeronautics Advisory Committee meeting on aerodynamics.

DATES: January 24, 1994, 8:15 a.m. to 5:30 p.m.; January 25, 1994, 8:15 a.m. to 5:30 p.m.; and January 26, 1994, 8:15 a.m. to 11:45 a.m.

ADDRESSES: National Aeronautics and Space Administration, Ames Research Center, Building 258, room 221, Moffett Field, CA 94035.

FOR FURTHER INFORMATION CONTACT: Dr. F. Ron Bailey, National Aeronautics and Space Administration, Ames Research Center, Moffett Field, CA 94035, 415/604–5065.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Aeronautics Program Update
—Aerodynamics Program Review
—Aeronautics Thrust Reviews

Dated: January 3, 1994.

Timothy M. Sullivan,

Advisory Committee Management Officer.

[FR Doc. 94–330 Filed 1–6–94; 8:45 am]

BILLING CODE 7510–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Music Advisory Panel; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Music Advisory Panel (Chamber Music/Jazz Ensembles/Composer in Residence Section) to the National Council on the Arts will be held on January 24–28, 1994. The panel will meet from 9 a.m. to 5:30 p.m. on January 24–27, 1994 and from 9 a.m. to 5 p.m. on January 28, 1994. This meeting will be held in room M–07, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

Portions of this meeting will be open to the public from 2 p.m. to 2:30 p.m. on January 24, 1994 for a discussion of policy and guidelines for the Composer in Residence category; and on January 28, 1994, from 4 p.m. to 5 p.m. for a discussion of policy and guidelines for the Chamber Music/Jazz Ensembles categories.

The remaining portions of this meeting, from 9 a.m. to 2 p.m. and from 2:30 p.m. to 5:30 p.m. on January 24, 1994; from 9 a.m. to 5:30 p.m. on January 25–27, 1994; and from 9 a.m. to 4 p.m. on January 28, 1994 are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation of 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 November 24, 1992, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and 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 Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TTY 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne Sabine, Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5439.

Dated: January 3, 1994.

Yvonne M. Sabine,

Director, Office of Panel Operation, National Endowment for the Arts.

[FR Doc. 94–304 Filed 1–6–94; 8:45 am]

BILLING CODE 7537–01–M

Presenting and Commissioning Advisory Panel; Meetings

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Presenting and Commissioning Advisory Panel (Commissioning Projects Section) to the National Council on the Arts will be held on January 25–28, 1994. The panel will meet from 9 a.m. to 6:30 p.m. on

January 25–27, 1994, and from 9 to 5 p.m. on January 28, 1994.

This meeting will be held in room 716, at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506.

A portion of this meeting will be open to the public on January 28, 1994 from 1:30 p.m. to 5 p.m. for a Round IV policy review.

The remaining portions of this meeting from 9 a.m. to 6:30 p.m. on January 25 to January 27, 1994 and from 9 a.m. to 1:30 p.m. on January 28, 1994, 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 November 24, 1992, these sessions will be closed to the public pursuant to subsection (c)(4), (6)(B) of section 552b of title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and 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 Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TTY 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne Sabine, Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5439.

Dated: January 3, 1994.

Yvonne M. Sabine,

Director, Office of Panel Operation, National Endowment for the Arts.

[FR Doc. 94–305 Filed 1–6–94; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–305]

Wisconsin Public Service Corporation, Wisconsin Power and Light Company, Madison Gas and Electric Company, Kewaunee Nuclear Power Plant; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of a partial exemption from the requirements of 10 CFR part 50 appendix J, section III.D.1.(a) and an amendment to Facility Operating License No. DPR–43 to Wisconsin Public Service Corporation, Wisconsin Power and Light Company, and Madison Gas and Electric Company (the licensees), for the Kewaunee Nuclear Power Plant located in Kewaunee County, Wisconsin.

Environmental Assessment

Identification of Proposed Action

The proposed action would grant a partial exemption from the requirements of section III.D.1.(a) of appendix J to 10 CFR part 50. This section requires that a set of three Type A tests be performed at approximately equal intervals during each 10-year service period and that the third test of each set be conducted when the plant is shut down for the 10-year plant inservice inspection (ISI). The licensees' request is for an exemption from the requirement to perform the third Type A test when the plant is shutdown for the 10-year plant ISI. Additionally, the proposed action would amend the Facility Operating License by removing the current Technical Specification requirement that couples the performance of the Type A leakage tests to the 10-year inservice inspection program requirements.

The proposed action is in accordance with the licensees' request for exemption and application for amendment dated November 16, 1993.

The Need for the Proposed Action

The proposed exemption and license amendment is needed to avoid unnecessary restraints in outage scheduling. The licensees propose to perform the three Type A tests at approximately equal intervals within each 10-year period, with the third test of each set conducted as close as practical to the end of the 10-year period. However, there would be no required connection between the Appendix J 10-year interval and the inservice inspection (ISI) 10-year interval. The Type A tests and the 10-year ISI program are independent of each other and provide assurances of different plant characteristics. The licensees perform the ISI inspection requirements throughout the 10-year inspection interval. As a result, there is no extended outage in which the 10-year ISI examinations are performed. Consequently, the subject coupling requirement offers no benefit either to safety or to economical operation of the facility.

Environmental Impacts of the Proposed Action

The Commission's staff has determined that granting the proposed exemption and license amendment would not significantly increase the probability or amount of expected primary containment leakage and that containment integrity would, thus, be maintained.

The only difference between the proposed requirements and the current requirements of 10 CFR part 50 appendix J, section III.D.1.(a) and the technical specifications would be that the third Type A test for each 10-year service period would not necessarily be conducted when the plant is shutdown for the 10-year plant inservice inspection. The number of required Type A tests and the periodicity of these tests would not be changed.

Alternative to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action. Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in connection with the Nuclear Regulatory Commission's Final Environmental Statement, dated December 1972, related to the operation of the Kewaunee Nuclear Power Plant.

Agencies and Persons Consulted

The staff consulted with the State of Wisconsin regarding the environmental impact of the proposed action. The state official had no comment.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption and license amendment. Based upon the foregoing environmental assessment, we conclude that the proposed action will

not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the request for exemption and license amendment dated November 16, 1993, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington DC and at the University of Wisconsin Library Learning Center, 2420 Nicolet Drive, Green Bay, Wisconsin 54301.

Dated at Rockville, Maryland, this 29th day of December 1993.

For the Nuclear Regulatory Commission.

John N. Hannon,

Director, Project Directorate III-3, Division of Reactor Projects III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 94-340 Filed 1-6-94; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-271]

Vermont Yankee Nuclear Power Corporation; Vermont Yankee Nuclear Power Station; Issuance of Director's Decision Under 10 CFR 2.206

Notice is hereby given that the Director, Office of Enforcement, has taken action with regard to a Petition for action under 10 CFR 2.206 received from Messrs. Michael Daley and Jonathan M. Block, dated September 1, 1993, on behalf of the New England Coalition on Nuclear Pollution (Petitioner), regarding the Vermont Yankee Nuclear Power Station.

The Petitioner requested that the NRC reconsider the August 2, 1993 civil penalty assessed against the Vermont Yankee Nuclear Power Corporation for operating the Vermont Yankee Nuclear Power Station outside Technical Specifications from October 15, 1992 to April 6, 1993.

The Petitioner requested reconsideration based on its view that: (A) the seriousness of the event was greater than determined by the NRC; (B) the licensee failed to adequately respond to a number of questions posed by the NRC in the cover letter to the May 24, 1993 inspection report documenting the review of the issue; (C) the licensee has consistently failed to heed and learn from industry experience and practice, which in this case involved industry and NRC guidance on materials used in scram solenoid pilot valves; and (D) the NRC failed to effectively penalize the licensee in relation to the income generated by plant operation during the period that the plant operated in violation of the Technical Specifications.

The Director of the Office of Enforcement has reviewed the bases for the Notice of Violation and civil penalty that was issued and found the enforcement action to be proper. Therefore, the Petitioner's request has been denied. The reasons for the denial are explained in the "Director's Decision Under 10 CFR 2.206" (DD-93-23) which is available for public inspection at the Nuclear Regulatory Commission's Public Document Room, 2120 L Street, NW., Washington, DC 20555, and at the Local Public Document Room for the Vermont Yankee Nuclear Power Station, Brooks Memorial Library, 224 Main Street, Brattleboro, Vermont 05301.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206(c) of the Commission's regulations. As provided by that regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the decision within that time.

Dated at Rockville, Maryland, this 28th day of December 1993.

For the Nuclear Regulatory Commission.

James Lieberman,

Director, Office of Enforcement.

[FR Doc. 94-339 Filed 1-6-94; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-416]

Entergy Operations, Inc., South Mississippi Electric Power Assoc., Mississippi Power and Light Co., Grand Gulf Nuclear Station, Unit 1; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-29, issued to the Entergy Operations, Inc. (the licensee), for operation of the Grand Gulf Nuclear Station (GGNS), located in Clairborne County, Mississippi.

Environmental Assessment

Identification of Proposed Action

The proposed amendment would consist of revisions to 10 CFR part 20 references to recognize the new section numbers, revise definitions to ensure consistency with 10 CFR part 20, and change administrative controls for reporting and recordkeeping to maintain compliance with the new part 20. The changes would revise the limitations on concentrations of radioactive material released in liquid effluents and the limitations on the dose rate resulting from radioactive material released in gaseous effluents and reflect the relocation of the prior 10 CFR 20.106 requirements to the new 10 CFR 20.1302. These changes are in response to the licensee's application for amendment dated August 11, 1993, implementing the 10 CFR part 20.

The Need for the Proposed Action

The proposed action is needed in order to retain operational flexibility consistent with 10 CFR part 50, appendix I, concurrent with the implementation of the revised 10 CFR part 20.

Environmental Impacts of the Proposed Action

The proposed revision, in regards to the actual release rates as referenced in the Technical Specifications (TSs) as a dose rate to the maximally exposed member of the public, will not increase the types or amounts of effluents that may be released offsite, nor increase individual or cumulative occupational radiation exposures. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed amendment.

With regard to potential nonradiological impacts, the proposed changes do not affect nonradiological effluents and have no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed amendment.

Alternatives to the Proposed Action

Since the Commission concluded that there are no significant environmental impacts associated with the proposed amendment to the TSs, any alternative to the amendment either will have no significantly different environmental impact or will have greater environmental impact. The principal alternative would be to deny the requested amendment. This would not reduce environmental impacts as a result of plant operation.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in the Final Environmental Statement related to the operation of the Grand Gulf Nuclear Station, dated September 1981.

Agencies and Persons Consulted

The Commission's staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of No Significant Impact

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed license amendment.

For further details with respect to this action, see the application for amendment dated August 11, 1993, which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC, and at the Judge George W. Armstrong Library, Post Office Box 1406, S. Commerce at Washington, Natchez, Mississippi 39120.

Dated at Rockville, Maryland, this 3rd day of January, 1994.

For the Nuclear Regulatory Commission.

David L. Wigginton,

Acting Director, Project Directorate IV-3, Division of Reactor Projects—III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 94-337 Filed 1-6-94; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 30-29567-CivP; ASLBP No. 94-686-01-CivP]

Cameo Diagnostic Centre, Inc., Byproduct Material License No. 20-27908-01; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1992, published in the **Federal Register**, 37 FR 28710 (1972), and sections 2.105, 2.700, 2.702, 2.714, 2.714a, 2.717 and 2.721 of the Commission's Regulations, all as amended, an Atomic Safety and Licensing Board is being established in the following proceeding:

Cameo Diagnostic Centre, Inc.
Byproduct Material License No. 20-27908-01
EA 93-005

This Board is being established pursuant to the request of the Licensee for an enforcement hearing regarding an Order issued by the Deputy Executive Director for Nuclear Materials Safety, Safeguards and Operations Support, dated November 24, 1993, entitled "Order Imposing a Civil Monetary Penalty" (58 FR 64341, December 6, 1993).

An order designating the time and place of any hearing will be issued at a later date.

All correspondence, documents and other materials shall be filed in accordance with 10 CFR 2.701. The Board is comprised of the following Administrative Judges:

Judge Ivan W. Smith, Board Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555

Judge Richard F. Cole, Board Member, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555

Judge Charles N. Kelber, Board Member, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555

Issued at Bethesda, Maryland, this 30th day of December, 1993.

B. Paul Cotter, Jr.,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 94-342 Filed 1-6-94; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-261]

Carolina Power & Light Co., (H.B. Robinson Steam Electric Plant, Unit No. 2); Exemption

I

Carolina Power and Light Company (CP&L or the licensee) is the holder of Facility Operating License No. DPR-23, which authorizes operation of the H.B. Robinson Steam Electric Plant, Unit No. 2 (HBR), at steady-state reactor power level not in excess of 2300 megawatts thermal. The facility consists of one pressurized water reactor located at the licensee's site in Darlington County, South Carolina. The license provides, among other things, that it is subject to all rules, regulations and Orders of the Nuclear Regulatory Commission (the Commission or NRC) now or hereafter in effect.

II

Section 50.54(q) of 10 CFR part 50 requires a licensee authorized to operate a nuclear power reactor to follow and maintain in effect emergency plans that meet the standards of 10 CFR 50.47(b) and the requirements of appendix E to 10 CFR part 50. Section IV.F.2 of appendix E requires that each licensee annually exercise its emergency plan. Section IV.F.3 of appendix E requires that each licensee shall exercise with offsite authorities such that the State and local emergency plans are exercised biennially.

The NRC may grant exemptions from the requirements of the regulations which, pursuant to 10 CFR 50.12(a), are (1) authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security; and (2) present special circumstances. Special circumstances exist when the exemption would result in benefit to the public health and safety that compensates for any decrease in safety that may result from the granting of the exemption (10 CFR 50.12(a)(2)(iv)). In addition, special circumstances exist when the exemption would provide only temporary relief from the applicable regulation and the licensee has made good faith efforts to comply with the regulation (10 CFR 50.12(a)(2)(v)).

III

By letters dated November 21 and 22, 1993, the licensee requested an exemption from the requirements of 10 CFR 50.47 and 10 CFR part 50, appendix E, section F.2, to conduct an annual exercise of the Emergency Plan in 1993. The licensee had planned to conduct a full-participation exercise involving the licensee's onsite response organization, the State of South Carolina and local response organizations on November 30, 1993. The licensee requested that an exemption be granted for the conduct of the onsite portion of the exercise because the licensee would not have sufficient staff to exercise in a meaningful way the HBR Emergency Plan due to resource constraints caused by an unscheduled outage to investigate and address core design issues. This proposed delay will prevent HBR from meeting the requirement to conduct an annual exercise of the HBR Emergency Plan. However, the licensee proposes that the offsite portion of the exercise involving the State of South Carolina and local governmental authorities be conducted as scheduled on November 30, 1993.

The licensee states that the granting of a delay in the implementation of the 1993 exercise for the onsite portion of the HBR Emergency Plan would allow management to focus on the safety issues identified during startup after refueling outage 15. The HBR plant was proceeding to full power operation after a refueling outage when low power physics testing revealed an improper configuration emanating from the design of the new fuel. The new fuel consisted of 44 fuel assemblies, 6 of which were found to be configured improperly against design specifications. As a result, the NRC dispatched an Augmented Inspection Team to the HBR site and the licensee formed three investigative teams. All of these efforts currently divert focus and resources to develop corrective actions for core

reconfiguration and to investigate and resolve any industry implications of fuel configuration problems.

The previous emergency preparedness exercise at HBR was successfully conducted on November 17, 1992, and included the partial participation of State and local agencies for notifications and communications only. The licensee had scheduled, planned, and coordinated the 1993 exercise with participating Federal, State, and local agencies for November 30, 1993. The scope and objectives, and the final scenario documentation for the November 1993 exercise were submitted to the NRC on September 13, 1993, and October 14, 1993, respectively, which is within the time frame established for their submittal in support of a November 1993 exercise. In addition, the licensee states that a training exercise with the State of South Carolina and local governmental agencies was conducted on November 16, 1993, which activated all emergency facilities and included participation from all major responder groups.

The schedule for future exercises will not be affected by this exemption. CP&L has stated it will conduct the previously scheduled 1994 exercise the week of November 15, 1994, as planned. Thus, the requested exemption would provide only temporary relief from the requirement to conduct an annual exercise and the licensee has made a good faith effort to comply with the regulation.

The November 30, 1993, exercise was conducted and evaluated by the Federal Emergency Management Agency (FEMA) as planned and included full participation by the State of South Carolina and the surrounding counties in the Plume Exposure Emergency Planning Zone. The exercise was fully supported by onsite exercise controllers such that no detection of simulation was apparent to the offsite participants. FEMA had concurred in this concept. The licensee stated that the State of South Carolina would support the delayed onsite exercise.

The most recent NRC Systematic Assessment of Licensee Performance (SALP) report for HBR, issued on September 8, 1992, for the period March 31, 1991, through June 27, 1992, indicated that adequate management support for the emergency preparedness program was evident during the period, as the licensee continued to maintain in a state of basic readiness the emergency preparedness elements needed to implement the emergency in response to emergency events. The licensee has been rated as Category 2 (Improving) in the functional area of emergency preparedness. Additionally, the May 14, 1993, inspection report (50–261/93–09) of the H. B. Robinson Emergency Preparedness Program, conducted April 12–16, 1993, indicates the emergency preparedness strengths were management's commitment to improving the site's emergency preparedness program and the licensee's annual emergency preparedness audit. It was determined that the licensee's emergency preparedness program and response capability were being maintained in an adequate state of operational readiness.

IV

Based upon a review of the licensee's request for an exemption from the requirement to conduct an exercise of the HBR Emergency Plan in 1993, the NRC staff finds that there will be a benefit to the public health and safety which compensates for any decrease in safety that may result from the rescheduling of the November 30, 1993, exercise to the week of March 21, 1994. By not conducting the exercise at this time, HBR will be able to concentrate its effort in the investigation and analysis of the core design issue. The adequate response capability demonstrated by the licensee during the 1992 emergency preparedness exercise, the activities in preparation for the 1993 exercise, including the comprehensive training exercise conducted with offsite authorities on November 16, 1993, and the readiness of the licensee's emergency preparedness program as reflected in its SALP rating and the most recent inspection report, provide assurance that the resources and personnel necessary for proper emergency response are in place to respond to a nuclear emergency at the HBR site. Thus, not conducting an exercise in 1993 would be offset by allowing the licensee to focus its attention on the investigation and core design issues and the requested exemption from the requirement in 10 CFR Part 50, Appendix E, Section IV.F, to defer the performance of an exercise of the HBR Emergency Plan until the week of March 21, 1994, will not adversely affect the overall state of emergency preparedness at the HBR site.

The Commission has determined that, pursuant to 10 CFR 50.12, the exemption requested by the licensee's letters dated November 21 and 22, 1993, as discussed above, is authorized by law and will not endanger life or property and are otherwise in the public interest. Furthermore, the Commission has determined, pursuant to 10 CFR 50.12(a), that special circumstances as set forth in 10 CFR 50.12(a)(2)(iv) and (v) are present and applicable in that the benefit to the public health and safety compensates for any decrease in safety that may result from this exemption, and this exemption will provide only temporary relief from the applicable regulation and the licensee has made good faith efforts to comply with the regulations.

The Commission hereby grants an exemption from the schedular requirements of 10 CFR Part 50, Appendix E, Section IV.F.2., for an extension of the onsite portion of the required biennial exercise of the HBR2 Emergency Plan from November 30, 1993, until week of March 21, 1994.

Pursuant to 10 CFR 51.32, the Commission has determined that granting this exemption will have no significant impact on the environment.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 30th day of December 1993.

For the Nuclear Regulatory Commission.

Gus C. Lainas,

Acting Director, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–338 Filed 1–6–94; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF PERSONNEL MANAGEMENT

National Partnership Council; Meeting; Confirmation

AGENCY: Office of Personnel Management.

ACTION: Notice of meeting; confirmation.

SUMMARY: Notwithstanding the announcement to the contrary at the December 17, 1993 meeting of the National Partnership Council (the Council), this notice confirms that the time and place of the January 14, 1994, meeting of the Council as published December 6, 1993 (58 FR 64347) have not changed.

TIME AND PLACE: The Council will meet on January 14, 1994 at 2 p.m. in the auditorium at the Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street NW., Washington, DC 20415–0001. The auditorium is located on the ground level.

POINT OF CONTACT: Douglas K. Walker, Office of Communications, Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street NW., room 5F12, Washington, DC 20415–0001, (202) 606–1800.

Office of Personnel Management.

James B. King,

Director.

[FR Doc. 94–375 Filed 1–6–94; 8:45 am]

BILLING CODE 6325–01–M

POSTAL RATE COMMISSION

[Docket No. A94–5; Order No. 998]

Notice and Order Accepting Appeal and Establishing Procedural Schedule Under 39 U.S.C. 404(b)(5)

Issued January 3, 1994.

Before Commissioners: W.H. "Trey" LeBlanc, III, Vice Chairman; George W. Haley; H. Edward Quick, Jr.; Wayne A. Schley.

Docket Number: A94–5.

Name of Affected Post Office: Moriah, New York 12960.

Name(s) of Petitioner(s): Donald M. Baker and others.

Type of Determination: Closing.

Date of Filing of Appeal Papers: December 23, 1993.

Categories of Issues Apparently Raised: 1. Effect on postal services (39 U.S.C. 404(b)(2)(C)).

2. Effect on the community (39 U.S.C. 404(b)(2)(A)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those set forth above. Or, the Commission may find that the Postal Service's determination disposes of one or more of those issues.

The Postal Reorganization Act requires that the Commission issue its decision within 120 days from the filing date of this appeal (39 U.S.C. 404(b)(5)). In the interest of expedition, in the light of the 120-day decision schedule, the Commission reserves the right to request the Postal Service to submit memoranda of law on any appropriate issue. If requested, such memoranda will be due 20 days from the issuance of the request and the Postal Service shall serve a copy of its memoranda on the petitioners. The Commission reserves the right to ask petitioners for more information.

If the Postal Service files a brief or motion to dismiss or a motion to affirm the appeal, the Postal Service may incorporate by reference any memoranda it previously filed in this docket.

The Commission Orders

(a) The Postal Service shall file the record in this appeal by January 7, 1994.

(b) The Secretary of the Postal Rate Commission shall publish this Notice and Order and Procedure Schedule in the **Federal Register.**

By the Commission.

Charles L. Clapp,

Secretary.

Appendix

Dec. 23, 1993 ...	Filing of Appeal Letter.
Jan. 3, 1994	Commission Notice and Order of Filing of Appeal.
Jan. 18, 1994	Last day of filing of petitions to intervene (see 39 CFR 3001.111(b)).
Jan. 27, 1994	Petitioners' Participant Statements or Initial Briefs (see 39 CFR 3001.115(a) and (b)).
Feb. 16, 1994	Postal Service's Answering Brief (see 39 CFR 3001.115(c)).
Mar. 3, 1994	Petitioners' Reply Briefs should Petitioners choose to file them (see 39 CFR 3001.115(d)).
Mar. 10, 1994 ...	Deadline for motions by any party requesting oral argument. The Commission will schedule oral argument only when it is a necessary addition to the written filings (see 39 CFR 3001.116).
Apr. 21, 1994 ...	Expiration of the Commission's 120-day decisional schedule (see 39 U.S.C. 404(b)(5)).

[FR Doc. 94–314 Filed 1–6–94; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–33404; File No. SR–CBOE–93–60]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Filing and Order Granting Partial Accelerated Approval of Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to an Extension and Request for Permanent Approval of the Pilot Program Involving Debit Put Spreads in Broad-Based Indexes With European-Style Exercise

December 30, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), and Rule 19b–4 thereunder,[1] notice is hereby given that on December 27, 1993, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 17 CFR 240.19b–4 (1993).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend Exchange Rule 24.11A, "Debit Put Spread Cash Account Transactions," to extend through December 31, 1994, a pilot program allowing approved public customers with qualified portfolios ("spread exemption customers") to effect and maintain in cash accounts debit put spread transactions in broad-based index options with European-style exercise.[2] In addition, the CBOE seeks permanent approval of the pilot program.

The text of the proposed rule change is available at the Office of the Secretary, CBOE, 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 self-regulatory organization 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 self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Currently, § 220.8 of Regulation T under the Act precludes customers from effecting spread transactions in cash

[2] The Commission approved the pilot program on a one-year basis through November 25, 1992. See Securities Exchange Act Release No. 29992 (November 26, 1991), 56 FR 63526 (order approving File Nos. SR-Amex-91–14 and SR–CBOE–91–17) ("Debit Put Spread Approval Order"). Subsequently, both the CBOE and the American Stock Exchange, Inc. ("Amex") amended the definition of "debit put spread" to provide that the strike price of the long leg of the spread must exceed, not equal, the strike price of the short leg. See Securities Exchange Act Release Nos. 30267 (January 21, 1992), 57 FR 3234 (order approving file No. SR–CBOE–91–50) and 30419 (February 26, 1992), 57 FR 7825 (order approving File No. SR-Amex-92–07). On June 30, 1993, the Commission approved an extension of the pilot program through December 31, 1993. See Securities Exchange Act Release No. 32556 (June 30, 1993), 58 FR 32556 (order approving File No. SR–CBOE–93–13) ("Pilot Extension Order").

accounts. Specifically, § 220.8(a)(3)(ii) of Regulation T includes in permissible cash account transactions a creditor's issue, endorsement or guarantee of a put option for a customer if the creditor obtains cash in an amount equal to the exercise price of the option or holds in the account any of the following instruments with a current market value at least equal to the exercise price of the option and with one year or less to maturity: U.S. government securities, negotiable bank certificates of deposit, or bankers acceptances issued by a U.S. bank and payable in the United States. Because offsetting options positions fail to satisfy these criteria, spreads are not included in permissible cash account transactions and therefore must be effected in margin accounts.

On November 26, 1991, the Commission approved proposals submitted by the CBOE and the Amex which established one year pilot programs allowing approved public customers[3] with qualified portfolios of stock to effect and maintain in cash accounts debit put spread transactions in broad-based index options with European-style exercise.[4] The Commission approved an extension of the CBOE's pilot program through December 31, 1993.[5] The CBOE now proposes to extend its debit put spread pilot program through December 31, 1994, and, in addition, the Exchange requests permanent approval of the pilot program.

The pilot program defines a "debit put spread" as "a long put position coupled with a short put position overlying the same broad-based index and having an equivalent underlying aggregate index value, where the short put(s) expires with the long put(s), and the strike price of the long put(s) exceeds the strike price of the short put(s)." Under the terms of the pilot, only public customers approved by the CBOE are permitted to participate in the pilot program. To obtain the CBOE's approval, customers are required, among other things, to hold a qualified stock portfolio or its equivalent that is composed of net long positions in common stocks in at least four industry groups and that contains at least twenty stocks, none of which accounts for more than fifteen percent of the value of the portfolio. A portfolio must meet these standards at all times, regardless of trading activity in the stocks. In addition, the debit put spread positions must be carried in an account with an Exchange member organization and the qualified portfolio must be maintained with either an Exchange member organization, another broker-dealer, a bank, or a securities depository.

In conjunction with the creation of the pilot programs, the Commission staff also issued no-action letters to the Amex and the CBOE stating that the staff would not recommend enforcement action against the Amex and the CBOE due to the operation of the pilot programs, namely the maintenance of spread positions in a cash account.[6] The staff of the Board of Governors of the Federal Reserve System ("Board") also informed the Commission staff that Board staff would not object to the Commission staff's issuance of these no-action positions in connection with the pilot programs.[7] As required by the Debit Put Spread Approval Order, the CBOE submitted a report assessing the effectiveness of the pilot program.[8] In addition, as required under the Pilot Extension Order, the CBOE has submitted a report dated as of November 10, 1993, assessing the effectiveness of the pilot program from January 1993 through September 1993.[9] In its 1993 Pilot Report, the CBOE states that no participant has operated in violation of the pilot since its inception. As it concluded in its initial Pilot Report, the CBOE states that the pilot program has provided an efficient means for investors who are limited to cash account transactions to effectively hedge their portfolios against market declines. The CBOE states that it has neither experienced nor detected any problems related to the pilot program and, in addition, that no activity of any participant appeared to violate the requirements of the pilot program or other Exchange Rules. The Exchange has found no evidence of market manipulation or other negative impact on market operations arising from the pilot program.

Accordingly, in order to allow the pilot to continue, the CBOE requests an extension of the pilot program through December 31, 1994, and permanent approval of the program at the time the Board staff notifies the Commission that it does not object to such approval.

The CBOE believes that the proposed rule change is consistent with section 6(b) of the Act, in general, and furthers the objectives of section 6(b)(5), in particular, in that it is designed to facilitate transactions in securities and to protect investors and the public interest by allowing investors to hedge qualified portfolios against market declines by purchasing and maintaining debit put spread transactions in cash accounts.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The CBOE does not believe that the proposed rule change will impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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 CBOE has requested that the proposed rule change be given accelerated effectiveness pursuant to section 19(b)(2) of the Act.

The Commission finds that the proposal to extend the pilot program through December 31, 1994, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6.[10] Specifically, the Commission believes, as it has previously concluded,[11] that this pilot program is designed to benefit qualified public customers who are

[3] For purposes of its pilot program, a public customer is a customer whose orders are eligible to be placed on a CBOE limit order book under Exchange Rule 7.4(a).

[4] See Debit Put Spread Approval Order, *supra* note 2.

[5] See Pilot Extension Order, *supra* note 2.

[6] See Letter from Howard L. Kramer, Assistant Director, Division of Market Regulation ("Division"), Commission, to Mary L. Bender, First Vice President, Division of Regulatory Services, CBOE, dated November 25, 1991, and Letter from Howard L. Kramer, Assistant Director, Division, Commission, to James M. McNeil, Assistant Vice President, Chief Examiner, Amex, dated November 25, 1991.

[7] See Letter from Laura Homer, Securities Credit Officer, Board, to Howard L. Kramer, Assistant Director, Division, Commission, dated July 12, 1991.

[8] See Letter from Mary L. Bender, First Vice President, Division of Regulatory Services, CBOE, to Sharon Lawson, Assistant Director, Division, Commission, dated October 1, 1992 ("Pilot Report"). In the Pilot Report, the CBOE stated that the pilot program has been an efficient means for investors that are limited to cash account transactions to effectively hedge their portfolios against declines in the market. The CBOE represented that it had neither experienced nor detected any problems related to the pilot. Moreover, the Exchange stated that no activity of any pilot participant appeared violative of the program's requirements or other Exchange rules, nor did Exchange studies find evidence of market manipulation or other negative impact on market operations.

[9] See Letter from Mary L. Bender, CBOE, to Sharon Lawson, Assistant Director, Division, Commission, dated November 10, 1993 ("1993 Pilot Report").

[10] 15 U.S.C. 78f(b)(5) (1988).

[11] See Debit Put Spread Approval Order, *supra* note 3.

prohibited or restricted in their use of margin accounts by facilitating their purchase of index option debit put spreads. Specifically, because the purchaser of a debit put spread uses the call premium to reduce the cost of purchasing the put, index option put spreads provide investors with an affordable means to hedge their portfolios against adverse market moves. In addition, to the extent that the pilot program has increased index options transactions, the program has benefited all options investors by contributing to the depth and liquidity of the CBOE's options markets.

The Commission continues to believe that the economic characteristics of index option debit put spreads permit an exception to the application of Regulation T. In a debit put spread, the long put entitles the spread exemption customer to receive payment when the index reaches the put option's strike price; because the strike price of the long put must exceed the strike price of the short put, the spread exemption customer's right to receive payment under the long put will offset any obligations he incurs from the sale of the short put. Because the short position must expire with the long position, the offset provided by the long put will last for the duration of the spread exemption customer's obligation as a short put writer. In addition, there is no risk that the short put will be exercised prior to the long put because the exemption applies solely to European-style options, which may be exercised only during a specified period prior to expiration.

In its 1993 Pilot Report, the CBOE states that no participant has operated in violation of the pilot since its inception, nor have the CBOE's surveillance procedures revealed evidence of manipulation or abuse of knowledge of impending expiration-related program trades for each expiration Friday during the review period. The 1993 Pilot Report indicates that the pilot program's 39 participants included corporations, pension/retirement plans, non-profit organizations, mutual funds, and individual or family trusts, the majority of which were prohibited by contractual agreements from using margin accounts. The debit put spreads of all of the participants were comprised of Standard & Poor's ("S&P") 500 Index ("SPX") options with one to four months remaining until expiration. During the review period the total number of spreads effected on a monthly basis under the pilot program each month ranged from 3,696 to 12,544.

On the basis of the 1993 Pilot Report, the Commission believes that the debit put spread pilot program has facilitated the needs of qualified public customers who are limited to cash account transactions by providing them with an effective means to hedge their portfolios against adverse market moves. At the same time, the 1993 Pilot Report indicates that no pilot participant has violated the pilot's parameters, nor has the Exchange discovered any market manipulation or abuse in connection with the pilot program. For these reasons, the Commission believes that the debit put spread pilot program has provided qualified public customers with additional means to implement their hedging strategies and, by facilitating index options transactions, has benefited all options investors by contributing to the depth and liquidity of the CBOE's options markets.

The Commission requests that the CBOE submit a report on the continued operation of the pilot by September 30, 1994 in the event that the pilot program has not been permanently approved by the Commission prior to that date. The report should contain information comparable to that provided in the 1993 Pilot Report. Additionally, the Commission expects the CBOE to notify the Commission promptly of any problems arising in connection with the pilot program.

The Commission finds good cause for approving the portion of the CBOE's proposal extending the pilot program through December 31, 1994, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register** in order to allow the pilot program to continue. In addition, because the Commission has received no comments regarding the operation of the pilot program since its implementation, and because the pilot program has been utilized by a number of qualified public customers, the Commission believes that granting accelerated approval of the CBOE's proposal is appropriate and consistent with sections 19(b)(2) and 6(b)(5) of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submissions 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 the filings will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the File No. SR–CBOE–93–60 and should be submitted by January 28, 1994.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the portion of the proposal (SR–CBOE–93–60), relating to an extension of the CBOE's debit put spread pilot program until December 31, 1994, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–313 Filed 1–6–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–33407; File No. SR–PSE–93–17]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Pacific Stock Exchange, Inc., Relating to Permanent Approval of the Options Trading Crowd Performance Evaluation Pilot Program

December 30, 1993.

On July 28, 1993, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change seeking permanent approval of the Options Trading Crowd Performance Evaluation pilot program provided in Options Floor Procedure Advice ("OFPA") B–13, "Subject: Evaluation of Options Trading Crowd Performance."[3]

[12] 15 U.S.C. 78s(b)(2) (1982).

[13] 17 CFR 200.30–3(a)(12) (1993).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1993).

[3] On April 22, 1988, the Commission approved the PSE's Options Trading Crowd Performance Evaluation program on a two-year pilot basis. See Securities Exchange Act Release No. 25611 (April 22, 1988), 53 FR 15325 (order approving SR–PSE–87–28). Subsequently, the Commission approved proposals which extended the pilot program

Continued

The proposed rule change was published in Securities Exchange Act Release No. 33094 (October 22, 1993), 58 FR 58365. No comments were received on the proposed rule change.

Currently, under the pilot program, the Options Allocation Committee ("Committee") conducts quarterly evaluations of options trading crowds to determine whether they have fulfilled performance standards relating to quality of markets, competition among market makers, observance of ethical standards, and administrative requirements.[4] In making its evaluations, the Committee may consider any relevant information, including (1) the results of a trading crowd evaluation questionnaire which the Committee distributes each quarter to floor brokers and floor brokerage firms;[5] (2) trading data; (3) reports filed with the Exchange (*e.g.*, Order Book Official Unusual Activity Reports); and (4) the regulatory history of the members in the crowd.

Trading crowds rated in the bottom 10% of the aggregate results of overall evaluation scores are presumed under OFPA B–13(b) to have failed to meet minimum performance standards. Under OFPA B–13 the Committee may call an informal meeting or conduct a formal hearing with a trading crowd that has failed to meet minimum performance standards. Prior to the close of the informal meeting, the Committee must inform the crowd of possible consequences if the unsatisfactory performance continues.

At a formal hearing under OFPA B–13(e), rights of confrontation and rights to counsel apply. Based on the information adduced at the formal hearing, the Committee has the authority to take action against a trading crowd or individual market makers in the crowd. Specifically, under OFPA B–13(a), the Committee may restrict the allocation of new options classes and reallocate existing options classes. The remedial actions provided in paragraph (a) may not be taken without a formal hearing and may be reviewed by the PSE's Board of Governors pursuant to PSE Rule XX, section 11(d), "Procedure Following Applications for Hearing or Review," of the Rules of the Board of Governors, upon submission of a timely application for review. The Exchange's Board of Governors may also review any Committee decision under OFPA B–13 on its own initiative.

The PSE has evaluated the Options Trading Crowd Evaluation Program and concluded that the program has provided an accurate and useful means of evaluating trading crowd and LMM performance. In this regard, the Exchange notes that the questionnaires are completed by options floor brokers, who are uniquely qualified to evaluate the trading crowds and LMMs. Based upon the increases in the survey ratings over the third and fourth quarters of 1992 and the first quarter of 1993, the Exchange believes that the program has improved the performances of the Exchange's market makers and LMMs.[6] The PSE notes that the general evaluation results are disseminated to the trading floor on a quarterly basis and that the Committee reviews the detailed survey responses and comments and considers them in allocating options to trading crowds and LMMs.

During the last quarter of 1992 and the first three quarters of 1993, the Committee held seven informal meetings with trading crowds and five informal meetings with LMMs.[7] The Exchange has held one formal hearing since the inception of the pilot program, regarding the performance of Post X–17. As a result of the hearing, the Exchange's Options Listing Committee reallocated three options and removed six options to another post. The members of Post X–17 appealed the decision to the Exchange's Board of Governors and thereafter to the Commission. On December 26, 1989, the Commission denied Post X–17's request for a stay of the Options Listing Committee's reallocation of three options.[8] On December 29, 1992, the Commission ruled that the PSE's reallocation of the options was not reviewable by the Commission under section 19(d)(2) of the Act because the reallocation was not imposed as a disciplinary sanction and because no limitation or prohibition to access occurred within the meaning of section 19(d) of the Act.[9]

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, and, in particular, the requirements of section 6(b)(5)[10] in that it is designed to remove impediments to and protect the mechanism of a free and open market and to protect investors and the public interest. The Commission believes that the trading crowd evaluation program is designed to help the Exchange to maintain the quality and integrity of its markets by setting minimum standards of market maker performance and providing a means to identify market makers and trading crowds which fail to meet performance standards. By allowing the Exchange to assess the quality of its trading crowds and market makers, and to take appropriate remedial measures where necessary, the Commission believes that the trading crowd evaluation program helps the Exchange to provide a more competitive, efficient and fair market.

Specifically, the Commission believes that the evaluation program furthers the PSE's ability to ensure liquid and continuous markets for options by permitting the Exchange to enforce more effectively the affirmative and negative obligations imposed on PSE market makers. In particular, the trading crowd evaluation questionnaire enables the PSE to determine whether market makers are making continuous, two-sided markets in all option series for each option class located at a trading station and whether deep and liquid markets are provided as a result of competition among market makers. The Commission believes that the more stringent, formalized market maker standards should further enhance the integrity of the PSE's markets and contribute to investor confidence and protection. In addition, the Commission

through October 1, 1993. See Securities Exchange Act Release Nos. 29930 (November 12, 1991), 56 FR 58598 (order approving File No. SR–PSE–91–30) and 31613 (December 17, 1992), 57 FR 61464 (order approving File No. SR–PSE–92–34). Most recently, the Commission approved an extension of the pilot program through January 1, 1994. See Securities Exchange Act Release No. 33094 (October 22, 1993), 58 FR 58365 (notice of filing and order granting partial accelerated approval of File No. SR–PSE–93–17).

[4] Prior to June 1992, the Options Listing Committee conducted the quarterly evaluations. In June 1992, the Commission approved a proposal allowing the Options Allocation Committee to assume the evaluation function. See Securities Exchange Act Release No. 30843 (June 19, 1992), 57 FR 28889 (order approving File No. SR–PSE–92–07).

[5] The PSE has stated that the questionnaire is distributed to 90% of the Exchange's floor brokers, and that 80% of those who receive the questionnaire complete it. Telephone conversation between Michael D. Pierson, Senior Attorney, Market Regulation, PSE, to Yvonne Fraticelli, Staff Attorney, Options Branch, Division, Commission, on October 7, 1993.

[6] The Committee has not distributed the evaluation questionnaires since the first quarter of 1993. However, the Committee plans to distribute questionnaires covering the last two quarters of 1993 early in 1994. Telephone conversations between Michael Pierson, Senior Attorney, Market Regulation, PSE, and Yvonne Fraticelli, Staff Attorney, Options Branch, Division, Commission, on December 15 and 16, 1993.

[7] Telephone conversations between Michael Pierson, Senior Attorney, Market Regulation, PSE, and Yvonne Fraticelli, Staff Attorney, Options Branch, Division, Commission, on December 15 and 16, 1993.

[8] See Securities Exchange Act Release No. 27568 (December 26, 1989) (Order Denying Stay, File No. 3–7285).

[9] See Securities Exchange Act Release No. 31666 (December 29, 1992), File No. 3–7285.

[10] 15 U.S.C. 78f(b) (1982).

believes that the Committee's consideration of the trading crowd survey results in allocating options to trading crowds and LMMs should provide an incentive for improved market maker performance.

The Commission also notes that the evaluation program provides procedural rights in connection with remedial actions taken under the program. Specifically, the Committee may restrict the allocation of new options and reallocate existing options under paragraph (a) of OFPA B–13 only after a formal hearing. At a formal hearing, the OFPA provides for a right to counsel and a record of the proceedings. In addition, the Committee's decision is reviewable by the Exchange's Board of Governors upon the submission of a timely application for review and the Exchange's Board of Governors may review any Committee decision on its own initiative. The Board review panel or the Chairman of the Board may grant or deny a stay of the Committee's action. By requiring that the Committee implement the remedial measures provided in paragraph (a) only after a formal hearing, and by providing a right to appeal the Committee's decision to the Exchange's Board of Governors, the Commission believes that the evaluation program contains processes designed to safeguard the procedural rights of individuals affected by remedial actions.

Finally, the Commission notes that the PSE's trading crowd evaluation program is similar to a program adopted previously by the Chicago Board Options Exchange ("CBOE").[11]

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–394 Filed 1–6–94; 8:45 am]

BILLING CODE 8010–01–M

[11] See Securities Exchange Act Release No. 28012 (May 14, 1990), 55 FR 20879 (order approving File No. SR–CBOE–90–04) and CBOE Rule 8.60, "Evaluation of Trading Crowd Performance."

[12] 15 U.S.C. 78s(b)(2) (1982).

[13] 17 CFR 200.30–3(a)(12) (1992).

[Release No. 34–33408; File No. SR–PHLX–93–63]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to an Extension of the Effectiveness of Its Pilot Program and Accompanying Rules Regarding the Trading of Nasdaq/National Market System Securities Through December 31, 1994

December 30, 1993.

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 December 27, 1993, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PHLX proposes to extend the effectiveness of the pilot program and its accompanying rules regarding the trading of Nasdaq/National Market System ("NMS") securities on the Exchange for the one-year period ending December 31, 1994.[3]

The Exchange requests the Commission to find good cause, pursuant to section 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after publication in the **Federal Register**. The PHLX states that it respectfully is requesting accelerated approval of this filing due to the noncontroversial nature of the pilot program coupled with the impending lapse of the PHLX's OTC/UTP privileges on December 31, 1993.

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] The Commission initially approved this pilot program and the accompanying rules for a temporary period ending on December 31, 1993. Securities Exchange Act Release No. 31672 (December 30, 1992), 58 FR 3054 (order temporarily approving File No. SR–PHLX–92–04) ("1992 PHLX Pilot Order").

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed 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 self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 26, 1993, the Commission approved a transaction reporting plan ("Plan") submitted by the National Association of Securities Dealers, Inc. ("NASD"), the American Stock Exchange ("Amex"), the Boston Stock Exchange ("BSE"), the Midwest Stock Exchange (currently the Chicago Stock Exchange, or "CHX"), and the PHLX (cumulatively, "Participants").[4] The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq/NMS securities traded on exchanges and by NASD market makers.[5]

Although the CHX has been trading Nasdaq/NMS securities since 1987, the PHLX obtained temporary approval of its rules to facilitate trading Nasdaq/NMS securities in late 1992,[6] and the PHLX began trading those securities pursuant to unlisted trading privileges ("UTP") and the pilot program in February, 1993. Since that time, the PHLX has been operating the program without any adverse consequences or developments which negatively impact upon the program and, therefore, seeks

[4] Securities Exchange Act Release No. 28146 (June 26, 1990), 55 FR 27917. The Commission notes that certain enhancements to electronic linkages were required before trading pursuant to the Plan could begin. These enhancements were completed and trading pursuant to the Plan commenced in June 1993 on a one-year pilot basis.

[5] See Securities Exchange Act Release No. 30984 (July 31, 1992), 57 FR 36114 (notice of filing of proposed rule change, File No. SR–PHLX–92–04). The Plan also superseded an interim transaction reporting plan filed by the NASD and the CHX and approved by the Commission on April 29, 1987. See Securities Exchange Act Release No. 24407 (April 29, 1987), 52 FR 17349.

[6] 1992 PHLX Pilot Order, *supra* note 3.

an extension of the pilot program to develop the UTP program further.[7]

The PHLX will continue to submit OTC/UTP applications to the Commission for specific securities for approval pursuant to section 12(f) of the Act.[8] Further, the PHLX understands that in considering an application for the extension of UTP to an OTC security pursuant to section 12(f)(2), the Commission considers, *inter alia*, the public trading activity in the security, the character of that trading, the impact of an extension of UTP on the existing markets for the security, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system.

2. Statutory Basis

This proposal is consistent with the requirements of the Act and the rules and regulations promulgated thereunder. Specifically, the proposal complies with section 6(b)(5) of the Act insofar as it is calculated to promote just and equitable principles of trade and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. 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 at the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PHLX. All submissions should refer to File No. SR–PHLX–93–63 and should be submitted by January 28, 1994.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission believes that the PHLX's proposal to extend the effectiveness of its pilot program and accompanying rules with respect to UTP in OTC securities is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] Specifically, the Commission believes that the proposed rule change is consistent with sections 6(b)(5), 11A and 12(f) of the Act.[10]

In 1985, the Commission published its policy to extend UTP to national securities exchanges in certain OTC securities provided certain terms and conditions are satisfied.[11] The Commission's policy stated that UTP approval would be conditioned, in part, on the approval of a plan to consolidate and disseminate exchange and OTC quotation data and transaction data upon which UTP is granted. As noted above, in 1990, the Commission approved the Plan which provides for the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq/NMS securities listed on an exchange or traded on an exchange pursuant to a grant of UTP.[12] Trading subject to Plan requirements in securities approved for UTP on the PHLX pursuant to section 12(f)(2) are and will continue to be reported in the consolidated transaction reporting system established under the Plan.

In our 1992 PHLX Pilot Order, the Commission emphasized that PHLX specialists trading Nasdaq/NMS securities pursuant to the grant of UTP are subject to Plan requirements as well as the PHLX By-Laws and Rules. Moreover, the Commission stated its intent to monitor any potential abuse of the informational advantage that options traders could acquire from the PHLX equity floor with respect to securities traded under the PHLX pilot program. In extending the PHLX pilot for an additional year, the Commission again emphasizes that PHLX specialists trading Nasdaq/NMS securities pursuant to the grant of UTP continue to be subject to Plan requirements as well as the PHLX By-Laws and Rules. The Commission also will continue to monitor side-by-side trading concerns during this extension of the pilot procedures.

In approving the Plan, the Commission noted that the Plan should enhance market efficiency and fair competition, avoid investor confusion, and facilitate regulatory surveillance of concurrent exchange and OTC trading. The Commission continues to believe that the proposed rule change will further promote these goals and the development of a national market system. However, in approving the Plan and in our 1992 PHLX Pilot Order, the Commission requested that the Participants evaluate the effect of OTC/UTP trading on the OTC market. The Commission also requested that the UTP Participants evaluate the quality of executions of customer orders and whether the Plan facilitates the goals of a national market system. To date, the Commission has not received the Participants' evaluations regarding these concerns.

While the PHLX has provided the Commission with useful information concerning trading volume in the relevant securities,[13] and the PHLX states in this filing that it has suffered no adverse consequences under the pilot, the PHLX should evaluate the effect of OTC/UTP trading on the OTC market, the quality of execution on customer orders, and whether the Plan facilitates the goals of a national market

[7] The Exchange attached Exhibit B to the proposal which provides an accounting of the number of shares and number of trades executed on the PHLX pursuant to the pilot program since its inception in February, 1993. Exhibit B states a total PHLX pilot program volume through November 19, 1993 of 457,790 shares.

[8] Commission approval of the Plan limits the PHLX authority to submit OTC/UTP applications for trading in up to a maximum of 100 Nasdaq/NMS securities. The PHLX must submit OTC/UTP applications to the Commission for specific securities for approval pursuant to section 12(f) of the Act.

[9] For a more detailed discussion of the Commission's findings with respect to the pilot program and its consistency with the Act, see 1992 PHLX Pilot Order, *supra* note 3.

[10] 15 U.S.C. 78f(b)(5), 78k–1, 78l(f) (1988). Section 6(b)(5) requires, among other things, that the rules of an exchange be designed 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. Section 11A provides, among other things, that it is in the public interest and appropriate for the protection of investors to assure fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets. Section 12(f) provides the terms and conditions regarding exchange applications for unlisted trading privileges and Commission approval of those applications.

[11] Securities Exchange Act Release No. 22412 (September 16, 1985), 50 FR 38640.

[12] See note 4, *supra*.

[13] See discussion of Exhibit B, note 7, *supra*.

system.[14] The Commission requests that the PHLX submit to the Commission a written evaluation of these issues, along with a statement addressing the Commission's side-by-side trading concerns discussed above, on or before November 1, 1994, along with either a request for permanent approval or an additional extension of this PHLX pilot program and the accompanying rules.

The Commission believes that it is appropriate to extend the PHLX pilot program of OTC/UTP trading for an additional year while the Commission awaits the Participants' evaluations of their trading experience pursuant to the Plan. Moreover, the Commission believes that PHLX OTC/UTP trading, as limited by the Plan and this pilot program, generally furthers the objectives of a national market system and is consistent with the maintenance of fair and orderly markets and the protection of investors as required by sections 6(b)(5), 11A and 12(f) of the Act.

V. Conclusion

For the reasons stated above, the Commission believes that it is appropriate to extend the PHLX pilot program for OTC/UTP trading for an additional year.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that accelerated approval of the proposal is appropriate in order to allow the PHLX to continue trading pursuant to the pilot program on an uninterrupted basis. Further, the pilot program and the accompanying rules have been noticed previously in the **Federal Register** for the full statutory period, and the Commission received no comments on the proposal.[15]

It is therefore ordered, pursuant to section 19(b)(2)[16] that the proposed rule change is hereby approved on a pilot basis through December 31, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

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[14] The Commission also stated in our 1992 PHLX Pilot Order that the Participants should develop an intermarket trading linkage and an accompanying trade-through rule. The Commission believes that the Participants should continue working toward these goals.

[15] See *supra* note 4.

[16] 15 U.S.C. 78s(b)(2) (1988).

[17] 17 CFR 200.30–3(a)(12) (1991).

[Rel. No. IC–19990; No. 811–5746]

Crown America Separate Account B

December 30, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for an Order under the Investment Company Act of 1940 (the "1940 Act").

APPLICANT: Crown America Separate Account B ("Applicant").

RELEVANT 1940 ACT SECTION: Order requested under Section 8(f) of the 1940 Act.

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company as defined by the 1940 Act.

FILING DATE: The application was filed on September 30, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the Application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 24, 1994, and should be accompanied by proof of service on Applicant in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requestor's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Applicant, 120 Bloor Street East, Toronto, Canada M4W 1B8.

FOR FURTHER INFORMATION CONTACT: Yvonne M. Hunold, Senior Counsel, on (202) 272–2676, or Michael V. Wible, Special Counsel, on (202) 272–2060, Office of Insurance Products (Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application; the complete application is available for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. On December 14, 1988, the Applicant was established as a separate account of Crown America Life Insurance Company ("Crown America") under Kentucky insurance law for the purpose of investing payments received under certain variable annuity contracts issued by Crown America.

2. On January 5, 1989, Applicant filed a notification of registration as an investment company, unit investment trust, on Form N–8A under section 8(a) of the 1940 Act (File No. 811–5746). Applicant also filed on January 5, 1989, a registration statement on Form N–4 (File No. 33–26413) under the Securities Act of 1933 ("1933 Act") for a class of variable annuity contracts and, under Rule 24f–2 of the 1940 Act, registered an indefinite amount of securities under the 1933 Act. This registration statement was declared effective on August 2, 1990. However, no variable annuity contracts were sold under this registration statement.

3. On February 1, 1991, Applicant filed a registration statement on Form N–4 under the 1933 Act (File No. 33–38840) for a second class of variable annuity contracts funded by the Applicant. Pursuant to Rule 24f–2 of the 1940 Act, Applicant registered an indefinite amount of securities under the 1933 Act. This registration statement was declared effective on June 10, 1991 and four variable annuity contracts were sold under this registration statement.

4. Crown America Holding Company ("Crown Holding"), Crown America's sole shareholder, entered into a Stock Purchase Agreement ("Agreement"), dated May 12, 1993, with Keyport Life Insurance Company ("Keyport"), to sell all of its issued and outstanding shares of Crown America to Keyport. Crown Holding's shares of Crown America consisted of its holdings in Applicant (File Number 811–5746), Crown America Separate Account A (File Number 811–5777), and Crown America Separate Account D (File Number 811–5747). The closing of the sale of shares occurred on October 1, 1993. Under the Agreement, Crown Holding agreed to take all reasonable steps to terminate the registration of certain separate accounts, including Applicant. On September 27, 1993, Crown America's Board of Directors adopted a resolution authorizing the deregistration and termination of Applicant.

5. Applicant's only securities issued consisted of four variable annuity contracts, all of which were surrendered and terminated by February 19, 1992. Applicant's assets when the Contracts were outstanding consisted of shares of the Annuity Management Series Trust. All such shares were surrendered for their redemption proceeds, which in turn were used to pay the surrender values on the Contracts. Since the payment of surrender proceeds on termination of the Contracts, the Applicant has had no assets or security holders and, accordingly, has made no distributions to security holders in connection with the winding-up of its affairs pursuant to its termination.

6. Crown America has paid or will pay all expenses incurred by all parties in connection with the liquidation and termination of the Applicant.

7. During the past 18 months, Applicant has not, for any reason, transferred any of its assets to a separate trust, the beneficiaries of which were or are security holders of the Applicant.

8. Applicant has retained no assets and has no security holders. Applicant does not have any debts or other liabilities which remain outstanding. Applicant is not a party to any litigation or administrative proceeding.

9. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding-up of its affairs.

10. Applicant filed a final Form N-SAR with the Commission on March 2, 1993.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-312 Filed 1-6-94; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19991; 812-8596]

Lincoln Renaissance Fund, Inc., et al.; Notice of Application

December 30, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Lincoln Renaissance Fund, Inc. (the "Existing Fund"), Lincoln National Investment Management Company ("LNIMC"), and LNC Equity Sales Corporation ("LNC Equity Sales").

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from sections 2(a)(32), 2(a)(35), 18(f)(1), 18(g), 18(i), 22(c), and 22(d) of the Act and rule 22c-1 thereunder.

SUMMARY OF APPLICATION: Applicants seek an order that would permit the Existing Fund and its series to (a) issue multiple classes of shares representing interests in the same portfolio of securities and (b) assess and, under certain circumstances, waive a contingent deferred sales charge ("CDSC") on redemptions of shares.

FILING DATE: The application was filed on September 27, 1993, and amended on November 23, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 24, 1994, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, 1300 South Clinton Street, Fort Wayne, Indiana 46801.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Staff Attorney, at (202)272-3026, or Robert A. Robertson, Branch Chief, at (202)272-3030 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. The Existing Fund is an open-end management investment company registered under the Act consisting of nine series. LNIMC serves as the Fund's investment adviser and LNC Equity Sales serves as distributor. LNIMC and LNC Equity Sales are both wholly-owned subsidiaries of Lincoln National Corporation ("Lincoln National").

2. Applicants request that relief be extended to any investment companies (a)(i) whose investment adviser or administrator is LNIMC, or a person controlling, controlled, or under common control with LNIMC ("Investment Adviser"), or (ii) whose principal underwriter is LNC Equity Sales, or a person controlling, controlled, or under common control with LNC Equity Sales ("Distributor") and (b) that (i) are within the same "group of investment companies" as that term is defined in rule 11a-3 under the Act, and (ii) issue classes of shares on a basis identical in all material respects to that described in the application (collectively with the Existing Fund, the "Funds").

A. The Multiple Class Distribution System

1. Applicants propose to establish a multiple distribution arrangement to enable each of the Funds, or series thereof, to create a potentially unlimited number of classes representing different pricing arrangements (the "Alternative Purchase Plans"). Applicants initially propose that each Fund, and series thereof, have the ability to offer investors the option of purchasing classes of shares that would be subject to a front-end sales load or subject to a CDSC, a combination of front-end sales load and CDSC, or not subject to any such sales charge. The shares offered pursuant to any of these options could be subject to a 12b-1 plan. The sum of any front-end load, asset based sales charge, and CDSC will not exceed the maximum sales charge provided for in article III, section 26 of the Rules of Fair Practice of the National Association of Securities Dealers ("NASD").

2. The net asset value of all outstanding shares of the classes would be computed separately for each class of shares by first allocating gross income and expenses (other than rule 12b-1 fees, the transfer agency fees of each class, and other incremental expenses properly attributable to a particular class) to each class based on the net assets attributable to each class at the beginning of the day and then by separately recording the differing rule 12b-1 fees, transfer agency fees of each class, and any other incremental expenses properly attributable to the class. The net asset value attributable to each shares of each class then would be calculated by dividing the net assets calculated for each class by the number of shares outstanding in that class.

3. Applicants propose an exchange program in which shares of a Fund will be exchangeable for the same class, or a class with a similar pricing structure, or another Fund. Under limited circumstances, shares of a Fund may be exchangeable for a class of shares of the same or another Fund with different pricing structures. For instance, shares subject to a CDSC of certain retirement and deferred compensation plans with total assets in excess of a specified dollar amount and whose accounts are held directly with the Fund's transfer agent and for which the transfer agent does individual account recordkeeping will be exchangeable for shares of a class with lower 12b-1 fees. All exchanges that are made at other than relative net asset value will be made in accordance with rule 11a-3 under the Act.

4. Future classes may provide for a conversion feature in which shares subject to a higher rule 12b-1 fee ("Higher 12b-1 Class") could convert, automatically after a period of time, to shares of another class with a lower

12b–1 fee ("Lower 12b–1 Class"). With a conversion feature, shares of Higher 12b–1 Classes would automatically convert after the expiration of a set number of years after purchase to shares of Lower 12b–1 Classes without the imposition of any additional sales charge and thereafter be subject to the lower rule 12b–1 fee, if any, applicable to the Lower 12b–1 Class.

B. The CDSC

1. Applicants also request an exemption to permit the Funds to impose a CDSC on redemptions of shares of the Funds, and to waive the CDSC under certain circumstances. No CDSC will be imposed on an amount that represents an increase in the shareholder's account resulting from capital appreciation or on those shares purchased more than a specified period prior to redemption. Furthermore, no CDSC will be charged on shares purchased prior to the effective date of the requested order.

2. Applicants seek the ability to waive the CDSC on redemptions (a) following the death or disability, as defined in section 72(m)(7) of the Internal Revenue Code of 1986 (the "Code"), of a shareholder; (b) in connection with distributions from a tax deferred retirement plan, an individual retirement account, a custodial account maintained pursuant to Code section 403(b)(7), or a pension plan or profit-sharing plan when the redemptions are (i) after termination of employment or retirement or, in the case of individual retirement accounts, after attaining age 59½, (ii) resulting from the return of an excess contribution, deferral amounts or aggregate contributions pursuant to the Code, (iii) or resulting from the death or disability of employee, (iv) by any 401(k) plan or pension, profit-sharing, stock bonus plans, deferred compensation, or annuity plans under sections 401, 403(b)(7), or 457 of the Code ("Benefit Plans") whose accounts are held directly with a Fund's transfer agent for which the transfer agent does individual record keeping ("Direct Account Benefit Plans"), (v) of shares of Benefit Plans sponsored by LNC Equity Sales ("Prototype Benefit Plans"), (vi) of shares acquired with amounts used to repay a loan from Direct Account Benefit Plans and on which a CDSC was previously imposed, and (vii) by Direct Account Benefit Plans and Prototype Benefit Plans which represent borrowings from such plans; (c) by trust accounts following the death or disability of the beneficiary or the grantor, trustee, or other fiduciary; (d) of shares purchased through a LNC Equity Sales sales representative which were purchased with the proceeds from the sale of any unaffiliated open-end investment company other than a money market fund; (e) by profit-sharing or stock bonus plans upon "hardship" of an employee, as determined by the plan; (f) pursuant to a qualified domestic relations order, as defined in section 414(p) of the Code; (g) by Direct Account Benefit Plans of shares originally purchased subject to a CDSC and subsequently exchanged for a Lower 12b–1 Class pursuant to an exchange privilege afforded to such plans with total assets in excess of a specified dollar amount; (h) of shares purchased with dividends or distributions earned in other Funds; (i) made in connection with a systematic withdrawal plan; and (j) by directors and officers of the Funds and employees of LNIMC, LNC Equity Sales, and Lincoln National and their subsidiaries.

3. In regards to waiver category (d) above, applicants will take such steps as may be necessary to determine that the shareholder has not paid a CDSC, fee, or other charge in connection with the redemption of shares of such other open-end investment company, including, without limitation, requiring the shareholder to provide a written representation that neither a CDSC, fee, nor other charge was imposed upon the redemption, and, in addition, either (a) requiring such shareholder to provide an activity statement reflecting the redemption that supports the shareholder's representation or (b) reviewing a copy of the current prospectus of the other open-end investment company and determining that such company does not impose a CDSC, fee, or other charge in connection with the redemption of shares.

Applicants' Legal Analysis

1. Applicants request an exemption under section 6(c) from sections 18(f)(1), 18(g), and 18(i) of the Act to issue multiple classes of shares representing interests in the same portfolio of securities. Applicants believe that by implementing the multiple class distribution system, the Funds would be able to facilitate the distribution of their shares and provide a broad array of services without assuming excessive accounting and bookkeeping costs. Applicants also believe that the proposed allocation of expenses and voting rights in the manner described above is equitable and would not discriminate against any group of shareholders.

2. The proposed arrangement does not involve borrowings, and does not affect the Funds' existing assets or reserves. The proposed arrangement also will not increase the speculative character of the shares of a Fund, since all such shares will participate in the Fund's appreciation, income, and expenses in the manner described above.

3. Applicants also request an exemption under section 6(c) from sections 2(a)(32), 2(a)(35), 22(c), and 22(d) of the Act and rule 22c–1 thereunder to assess and, under certain circumstances, waive a CDSC on redemptions of shares. Applicants believe that their request to permit the CDSC arrangement would place the purchaser in a better position than if a sales load were imposed at the time of sale, since the shareholder may have to pay only a reduced sales charge or no sales charge at all.

Applicants' Conditions

A. The Multiple Class Distribution System

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. Each class of shares will represent interests in the same portfolio of investments of a Fund, and will be identical in all respects, except as set forth below. The only differences among the classes of the same Fund will relate solely to: (a) The impact of the disproportionate rule 12b–fees, any higher incremental transfer agency costs attributable solely to the classes, and any other incremental expenses subsequently identified that should be properly allocated to one or more classes and which shall be approved by the SEC pursuant to an amended order; (b) the fact that the classes will vote separately with respect to the rule 12b–1 plan, if any, adopted by each class of the Fund, except as set forth in condition 14 below; (c) the difference in exchange privileges of the classes of shares; (d) the designation of each class of shares of the Fund; and (e) the difference in conversion features of the classes of shares.

2. The directors of a Fund, including a majority of the independent directors, will approve the creation and issuance of any new classes of shares in the Fund. The minutes of the meetings of the board of directors of a Fund regarding the deliberations of the directors with respect to the approvals necessary to add or change a class of shares will reflect in detail the reasons for determining that offering any of the proposed Alternative Purchase Plans is in the best interests of the Fund and its shareholders.

3. On an ongoing basis, the directors of a Fund, pursuant to their fiduciary responsibilities under the Act and

otherwise, will monitor the Fund for the existence of any material conflicts between the interests of the various classes of shares offered by the Fund. The directors, including a majority of the independent directors, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The Investment Adviser and the Distributor will be responsible for reporting any potential or existing conflicts to the boards of directors. If a conflict arises, the Investment Adviser and the Distributor at their own cost will remedy such conflict up to and including, if necessary, establishing new registered management investment companies.

4. The directors of the Funds with regard to Funds with rule 12b–1 plans will receive quarterly and annual statements concerning distribution and shareholder servicing expenditures complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify the rule 12b–1 fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the directors to justify rule 12b–1 fees charged to shareholders of that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent directors in the exercise of their fiduciary duties.

5. Dividends paid by a Fund with respect to its various classes of shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time on the same day, and will be in the same amount, except that rule 12b–1 fee payments relating to each respective class of shares will be borne exclusively by that class and except that any higher incremental transfer agency costs attributable solely to one class will be borne exclusively by that class.

6. The methodology and procedures for calculating the net asset value and dividends and distributions of multiple classes and the proper allocation of expenses among them has been reviewed by an expert (the "Independent Examiner") which has rendered a report to applicants, which has been provided to the staff of the SEC, that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner. On an ongoing basis, the Independent Examiner, or an appropriate substitute Independent Examiner, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Funds that the calculations and allocations are being made properly. The reports of the Independent Examiner shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Independent Examiner with respect to such reports, following request by a Fund (which each Fund agrees to provide), will be available for inspection by the SEC staff upon the written request to a Fund for such work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Independent Examiner is a "report on policies and procedures placed in operation" and the ongoing reports will be "reports on policies and procedures placed in operation and tests of operating effectiveness" as defined and described in SAS No. 70 of the AICPA, as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

7. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distributions of the various classes of shares and the proper allocation of expenses among the various classes of shares and this representation has been concurred with by the Independent Examiner in the initial report referred to in condition (6) above and will be concurred with by the Independent Examiner, or an appropriate substitute Independent Examiner, on an ongoing basis at least annually in the ongoing reports referred to in condition (6) above. Applicants will take immediate corrective measures if this representation is not concurred in by the Independent Examiner or an appropriate substitute Independent Examiner.

8. The prospectuses of the Funds will contain a statement to the effect that a salesperson and any other person entitled to receive compensation for selling or servicing Fund shares may receive different levels of compensation with respect to one particular class of shares over another in a Fund.

9. The Distributor will adopt compliance standards as to when each class of shares may appropriately be sold to particular investors. Applicants will require all persons selling shares of the Funds to agree to conform to such standards.

10. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the boards of directors of the Funds with respect to the Alternative Purchase Plans will be set forth in guidelines which will be furnished to the boards of directors.

11. Each Fund will disclose the expenses, performance data, distribution arrangements, services, fees, sales loads, deferred sales loads, conversion features, and exchange privileges applicable to each class of shares of the Fund in every prospectus, regardless of whether all classes of shares are offered through each prospectus. Each Fund will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report. The shareholder reports will contain, in the statement of assets and liabilities and statement of operations, information related to a Fund as a whole generally and not on a per class basis. A Fund's per share data, however, will be prepared on a per class basis with respect to all classes of shares of such Fund. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of shares, it will also disclose the expenses and/or performance data applicable to all classes of shares. The information provided by applicants for publication in any newspaper or similar listing of a Fund's net asset value and public offering price will present each outstanding class of shares separately.

12. Applicants acknowledge that the grant of the exemptive order requested by the application will not imply SEC approval, authorization, or acquiescence in any particular level of payments that the Funds may make pursuant to rule 12b–1 plans in reliance on the exemptive order.

13. Any class of shares with a conversion feature ("Purchase Class") will convert into another class ("Target Class") of shares on the basis of the relative net asset values of the two classes, without the imposition of any sales load, fee, or other charge. After conversion, the converted shares will be subject to an asset-based sales charge and/or service fee (as those terms are defined in article III, section 26 of the NASD's Rules of Fair Practice), if any, that in the aggregate are lower than the asset-based sales charge and service fee to which they were subject prior to the conversion.

14. If a Fund implements any amendment to a rule 12b–1 plan (or, if presented to shareholders, adopts or implements any amendment to a non-

rule 12b–1 shareholder services plan) that would increase materially the amount that may be borne by a Target Class under the plan, existing Purchase Class shares will stop converting into shares of such Target Class unless Purchase Class, voting separately as a class, approve the amendment. The directors shall take such action as is necessary to ensure that existing Purchase Class shares and exchanged or converted into a new class of shares ("New Target Class"), identical in all material respects to Target Class shares as they existed prior to implementation of the amendment, no later than the date such shares previously were scheduled to convert into Target Class shares. If deemed advisable by the board of directors to implement the foregoing, such action may include the exchange of all existing Purchase Class shares for a new class ("New Purchase Class") of shares, identical to existing Purchase Class shares in all material respects except that the New Purchase Class will convert into the New Target Class. The New Target Class and New Purchase Class may be formed without further exemptive relief. Exchanges or conversions described in this condition shall be effected in a manner that the board of directors reasonably believe will not be subject to federal taxation. In accordance with condition 3, any additional cost associated with the creation, exchange, or conversion of the New Target Class or New Purchase Class shall be borne solely by the Investment Adviser and the Distributor. Purchase Class shares sold after the implementation of the amendment may convert into Target Class shares subject to the higher maximum payment, provided that the material features of the Target Class plan and the relationship of such plan to the Purchase Class are disclosed in an effective registration statement.

B. The CDSC

1. Applicants will comply with the provisions of proposed rule 6c–10 under the Act (Investment Company Act Release No. 16619 (Nov. 2, 1988)), as such rule is currently proposed and as it may be reproposed, adopted or amended.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–310 Filed 1–6–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 35–25969]

Filings Under the Public Utility Holding Company Act of 1935 ("Act")

December 30, 1993.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 24, 1994 to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

The Southern Company (70–8181)

The Southern Company ("Southern"), 64 Perimeter Center East, Atlanta, Georgia 30346, a registered holding company, has filed a post-effective amendment under sections 6(a) and 7 under the Act to their declaration under sections 6(a), 7 and 12(e) of the Act and Rule 62 thereunder.

By order dated November 2, 1993 (HCAR No. 25917), Southern was authorized to amend ("Amendment") the fourth Article of its Certificate of Incorporation in order to increase, from 500 million to 1 billion, the total number of shares of common stock, par value $5.00 per share, that Southern shall have authority to issue. By notice dated April 9, 1993 (HCAR No. 25788), Southern was granted the authority to solicit proxies from its shareholders in order to seek shareholder approval of the Amendment at the annual meeting of shareholders.

Southern now proposes to effect a stock split in the form of a stock distribution at any time on or prior to December 31, 1995. Southern proposes to issue and distribute to the holders of record of the then outstanding shares of common stock up to one additional share of such stock for each share held at such time. The proposed stock split would be effected pursuant to authorization by the Board of Directors of Southern at such time as the Board considers the same to be desirable and in the best interests of Southern and its stockholders. The par value of the shares of common stock, $5.00 per share, will not be affected by the proposed stock split.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–311 Filed 1–6–94; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–19992; File No. 812–8692]

Nationwide Life Insurance Company, et al.

January 3, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "1940 Act").

APPLICANTS: Nationwide Life Insurance Company ("Nationwide Life"), Nationwide Variable Account–5 (the "Separate Account"), and Nationwide Financial Services, Inc., collectively, the "Applicants."

RELEVANT 1940 ACT SECTIONS: Order requested under section 6(c) of the 1940 Act for exemptions from sections 26(a)(2)(C) and 27(c)(2) thereof.

SUMMARY OF APPLICATION: Applicants seek an order permitting the deduction of a mortality and expense risk charge from the assets of the Separate Account which serves as a funding medium for certain variable annuity contracts (the "Contracts") issued by Nationwide Life.

FILING DATE: The application was filed on November 22, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on the application by writing to the Secretary of the SEC and serving the Applicants with a copy of the request, either personally or by mail. Hearing requests must be received by the SEC by 5:30 p.m. on January 28, 1994, and should be accompanied by proof of service on the Applicants in the form of

an affidavit or, for lawyers, by certificate. Hearing requests should state the nature of the interest, the reason for the request, and the issues contested. Persons may request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, DC 20549. Applicants, c/o Carol Edwards Dunn, Esq., McCutchan, Druen, Maynard, Rath & Dietrich, One Nationwide Plaza, Columbus, Ohio 43216.

FOR FURTHER INFORMATION CONTACT: Patrice M. Pitts, Attorney, or Michael V. Wible, Special Counsel, Division of Investment Management, Office of Insurance Products, at (202) 272–2060.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. Nationwide Life is a stock life insurance company incorporated under the laws of Ohio.

2. Nationwide Life established the Separate Account on November 1, 1989, under Ohio law. The Separate Account is registered under the 1940 Act as a unit investment trust, and serves as a funding medium for the Contracts. Just prior to the filing of this application, the Separate Account filed a Form N–4 registration statement with the SEC to register the Contracts under the Securities Act of 1933.

3. The Separate Account consists of several subaccounts, each of which invests in one or more portfolios of several underlying registered investment companies.

4. Nationwide Financial Services, Inc., will serve as the general distributor for the Contracts.

5. The Contracts are sold to individuals either as non-qualified Contracts or for use in retirement plans which may qualify for special federal tax treatment under the Internal Revenue Code of 1986, as amended.

6. The initial first year purchase payment must be at least $1,500 for non-qualified Contracts. However, if periodic payments are expected by Nationwide Life, the initial first year minimum purchase payment may be satisfied by purchase payments made on an annualized basis. The cumulative total of all purchase payments under a Contract may not exceed $1,000,000 without the prior consent of Nationwide Life.

7. The Contract owner may select one of three annuity payment options, each of which provides for a series of annuity payments commencing on the annuity commencement date. If the designated annuitant dies prior to the annuity commencement date, a death benefit will be paid to the beneficiary either as a single sum payment or in accordance with an annuity payment option, as elected by the beneficiary. If the annuitant dies prior to age 75, the amount of the death benefit will be the greater of the Contract value, or the sum of all purchase payments less any amounts surrendered. The amount of the death benefit will be limited to the Contract value if the annuity commencement date is deferred beyond age 75 of the annuitant and the annuitant dies after attaining such age. If the annuitant dies after the annuity commencement date, the death benefit (if any) will be as specified in the annuity payment option elected.

8. If the Contract value at the date on which annuity payments commence is less than $500, the Contract value may be distributed in one lump sum instead of annuity payments. If any annuity payment would be less than $20, Nationwide Life shall have the right to change the frequency of payments to such intervals as will result in payments of at least $20.

9. No sales charge is deducted from purchase payments made under the Contracts. If part or all of the Contract value is withdrawn, a contingent deferred sales charge ("CDSC") may be assessed by the Company, and deducted from the amount withdrawn. For purposes of the CDSC, withdrawals are considered to come first from the oldest purchase payment made to the Contract, then the next oldest purchase payment, and so forth. The CDSC is calculated by multiplying the applicable CDSC percentage noted below by the purchase payments being withdrawn:

Number of completed years from the date of purchase payment	Contingent deferred sales charge percentage
0	7
1	6
2	5
3	4
4	3
5	2
6	1
7	0

Each Contract year after the first, the Contract owner may withdraw without CDSC an amount equal to 10% of the total sum of all purchase payments made to the Contract, less any purchase payments previously withdrawn which were subject to CDSC. This CDSC-free withdrawal privilege is non-cumulative. Free amounts not taken during any given Contract year cannot be taken as free amounts in a subsequent Contract year.

10. An annual Contract Maintenance Charge of $30 is deducted from the Contract value, as well as an Administration Charge equal on an annual basis to 0.05% of the daily net asset value of the Variable Account. The 0.05% Administration Charge is deducted during both the "pay-in" accumulation phase and the "pay-out" annuity phase. Nationwide Life relies upon Rule 26a–1 to assess both the Contract Maintenance Charge and the Administration Charge. In this regard, Nationwide Life will monitor the proceeds of the Administration Charge to ensure that they do not exceed expenses.

11. Nationwide Life seeks to assess a mortality and expense risk charge at an annual rate of 1.25% of the value of the daily net asset value of the Separate Account. Of this amount, 0.80% represents mortality risks and 0.45% represents expense risks.

12. The mortality risk Nationwide Life assumes is twofold: (a) the risk of guaranteeing to make monthly payments—at rates set at the time the Contract is issued—for the lifetime of the annuitant, no matter how long the annuitant may live, and no matter how long all annuitants as a class may live; and (b) the guaranteed minimum death benefit risk assumed by Nationwide Life in connection with its promise to return, at a minimum, the Contract owner's purchase payments upon death of the designated annuitant prior to the annuity commencement date, even if the investment experience in the Separate Account has eroded the Contract owner's principal investment.

13. The expense risk Nationwide Life assumes results from its guarantee that the annual Contract charges (i.e., the Contract Maintenance Charge, the Administration Charge and the mortality and expense risk charge) will never be increased regardless of the actual expense incurred by Nationwide Life.

14. If the mortality and expense risk charge is insufficient to cover the actual cost of the mortality and expense risk, the loss will be borne by Nationwide Life. Conversely, if the mortality and expense risk charge proves more than sufficient, the excess will be a profit to Nationwide Life and will become part of its general account surplus.

Applicants' Legal Analysis and Conclusions

1. The Applicants request an exemption from sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to the extent

relief is necessary to permit the deduction of a mortality and expense risk charge from the assets of the Separate Account which serves as a funding medium for the Contracts.

2. Sections 26(a)(2)(C) and 27(c)(2), as herein pertinent, prohibit a registered unit investment trust and any depositor thereof or underwriter therefor from selling periodic payment plan certificates unless the proceeds of all payments (other than sales load) are deposited with a qualified bank as trustee or custodian and held under arrangements which prohibit any payment to the depositor or principal underwriter except a fee, not exceeding such reasonable amounts as the Commission may prescribe, for performing bookkeeping and other administrative services.

3. The Applicants represent that the mortality and expense risk charge is within the range of industry practice for comparable annuity products and is reasonable in relation to the risks assumed under the Contracts. This representation is based upon Nationwide Life's analysis of publicly available information of other insurance companies of similar size and risk ratings offering similar products. Nationwide Life will maintain, and make available to the Commission, a memorandum setting forth in detail the products analyzed in the course of, and the methodology and results of, its comparative survey.

4. Nationwide Life also maintains a supporting actuarial memorandum demonstrating the reasonableness of the mortality and expense risk charge, given the risks assumed under the Contracts. This memorandum will be made available to the Commission upon request.

5. Should revenue from the CDSC prove insufficient to cover all sales expenses, Nationwide Life bears this shortfall in the general account. To this extent, some portion of the profit, if any, from the mortality and expense risk charge could be used to make up unrecovered sales expenses. Nationwide Life has concluded that there is a reasonable likelihood that the proposed distribution financing arrangement will benefit the Separate Account and the owners of the Contracts. The basis for this conclusion is set forth in a memorandum which will be made available to the Commission upon its request.

6. Nationwide Life represents that the Separate Account will invest only in investment companies which, if they should adopt any distribution financing plan under Rule 12b–1 under the 1940 Act, will have a board of trustees or directors, the majority of which will be "disinterested," as defined by the Act. Such boards of directors or trustees must formulate and approve any such distribution plan.

Applicants' Conclusion

The Applicants assert that for the reasons set forth above, the requested exemptions from sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to deduct a mortality and expense risk charge under the Contracts meet the standards in section 6(c) of the 1940 Act. The Applicants assert that the requested exemptions are necessary or appropriate in the public interest or for the protection of investors, and for the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–397 Filed 1–6–94; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

Office of Defense Trade Controls

[Public Notice 1928]

Statutory Debarment Under the International Traffic in Arms Regulations

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of which persons have been statutorily debarred pursuant to § 127.7(c) of the International Traffic in Arms Regulations (22 CFR parts 120–130) (ITAR).

EFFECTIVE DATE: January 7, 1994.

FOR FURTHER INFORMATION CONTACT: Clyde G. Bryant Jr., Chief, Compliance Enforcement Branch, Office of Defense Trade Controls, Department of State (703–875–6650).

SUPPLEMENTARY INFORMATION: Section 38(g)(40(A) of the Arms Export Control Act (AECA), 22 U.S.C. 2778, prohibits export licenses to be issued to a person, or any party to the export, who has been convicted of violating certain U.S. criminal statutes, including the AECA. The term "person," as defined in 22 CFR 120.14 of the International Traffic in Arms Regulations (ITAR), means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities. The ITAR, specifically § 126.7(e), defines the term "party to the export" to include the president, the chief executive officer, and other senior officers and officials of the license applicant; the freight forwarders or designated exporting agent of the license applicant; and any consignee or end-user of any item to be exported. The statute permits certain limited exceptions to this prohibition to be made on a case-by-case basis. 22 U.S.C. 2778(g)(4).

The ITAR, § 127.7, authorizes the Assistant Secretary of State for Political-Military Affairs to prohibit certain persons convicted of violating, or conspiring to violate, the AECA from participating directly or indirectly in the export of defense articles or in the furnishing of defense services. Such a prohibition is referred to as a "statutory debarment," which may be imposed on the basis of judicial proceedings that resulted in a conviction for violating, or of conspiring to violate, the AECA. See 22 CFR 127.7(c). The period for debarment will normally be three years from the date of conviction. At the end of the debarment period, licensing privileges may be reinstated at the request of the debarred person following the necessary interagency consultations, after a thorough review of the circumstances surrounding the conviction, and a finding that appropriate steps have been taken to mitigate any law enforcement concerns, as required by the AECA, 22 U.S.C. 2778(g)(4).

Statutory debarment is based solely upon a conviction in a criminal proceeding, conducted by a United States court. Thus, the administrative debarment procedures, as outlined in the ITAR, 22 CFR part 128, are not applicable in such cases.

The Department of State will not consider applications for licenses or requests for approvals that involve any person or any party to the export who has been convicted of violating, or of conspiring to violate, the AECA during the period of statutory debarment. Persons who have been statutorily debarred may appeal to the Under Secretary for International Security Affairs for reconsideration of the ineligibility determination. A request for reconsideration must be submitted in writing within 30 days after a person has been informed of the adverse decision. 22 CFR 127.7(d).

The Department of State policy permits debarred persons to apply for an exception one year after the date of the debarment, in accordance with the AECA, 22 U.S.C. 2778(g)(4)(A), and the ITAR, § 127.7. This request is made to the Director of the Office of Defense

Trade Controls. Any decision to grant an exception can be made only after the statutory requirements under section 38(g)(4) of the AECA have been satisfied. If the exception is granted, the debarment will be suspended.

Pursuant to the AECA, 22 U.S.C. 2778(g)(4)(A), and the ITAR, 22 CFR 127.7, the Assistant Secretary for Political-Military Affairs has statutorily debarred nine persons who have been convicted of conspiring to violate or violating the AECA.

These persons have been debarred for a three-year period following the date of their conviction, and have been so notified by a letter from the Office of Defense Trade Controls. Pursuant to ITAR, § 127.7(c), the names of these persons, their offense, date of conviction(s) and court of conviction(s) are hereby being published in the **Federal Register.** Anyone who requires additional information to determine whether a person has been debarred should contact the Office of Defense Trade Controls.

This notice involves a foreign affairs function of the United States encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act. Because the exercising of this foreign affairs function is discretionary, it is excluded from review under the Administrative Procedure Act.

In accordance with these authorities the following persons are debarred for a period of three years following their conviction for conspiring to violate or violating the AECA (name/address/offense/conviction date/court citation):

1. Jetborne, Inc., 4010 N.W. 36th Avenue, Miami, FL 33142, 22 U.S.C. 2778 (violating the Arms Export Control Act), December 3, 1992, *United States* v. *Jetborne, Inc.*, (U.S. District Court, Southern District of Florida, Criminal Docket No. 91–199–CR–MORENO(S)(01))
2. John L. Broussard, 110 Churchill Drive, Lafayette, LA 70501, 18 U.S.C. 371 (conspiracy to violate 22 U.S.C. 2778), June 26, 1992, *United States* v. *John L. Broussard*, (U.S. District Court, Western District of Louisiana, Criminal Docket No. 91–60025–01)
3. Hilton Langley, 101 North Pine, Lafayette, LA 70501, 18 U.S.C. 371 (conspiracy to violate 22 U.S.C. 2778), June 26, 1992, *United States* v. *Hilton Langley*, (U.S. District Court, Western District of Louisiana, Criminal Docket No. 91–60025–02)
4. Edouard Michel Heldewier, 15630 S.W. 46th Terrace, Miami, FL 33185, 18 U.S.C. 371 (conspiracy to violate 22 U.S.C. 2778) and 22 U.S.C. 2778 (violating the Arms Export Control Act), June 3, 1991, *United States* v. *Edouard Michel Heldewier*, (U.S. District Court, Eastern District of Michigan, Criminal Docket No. CR–90–81079–DT–01)
5. Miles Andrew Maynard, 1588 South Shore Drive, East Lansing, MI 48823, 18 U.S.C. 371 (conspiracy to violate 22 U.S.C. 2778) and 22 U.S.C. 2778 (violating the Arms Export Control Act), June 3, 1991, *United States* v. *Miles Maynard*, (U.S. District Court, Eastern District of Michigan, Criminal Docket No. CR–90–81079–DT–02)
6. Phyllis Ware, 1588 South Shore Drive, East Lansing, MI 48823, 22 U.S.C. 2778 (violating the Arms Export Control Act), June 3, 1991, *United States* v. *Phyllis Ware*, (U.S. District Court, Eastern District of Michigan, Criminal Docket No. CR–90–81079–DT–03
7. Louis Haneef, Metropolitan Correctional Center, 15801 S.W. 137th Avenue, Miami, FL 33177 18 U.S.C. 371 (conspiracy to violate 22 U.S.C. 2778) and 22 U.S.C. 2778 (violating the Arms Export Control Act), December 30, 1991, *United States* v. *Louis Haneef, et al.*, (U.S. District Court, Southern District of Florida, Criminal Docket No. 90–6161–CR–PAINE)
8. Colin J. Devellerez, 148 East 122nd Street, Upland, CA 91786, 18 U.S.C. 371 (conspiracy to violate 22 U.S.C. 2778) and 22 U.S.C. 2778 (violating the Arms Export Control Act), September 14, 1993, *United States* v. *Japan Aviation Electronics Industry, Ltd, et al.*, (U.S. District Court, District of Columbia, Criminal Docket No. 91–516–06)
9. Glenda Joyce Tucker, 1634 Edom Street, Carson, CA 90746, 22 U.S.C. 2778 (violating the Arms Export Control Act), September 20, 1993, *United States* v. *Glenda Joyce Tucker*, (U.S. District Court, Central District of California, Docket No. CR–93–425(A)–RSWL)

Dated: December 10, 1993.

William B. Robinson,

Director, Office of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State.

[FR Doc. 94–360 Filed 1–6–94; 8:45 am]

BILLING CODE 4710–25–M

Office of the Secretary

[Public Notice 1924]

Delegation of Authority No. 208; to the Assistant Secretary for Intelligence and Research

By virtue of the authority vested in me as Secretary of State, including by Public Law 98–164, as amended (the "Act") and section 4 of the Act of May 26, 1949, as amended (22 U.S.C. 2658), I hereby delegate to the Assistant Secretary of State for Intelligence and Research the functions vested in me under section 804(a) of the Act.

Notwithstanding any provision of this delegation of authority the Secretary of State may at any time exercise the functions delegated by this delegation of authority. Functions delegated by this delegation of authority may be redelegated, to the extent consistent with law. Any act, executive order, regulation or procedure affected by this delegation of authority shall be deemed to be such act, executive order, regulation or procedure as amended from time to time.

This delegation of authority should be published in the **Federal Register**

Dated: November 30, 1993.

Peter Tarnoff,

Acting Secretary of State.

[FR Doc. 94–362 Filed 1–6–94, 8:45 am]

BILLING CODE 4710–10–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–93–54]

Petitions for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or

omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before January 27, 1994.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC–200), Petition Docket No. _____, 800 Independence Avenue, SW., Washington, DC 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC–200), room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3132.

FOR FURTHER INFORMATION CONTACT: Mr. Frederick M. Haynes, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3939.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of part 11 of the Federal Aviation Regulations (14 CFR part 11).

Issued in Washington, DC, on December 30, 1993.

Joseph A. Conte,

Acting Manager, Regulations Division, Office of Chief Counsel.

Petitions for Exemption

Docket No.: 26478
Petitioner: United States Air Force
Sections of the FAR Affected: 14 CFR 91.209
Description of Relief Sought: To allow the petitioner to continue to conduct lights out training in support of law enforcement and drug interdiction operations.

Docket No.: 27429
Petitioner: Community College of the Air Force
Sections of the FAR Affected: 14 CFR 147.31(a)(iii)
Description of Relief Sought/ Disposition: To permit individuals who have completed military aviation maintenance training courses to be evaluated using the same criteria that is used for the civilian sector.

Docket No.: 27484
Petitioner: Delaware State University
Sections of the FAR Affected: 14 CFR 141.27(c)(2)
Description of Relief Sought/ Disposition: To permit Delaware State University to reapply for a provisional pilot school certificate in less than 180 days after the expiration date of its prior certificate.

Docket No.: 27487
Petitioner: Ms. Rebecca Cohen-Pardo
Sections of the FAR Affected: 14 CFR 61.39
Description of Relief Sought: To allow the petitioner to be eligible for a flight test even though more than 24 months have elapsed since the required written examination was passed.

Docket No.: 27492
Petitioner: American Express Company
Sections of the FAR Affected: 14 CFR 91.411(b)
Description of Relief Sought: To allow the petitioner's experienced technicians, using certified equipment, to conduct data correspondence tests when American Express Company removes and reinstalls a Digital Air Data Computer on its Gulfstream IV aircraft.

Docket No.: 27539
Petitioner: Association of Air Medical Services and Helicopter Association International
Sections of the FAR Affected: 14 CFR 135.213(b), 135.219 and 135.255 (a)(1), (a)(2), (f) and (g)
Description of Relief Sought/ Disposition: To permit the petitioners to file an instrument flight rule (IFR) flight plan, take off under IFR, and conduct IFR approaches and takeoffs at airports/heliports that do not have weather reporting capability.

Docket No.: 27546
Petitioner: Mr. Theodore L. Herbert
Sections of the FAR Affected: 14 CFR 121.383(c)
Description of Relief Sought/ Disposition: To permit the petitioner to serve as a pilot in part 121 air carrier operations after his 60th birthday.

Dispositions of Petitions

Docket No.: 25286
Petitioner: United States Parachute Association
Sections of the FAR Affected: 14 CFR 91.307(a)(2) and 105.43(a)
Description of Relief Sought/ Disposition: To amend Exemption No. 4946C to exempt foreign nationals participating at USAP-sponsored events from using FAA-approved equipment while practice jumping in preparation for the event.
Denial, December 6, 1993, Exemption No. 5805

Docket No.: 26101
Petitioner: America West Airlines, Inc.
Sections of the FAR Affected: 14 CFR 93.225
Description of Relief Sought/ Disposition: To permit the petitioner to continue to operate four flights (two arrivals and two departures) at Washington National Airport (DCA).
Grant, November 15, 1993, Exemption No. 5133E

Docket No.: 26577
Petitioner: Jet Tech, Inc.
Sections of the FAR Affected: 14 CFR 61.55(b)(2); 61.56(b)(1); 61.57(c) and (d); 61.58(c)(1) and (d); 61.63(c)(2) and (d)(2) and (3); 61.67(d)(2); 61.157(d)(1) and (2) and (e)(1) and (2); and Appendix A of part 61.
Description of Relief Sought: To allow Jet Tech, Inc., and persons who contract for services from Jet Tech, Inc. to continue to use FAA-approved simulators to meet certain training and testing requirements.
Grant, December 9, 1993, Exemption No. 5377A

Docket No.: 27235
Petitioner: United Air Lines, Inc.
Sections of the FAR Affected: 14 CFR 121, Appendix H
Description of Relief Sought: To allow the petitioner to use its 747 #2 simulator, qualified at Level C (Phase II), as if it were qualified at Level D (Phase III).
Partial Grant, December 8, 1993, Exemption No. 5807

Docket No.: 27416
Petitioner: Airways Service
Sections of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought/ Disposition: To permit the petitioner to operate without a TSO–C112 (Mode S) transponder on its aircraft operating under the provisions of part 135.
Grant, December 20, 1993, Exemption No. 5808

Docket No.: 27461
Petitioner: Sierra Industries Inc.
Sections of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought: To allow the petitioner to operate without a TSO–C112 (Mode S) transponder installed on its aircraft operating under the provisions of part 135.
Grant, December 20, 1993, Exemption No. 5809

Docket No.: 27486
Petitioner: Carroll Aviation, Inc.
Sections of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought: To allow the petitioner to operate without a TSO–C112 (Mode S) transponder installed on its aircraft operating under the provisions of part 135.
Grant, December 20, 1993, Exemption No. 5810

[FR Doc. 94–365 Filed 1–6–94; 8:45 am]
BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

January 3, 1994.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Bureau of Alcohol, Tobacco and Firearms

OMB Number: 1512–0130.

Form Numbers: ATF F 4473, Part II (ATF F 5300.9).

Type of Review: Extension.

Title: Firearms Transaction Record, Part II Intrastate, Non-Over the Counter.

Description: Form is used to determine the eligibility (under the Gun Control Act) of a person to receive a firearm from a Federal firearms licensee. It is also used to establish the identity of the buyer. The form is used in law enforcement in investigations/inspections to trace firearms or to confirm criminal activity of persons violating the Gun Control Act (GCA).

Respondents: Individuals or households, Businesses or other for-profit, Small businesses or organizations.

Estimated Number of Respondents/Recordkeepers: 20,900.

Estimated Burden Hours Per Respondent/Recordkeeping: 24 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting/Recordkeeping Burden: 11,843 hours.

Clearance Officer: Robert N. Hogarth (202) 927–8930, Bureau of Alcohol, Tobacco and Firearms, room 3200, 650 Massachusetts Avenue, NW., Washington, DC 20226.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 94–354 Filed 1–6–94; 8:45 am]

BILLING CODE 4810–31–P

Bureau of Alcohol, Tobacco and Firearms

[Notice No. 786]

Commerce in Explosives; List of Explosive Materials

Pursuant to the provisions of section 841(d) of title 18, United States Code, and 27 CFR 55.23, the Director, Bureau of Alcohol, Tobacco, and Firearms, must publish and revise at least annually in the **Federal Register** a list of explosives determined to be within the coverage of 18 U.S.C. chapter 40, Importation, Manufacture, Distribution and Storage of Explosive Materials. This chapter covers not only explosives, but also blasting agents and detonators, all of which are defined as explosive materials in section 841(c) of title 18, United States Code. Accordingly, the following is the 1994 List of Explosive Materials subject to regulation under 18 U.S.C. Chapter 40, which includes both the list of explosives (including detonators) required to be published in the **Federal Register** and blasting agents. The list is intended to also include any and all mixtures containing any of the materials in the list. Materials constituting blasting agents are marked by an asterisk. While the list is comprehensive, it is not all inclusive. The fact that an explosive material may not be on the list does not mean that it is not within the coverage of the law if it otherwise meets the statutory definitions in section 841 of Title 18, United States Code. Explosive materials are listed alphabetically by their common names followed by chemical names and synonyms in brackets. This revised list supersedes the List of Explosive Materials dated January 15, 1993, (58 FR 4736) and will be effective as of the date of publication in the **Federal Register.**

List of Explosive Materials

A

Acetylides of heavy metals.
Aluminum containing polymeric propellant.
Aluminum ophorite explosive.
Amatex.
Amatol.
Ammonal.
Ammonium nitrate explosive mixtures (cap sensitive).
*Ammonium nitrate explosive mixtures (non cap sensitive).
Aromatic nitro-compound explosive mixtures.
Ammonium perchlorate explosive mixtures.
Ammonium perchlorate composite propellant.
Ammonium picrate [picrate of ammonia, Explosive D].
Ammonium salt lattice with isomorphously substituted inorganic salts.
*ANFO [ammonium nitrate-fuel oil].

B

Baratol.
Baronol.
BEAF [1,2-bis (2,2-difluoro-2-nitroacetoxyethane)].
Black powder.
Black powder based explosive mixtures.
*Blasting agents, nitro-carbo-nitrates, including non cap sensitive slurry and water-gel explosives.
Blasting caps.
Blasting gelatin.
Blasting powder.
BTNEC [bis (trinitroethyl) carbonate].
Bulk salutes.
BTNEN [bis (trinitroethyl) nitramine].
BTTN [1,2,4 butanetriol trinitrate].
Butyl tetryl.

C

Calcium nitrate explosive mixture.
Cellulose hexanitrate explosive mixture.
Chlorate explosive mixtures.
Composition A and variations.
Composition B and variations.
Composition C and variations.
Copper acetylide.
Cyanuric triazide.
Cyclotrimethylenetrinitramine [RDX].
Cyclotetramethylenetetranitramine [HMX].
Cyclonite [RDX].
Cyclotol.

D

DATB [diaminotrinitrobenzene].
DDNP [diazodinitrophenol].
DEGDN [diethyleneglycol dinitrate].
Detonating cord.
Detonators.
Dimethylol dimethyl methane dinitrate composition.
Dinitroethyleneurea.
Dinitroglycerine [glycerol dinitrate].
Dinitrophenol.
Dinitrophenolates.
Dinitrophenyl hydrazine.
Dinitroresorcinol.
Dinitrotoluene-sodium nitrate explosive mixtures.
DIPAM.
Dipicryl sulfone.
Dipicrylamine.
Display fireworks.
DNDP [dinitropentano nitrile].
DNPA [2,2-dinitropropyl acrylate].
Dynamite.

E

EDDN [ethylene diamine dinitrate].
EDNA.
Ednatol.
EDNP [ethyl 4,4-dinitropentanoate].
Erythritol tetranitrate explosives.
Esters of nitro-substituted alcohols.
EGDN [ethylene glycol dinitrate].
Ethyl-tetryl.
Explosive conitrates.
Explosive gelatins.
Explosive mixtures containing oxygen releasing inorganic salts and hydrocarbons.
Explosive mixtures containing oxygen releasing inorganic salts and nitro bodies.
Explosive mixtures containing oxygen releasing inorganic salts and water insoluble fuels.

Explosive mixtures containing oxygen releasing inorganic salts and water soluble fuels.
Explosive mixtures containing sensitized nitromethane.
Explosive mixtures containing tetranitromethane (nitroform).
Explosive nitro compounds of aromatic hydrocarbons.
Explosive organic nitrate mixtures.
Explosive liquids.
Explosive powders.

F

Flash powder.
Fulminate of mercury.
Fulminate of silver.
Fulminating gold.
Fulminating mercury.
Fulminating platinum.
Fulminating silver.

G

Gelatinized nitrocellulose.
Gem-dinitro aliphatic explosive mixtures.
Guanyl nitrosamino guanyl tetrazene.
Guanyl nitrosamino guanylidene hydrazine

H

Hexogene or octogene and a nitrated N-methylaniline.
Hexolites.
HMX [cyclo-l,3,5,7-tetramethylene-2,4,6,8-tetranitramine; Octogen].
Hydrazinium nitrate/hydrazine/aluminum explosive system.
Hydrazoic acid.

I

Igniter cord.
Igniters.
Initiating tube systems.

K

KDNBF [potassium dinitrobenzo-furoxane].

L

Lead azide.
Lead mannite.
Lead mononitroresorcinate.
Lead picrate.
Lead salts, explosive.
Lead styphnate [styphnate of lead, lead trinitroresorcinate].
Liquid nitrated polyol and trimethylolethane.
Liquid oxygen explosives.

M

Magnesium ophorite explosives.
Mannitol hexanitrate.
MDNP [methyl 4,4-dinitropentanoate].
MEAN [monoethanolamine nitrate].
Mercuric fulminate.
Mercury oxalate.
Mercury tartrate.
Metriol trinitrate.
Minol-2 [40% TNT, 40% ammonium nitrate, 20% aluminum].
MMAN [monomethylamine nitrate]; methylamine nitrate.
Mononitrotoluene-nitroglycerin mixture.
Monopropellants.

N

NIBTN [nitroisobutametriol trinitrate].
Nitrate sensitized with gelled nitroparaffin.
Nitrated carbohydrate explosive.
Nitrated glucoside explosive.
Nitrated polyhydric alcohol explosives.
Nitrates of soda explosive mixtures.
Nitric acid and a nitro aromatic compound explosive.
Nitric acid and carboxylic fuel explosive.
Nitric acid explosive mixtures.
Nitro aromatic explosive mixtures.
Nitro compounds of furane explosive mixtures.
Nitrocellulose explosive.
Nitroderivative of urea explosive mixture.
Nitrogelatin explosive.
Nitrogen trichloride.
Nitrogen tri-iodide.
Nitroglycerine [NG, RNG, nitro, glyceryl trinitrate, trinitroglycerine].
Nitroglycide.
Nitroglycol (ethylene glycol dinitrate, EGDN)
Nitroguanidine explosives.
Nitroparaffins Explosive Grade and ammonium nitrate mixtures.
Nitronium perchlorate propellant mixtures.
Nitrostarch.
Nitro-substituted carboxylic acids.
Nitrourea.

O

Octogen [HMX].
Octol [75% HMX, 25% TNT].
Organic amine nitrates.
Organic nitramines.

P

PBX [RDX and plasticizer].
Pellet powder.
Penthrinite composition.
Pentolite.
Perchlorate explosive mixtures.
Peroxide based explosive mixtures.
PETN [nitropentaerythrite, pentaerythrite tetranitrate, pentaerythritol tetranitrate].
Picramic acid and its salts.
Picramide.
Picrate of potassium explosive mixtures.
Picratol.
Picric acid (manufactured as an explosive).
Picryl chloride.
Picryl fluoride.
PLX [95% nitromethane, 5% ethylenediamine].
Polynitro aliphatic compounds.
Polyolpolynitrate-nitrocellulose explosive gels.
Potassium chlorate and lead sulfocyanate explosive.
Potassium nitrate explosive mixtures.
Potassium nitroaminotetrazole.
Pyrotechnic compositions.
PYX (2,6-bis(picrylamino))-3,5-dinitropyridine.

R

RDX [cyclonite, hexogen, T4, cyclo-l,3,5,-trimethylene-2,4,6,-trinitramine; hexahydro-l,3,5-trinitro-S-triazine].

S

Safety fuse.
Salutes, (bulk).
Salts of organic amino sulfonic acid explosive mixture.
Silver acetylide.
Silver azide.
Silver fulminate.
Silver oxalate explosive mixtures.
Silver styphnate.
Silver tartrate explosive mixtures.
Silver tetrazene.
Slurried explosive mixtures of water, inorganic oxidizing salt, gelling agent, fuel and sensitizer (cap sensitive).
Smokeless powder.
Sodatol.
Sodium amatol.
Sodium azide explosive mixture.
Sodium dinitro-ortho-cresolate.
Sodium nitrate-potassium nitrate explosive mixture.
Sodium picramate.
Special fireworks.
Squibs.
Styphnic acid explosives.

T

Tacot [tetranitro-2,3,5,6-dibenzo-l,3a,4,6a tetrazapentalene].
TATB [triaminotrinitrobenzene].
TEGDN [triethylene glycol dinitrate].
Tetrazene [tetracene, tetrazine, l(5-tetrazolyl)-4-guanyl tetrazene hydrate].
Tetranitrocarbazole.
Tetryl [2,4,6 tetranitro-N-methylaniline].
Tetrytol.
Thickened inorganic oxidizer salt slurried explosive mixture.
TMETN (trimethylolethane trinitrate).
TNEF [trinitroethyl formal].
TNEOC [trinitroethylorthocarbonate].
TNEOF [trinitroethylorthoformate].
TNT [trinitrotoluene, trotyl, trilite, triton].
Torpex.
Tridite.
Trimethylol ethyl methane trinitrate composition.
Trimethylolthane trinitrate-nitrocellulose.
Trimonite.
Trinitroanisole.
Trinitrobenzene.
Trinitrobenzoic acid.
Trinitrocresol.
Trinitro-meta-cresol.
Trinitronaphthalene.
Trinitrophenetol.
Trinitrophloroglucinol.
Trinitroresorcinol.
Tritonal.

U

Urea nitrate.

W

Water bearing explosives having salts of oxidizing acids and nitrogen bases, sulfates, or sulfamates (cap sensitive).
Water-in-oil emulsion explosive compositions.

X

Xanthamonas hydrophilic colloid explosive mixture.

FOR FURTHER INFORMATION CONTACT: Linda Deel, Specialist, Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, NW, Washington, DC 20226 (202–927–8310).

Approved: December 30, 1993.

Daniel R. Black,

Acting Director.

[FR Doc. 94–333 Filed 1–6–94; 8:45 am]

BILLING CODE 4810–31–P

Customs Service

Annual User Fee for Customs Brokers Permit

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of due date of broker's user fee.

SUMMARY: This document advises Customs brokers that for 1994 the annual user fee of $125 that is assessed for each permit held by an individual, partnership, association, or corporate broker is due by March 1, 1994. This announcement is being published to comply with the Tax Reform Act of 1986.

DATES: Due date for fee: March 1, 1994.

FOR FURTHER INFORMATION CONTACT: Bruce Friedman, Chief, Drawback and Broker Licensing Branch: (202) 927–0916.

SUPPLEMENTARY INFORMATION:

Background

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272) established that an annual user fee of $125 is to be assessed for each Customs broker's permit held by an individual, partnership, association or corporate broker. This fee is set forth in the Customs Regulations in § 111.96 (19 CFR 111.96).

Section 111.96 Customs Regulations provides that the fee is payable for each calendar year in each district where a broker has a permit to do business by the due date which will be published in the **Federal Register** annually.

Section 1893 of the Tax Reform Act of 1986 (Pub. L. 99–0415), provides that notice of the date on which payment is due of the user fee for each broker permit shall be published by the Secretary of the Treasury in the **Federal Register** no later than 60 days before such due date.

This document notifies brokers that for 1994, the due date for payment of the user fee is March 1, 1994. It is expected that annual user fees for brokers for subsequent years will be due on or about the 15th of January each year.

George J. Weise,

Commissioner of Customs.

[FR Doc. 94–189 Filed 1–6–94; 8:45 am]

BILLING CODE 4820–02–M

Sunshine Act Meetings

Federal Register
Vol. 59, No. 5
Friday, January 7, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

U.S. COMMISSION ON CIVIL RIGHTS

DATE AND TIME: January 14, 1994, 9:00 a.m.

PLACE: U.S. Commission on Civil Rights, 624 Ninth Street, NW., room 540, Washington, DC 20425.

STATUS: Open to the Public.

January 14, 1994

I. Approval of Agenda
II. Approval of Minutes of November 29 and December 3, 1993 Meetings
III. Announcements
IV. Followup to Previous Meeting
V. Appointments to the Alaska (interim), Connecticut, Nevada, Texas, and Virginia (interim) Advisory Committees
VI. White Supremacist Activity in Montana
VII. Hate Crime in Indiana: A Monitoring of the Level, Victims, Locations, and Motivations
VIII. New York Hearing Update
IX. Fair Housing Report
X. Commissioner Task Force Report on SAC Projects and Reports
XI. Staff Director's Report
XII. Future Agenda Items

CONTACT PERSON FOR FUTURE INFORMATION: Barbara Brooks, Press and Communications, (202) 376–8312.

Emma Mongroig,
Solicitor.

[FR Doc. 94–501 Filed 1–5–94; 2:23 pm]

BILLING CODE 6335–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:30 a.m., Friday, January 14, 1994.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Enforcement Matters

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 94–524 Filed 1–5–94; 3:24 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Tuesday, January 25, 1994.

PLACE: 2033 K St., NW., Washington, DC, Lower Level Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Quarterly review, First Quarter/FY 1994

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, Secretary of the Commission.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 94–525 Filed 1–5–94; 3:24 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:30 a.m., Tuesday, January 25, 1994.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Enforcement objectives

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 94–526 Filed 1–5–94; 3:24 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:00 a.m., Tuesday, January 25, 1994.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Enforcement matters

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 94–527 Filed 1–5–94; 3:25 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Monday, January 31, 1994.

PLACE: 2033 K St., NW., Washington, DC, Lower Level Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Proposed rules on holding company risk assessment
Final rules relating to reparation proceedings

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, Secretary of the Commission.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 94–528 Filed 1–5–94; 3:25 pm]

BILLING CODE 6351–01–M

COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:30 a.m., Monday, January 31, 1994.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Enforcement matters

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,
Secretary of the Commission.

[FR Doc. 94–529 Filed 1–5–94; 3:25 pm]

BILLING CODE 6351–01–M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

TIME AND DATE: 10:00 a.m., Thursday, January 13, 1994.

PLACE: Room 600, 1730 K Street NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *Dolese Brothers Co.*, Docket No. CENT 92–110–M. (Issues include whether the judge erred in finding that Dolese violated 30 CFR 56.14211(d) by suspending a work platform from the load line of a hydraulic crane that was not equipped with an anti-two block device to prevent contact between the load block and the tip of the boom.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(e).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653–5629 / (202) 708–9300 for TDD Relay / 1–800–877–8339 for toll free.

Jean H. Ellen,
Agenda Clerk.

[FR Doc. 94–488 Filed 1–5–94; 2:22 pm]

BILLING CODE 6735–01–M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10 a.m., Wednesday, January 12, 1994.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: January 5, 1994.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 94–465 Filed 1–5–94; 12:10 pm]

BILLING CODE 6210–01–P

FOREIGN CLAIMS SETTLEMENT COMMISSION

FCSC Meeting Notice No. 4–94

Announcement in Regard to Commission Meetings and Hearings

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings and oral hearings for the transaction of Commission business and other matters specified, as follows:

Date, Time, and Subject Matter

Friday, January 14, 1994 at 10:30 a.m.: Hearings on the record on objections to Proposed Decisions in the following claims against Iran:

—IR–0623—James Hopper
—IR–2319—James A. Corbett

Consideration of Proposed Decisions on Claims against Iran.

Subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

All meetings are held at the Foreign Claims Settlement Commission, 601 D Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe a meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 601 D Street, NW., Room 10000, Washington, DC 20579. Telephone: (202) 208–7727.

Dated at Washington, DC, on January 4, 1994.

Judith H. Lock,

Administrative Officer.

[FR Doc. 94–485 Filed 1–5–94; 12:32 pm]

BILLING CODE 4410–01–M

federal register

Friday
January 7, 1994

Part II

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 990
Natural Resource Damage Assessments; Proposed Rules

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 990

RIN 0648-AE13

[No. P20105-3196]

Natural Resource Damage Assessments

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: Section 1006(e)(1) requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere, to promulgate regulations for the assessments of natural resource damages resulting from discharges of oil. By today's Notice, NOAA is seeking comments concerning the proposed rule. The proposed rule is for the use of authorized federal, state, and tribal officials referred to in the Oil Pollution Act of 1990 (OPA) as "trustees," for the assessment of damages to natural resources and/or services from a discharge of oil. Natural resource damage assessments are not identical to response or remedial actions addressed by the larger statutory scheme of OPA. Assessments are not intended to replace response actions, which have as their primary purpose the protection of human health, but to supplement them, by providing a process for determining proper compensation to the public for injury to natural resources.

DATES: Written comments should be received no later than April 7, 1994.

ADDRESSES: Written comments are to be submitted to Linda Burlington, Project Manager, or Eli Reinharz, Assistant Project Manager, Damage Assessment Regulations Team (DART), c/o NOAA/DAC, 1305 East-West Highway, SSMC #4, 10th Floor, Workstation #10218, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Linda Burlington or Eli Reinharz, Office of General Counsel, DART, telephone (202) 606-8000, FAX (202) 606-4900.

SUPPLEMENTARY INFORMATION: The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides for the prevention of, liability for, removal of, and compensation for the discharge, or substantial threat of discharge, of oil into or upon the navigable waters of the United States, adjoining shorelines, or the Exclusive Economic Zone. Section 1006(e) requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere, to develop regulations establishing procedures for natural resource trustees to use in the assessment of damages for injury to, destruction of, loss of, or loss of use of natural resources covered by OPA. Section 1006(b) provides for the designation of federal, state, Indian tribal, and foreign natural resource trustees to determine resource injuries, assess natural resource damages (including the reasonable costs of assessing damages), present a claim, recover damages, and develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship.

NOAA has published eight **Federal Register** Notices, 55 FR 53478 (December 28, 1990), 56 FR 8307 (February 28, 1991), 57 FR 8964 (March 13, 1992), 57 FR 14524 (April 21, 1992), 57 FR 23067 (June 1, 1992), 57 FR 44347 (September 25, 1992), 57 FR 56292 (November 27, 1992), and 58 FR 4601 (January 15, 1993), requesting information and comments on approaches to developing damage assessment procedures. NOAA conducted a public meeting on March 20, 1991, for additional public participation into the process and held four regional workshops during 1991 in Rockville, Maryland; Houston, Texas; San Francisco, California; and Chicago, Illinois, to learn of regional concerns in coastal and inland waters. One workshop held in Alexandria, Virginia, in November, 1991, provided a forum for early discussions of various economic issues likely to be raised during the damage assessment rulemaking process. In addition, on August 12, 1992, NOAA held a public hearing on the issue of whether constructed market methodologies, including Contingent Valuation (CV), can be used to calculate reliably passive use values for natural resources, and if so, under what circumstances and under what guidance. On January 15, 1993, at 58 FR 4601, NOAA published in full the report of the panel commissioned by NOAA to evaluate the reliability of CV in calculating passive use values for natural resources.

The proposed rule summarizes the written comments received by the agency and issues raised during the public meetings and workshops, responds to those comments, and contains proposed regulatory language on the various issues raised. Many of the specific comments summarized in the proposed rule refer to the status report published by NOAA in the March 13, 1992, **Federal Register** notice.

This preamble is organized in the following manner: the Introduction gives an overview of the proposed rule and is followed by a discussion of each of the subparts of the proposed rule. Subpart A deals with the optional prespill planning for a damage assessment and other general topics, subpart B describes the Preassessment Phase, and subparts C, D, E, F, and G contain the description of the Assessment Phase and the range of assessment procedures. Subpart H describes the Post-assessment Phase.

INTRODUCTION

Overview of Process

I. General

The proposed rule simplifies the task of the natural resource trustee(s) by providing a flexible and logical process for assessing natural resource damages resulting from a discharge of oil. To assist the trustee(s) in conducting damage assessments, the proposed rule defines a number of key statutory terms relevant to damage assessment and identifies a number of damage assessment techniques that NOAA has determined are the best available. In addition, the proposed rule is intended to facilitate public and responsible party (RP) involvement in the restoration of injured natural resources and/or services by creating an open, administrative process for selection of restoration measures. The proposed rule promotes a cooperative approach to resolution of natural resource damage cases by providing greater certainty regarding the measure of damages and the process by which damages will be determined.

The proposed rule is intended to provide the trustee(s) with maximum flexibility in conducting damage assessments. It is important to bear in mind that the proposed rule is optional. The trustee(s) is free to depart from the proposed rule, however, section 1006(e)(2) of OPA provides that damage assessments conducted pursuant to this proposed rule shall have a rebuttable presumption of accuracy in any administrative or judicial proceedings under OPA. Also, this proposed rule makes possible judicial review on the administrative record for the Assessment/Restoration Planning process. The administrative record is the repository of all the information and data considered by the trustee(s) during the assessment. The trustee(s) may use damage assessment techniques outside the scope of this proposed rule at the cost of assuming the burden of proof with respect to those components of the damage assessment.

The nature and scope of this proposed rule can best be understood in the context of the overall statutory scheme for natural resource damage cases. The elements of liability under sections 1002(a) and (b)(2) of OPA are simple and straightforward: (1) A discharge (2) of oil (3) from a vessel or facility (4) into or upon navigable waters, adjoining shorelines or the Exclusive Economic Zone, (5) which results in injury to natural resources and/or services. Thus, liability is established when there is some injury to a natural resource and/or service resulting from a discharge of oil. The damage assessment is designed to determine and quantify injury, the appropriate restoration approach, and the damages resulting from the injury.

The damage assessment process described in this proposed rule has three major phases: (1) The Preassessment Phase; (2) the Assessment Phase; and (3) the Post-Assessment Phase (See Figure 1).

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NATURAL RESOURCE DAMAGE ASSESSMENT PROCESS
PROPOSED RULE UNDER OPA 1990

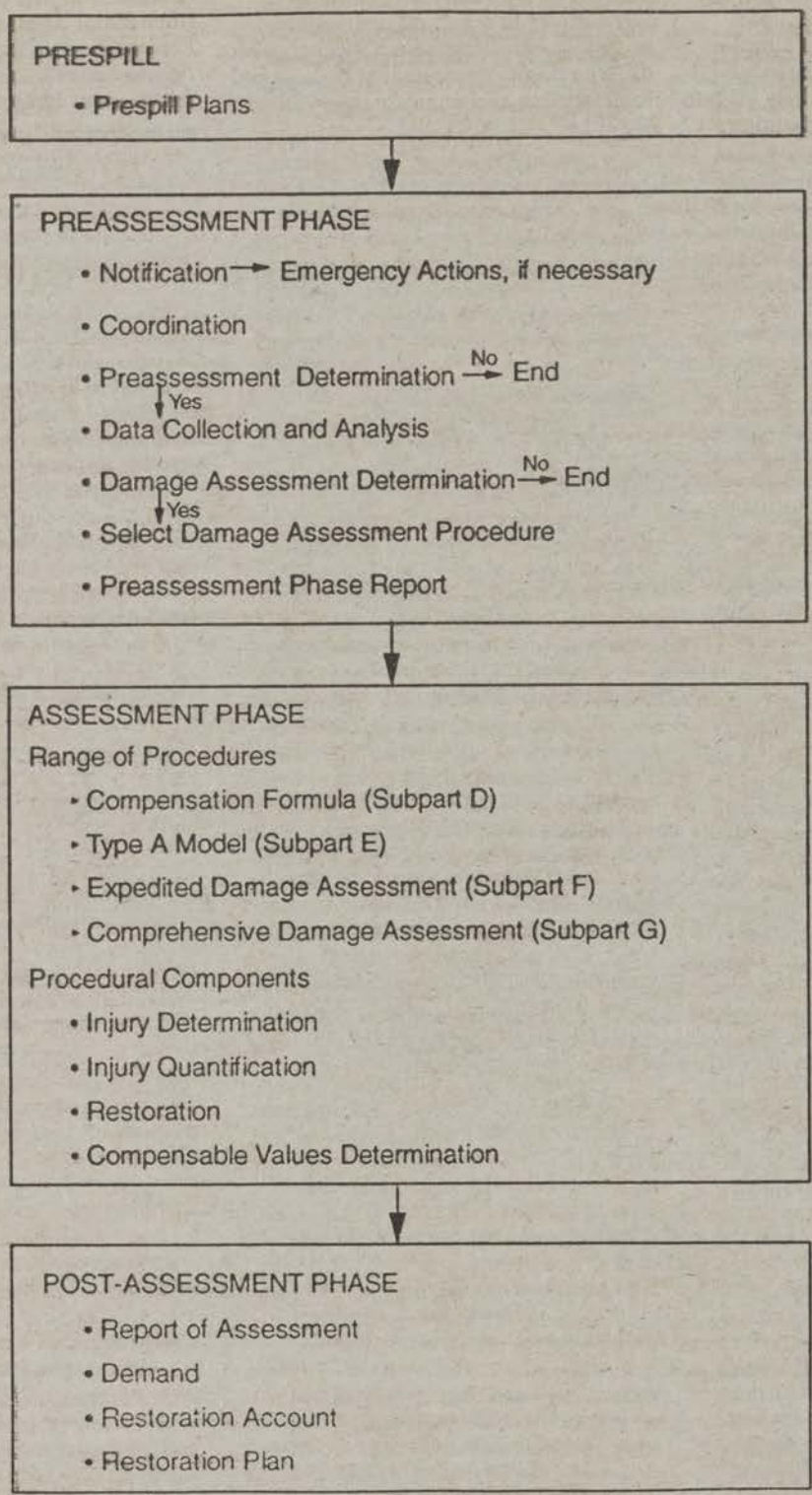

FIGURE 1

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Prespill planning involves planning and coordination among trustees, coordination with the Area Committees, potential RPs, and the public to ensure a cost-effective and coordinated assessment once a discharge of oil occurs. Thus, it is not part of an incident-specific assessment, but an important part of preparation by the trustee(s) for fulfilling their natural resource damage assessment responsibilities during spill response. The Preassessment Phase involves two basic decisions: The decision whether to proceed with the Preassessment Phase and the decision as to the scope of the assessment to conduct, if any. The Assessment Phase offers a choice involving four types of assessment procedures: compensation formulas, computer models, expedited procedures, and comprehensive procedures. The Post-Assessment Phase gives guidance on using the recoveries effectively and efficiently to bring about the recovery of injured natural resources and/or services.

NOAA is also developing detailed guidance on various aspects of damage assessment. It is anticipated that guidance documents will soon be available on: Preassessment, injury determination and quantification, and restoration. NOAA will publish a Notice of Availability when these documents are ready for the public. These guidance documents are being prepared in conjunction with this rulemaking to provide more specific technical information to those performing assessments and restorations under OPA and other interested members of the public. These documents will not constitute regulatory guidance nor must they be followed to obtain the rebuttable presumption. The documents, in their final form, will be made available through a public information distribution service.

II. Prespill Planning

Prespill planning and coordination by various parties are likely to be involved in damage assessments under OPA. Prespill activities are a crucial component of trustee responsibilities. Immediately after an oil discharge, it is extremely difficult to determine the availability of baseline scientific data, plan additional data collection, and coordinate the damage assessment approach of the trustee(s). Thus, baseline data collection and planning are important to a successful assessment.

The proposed rule strongly encourages natural resource trustees to coordinate among themselves, the response agencies, the public, and any potential RPs interested in developing contingency plans for a damage assessment. These prespill plans can consist of products of previous planning efforts, or can be management plans modified or supplemented to cover damage assessment issues.

In prespill planning, the trustee(s) should anticipate what may be required to document the damage assessment. The documentation requirements in the proposed rule are drawn largely from the comparable process set out in the National Contingency Plan (NCP) for selection of remedies at hazardous waste sites. The trustee(s) should have the procedures in place to begin the assessment and restoration planning process when a discharge occurs.

III. Preassessment Phase

A. Introduction

A natural resource damage assessment begins with the Preassessment Phase, which consists of two basic components: (1) Preassessment Determination and (2) Damage Assessment Determination. The Preassessment Determination requires a decision by the trustee(s) whether to initiate the Preassessment Phase. During the Preassessment Phase, the trustee(s) may conduct limited data collection and analysis (data collection). At the end of the Preassessment Phase, the trustee(s) decides whether to proceed with a damage assessment in the Damage Assessment Determination.

The Preassessment Phase also identifies the conditions for notification, coordination, estimation of assessment costs, reporting, and emergency restoration. Guidance on conducting the Preassessment Phase will be available in the Preassessment Phase Guidance Document.

B. Relationship of Preassessment Activities to Response Activities

It is very probable that the Preassessment Phase will be conducted simultaneously with the On-Scene Coordinator (OSC)-coordinated response activities. Any activities conducted in the discharge area should be coordinated with the OSC or designee, especially with regards to damage assessment trustee(s) requests for response operations resources. The trustee(s) at the discharge site is likely to be participating as a part of the OSC's response organization and member of the damage assessment team. The response activities are under the jurisdiction of the OSC, whereas the damage assessment activities are under the jurisdiction of the trustee(s).

C. Preassessment Process

1. *Preassessment Determination.* After notification, the trustee(s) should determine if conducting the Preassessment Phase is justified. The Preassessment Determination is largely a "desktop" exercise based upon readily available information on the discharge and environmental setting.

Based on that information, the trustee(s) should determine if: (1) The discharge of oil meets the exclusionary conditions as set forth in section 1002(c) of OPA; (2) the trustee(s) has authority under OPA to assert damage claims for natural resources and/or services that may be adversely affected by the discharge of oil; and (3) there is a reasonable probability that the trustee(s) can make a successful damage claim based on the scientific, economic, and legal merits of the case, i.e., potential for injury resulting from the discharge and successful and meaningful restoration and/or compensation. If these conditions are met, the trustee(s) may proceed with the Preassessment Phase.

2. *Damage Assessment Determination.* In the Damage Assessment Determination, the trustee(s) decides which, if any, damage assessment procedure to conduct. Further, damage assessment is appropriate for those injured natural resources and/or services that can be restored or for which damages can be estimated. As part of the Damage Assessment Determination, the trustee(s) should make a preliminary determination regarding the applicability of the damage assessment procedures. These decisions should be documented in the Preassessment Phase Report.

The trustee(s) has a great deal of flexibility in selecting appropriate damage assessment methods. If at any time during the Preassessment Phase the trustee(s) determines sufficient information was collected in order to select a damage assessment procedure, the trustee(s) may complete the preassessment and move into the Assessment Phase. The proposed rule provides factors for the trustee(s) to consider in the selection of appropriate assessment procedures.

3. *Preassessment Phase Report.* At the conclusion of the Preassessment Phase, the trustee(s) should document briefly: preassessment actions, such as data collection and emergency restoration; estimated costs directly related to those actions; and decisions to proceed with preassessment and damage assessment. The report should provide sufficient information for input in the damage assessment/restoration process.

If no further damage assessment actions are taken, the Preassessment Phase Report becomes the Report of Assessment. If damage assessment actions are undertaken, the Preassessment Phase Report becomes part of the Report of Assessment. If the trustee(s) decides to proceed with an assessment, the trustee(s) should develop a Draft Assessment/Restoration Plan (DARP) as a guide to how the damage assessment will be conducted.

D. Data Collection and Analysis

The primary reason for data collection and analysis (data collection) in the Preassessment Phase is to ensure that there is sufficient information to evaluate the risk to natural resources and/or services resulting from the exposure to oil. The scope of the trustee's(s') data collection should be reasonable in light of the characteristics of the discharge and natural resources and/or services potentially affected by the discharge. However, the trustee(s) and RP(s) may agree to undertake limited injury determination studies to verify that no significant injury to natural resources and/or services has resulted from the discharge, although costs for such undertakings are not recoverable.

When reasonably practicable, the trustee(s) should collect the following types of information during the Preassessment Phase: (1) Data that are necessary to make a determination to proceed with the Preassessment Phase; (2) ephemeral or perishable data that may be lost if not collected immediately; and (3) necessary data that serves as the basis for the selected damage assessment procedure, the absence for which data would prevent the trustee(s) from proceeding with the damage assessment determination of § 990.23 (i.e., input into the compensation formulas of Type A models, or the study design for the Expedited Damage Assessment (EDA) or Comprehensive Damage Assessment (CDA)).

E. Emergency Restoration

At any time after the discharge, the trustee(s), with the approval of the OSC, may decide to conduct emergency restoration as long as it does not interfere with response actions. These actions are designed to protect natural resources and/or services where there is insufficient time to await completion of the entire damage assessment/restoration planning process.

Emergency restoration is not subject to required public review and comment. Consequently, the proposed rule requires the trustee(s) to document that any actions taken under this authority are necessary and, to the extent reasonably practicable, cost-effective.

IV. Assessment Phase

A. General

Through this proposed rule, NOAA is providing the trustee(s) with a variety of assessment procedures in recognition of the need for flexibility in dealing with situations that, by their nature, are incident-specific. The trustee(s) can choose among the various procedures based upon the circumstances of the discharge or natural resource and/or service involved.

In the selection process, the trustee(s) should first consider the simplified procedures, either the compensation formula, the Type A model, or Expedited Damage Assessment (EDA), before a Comprehensive Damage Assessment (CDA). The RP(s) may request that the trustee(s) use a more complex assessment procedure than that chosen by the trustee(s), only if the RP(s) provides the money up front to fund such an effort, and it is understood that the trustee(s) has the ultimate responsibility for the design and management of that study. The trustee(s) has the option to decline to conduct the more complex assessment procedure, but must justify and document that decision in the Report of Assessment.

B. Draft Assessment/Restoration Plan (DARP)

The proposed rule requires that the trustee(s) prepare a DARP for all assessments. The DARP is the document that gives the trustee(s) the opportunity to present for comment the chosen approach for restoration, replacement, rehabilitation, or acquisition of the equivalent of the injured resources and services. The DARP will also give enough information about the injury determination and quantification to allow for a meaningful review of the trustee's(s') determination of the restoration approach. The DARP will also contain the estimated costs of implementing the chosen approach. The DARP also may, at the trustee's discretion, contain a list of the planned valuation studies.

After the DARP has been reviewed by the public, the trustee(s) will then modify it as appropriate. The DARP then becomes the Report of Assessment, which is the final description of the restoration approach selected by the trustee(s) and the estimated costs of implementing that approach.

Although each assessment will be incident-specific, many elements of a DARP will be essentially the same. At a minimum, the DARP should identify the following: (1) The objectives of the trustee(s); (2) how the trustee(s) plans to accomplish the objectives; and (3) whether the planned actions are conducted in a cost-effective manner to the extent reasonably practicable. It is expected that the DARP will address issues such as study design, data collection and analysis, quality assurance (QA), data management, and guidelines for conducting the overall assessment/restoration process and individual studies within that process. The proposed rule addresses these common components as they are addressed through the DARP. Not all of these elements will be required in every DARP, particularly in a compensation formula or Type A assessment.

As mentioned throughout this preamble and proposed rule, the trustee(s) is strongly encouraged to develop prespill plans for conducting an assessment. Those prespill plans could even identify the type of assessment procedure conducted under certain discharge scenarios. When the trustee(s) determines that the assessment will be conducted pursuant to prespill plans, the DARP shall document that decision and be consistent with the actions identified in the prespill plan to the maximum extent practicable. If the circumstances of the incident are such that the trustee(s) determines that the assessment will be conducted on an incident-specific manner rather than pursuant to any prespill plans, the DARP shall document that decision.

The trustee(s) will prepare a DARP following the determination to proceed with further assessment activities. The DARP should be based upon the findings of the Preassessment Phase, identify the assessment procedures the trustee(s) is planning to use, describe proposed studies relating to injury determination and quantification, if any, and describe proposed actions relating to the determination of the type and nature of restoration actions, if any, subject to the prespill plans. Although the trustee(s) should view the development of the DARP as one process, it may be reasonable to develop the restoration component separately and at a later date than the assessment component.

The development of a DARP will assist the trustee(s) in conducting an efficient assessment and, subject to prespill plans, be available for public review. The scope of the public notice and review should be comparable to the scope of the extent of the assessment area and expected effects. The DARP (including comments and responses) is

to be included in the administrative record accompanying the assessment. The DARP will also ultimately become the Report of Assessment. The trustee(s) is not required under the proposed rule to provide a review and comment period of any specific injury determination/quantification studies, only general notification of the nature and type of assessment being conducted.

The trustee(s) must review and respond to public comments during preparation of the restoration component of the DARP. In addressing comments received concerning the proposed restoration approach, it is not necessary for the trustee(s) to respond to each comment received. Comments may be summarized in like-subject areas and responded to only once.

The proposed rule allows the trustee(s) to modify the restoration component of the DARP, if necessary. Public review is required for modifications deemed significant by the trustee(s). Large discharges or discharges with extensive environmental effects may require the trustee(s) to develop multi-year plans. Again, modifications of the annual restoration plans that are significantly different from the preceding year should be provided for public review.

C. Compensation Formulas

The estuarine/marine and inland waters compensation formulas described in this proposed rule would be applicable to the vast majority of oil discharges. An analysis of reported coastal discharges of oil from 1973–1990 shows that 99.8% of the discharges were less than 50,000 gallons and 99% were less than 10,000 gallons. Compensation formulas could be used for most of these relatively small discharges, particularly for those that occur in areas where it would be difficult to ascertain precise environmental effects, e.g., small discharges in open water or in areas that are subject to frequent discharges.

These formulas allow an estimate of damages per gallon taking into account average restoration costs, plus average lost direct use values pending restoration. The formulas assume various levels of natural resource effects likely to result from the discharge of oil. These assumptions consider the amount and type of oil discharged and region and habitat type in which the discharge occurs. The formulas are applicable to a wide range of the most commonly discharged oil products. This approach allows both a national consistency and regional specificity.

D. Computer Models

NOAA is proposing that the natural resource trustee(s) may use the Natural Resource Damage Assessment Model for Coastal and Marine Environments, Version 1.2, known as the Type A model, developed by the U.S. Department of the Interior (DOI), for damage assessments under OPA. The Type A model is described at 43 CFR Part 11, subpart D. The Type A model may be used when the conditions of the discharge are sufficiently similar to the conditions at 43 CFR 11.33(b).

It is likely NOAA will also recommend the new set of computer models being developed by DOI. The current computer model, for use in coastal and marine environments, is being revised to comply with the circuit court's decision in *Colorado* v. *U.S. Department of the Interior*, 880 F.2d 481 (D.C. Cir. 1989) (*Colorado* v. *DOI*) and as part of the statutorily-mandated review and update. The court in *Colorado* v. *DOI* held that natural resource damage assessments should be based upon costs to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources, plus the diminution of all reliably calculated values pending recovery. Until the revisions to the Type A model are completed, the trustee(s) may use the current Type A model for lost use values and supplement the resulting figure with estimates of restoration costs and other applicable damages. DOI is also developing a second computer model for use in the Great Lakes and their connecting channels.

These new computer models are under development through DOI, but are not yet available for public review. NOAA is working closely with DOI in its development of these computer models. Based upon an initial evaluation of these models, it is likely that NOAA will recommend that there be available procedures that the trustee(s) may choose to use.

E. Expedited Damage Assessment (EDA)

Included in the proposed rule is a new type of assessment procedure—Expedited Damage Assessment. EDA reflects a damage assessment approach that is intermediate between the current Type A and the CDA procedures. This approach recognizes that a Type A model may not address all key natural resources and/or services injured or at risk, particularly for inland discharges. The approach also recognizes that the size, location, and timing of a given discharge may not warrant the extensive procedures associated with a CDA. The EDA offers an option that addresses a broader range of natural resources and/or services than a Type A model but is less time consuming and less expensive than a CDA.

The goal of an EDA is to initiate necessary restoration as quickly as possible by truncating the injury determination and quantification components. Accordingly, an EDA does not include comprehensive or long-term injury determination and quantification studies nor does it address injury for every natural resource and/or service that may be injured.

An EDA is not necessarily a unitary approach to damage assessment. It encompasses a range of techniques that permit the trustee(s) to determine injury based on limited, focused observations. In some circumstances, an EDA may entail supplementing the Type A model with field studies. In other situations, an EDA may comprise an abbreviated CDA approach. Accordingly, the EDA should be viewed as a dynamic, flexible process rather than a rigid step-by-step approach.

Simply stated, the goals of an EDA are to: (1) Identify and quantify injuries to selected natural resources and/or services resulting from a discharge, (2) accomplish the above goal using focused studies and/or preexisting information, and (3) provide the basis for restoration and recovery of natural resources and/or services. The trustee(s) may undertake injury determination and quantification only for selected natural resources and/or services.

Ideally, data collection in an EDA should not exceed two field seasons. During this period, the trustee(s) should quickly develop appropriate injury determination and quantification studies, and a draft restoration plan. The remaining time should be devoted to completion of the restoration plan, and to public review of the consent decree and/or restoration plan.

F. Comprehensive Damage Assessment (CDA)

1. *General*. Whereas the EDA described above is intended primarily for situations involving cooperative efforts completed within a relatively short time, the CDA should be used where it is anticipated that the assessment will require prolonged (i.e., multi-year) studies. The CDA is particularly appropriate where the trustee(s) expects complex effects for which there is little documentation in the literature. The CDA includes guidance on: injury determination, injury quantification, restoration planning and costs, and economic valuation.

2. *Injury determination.* The purpose of the injury determination component in CDA is to verify injury to natural resources and/or services. Before beginning the CDA, the trustee(s) must assess the feasibility of detecting injury based on a scientifically valid study design.

If an injury cannot be determined or cannot be linked to the discharge, further assessment efforts should be terminated and the results of the injury determination component documented in the Report of Assessment. If injury is determined, the approach for the next two components (i.e., quantification and damages) must be selected consistent with the findings of the injury determination.

3. *Injury quantification.* After establishing that a natural resource and/or service is injured by the discharge of oil, the next step calls for quantifying the effects on natural resources and/or services. Close coordination is required between natural resource specialists and economists in planning and implementing this phase of the assessment to estimate values in the economic valuation phase. Quantification should only be conducted for natural resources and/or services that can be restored and for which damages will be sought.

The proposed rule allows the trustee(s) to quantify injuries in one of two ways: (1) Measuring direct changes in the natural resource itself (i.e., changes in the chemical, physical, or biological parameters); or (2) measuring changes in the level of services provided by the natural resource. In either case, injury quantification requires before-after and reference/contol-impact comparisons. Such comparisons will depend on the recovery period of both the affected natural resources and/or services. Quantification will ultimately be essential for the evaluation of restoration alternatives, and measuring the compensable value of lost services.

4. *Restoration Planning.* The purposes of the restoration component are to: (1) Determine the most appropriate restoration approach for the recovery of natural resources and/or services injured by a discharge of oil; and (2) estimate the costs of implementing that approach. The goal of restoration is to return an injured natural resource and/or service to as close to the baseline condition as possible. OPA provides the trustee(s) the following options to remedy injury to natural resources and/or services: restoration, rehabilitation, replacement, and acquisition of the equivalent natural resources. Natural recovery is an option that should always be considered. When acquisition of equivalent natural resources is selected, the DARP shall define clearly the relationship of acquired natural resources to the injured natural resources and/or services.

5. *Compensable Values Determination.* Natural resources are public assets. Like other assets they provide a flow of services. The basic types of services associated with natural resources include, but are not limited to: (1) Recreational, (2) commercial, (3) ecological, (4) special significance, and (5) passive use. Lost services may result from the loss of, or reduction in, the quality or quantity of services provided by a natural resource as a result of a discharge of oil. The final estimate of interim lost value will, therefore, depend on the most likely restoration approach. If no restoration is being considered for the injured natural resources and/or services, damages include the value of the lost or impaired/diminshed services from the time of the discharge through the completion of natural recovery.

The total diminution in the value of natural resources and/or services, whether with restoration actions or natural recovery, is referred to as "compensable values." For the purposes of this proposed rule, compensable values include all reliably calculated values that comprise the total diminution in value of lost or diminished services of trust resources as a result of a discharge, from the onset of the event until recovery to baseline or comparable conditions is deemed complete by the trustee(s), i.e., interim lost values. "Compensable values" are defined broadly to encompass both direct use and passive use values that can be reliably calculated in a manner that is trustworthy or worthy of confidence.

Direct use values are defined as the value individuals derive from direct use of a resource. Passive use values are defined as the values individuals place on resources independent of direct use of a resource by the individual. The term "nonuse values" has also been used to refer to the same concept, but NOAA prefers the term "passive use values."

Factors to consider in calculating compensable values include: (1) The value of the services injured or lost, (2) the predicted level of services if the discharge had never occurred, (3) the predicted level of services given injury and natural recovery, and (4) the predicted level of services given injury and a feasible restoration plan. For some categories of economic damage, it will be possible to conduct site-specific analyses. For example, the economic damages associated with the loss of access to a marine transportation corridor due to closure of a waterway can be estimated using existing site-specific data in most instances. In other cases the trustee(s) may employ benefits transfer procedures to apply valuation estimates or valuation functions from existing valuation studies from other contexts to estimate losses in the present incident.

Several methodologies exist to measure direct use and passive use values. This proposed rule provides maximum flexibility to the trustee(s) for selecting any methodology that can provide reliable and valid resource values and that is appropriate for valuing the injuries associated with a particular discharge. The trustee(s) will have broad discretion in selecting among existing and potential new methodological approaches that may be employed in damage assessment. The flexibility to exercise professional judgment in selecting and applying specific analytical techniques is necessary because of the "site-specific" nature of discharges of oil. Further, the trustee(s) may use different methodologies to produce separate damage estimates for different resource services, so long as there is no double recovery of losses. The choice of methodological approaches in a particular context will depend upon the types of injuries associated with a discharge. Estimates of the value of lost services pending recovery of injured natural resources and/or services will be submitted as part of the total damage determination.

V. Post-Assessment Phase

At the conclusion of an assessment the trustee(s) shall prepare a Report of Assessment. The Report of Assessment, which is the final description of the restoration approach selected by the trustee(s) and the estimated costs of implementing that approach serves as the basis for the judicial review on the record of the assessment.

Once the Report of Assessment is compiled, the trustee(s) should present to the RP(s) a demand in writing for the total damages. The demand is the document that is presented as the summation of all damages claimed by the trustee(s) resulting from the discharge. The demand will consist of an identification of the discharge, the identity of the trustee(s), the amount of damages, and the Report of Assessment as an attachment.

The total damage figure may be divided into two components: estimated restoration costs and other damages, including but not limited to assessment

costs and compensable values. Judicial review of that portion of the demand representing costs shall be conducted on the administrative record. Judicial review of that portion of the demand representing compensable values shall be conducted with the trustee(s) receiving the benefit of the rebuttable presumption.

There are several issues involving handling sums recovered. One issue is management of the account into which sums recovered are placed. The proposed rule allows trustees to establish a "joint trustee account." This trustee account should be managed by all trustees through a mutually agreed upon trustee committee or council. However, if for some reason, the trustees cannot establish a joint account, the proposed rule allows the trustees to divide the recoveries and deposit their respective amounts into separate accounts.

The second issue is the possible pooling of recoveries from more than one discharge into one account for Regional Restoration Plans. Whether the trustee(s) establishes joint or separate accounts, there are two possibilities for handling sums recovered from discharges. The trustee(s) may establish an incident-specific account into which sums recovered from a single discharge may be placed. However, an alternative allowed by the proposed rule would be for the trustee(s) to establish a combined account into which sums recovered from several discharges could be placed.

Finally, whether joint or separate, incident-specific or combined, these various accounts may be established within the trustee agency's own treasury, in an account under the registry of the applicable federal court, or in a commercial account. The commercial account may be an escrow account or any other type of account not prohibited by law. Each of these various types of accounts should be interest bearing. The trustee(s) should provide that money may only be withdrawn from such accounts with trustee(s) approval. Also, because of the multiple types of accounts, the trustee(s) must maintain appropriate accounting and reporting methods to ensure the proper use of sums recovered. The damages representing compensation for injuries to natural resources and/or services are to be spent to develop and implement a final restoration plan.

The proposed rule describes two types of post-assessment restoration plans. First, the trustee(s) may develop an incident-specific restoration plan to address the effects of the discharge of concern. This plan shall be based upon the restoration component of the DARP developed using guidance given in the CDA phase of the proposed rule.

Second, the trustee(s) is allowed to pool recoveries to apply them to a Regional Restoration Plan for a specific area. This Regional Restoration Plan would have to be developed through a public review and comment process consistent with the restoration planning process described in the proposed rule. Where such a plan already exists, whether developed pursuant to this proposed rule or under other management efforts, that plan may be used subject to the requirements for such a plan listed in the proposed rule. This Regional Restoration Plan would allow the trustee(s) to apply several relatively small recoveries to a specific area, such as a bay or estuary to achieve a more comprehensive restoration than what may otherwise be achieved through a smaller, more segmented approach.

Relationship to 43 CFR Part 11

The U.S. Department of the Interior (DOI) has promulgated natural resource damage assessment regulations under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9601 *et seq.* These regulations, which are codified at 43 CFR part 11, establish an administrative process and procedures for the assessment of damages for injuries to natural resources affected by a release of a hazardous substance or a discharge of oil. These regulations currently provide guidance for damage assessments resulting from both oil and hazardous substances. After the OPA regulations are promulgated, the 43 CFR part 11 procedures can still be used to assess damages for natural resource injuries resulting from a release of a hazardous substance or a discharge of oil not covered under OPA.

The procedures identified in 43 CFR part 11 provided a base from which to identify assessment procedures to be promulgated under OPA. NOAA requested comments on the applicability to oil discharges of 43 CFR part 11, as modified by the court decisions of *Ohio* v. *U.S. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989), and *Colorado* v. *U.S. Department of the Interior*, 880 F.2d 481 (D.C. Cir. 1989). In addition, NOAA and DOI are coordinating their respective rulemakings to ensure consistency, when practicable, for the trustee(s) and RP(s) in conducting natural resource damage assessments due to either a discharge of oil or release of a hazardous substance. Although similar, these proposed procedures vary in several aspects from the DOI rule.

Procedural Comparison

Figure 2 shows a rough structural comparison between the two processes. First, this proposed rule strongly encourages actions conducted prior to a discharge for "prespill planning."

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COMPARISON BETWEEN CERCLA AND OPA PROCESSES

CERCLA	OPA
	I. Prespill A. Prespill Planning B. Trustee Coordination
I. Preassessment Phase A. Preassessment Screen B. Data Collection & Sampling C. Preassessment Screen Determination	II. Preassessment Phase A. Preassessment Determination B. Data Collection and Sampling C. Damage Assessment Determination D. Emergency Actions
II. Assessment Phase A. Coordination B. Notification C. Planning D. Decision on Type of Assessment 1. Type A or Type B E. Assessment 1. Injury Determination 2. Injury Quantification 3. Damage Determination	III. Assessment Phase A. Plan Development B. Assessment (Comp. Formula/ Type A/ EDA/ CDA) 1. Injury Determination 2. Injury Quantification 3. Restoration 4. Compensable Values Determination
III. Post Assessment Phase A. Report of Assessment B. Demand C. Restoration Account D. Restoration Plan	IV. Post Assessment Phase A. Report of Assessment B. Demand C. Restoration Account D. Restoration Plan

FIGURE 2

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NOAA wishes to emphasize with this designation that actions taken before a discharge actually occurs are important to the conduct of an assessment after the discharge has occurred.

Second, the Preassessment Phase described in this proposed rule has been expanded to reflect more clearly those actions that must occur before beginning an assessment. This phase includes the Preassessment Determination, similar to the Preassessment Screen found in 43 CFR part 11. However, the decision as to what kind of assessment procedure is appropriate for a given incident has been moved up to the Preassessment Phase in this proposed rule in recognition that this decision must, by necessity, precede the actual assessment.

Third, the Assessment Phase in this proposed rule lists a wider range of assessment procedures available to the trustee(s). Section 301(c) of CERCLA, which requires the development of the 43 CFR part 11 process, calls for two types of assessment procedures. Section 1006(e) of OPA, which requires the promulgation of this proposed rule, does not specify the number of assessment procedures to be made available to the trustee(s). Therefore, this proposed rule offers four types of assessment procedures—two new procedures and two procedures based upon 43 CFR part 11. The two new procedures contained in this proposed rule are the compensation formulas and the expedited damage assessment procedures. The compensation formulas are the simplest procedure available and are designed to address the vast majority of discharges, those under 50,000 gallons. The expedited damage assessment procedure recognizes the need for a procedure that falls somewhere on a scale between the current Type A and Type B procedures found in 43 CFR part 11. Besides these two new procedures, NOAA recognizes the need for assessment procedures like the Type A and Type B procedures. Therefore, NOAA is proposing to adopt the use of the current Type A procedure of 43 CFR part 11, subpart D, for use in assessments conducted pursuant to this proposed rule. Finally, NOAA has also used the current Type B procedure as a base to develop the comprehensive damage assessment procedure in this proposed rule. The current Type B process has been modified to allow a streamlining of the process to recognize the dynamic nature of a discharge of oil, even a discharge requiring a multi-year assessment process.

Fourth, the Post-assessment Phase of this proposed rule is structured in a similar way to 43 CFR part 11. NOAA recognizes that, at the completion of a damage assessment, the same basic actions are necessary.

Substantive Comparison

In reviewing this proposed rule, the reader will find numerous substantive differences between this proposed rule and 43 CFR part 11. Some of these differences are dictated by the differences between OPA and CERCLA. Other differences are necessary either to reflect lessons learned in damage assessments in the last several years or to acknowledge the inherent differences between oils and hazardous substances. One example of the substantive differences between the two rules is in the components of the assessment procedures. In this proposed rule, restoration planning and compensable value determination are separated, as opposed to the "Damage Determination" step of 43 CFR part 11. This separation is necessary to allow a clear line for the record review of the restoration component without trying to include the compensable valuation component into that review. Other substantive differences appear throughout the proposed rule.

Issues of Interest in Proposed Rule

Several specific issues within the rulemaking process have been the focus of attention among interested parties. Some of the interest is in response to the fact that damage assessment regulations were promulgated under CERCLA. These current regulations, codified at 43 CFR part 11, apply to both hazardous substances and oils. The OPA rule, when it becomes effective, will supersede those parts of the CERCLA rule that deal with oil. Therefore, NOAA is specifically seeking comments on those aspects of this proposed rule that are different from the CERCLA rule.

Although the entire proposed rule is open for comment, NOAA is also particularly interested in receiving comments on several issues that have drawn much interest from very different points of view. These issues include: The appropriate standard of judicial review of damage assessments; the proposed definition of assessment costs; causation as it relates to injury; the use of a compensation formula and the nature of its results; and whether the trustee(s) may pool recoveries from various "small" discharges to conduct restoration efforts from a regional or watershed approach. Specific economic issues include: the recovery of passive use values for natural resources and the measurement of these values using the contingent valuation method; and the appropriate discount rate to use in converting damages to current dollars. Each of these issues is discussed in the following pages.

Review on the Record

Section 1006(c) of OPA provides that the trustees shall "develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship." Section 1006(c)(5) provides that "plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing and consideration of all public comment." NOAA is proposing to implement these provisions by requiring the trustee(s) to document development of restoration plans in an administrative record through notice and comment procedures.

A majority of the commenters who have spoken to the issue of the administrative record and judicial review "on the record" support the concept. Several commenters pointed out that these assessments involve highly technical, scientific findings in which courts have traditionally treated the agency's determination with great deference. Therefore, the commenters conclude that judicial review of the assessment/restoration plan should be conducted on the administrative record, applying an arbitrary and capricious standard.

Other commenters, however, contend that NOAA would exceed its statutory authority in granting such a standard of review. Several commenters stated that the responsible party has the legal right to a jury trial in natural resource damage assessment disputes as guaranteed by the United States Constitution. The commenters argued that every CERCLA natural resource damage case that has addressed the issue has required a jury trial for these actions at law, therefore, issues related to the selection of assessment/restoration plans must be decided by a trial court.

NOAA notes that the administrative record provisions in the proposed rule are intended to implement several important policy concerns expressed by Congress in OPA. NOAA has considered administrative law principles and various comparable policies found in CERCLA to be relevant to the natural resource damage assessment process in several areas. The administrative record provisions of this proposed rule are intended to create an open assessment/restoration process to allow an objective evaluation of how to restore or replace resources injured by discharges of oil. Whether these provisions would result

in "record review" is ultimately the decision of the courts. However, NOAA feels that record review is essential for the type of expeditious, fair assessments called for by OPA, and specifically asks for comments on this approach.

Assessment Costs

OPA allows recovery of damages for injury to natural resources as well as the reasonable costs of assessing those damages. Under the CERCLA rule, reasonable costs are defined in terms of the costs being less than the anticipated damage amount. NOAA has received several comments in support of adopting the CERCLA rule's definition of "reasonable costs" to avoid exorbitant assessment costs. However, some commenters have argued that it is difficult at the onset of a discharge to make a preliminary damage estimate that will then be used to shape the subsequent assessment.

Within the proposed rule, NOAA is defining reasonable costs to mean those costs associated with performing an assessment in accordance with the proposed rule. The proposed rule, in turn, gives guidance for each phase of the assessment as to the reasonableness of assessment activities. The proposed rule requires that any studies or procedures be directly related to the purpose of the assessment and are conducted in a cost-effective manner. This approach does not require the trustee(s) in the early stages of a discharge to devise a preliminary estimate of total damages likely to result from that discharge. However, the proposed rule does require that the assessment be conducted in such a manner to avoid unnecessary and excessive costs.

Injury/Causation

Under section 1002 of OPA, liability is established when there is any injury to a natural resource resulting from a discharge of oil. Injury under OPA encompasses the phrases "injury to," "destruction of," "loss," and "loss of use." The definition of "injury" proposed by NOAA is different from that contained in the CERCLA rule.

According to the CERCLA rule, injury is defined as "a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to a discharge of oil or release of a hazardous substance, or exposure to a product of reactions resulting from the discharge of oil or release of a hazardous substance." The definition of injury under CERCLA incorporates the concepts of injury and causality. Specific injury definitions and causation for resources are detailed in the CERCLA rule.

Under the OPA proposed rule, NOAA has attempted to more clearly delineate these terms. The definition of injury under the OPA proposed rule is more relaxed because it does not require that there be a "measurable" adverse change. Consequently, any discharge is likely to result in an injury. The OPA proposed rule defines injury as "any adverse change in a natural resource, or any impairment of a human or ecological service provided by a resource." Injury causation (i.e., definition of "injury resulting from a discharge") has been determined when the trustee(s) has demonstrated that: (1) With direct exposure, (a) the natural resource was exposed; (b) there is a pathway between the discharge and exposed natural resource; and (c) the exposure of oil, its components, or by-products has been shown by rigorous and appropriate scientific methodology to have an adverse effect on the natural resource in laboratory experiments or the field; or (2) in the absence of direct exposure, (a) the adverse effect on or impaired/diminished use of a natural resource has been shown by rigorous and appropriate scientific methodology; and (b) the adverse effect on or impaired/diminished use of the natural resource would not have occurred but for the fact of the discharge or threat of a discharge. The rationale for this approach is to simplify the legal determination of liability. Basically, liability is established by the presence of oil in the water. The trustee(s), however, recovers damages by establishing a causal link between the presence of oil and the observed adverse change in the resource or impairment of a human or ecological service. Conceptually, this approach does not change substantially the definition of injury under the CERCLA rule.

Compensation Formulas

The proposed rule offers a new damage assessment procedure in the form of compensation formulas for both estuarine/marine and inland waters. The estuarine/marine and inland waters compensation formulas described in this proposed rule are applicable to the vast majority of oil discharges. An analysis of reported coastal discharges of oil from 1973–1990 shows that 99.8% of the discharges were less than 50,000 gallons and 99% were less than 10,000 gallons. Compensation formulas would be used for most of these relatively small discharges. These formulas would allow an estimate of damages per gallon taking into account average restoration costs, plus average lost direct use values pending restoration. For various reasons, passive use values are not included in these formulas at this time. The formulas assume various levels of natural resource effects likely to result from the discharge of oil. These assumptions consider the amount and type of oil discharged and region and habitat type in which the discharge occurs. The formulas are applicable to a wide range of the most commonly discharged oil products. This approach allows both a national consistency and regional specificity.

Some commenters expressed concern that such formulas may under-value resources in industrialized or biologically degraded areas. Others noted several disadvantages in simplified assessments, including the potential overlapping trustee interests in certain natural resources, damages will not sufficiently reflect the extent of the actual injury, and the risk that a compensatory assessment could be transformed into a punitive exercise.

Since the compensation formula is based upon averages, it is impossible to include all known coastal habitats and every combination of discharges. As proposed, the Estuarine and Marine Environments Compensation Formula is based upon 55 representative province/habitat combinations, ranging from Northern Maine to the Alaskan coast, the Hawaiian and Pacific Islands. The Inland (Freshwater) Waters Compensation Formula is based upon 100 representative province/habitat combinations representing the Great Lakes and other inland waters by type, i.e., river, lake, fast flowing stream, etc. By comparing the habitat of the actual discharge with the province and specific habitat used to estimate the damages in the formula, the trustee(s) should, in most cases, find the most applicable scenario. NOAA emphasizes that the primary advantages of a compensation formula are for simplicity and cost-effectiveness.

In cases where the circumstances of an actual discharge are determined to be far out of the bounds of the compensation formula, the trustee(s) should consider the use of another assessment procedure. The compensation formulas generate damages based on average restoration costs and average diminution of value of the affected natural resources and are thus compensatory as authorized by OPA. Therefore, the compensation formulas are not akin to punitive damages.

NOAA is also proposing that the damages generated by the compensation formulas will be conclusive in nature.

That is, once the rule becomes final and survives any judicial review, parties may challenge the information used in applying the formulas in a particular assessment, but may not challenge within that assessment the underlying data used in developing the formulas.

Regional Restoration Plans

Section 1006(f) of OPA requires that sums recovered as damages be used to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the injured natural resources. The proposed rule describes two types of Restoration Plans. First, the trustee(s) may develop an Incident-Specific Restoration Plan to address the effects of the discharge of concern. This plan would be based upon the restoration planning guidance given in the proposed rule. This plan should serve to define the objectives and approach based on a sound decisionmaking process for the particular discharge site. However, under this proposed rule, the trustee(s) would also be allowed to pool recoveries to apply them to a Regional Restoration Plan. These plans could be developed on a geographical or habitat basis to allow the recovery of the system covered by the plan. Where such a plan already exists, whether developed through prespill planning efforts or under regular management efforts, that plan may be used if it has been developed through a public review and comment process that considers the major factors contained in the restoration planning guidance in the rule. The plan must also address the same or similar resource injuries as those identified in the assessment procedure. These requirements are completely consistent with the current CERCLA rule, which also allows for pooling damages. This option will likely be most useful in areas with long-term pollution effects where damages from a single discharge would be too small to "restore" the ecosystem or where the planning costs for the restoration after a single discharge would be quite high compared to the damage figure. However, where a Regional Restoration Plan has not been developed, an Incident-Specific Restoration Plan must be developed for use of the damages recovered.

Several commenters have strongly rejected the use of recoveries from several discharges for an ecosystem, bay, or area approach. The commenters argued that pooling and usage of funds is contrary to the principles of compensatory damages and avoidance of double damages enunciated by Congress in passing OPA. Further, this usage contradicts section 1006(f) that "there be a nexus between monies recovered resulting from a particular spill and their use to restore or enhance the specific resources 'affected by a discharge.'" Other commenters, however, have supported a pooling of funds in order to fund a restoration plan for an entire region, provided a legally-approved regional restoration plan exists.

NOAA does not believe that pooling recoveries for use in a Regional Restoration Plan contradicts the requirement in OPA that recoveries be used to restore the resources affected by a discharge. A relatively small recovery, assessed by a compensation formula, is unlikely to be sufficient to restore a bay or estuary affected by a discharge where many forces are working to degrade that ecosystem. By pooling recoveries, the trustee(s) has a chance to carry out meaningful actions to help that system recover. The responsible party will be able to defend against an attempted double recovery by showing how the damage figure is to be applied within the regional plan.

Resource Values

The major focus on economic issues within the rulemaking has been the question of what types of values should be included in a damage assessment and what methods should be used to measure those values. Section 1006(d) of OPA authorizes the trustee(s) to recover: The cost of restoring, rehabilitating, replacing or acquiring the equivalent of the injured or lost natural resources and/or services; the diminution in value of the injured or lost natural resources pending restoration; plus the reasonable cost of assessing those damages. In the proposed rule, the total diminution in value of resources and/or services affected by a discharge is referred to as compensable values, which include all reliably calculated values that comprise the total diminution in value of lost or diminished services of trust resources as a result of a discharge, from the onset of the event until recovery to baseline or comparable conditions is deemed complete by the trustee(s). In accordance with the OPA Conference Report, "diminution of value" refers to the standard for measuring resource damages cited in the D.C. Circuit Court decision on *Ohio* v. *DOI*. The *Ohio* opinion defines "use values" broadly, to encompass both direct use and passive use values that can be reliably calculated, i.e., calculated in a manner that is trustworthy or worthy of confidence.

Direct use values are defined as the value individuals derive from direct use of a natural resource. Direct uses of resources include both consumptive uses, such as fishing and hunting in which resources are harvested, and nonconsumptive uses, in which the activity does not reduce the stock of resources available for others at another time, such as bird watching and swimming. Passive use values are defined as the values individuals place on natural resources independent of direct use of a resource by the individual. The term "nonuse values" has also been used to refer to the same concept, but NOAA prefers the term "passive use values." Passive use values include, but are not limited to: the value of knowing the resource is available for use by family, friends, or the general public; and the value derived from protecting the natural resource for its own sake; and the value of knowing that future generations will be able to use the resource.

Some interested parties have asserted that passive use value damages should only be assessed for permanent or long-lasting injuries to unique natural resources—atypical conditions for discharges of oil. They argued there is no need for compensation for lost passive use values when the resource will fully recover and when compensation will be paid for direct use losses pending restoration.

Others have argued that passive use values should be included in damage assessment, because exclusion would understate the true cost of exposing natural resources to environmentally risky activities. They have also argued that exclusion of passive use values would induce systematic reallocation of environmentally risky activities to those environments that generate greater passive use values relative to direct use values.

NOAA has found no empirical evidence to suggest that a natural resource must be unique, non-reproducible and/or permanently injured in order to have significant passive use values. NOAA recognizes that, in cases involving temporary injury, individuals may not experience a significant sense of loss because the existence of the resource is not permanently threatened. NOAA has found ample evidence, from the OPA Conference Report and the decision in *Ohio* v. *DOI*, to believe that "diminution of value" refers to the standard for measuring resource damages cited in *Ohio* v. *DOI*. This opinion defines "use values" broadly, to encompass both direct use and passive use values that can be reliably measured. NOAA

believes that failure to include all relevant categories of damages in a claim would understate the true loss to the American public attributable to a discharge of oil. Under OPA, and in accordance with the *Ohio* v. *DOI* decision, passive use values are a component of compensable values that are necessary to fully compensate the public for losses as a result of a discharge, and to return the public, as nearly as possible, to the level of well-being it enjoyed before the discharge.

Contingent Valuation Method

In the *Ohio* decision, the D.C. Circuit Court determined that the interim lost value portion of the claim was to include total resource value, encompassing both direct use (recreational, commercial, cultural/historical) and passive use of resources. In the comments, there has been substantial discussion about contingent valuation (CV), the only known methodology for measuring the passive use component of total resource value. CV is a survey-based approach to the valuation of nonmarket goods and services that relies on a questionnaire for the direct elicitation of information about the value of the good or service in question.

Contingent valuation surveys generally measure total value of a good or service, which includes both direct use value and passive use values. Because passive uses of resources leave no behavioral trace, they are difficult to validate externally. A number of criticisms of CV pertain specifically to its use in valuing the passive use component of total use value and the difficulty of external validation of that component of total value. Proponents of CV assert that these problems are not inherent to the method and that well-designed and well-executed CV studies can eliminate them or render them inconsequential.

Though no other methods are available to provide alternative estimates of the passive use component of total value, it is possible to develop a variety of tests to evaluate the validity of the responses. Due to the substantial interest in the topic, NOAA convened a panel of experts co-chaired by two Nobel laureates, to evaluate the reliability of CV to measure passive use values. The report issued by the panel is part of the administrative record of this rulemaking, along with the comments received from economists, industry representatives and other interested parties. Based upon information in the panel's report and other comments, NOAA is recommending several validity tests in guidance for designing and conducting CV studies provided in the proposed rule.

NOAA is proposing that reliable estimates of lost passive use value due to discharges of oil can be estimated using CV so long as the CV study follows the guidance offered in this preamble and the proposed regulations. This guidance basically states that the trustee(s) should follow a conservative approach when designing a CV instrument, that is, to choose the design that would understate the natural resource damage rather than overstate the damage.

One commenter has noted that any damage assessment rule authorizing CV to measure passive use damages could well cost the U.S. economy hundreds of millions of dollars annually by generating excessively high estimates of passive use damages and could result in the bankruptcy of some responsible parties. The proposed rule has been designated as a "major" rule because of the significant issues involved in the rulemaking. However, because of the difficulty of evaluating the effects of alternatives to this proposal, a Regulatory Impact Analysis under E.O. 12866 is not necessary and has been waived.

Discounting Damages

Calculation of natural resource damages will generally require the use of discounting in the estimation of: (1) Estimated restoration costs; (2) diminution in value of the injured or lost resources pending restoration; and (3) damage assessment and restoration costs incurred by the trustee(s). "Discounting" is a widely used economic procedure that allows the trustee(s) to convert past and future damage sums to current dollars. This conversion is necessary for the trustee(s) to be able to present a claim for a "sum certain." Currently, the CERCLA rule requires that a 10% discount rate be used. NOAA is proposing that the U.S. Treasury rate should be used for discounting a trustee damage claim.

DISCUSSION

Subpart A

Scope, Applicability, Purpose

OPA provides for the prevention of, liability for, removal of, and compensation for the discharge of oil into or upon the navigable waters or adjoining shorelines of the United States, including the natural resources of the Exclusive Economic Zone. OPA provides for the designation of federal, state, Indian tribe, and/or foreign officials to act on behalf of the public as trustee(s) for the nation's natural resources. In the event that natural resources are injured, destroyed, lost, or the loss of use of natural resources occurs as a result of a discharge of oil covered by OPA, these officials are to assess natural resource damages, present a claim to the RP(s), recover damages, and develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of natural resources and/or services under their trusteeship.

This part applies to assessments of damages resulting from discharges of oil where those discharges occurred after the effective date of OPA (August 18, 1990). Discharges involving mixtures of oil and hazardous substances would ordinarily be covered by CERCLA. However, the U.S. Environmental Protection Agency (U.S. EPA) has issued guidance on the petroleum exclusion under sections 101(14) and 104(a)(2) of CERCLA. (U.S. EPA Memorandum on the Petroleum Exclusion under the Comprehensive Environmental Response, Compensation, and Liability Act, July 31, 1987; BNA Environment Reporter 41:3321, 2/12/88.) Under this guidance oil covered by OPA would be: (1) Crude oil and fractions of crude oil including the hazardous substances, such as benzene, toluene, and xylene, which are indigenous to petroleum and its refined products; and (2) hazardous substances that are normally mixed with or added to crude oil or crude oil fractions during the refining process, including hazardous substances that have increased in level as a result of the refining process. However, hazardous substances added to petroleum that increase in concentration through any process other than refining, or added as a result of contamination of the petroleum during use (including waste oil), would not be excluded from CERCLA. For example, the presence of dioxin in oil used as a dust suppressant on highways would bring a discharge of such a mixture under the jurisdiction of CERCLA, not OPA.

This part applies to all natural resource damages caused by oil (as defined by the Clean Water Act amended by OPA) discharged into navigable waters of the United States. The "oil" definition includes petroleum and non-petroleum (e.g., animal, vegetable, and wood chemical). A natural resource damage assessment may be appropriate even in discharges caused by carriers transporting quantities smaller than the threshold limits that would require OPA response plans. The determination of when natural resource damage assessment will be conducted is a responsibility of

the trustee(s) acting on behalf of the public.

NOAA is using in the proposed rule, the OPA definition of natural resources that provides for various degrees of government regulation, management or other form of control over the natural resources to make the OPA natural resource damage provisions applicable. The proposed rule repeats the statutory language of "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by," and thus covers a broad range of government interest in natural resources on behalf of the public. Pursuant to that language, general sources of authority for recovery under the rule could include, but not necessarily be limited to, relevant treaty or other provision of international law, constitution, statute, common law, regulation, order, deed or other conveyance, permit, or agreement.

The statutory phrase "belonging to" connotes ownership and would cover government-owned lands, as well as resources affixed, i.e., permanently attached, to such lands. However, the remaining terms, "managed by, held in trust by, appertaining to, or otherwise controlled by," ensure a wide range of legitimate government interest in natural resources that may, in fact, be held in private ownership.

Therefore, the proposed rule directs the trustee(s), or co-trustees, to state briefly the authority for asserting trusteeship, or co-trusteeship in the Preassessment Report and in the Draft Assessment/Restoration Plan. In describing the natural resources of concern to the trustee(s), the trustee(s) will cite the relevant treaty or other provision of international law, constitution, statute, common law, regulation, order, deed or other conveyance, permit, or agreement providing the basis for the trusteeship.

This part supplements the procedures established under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, for the identification, investigation, study, and response to a discharge of oil, and provides procedures for a natural resource trustee(s) to determine compensation for injuries to natural resources and/or services that have not been nor are expected to be sufficiently addressed by response actions conducted pursuant to the NCP.

This part provides for a process to develop a DARP to document the most appropriate restoration approach for the administrative record, with its estimated costs, for a particular discharge. Therefore, any judicial review of the development of the restoration component of the assessment would be based solely upon the administrative record. Once the restoration approach is developed, the trustee(s) then can determine the expected interim lost values. It is anticipated that the calculation of those values would not be included in the administrative record and would not, therefore, be reviewed on the basis of the administrative record.

Response to Comments

Scope, Applicability, Purpose

Comment: Several commenters noted that the damage assessment procedures outlined in this proposed rule apply only to discharges of oil under OPA. These commenters pointed out that this rule replaces the current DOI rule, at 43 CFR part 11, for natural resource damage assessments in discharges of oil. One of these commenters noted that the DOI rule cannot be incorporated since parts of that rule were declared illegal and are not yet revised.

Response: NOAA agrees that the proposed rule only applies to natural resource damage assessments performed for discharges of oil under OPA. When this proposed rule is promulgated as a final rule, it will supersede those parts of the current 43 CFR part 11 that deal with discharges of oil covered by OPA. The status of 43 CFR part 11 is immaterial to this ongoing rulemaking since only those sections upheld by the Court in the *Ohio* decision were used as a starting point for the OPA regulations.

Comment: One of these commenters specifically stated that, since the decisions of *Ohio* v. *U.S. Department of the Interior (Ohio) and State of Colorado* v. *U.S. Department of the Interior (Colorado)* concerning 43 CFR part 11 were decided before OPA's passage, those two decisions are not controlling over NOAA's rule. These commenters argue that Congress was aware of the decisions but did not incorporate them in the NOAA charge to promulgate this proposed rule.

Response: NOAA notes that the decisions in *Ohio* and *Colorado* cases are not directly controlling on the OPA rules. However, the decisions do represent the only existing case law on some of the issues involved in this rulemaking. Also, Congress did specifically reference the *Ohio* decision's definition of "diminution of value" in the Conference Report on OPA.

Comment: Several commenters noted that the natural resource damage assessment rule is a part of the regulatory scheme covered by OPA. These commenters urged NOAA to keep this perspective in mind so that NOAA's rule does not duplicate or overlap other OPA regulations; therefore, NOAA's rule should not allow punitive damages, since penalties are set up in other provisions of OPA, nor should this rule allow scientific research beyond what is needed to determine the natural resource damages.

Response: NOAA recognizes that this proposed rule is but a small part of the larger scheme of regulations required by OPA. For example, this proposed rule would supplement the overall activities surrounding a response to oil discharges set out in the NCP, 40 CFR part 300. There are also regulatory requirements for transport of oil, certification of vessels, etc., called for by Title IV of OPA. These other rulemakings are separate and apart from this proposed rule. NOAA has been coordinating with other federal agencies, particularly those other agencies that have regulatory and planning responsibilities under OPA to ensure consistency and avoid overlapping requirements.

NOAA also notes that Title VII of OPA authorizes an ambitious research and development program on oil pollution to cover the basic research that is beyond a natural resource damage assessment. As noted elsewhere in the preamble, this proposed rule disallows work beyond that needed to determine, quantify, restore, rehabilitate, replace, acquire the equivalent, and value injury to, destruction of, loss of, or loss of use of natural resources and/or services resulting from a discharge of oil.

NOAA further recognizes that penalties or other punitive measures are provided for elsewhere in OPA. The natural resource damage provisions of OPA are compensatory, not punitive. A discussion of allowable damages is found in the discussion of § 990.14—"Recovery of Damages" and elsewhere in this preamble.

Comment: One commenter recommended that NOAA consider clarifying whether CERCLA or OPA would cover a particular discharge of oil.

Response: NOAA notes that the previous preamble discussion on the scope of this proposed rule describes the types of oil that are covered by OPA.

Comment: One commenter suggested that NOAA's rule should serve to provide the basic framework from which different state and local agencies can adopt and expand upon through implementation.

Response: NOAA notes that, while the use of the proposed rule is optional, it is hoped that the guidance and procedures in this proposed rule will prove useful to all trustee agencies.

Comment: A few commenters discussed the requirement that new regulations result in greater benefits than costs to society, as directed by E.O. 12291 [now E.O. 12866].

Response: NOAA notes that this proposed rule is explicitly designed to allow for expeditious and fair compensation to the public for effects of a discharge on the public's natural resources. Purely speculative damages clearly are not allowed under this damage assessment process.

Comment: One commenter suggested that the natural resource damage assessment rule allow for consideration of the size of the business enterprise responsible for the damages. Another commenter suggested that damages should be allocated somehow proportionately across the different stages of oil production, i.e., production, transport, use.

Response: NOAA points out that the RP's ability to pay based on its financial "size" should not be a determining factor. The damage assessment process required under section 1006(e) of OPA is to determine the type and extent of adverse effects and define the best approach for the recovery of the affected natural resources and/or services. In fact, Congress explicitly removes this concern from the assessment of damages by allowing uncompensated claims against the Fund. Allocation across stages of production is not possible within this proposed rule.

Comment: One commenter stated that loss of subsistence use of resources should be covered in the natural resource damage assessment process.

Response: NOAA points out that section 1002(b)(2)(C) of OPA specifically provides for the recovery of damages for the loss of subsistence use of natural resources. Such damages are recoverable by anyone who uses natural resources for subsistence.

Comment: Although several commenters mentioned that section 1006(e) of OPA provides a rebuttable presumption for assessments performed pursuant to the natural resource damage assessment rule, one commenter specifically raised the question of how one might define the phrase "in accordance with." One commenter noted that, so long as the trustee(s) follows the rule and the public is given the opportunity to review and comment on the restoration plans called for by section 1006(c)(5), the trustee's(s') determination of damages is granted the rebuttable presumption. Another commenter suggested that the rebuttable presumption should only apply to issues and components of an assessment that are specifically included in the proposed rule. A few commenters questioned the relationship between the statutorily granted rebuttable presumption and the NOAA suggestion of assessments being conducted "on the record" to be reviewed under the "arbitrary, capricious, or otherwise not in accordance with law" standard of review. Another commenter pointed out that the trustee(s) is also entitled to the rebuttable presumption when presenting a claim to the Fund.

Response: NOAA notes that the damage assessment and restoration planning process developed through this rulemaking is a framework that offers both guidance and a range of procedures for the trustee(s) to design the assessment/restoration approach most appropriate for the specific discharge. The philosophy of this proposed rule is to provide flexibility to allow the most cost-effective assessment/restoration approach for a particular incident while giving guidance on how this assessment can be conducted using "good science."

The rebuttable presumption applies, in the statutory language, to "any determination or assessment of damages to natural resources." This language indicates that the entire assessment, including the dollar figure is granted the presumption. Given the need for flexibility in an assessment, the presumption will apply to any part of the assessment conducted pursuant to this proposed rule, even if some part of the assessment activities are not specifically listed in the rule. NOAA also notes that section 1006(e) applies both to actions against an RP and claims against the Fund.

In response to the commenters' questioning the relationship between the rebuttable presumption and a review on the record, NOAA notes that the rebuttable presumption goes to the trustee(s) who conducts an assessment "in accordance with" this proposed rule. This language is comparable to the "not inconsistent with the NCP" language found in section 107(a)(4)(A) of CERCLA, which allows recovery of response costs that are not inconsistent with the NCP by the United States, a state, or an Indian tribe. Therefore, one challenging such costs must show that the claimant acted in a way that was inconsistent with the NCP. In a natural resource damage assessment under OPA, the trustee(s) gets a rebuttable presumption for the assessment conducted "in accordance with" this proposed rule. Therefore, someone challenging the assessment must affirmatively prove that the assessment was inconsistent with the assessment process set forth in this proposed rule.

Reviewing a damage assessment "on the record" refines the phrase "in accordance with." The review is of the information, data, and procedures used in the assessment/restoration planning process, to determine the type and extent of effects and best approach for ecosystem recovery. In this way, therefore, the rebuttable presumption and record review complement each other. (A further discussion of record review and this proposed rule is provided later in this preamble.)

Comment: Several commenters noted that NOAA should develop guidance and technical support documents, rather than rigid rules. One other commenter, however, stated that the proposed rule should contain a clear process to ensure the consistent application of the damage assessment process and gain public trust in that process. This commenter urged that NOAA not limit the rulemaking to developing "guidance" for damage assessment instead of providing clear requirements. Other commenters recognized that national uniformity is a desirable goal, but less formalized, i.e., flexible procedures are preferable in dealing with a wide range of incidents.

Response: NOAA believes that flexibility is important in the proposed rule. The trustee(s) must be allowed the ability to design an assessment/restoration approach that is appropriate for the situation at hand. No national scheme could possibly anticipate all possible discharge situations. In response to the requests for guidance, NOAA is providing guidance on the best approaches to an assessment, in addition to certain required steps and criteria. NOAA is also developing technical guidance documents on: Preassessment, Injury Determination and Quantification, and Restoration (Guidance and Bibliography), as part of this rulemaking.

II. Definitions

Response to Comments

"Acquisition"

Comment: One commenter disagreed with grouping "replacement" and "acquisition" together, as acquisition implies an off-site activity. Another commenter indicated that the proposed definition describes "replacement," but the definition of "acquisition of the equivalent" should also incorporate the requirement of "proximity to the affected area," for the purpose of "enhancing the recovery * * * of the ecosystem affected by a discharge." In addition, the commenter stated that the regulations should reflect Congress' preference for on-site restoration and should limit the availability of acquiring

equivalent resources to those rare situations where the cost of site specific restoration would be "grossly disproportionate to the value of the resources involved."

Another commenter noted that acquisition must be accompanied by some effort to restore the discharge-impaired habitat. Acquisition involves only a transfer of property accompanied by a net loss of the species affected by the discharge. However, the commenter also stated that acquisition may be used to replace the loss of resources between the time of initial loss and full recovery of the habitat affected by a discharge. One commenter noted that acquisition of equivalent resources is not the same as replacement because it does not occur in the area affected by the discharge.

Response: NOAA agrees that the terms "acquisition" and "replacement" should be defined separately. NOAA recognizes that the Conference Report accompanying OPA states that the alternative of acquiring equivalent natural resources should be chosen only when the other alternatives are not possible, or when the cost of those alternatives would, in the judgment of the trustee(s), be grossly disproportionate to the value of the natural resources involved. This discussion, however, is more appropriate in other parts of the preamble and proposed rule.

"Baseline"

Comment: One commenter requested a more clear definition of "baseline." Another commenter recommended that the definition of "baseline" reflect that, in the absence of reliable data on natural variability, the baseline condition will be the condition of the resources that existed at the location and time of the discharge. Further, the commenter suggested that the definition be replaced or supplemented with the following definition: Baseline data are those which have been collected for natural resources and environmental variables of interest for an extended period of time (typically years) on a regular basis (e.g., annually, quarterly) up to the time of the discharge. This database should describe the temporal mean and variation of the variable(s) of interest, so that statistically significant departures from this mean could be measured. Baseline data, therefore, should "take into account the natural variability that would have existed at the assessment area." The commenter suggested that ideally, the last sampling period in a baseline would have occurred immediately prior to the discharge and included specific locations that are or will be affected by the discharge. The commenter stated that the early sampling program cannot provide a baseline (as defined above), and should be clearly distinguished from a baseline. The early sampling program cannot document the temporal variability in the natural environment, especially for resources that have life cycles longer than a few days or environmental variables that have seasonal components.

Response: NOAA agrees that the definition of baseline should be clarified and has revised the definition accordingly. The definition of early sampling has been deleted.

"Biological Resources"

Comment: One commenter recommended that habitats, such as the water column or substrate, must be included as "biological resources" along with the interrelationships between species that are necessary for a normal healthy functioning ecosystem. The commenter argued that species depend on these habitats for successful completion of their normal life histories. If the discharge adversely affects these ecosystem components, then it should be presumed that injury to biological resources has occurred.

Response: NOAA has deleted the definition of "biological resources" along with those for "air," "drinking water supply," and "surface water." NOAA believes that these natural resources are included in the statutory definition of natural resources, which encompass "other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by," the trustee(s). NOAA takes the position that this provision includes biological resources, and therefore there is no need for a separate definition. Further, NOAA interprets the statutory definition as sufficiently broad to include the water column or substrate. Accordingly, a trustee(s) may seek damages for injury to the water column or substrate.

"Compensation"

Comment: One commenter suggested "compensation" is the sum total of payment for damages to natural resources. The commenter noted that payment shall include costs for injury and assessment investigations, restoration of affected resources in the assessment area, monitoring of the restoration implementation, necessary mid-course adjustments to the restoration plan based on monitoring results, and acquisition of additional habitat for the same or comparable resources affected by the discharge to offset resource injuries between the time of the discharge incident and full recovery following implementation of the restoration plan. The term "compensation" must either be incorporated as a part of the definition for "restoration or rehabilitation" or contained in a separate definition as proposed. This concept for compensation should also be included within the scope of "damages."

Response: NOAA has not specifically defined "compensation." However, § 990.14 of this proposed rule addresses recoveries and includes items that the commenter suggested should be compensable. The trustee(s), therefore, may recover: (1) For injury to natural resources and/or services through the recovery period, including monitoring costs, (2) costs of emergency restoration, (3) the reasonable costs of assessment including preassessment and methodologies provided for in the various assessment procedures, (4) the cost of restoration, rehabilitation, replacement, or acquiring equivalent resources, and (5) interest on the amounts recoverable, as provided in section 1005 of OPA.

"Control Area" or "Resource and Reference Area" or "Resource"

Comment: One commenter believed "control area," "control resource," "reference area," or "reference resource" need further definition and clarification. The commenter stated that all have identical definitions and are cross-referenced in the earlier notice. The commenter recommended that the terms "control area" and "control resource" be deleted or restricted in the regulation, and that the terms "reference area" and "reference resource" be used instead. The word "control" should only be used in relation to the laboratory or some microcosm and mesocosm testing facilities. The commenter believed that "control area" refers to completely controlled systems. Natural environments, however, are affected by many variables (in time and/or space). The commenter noted that "reference area" data and information are collected following the discharge, but in areas unaffected by the discharge. The reference areas should be as nearly identical to the affected areas as practical, except that there will not be oil from the incident in the reference area. The reference area sampling program(s) should be identical to those in the affected areas in order to conduct quantitative comparisons regarding effects, recovery, natural variation, etc. Further, the commenter stated the "reference area" concept is based on the reality that there may be frequent and

often substantial change in physical, chemical, and ultimately, biological variables in the natural resources of interest, due to natural, not man-made, factors. These natural changes should be monitored so that their influence on the affected, and recovering, community can be evaluated. The commenter noted that the effect of natural variation, as documented in reference areas, on affected areas may be very important in the injury assessment and quantification phases of the natural resource damage assessment, and thus in the ultimate damages assessed against the RP.

Response: NOAA recognizes that the terms "control" and "reference" are distinct. NOAA has incorporated the commenter's concerns both in the rule and preamble language. NOAA further has addressed the importance of natural variation in the damage assessment process.

"Destruction"

Comment: One commenter believed the definition of "destruction" is so narrow that almost nothing will be covered because "total" and "irreversible loss" are very difficult to achieve. Further, the commenter suggested that this definition be omitted.

Response: NOAA agrees, in part, and has revised the definition by deleting the phrase "irreversible loss."

"Drinking Water Supply"

Comment: One commenter suggested that a "drinking water supply" for less than ten people would not justify restoration so that an alternate supply would be a better answer for the limited period an oil discharge would affect such a water supply. Another commenter noted the definition is too broad as it would cover any water supply that one person might drink once. The commenter suggested that the definition be amended to read "drinking water supply" means any raw or finished water which is or may be used by a public water system, as defined in the Safe Drinking Water Act, or as drinking water by one or more individuals on a regular basis.

Response: NOAA has deleted the definition of "drinking water supply" because it is included in the statutory definition of natural resources.

"Early Sampling Data"

Comment: One commenter noted "early sampling data" are those obtained in the early sampling of both affected and reference areas immediately after the discharge occurs. The commenter stated that often this program will be designed without benefit of baseline or historical data (as defined earlier). The early sampling program provides data on the natural resources and environmental variables at the time of the discharge. It may be described as a "time slice," a "benchmark," or a "base point" in time, compared to a baseline (i.e., a series of "base points").

Response: NOAA agrees with the commenter's description of early sampling data. While NOAA has not included the phrase "early sampling data" in the definitions section, the concepts outlined by the commenter are included in the preamble and this proposed rule.

"Equivalent"

Comment: Two commenters stated "equivalent" resources under this section are resources that the trustee(s) determines are comparable to the injured resources. They noted "equivalent" resources should be acquired to enhance the recovery, productivity, and survival of the ecosystem affected by a discharge, preferably in proximity to the affected area. Another commenter defined "equivalent" as, "to have equal power * * * equal in force, amount or value * * * corresponding or virtually identical especially in effect or function * * *" Webster's New Collegiate Dictionary (1981). The commenter noted that NOAA does not define the term "equivalent" and recommends a nationally consistent definition be developed.

Response: The OPA Conference Report, H.R. 101–653 at p. 109, defines "equivalent" to mean natural resources that the trustee(s) determines are comparable to the injured natural resources. NOAA adopts a similar definition.

"Exposed to" or "Exposure of"

Comment: One commenter noted that the definition of "exposed to" properly implies that physical contact with the oil discharge must be the proximate cause of any compensable natural resource damage.

Response: NOAA disagrees that the definition of "exposed to" implies that physical contact with oil discharge must be the proximate cause of any compensable natural resource damage. NOAA defines "exposed to" to mean that all or part of a natural resource that may be in contact with oil or with any medium containing oil. Further, NOAA is not limiting recovery of damages to natural resources that have been exposed to oil (see definition of "resulting from").

"Geologic Resources"

Comment: One commenter believed the definition of "geologic resources" is redundant under the OPA regulations and should be omitted.

Response: NOAA has adopted the statutory definition of natural resources which implies that "geologic resources" are included. Specifically, the definition includes "other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by," the trustee(s). NOAA takes the position that this provision may include geologic resources, and therefore, there is no need to include a separate definition of geologic resources.

"Historical Data"

Comment: One commenter believed "historical data" are those that have been collected prior to the incident, but may not have been collected for several periods (e.g., months, quarters, years) prior to the incident. This database may provide a description of the resources in the past, but there may be a temporal discontinuity long enough that there could have been a significant change in the variable during that time. The temporal gap, therefore, may be sufficient so that: (a) It exceeds a few generation times of the "important" resources, (b) a major episodic recruitment event could have occurred, or (c) that a major disturbance event (e.g., storm) could have occurred. Further, "historical data" from areas similar to the affected area, though the areas may not be suitable as reference areas, may be appropriate. "Historical data" may provide a "gestalt" about the present affected areas, in some cases, but may not be appropriate for quantitative comparison.

Response: NOAA agrees with the commenter's discussion of historical data and has revised the definition accordingly.

"Natural Resource Damage Assessment"

Comment: One commenter believed the definition of "natural resource damage assessment" should include new scientifically developed methodologies that may be devised for the unique resource damage circumstance related to the discharge at hand. Such methodologies may not necessarily exist in a prescribed state prior to the discharge.

Response: NOAA agrees and has eliminated the restrictions in the earlier notice.

"Natural Resources"

Comment: One commenter urged that areas that are privately owned but that

support public natural resources should be included. A commenter agreed with NOAA's decision not to attempt to limit the broad statutory definition of "natural resources" by providing specific guidelines on the degree of governmental control necessary to allow public recovery. The commenter stated that a natural resource located on private property may have both public and private value, and it is the trustee(s) who should determine whether the public has an interest in the resource.

Response: NOAA recognizes that there are times when natural resources located on private property may have public value. However, the "public" nature of the resource would have to be decided on a case-by-case basis. At the time of the Preassessment Phase, the trustee(s) is required to determine if there are resources of concern to the trustee(s) that might be affected by the discharge. It is at that time that the determination could be made of the nature of the public's interest in the resource.

Comment: One commenter stated that NOAA should attempt to ensure inclusion of all potentially affected trustee resources, such as archeological resources and park lands or other preserved natural areas valued particularly for their pristine state, into the natural resource damage assessment process.

Response: NOAA has included a new definition of "resources of special significance." This definition is designed to address the concerns of the comments (see "resources of special significance").

"Nonuse (Passive use) Value"

Comment: Two commenters questioned whether a regulatory definition for passive use value is necessary, except to refer to values that cannot be reliably calculated. Another commenter urged the inclusion of the phrase, "such services encompass values associated with the knowledge that such resources simply exist as well as associated with the option to directly use or not use such resources in the future."

Response: NOAA believes that a definition of nonuse values, referred to as passive use values, is appropriate and therefore will continue to include such definition. NOAA's definition of passive use values is broad and therefore includes the notions included in the second commenter's proposed definition.

"Oil"

Comment: One commenter contended that unless the material under consideration is definitely a single hazardous compound derived from processing oil, it should be classified as "oil" (e.g., diesel or gasoline would be oil for this purpose). Another commenter believed the definition seems practical and reasonable to focus on what has been discharged and not on its degradation products. The commenter recognized the potential for dual regulation (CERCLA and OPA) of one discharge of oil due to the hazardous constituents contained in some oils. The same commenter noted, however, that the proposed definition is cumbersome.

Response: NOAA agrees that the definition of oil is cumbersome and has revised it accordingly.

"Reasonable Cost"

Comment: One commenter urged NOAA to revise the definition of "reasonable cost." Two commenters urged NOAA to adopt the requirements in DOI's rule 43 CFR 11.14(ee). One of those commenters requested adoption of DOI's rule provided it is modified to show that the reasonable cost test applies to separable subparts of the assessment, as well as the assessment as a whole. Another commenter believed that this definition is circular and recommended the cost of a natural resource damage assessment be reasonable in keeping with the size of the discharge and type and amount of natural resource damages to be determined. Another commenter believed the definition is incomplete, stating that just because a cost can be recovered, does not mean it is reasonable.

Response: NOAA agrees that the definition in the Advance Notice of Proposed Rulemaking (ANPRM) is somewhat circular and has revised the definition. The costs of the damage assessment are deemed reasonable if the assessment is conducted in accordance with this proposed rule, or if the costs are otherwise reasonable under the circumstances. NOAA believes this definition is simpler than the DOI definition.

Comment: One commenter stated that making the definition of reasonable costs contingent on a preliminary and probably inaccurate estimate is unreasonable because scientists' present understanding of the effects of oil pollution is limited. In addition, the full extent of damages may not be apparent for several years following a discharge.

Response: NOAA's definition of reasonable cost avoids the problems the commenter identified with respect to the difficulty of ascertaining reasonable costs based on preliminary information.

"Responsible Party(ies)" (RP(s))

Comment: One commenter noted that the proposed definition of "responsible party(ies)" is confined to "person or persons." The commenter noted the RP should include the company or corporate entity that owns or is otherwise responsible for the vessel or facility that contained the discharged material. The owner of the discharged material perhaps should also be initially included until the investigation ascertains responsibility.

Response: NOAA agrees and that definition has been modified in the proposed rule.

"Restoration or Rehabilitation"

Comment: One commenter endorsed the existing DOI definition of "restoration," as occurring once resources are capable of providing baseline service levels. This definition is consistent with *Ohio* v. *DOI* as well as OPA's legislative history, which revealed no Congressional intent to alter that definition. Another commenter agreed that restoration occurs when the resources are capable of providing the "without spill" service levels. One commenter urged NOAA to clarify the definition as meaning "measures to restore the services provided by the affected resources." Another commenter agreed with the proposed definition as encompassing all four management options set forth. The same commenter, however, urged NOAA to state that these techniques should be designed to achieve the best possible overall restoration of resources. One commenter disagreed with grouping "restoration" or "rehabilitation" together. The commenter argued that "restoration" is commonly used as an inclusive term for restoration, rehabilitation and replacement as all are in situ approaches. For example, "replacement" may mean reestablishing a population at the site.

One commenter noted the proposed definitions of "restoration" and "rehabilitation" appear to expand the measure of natural resource damages to include restoration of both "the injured resources' physical, chemical or biological properties." Any attempt by NOAA to expand the measure of damages to require restoration of the resources' properties beyond what is necessary to restore their services would be contrary to economic principles and inconsistent with the structure of section 1006(d)(1) of OPA. The same commenter suggested the definitions of "restoration" and "rehabilitation" should be refined to read "measures adopted to return injured natural

resources to the condition where they provide the same or substantially similar services as they would have provided if the spill of oil had not occurred.'"

Response: NOAA agrees that the terms restoration and rehabilitation should be defined separately. In the revised definition, NOAA distinguishes restoration from rehabilitation. Restoration actions are designed to return the injured natural resources and/or services to baseline conditions. The baseline condition is measured in terms of the physical, chemical, or biological properties of those resources and/or services prior to the discharge. Rehabilitation refers to actions that are designed to bring the injured natural resources and services to a different state from baseline conditions, but still beneficial to both the environment and public. NOAA agrees with the suggestion that sometimes a combination of techniques would best serve the overall goals of resource recovery. Under those circumstances, the trustee(s) may consider a combination of restoration techniques.

"Restoration, Rehabilitation, Replacement and Acquisition"

Comment: One commenter noted the definitions of "restoration, rehabilitation, replacement, and acquisition of equivalent" resources that are set forth in the notice do not maintain the hierarchy of choices and their interrelationship as contemplated by OPA.

Response: The OPA Conference Report specifies that acquisition of the equivalent resources will be undertaken when the alternatives of restoration, rehabilitation, and replacement of damaged natural resources will be technically infeasible or grossly disproportionate to the value of the resources involved. Discussion regarding the use of any of these options is addressed elsewhere in the preamble and the proposed rule.

"Technical Feasibility"

Comment: One commenter suggested the definition of "technical feasibility" seems to preclude the implementation of new or innovative strategies in restoration/rehabilitation efforts. The commenter believed that nontraditional approaches should be explored where appropriate. The commenter also recommended that these approaches should be encouraged where there is mutual agreement among the trustees. Another commenter believed the proposed definition of "technically feasible" is too stringent. Currently very few recovery techniques are well known. The same commenter recommended the definition be revised as, "technical feasibility means those on-site restoration actions that are deemed possible following appropriate planning, implementation, monitoring, and necessary mid-course corrections of a restoration project." The commenter also noted that project costs shall not be a part of technical feasibility but may be considered as part of the overall settlement for damages taking into account technical feasibility of restoration, acquisition, or other means to make the damaged resources whole over a reasonable period of time.

Response: NOAA agrees that the definition of technical feasibility is too stringent and has revised the definition accordingly.

"Trauma"

Comment: One commenter recommended the definition of "trauma" include all adverse, sublethal, chemical, physical and behavioral changes to living fish and wildlife resources, including adverse change in the presence and activity levels of enzymes and other vital components of living systems, caused by a discharge of oil and attendant necessary cleanup and response activities. Trauma may include disruption of reproductive rate or reproductive cycles normally associated with a species. As used within this context, the commenter argued that trauma is an injury and should be included within the scope of damages.

Response: NOAA does not agree that a separate category of injury defined as trauma should be included in this proposed rule. The current injury definition is broad enough to include much of what the commenter is concerned about.

"Use Value or Values"

Comment: One commenter agreed with the definition for "use value or values" under OPA in the March 13, 1992, Notice.

Response: The proposed rule no longer defines "use value" separately, but defines "compensable values" to incorporate all use values, including direct and passive uses.

"Water"

Comment: One commenter recommended "water" in the definition be revised to "waters of the United States" consistent with the definition in the Clean Water Act.

Response: OPA defines "navigable waters" to mean the waters of the United States, including the territorial sea. NOAA has adopted this definition in the proposed rule.

"Wetlands"

Comment: One commenter recommended that "wetlands" be included in the definition of "natural resources."

Response: NOAA has adopted the definition of natural resources from OPA and believes that the definition encompasses wetlands. Therefore, there is no need to revise the definition to specifically include wetlands.

III. Recoveries

Section 990.14 identifies what is recoverable as damages. In section 1006 of OPA, Congress clearly delineates the measure of damages to include the costs (both direct and indirect) of restoring, rehabilitating, replacing, or acquiring the equivalent of the injured natural resources, the diminution in value of those natural resources pending restoration, plus the reasonable costs of assessing those damages. These damages are based upon injuries occurring from the onset of a discharge of oil through the recovery period (including monitoring costs), less any mitigation of those injuries by response actions taken or anticipated, plus any increase in injuries that are a result of response actions taken or anticipated. Damages may also include the costs of emergency restoration actions and the reasonable costs of the assessment, which includes the cost of performing the preassessment, assessment, and post-assessment phases; administrative or legal or other enforcement costs, including base and incremental costs, and expenses necessary for and incidental to the preassessment, assessment, restoration planning, and post-assessment (including salaries); any restoration or replacement undertaken; restoration monitoring; mid-course corrections, and interest on the amounts recoverable as set forth in section 1005 of OPA. The period for which interest shall be paid is the period beginning on the 30th day following the date on which the claim is presented to the RP(s) or guarantor(s) and ending on the date on which the claim is paid. Interest is to be calculated in accordance with Section 1005 of OPA. The determination of the damage amount shall consider any applicable limitations provided for in section 1004 of OPA.

In accordance with section 1006(d)(3) of OPA, there shall be no double recovery under this rule. Actions for damages and assessment costs shall comply with the statute of limitations set forth in section 1017(f) of OPA.

Finally, this proposed rule clearly authorizes the trustee(s) to settle claims

without completing an assessment. The trustee(s) is authorized to reach settlement with the RP(s) at any time following a discharge; neither OPA nor this proposed rule requires that an assessment procedure of any type be completed. However, the trustee(s) should be mindful of the great public interest in many discharges of oil and may provide the public an opportunity to review and comment upon the settlement terms and/or the restoration component of the DARP should the assessment not be completed.

Response to Comments

Recoveries

"Assessment Costs"

Comments: Several comments were received regarding the appropriate definition of "reasonable costs" and to the extent that such costs are recoverable. Many of these comments are addressed in the section dealing with definitions within the rule. Others indicated that the trustee(s) could capture many of the administrative costs by simple bookkeeping, i.e., recording the number of man-hours, travel costs, etc. Several commenters indicated that the individual study costs conducted in the context of an assessment should only be recoverable if the individual study costs are reasonable. Other commenters indicated their preference for the overall approach, i.e., the total costs of the assessment are anticipated to be less than the damages.

Response: NOAA agrees that the trustee(s) should document all administrative costs. The costs of damage assessments are deemed reasonable if the damage assessment is conducted in accordance with this proposed rule or if the costs are otherwise reasonable under the circumstances. However, the trustee(s) is required to conduct only studies that will provide data directly relating to the purpose of the assessment, to the extent practicable under the circumstances, and to conduct those studies in a cost-effective manner. NOAA does not require the trustee(s) to consider whether individual study costs are reasonable so long as the trustee(s) meets the requirements specified in the previous sentence. To determine reasonableness, the trustee(s) should consider the overall costs of the assessment against the expected recovery.

Comment: Some commenters requested that the costs of monitoring during the Assessment Phase be recoverable.

Response: NOAA has specifically included monitoring costs in the recoverable damages.

Comment: Several commenters suggested that recoverable costs should include the costs of recovering damages.

Response: NOAA agrees that the costs of "assessing damages" includes the costs of recovering those damages.

Comment: Some commenters desired more clarification on recoverable damages, specifically, whether the rule would allow recovery of funds in excess of the costs of restoration plus the assessment cost.

Response: The proposed rule allows for the recovery of damages required by OPA, namely: (1) The cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the injured natural resources and/or services pending restoration; (2) the diminution in value of those natural resources and/or services pending restoration; plus (3) the reasonable cost of assessing those damages. The recovery of those three items is not excess recovery. The trustee(s) is to use the money to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources and/or services and to be reimbursed for the reasonable costs of conducting the assessment. Any recoveries that remain after implementing the restoration plan shall be deposited in the Oil Spill Liability Trust Fund in accordance with section 1006(f) of OPA.

Comment: One commenter indicated that the costs of emergency restoration are more properly classified as response costs and not associated with restoration.

Response: NOAA agrees that the appropriate avenue of redress is through the OSC's response structure, which may consist of simply having the OSC approve the trustee actions and costs as removal actions and costs. While these actions/costs are not strictly preassessment activities, it is likely that such actions/costs will be taken while the trustee(s) is conducting the preassessment and can be included in the Preassessment Phase. In circumstances where the trustee(s) takes emergency restoration to repair or replace habitat or resources, these are technically restoration costs, but again can be claimed in the costs of conducting an assessment. NOAA reminds the trustee(s) that emergency restorations are the exception, not the usual course of business. NOAA expects fully that close cooperation and coordination with the response agency(ies) and the RP(s) will greatly alleviate the need for emergency restoration.

Comment: One commenter noted several disadvantages in simplified assessments, including the potential overlapping trustee interests in certain natural resources, damages will not sufficiently reflect the extent of the actual injury, and the risk that a compensatory assessment could be transformed into a punitive exercise.

Response: NOAA notes that double recovery is prohibited to the extent provided by section 1006(d)(3) of OPA. The simplified damage assessment procedures produce calculations based on statistical averages and will reasonably reflect the damages of the actual injury in a timely and economical manner. Finally, NOAA disagrees with the charge that simplified damage assessments are akin to punitive damages. The computer models and compensation formulas generate damages based on average restoration costs and average diminution of value of the affected natural resources and are thus compensatory as authorized by OPA.

"Coordination With Legal Counsel"

Comment: Commenters covered the possible range concerning the appropriate involvement of legal counsel. Some indicated that attorneys will slow down the assessment process while others indicated that assessments are complicated legal processes that may involve a variety of legal issues, including Freedom of Information Act requests and coordination among federal and state laws, and that attorneys must be involved in the process from the onset. Most commenters indicated that a formal process for attorneys need not be identified in the rule. Some commenters indicated that, since many assessments have been conducted under the threat of litigation, attorneys have more say than the scientists in the assessment process. One commenter suggested that early involvement of attorneys leads to adoption of extreme positions by both parties and encourages unnecessary and poorly designed studies aimed at litigation, not restoration.

Response: NOAA has determined that there is no need to specifically provide a role for either trustee agency counsel or attorneys representing the RP(s) in the proposed rule. NOAA has attempted to propose a rule that is scientifically driven, and not specifically geared to the potential of litigation, even though that potential certainly looms ever-present. As a practical matter, NOAA encourages trustee agencies to keep their respective counsels informed of the assessment and seek their advice in legal matters. It is expected that the

RP(s) will rely upon its attorney(s) for advice and counsel throughout most assessments.

"Private Causes of Action"

Comment: Some commenters encouraged NOAA to specifically allow the trustee(s) to recover for private causes of action under OPA. They reasoned that often it is the government that is the most logical party to recover for what are arguably "private" harms, i.e., increased prices due to fishery closures, since the consumers would have no mechanism to individually recover those damages. Another example cited was recreational users, who would be unlikely to pursue individual claims.

Response: Section 1002 of OPA provides specifically for damages recoverable under OPA, including natural resources, real or personal property, subsistence use, revenues, profits and earning capacity and public services. However, although OPA states that a natural resource trustee may seek recovery of damages for injuries to, or loss of use of, natural resources, OPA gives the right of action for the other types of damages to the actual users or owners of the property affected.

"Punitive Damages"

Comment: Some commenters expressed the opinion that recoveries under OPA should not include punitive damages.

Response: NOAA agrees fully. The proposed rule is designed to assess compensatory damages for the injury to, and loss of use of natural resources, their corresponding diminution in value pending restoration, and the reasonable costs of conducting an assessment.

"Future Damages"

Comment: Some commenters suggested that the damage figure should include an added amount to pay for cumulative unknown effects that cannot be determined by the assessment, comparable to the Superfund provision with respect to damages for unforseen future liability. One of these commenters suggested that these damages could be used to carry out additional research, monitoring, etc.

Response: NOAA does not believe that OPA requires damages for unforeseen future natural resource injuries. Such recoveries may be speculative in nature. However, for any particular discharge the trustee(s) and RP(s) may agree, through negotiations, to establish an escrow account to cover future effects, perhaps with unused sums reverting back to the RP(s) after a specified amount of time.

"Limits of Liability"

Comment: One commenter stated that liability limits for oil and gas extractive facilities should hold under OPA, except on cases of proven gross negligence, willful misconduct, or violation of certain federal stipulations.

Response: NOAA notes that the commenter is requesting a statutory change, clearly outside the scope of this rulemaking.

IV. Assessment on the Record

Purpose

Section 1006(c) of OPA provides that the trustee(s) shall "develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship." 33 U.S.C. section 2706(c)(1)(C), (c)(2)(B), (c)(3)(B) and (c)(4)(B). Section 1006(c)(5), 33 U.S.C. section 2706(c)(5), provides that "plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing and consideration of all public comment." Thus, Congress intended that restoration plans be developed by the trustee(s) pursuant to an administrative process that provides an adequate opportunity for public participation in the selection of restoration measures. In accordance with traditional principles of administrative law, NOAA is proposing to implement these provisions by requiring the trustee(s) to document development of draft assessment/restoration plans (DARP) in an administrative record through notice and comment procedures.

The administrative record has four basic purposes. First, it facilitates selection of restoration, rehabilitation, replacement, or equivalent acquisition actions by providing a central repository for scientific data. Second, it documents the relevant factors the trustee(s) considered in selecting restoration actions. Third, it facilitates public participation. Fourth, it provides the basis for judicial review.

The DARP serves to document, for the administrative record, the most appropriate restoration approach, with its estimated restoration, rehabilitation, replacement, or equivalent acquisition costs for a particular discharge. Therefore, the judicial review standard of "arbitrary, capricious, or otherwise not inconsistent with law" would apply to determinations through the development of the restoration approach. Once the restoration approach is developed, the trustee(s) then can determine the expected interim lost resource values. It is anticipated that the calculation of those values would not be included in the administrative record. This approach is suggested in the legislative history of OPA, which states:

> Calculating the total measure of damages under this section will ordinarily be dependent upon the development by the trustees of the appropriate plans for mitigating the injury to those resources. This is because the estimated cost of implementing the plans will be a major component of the measure of damages. Therefore, the trustees should, in sequence, conduct the necessary assessments, develop and estimate the cost of implementing the appropriate plans, and calculate the diminution in lost use and other values of the injured resources pending restoration. At that point, the total liability of a responsible party under this section can be calculated (Committee of Conference Report No. 101-653; 101 Cong. 2d Sess. at 109 (Aug. 1, 1990)).

Content and Level of Detail

The administrative record must contain sufficient information to support judicial review of the assessment. The administrative record should contain all documents considered by the trustee(s) in selecting assessment and restoration measures, including documents that support options the trustee(s) ultimately rejected. Pertinent documents that are timely submitted by the RP(s) or the public shall be included in the administrative record.

The administrative record should be limited to final documents when possible. For example, draft documents that are superseded by final documents are not considered documents on which the trustee(s) specifically relies and therefore are not included in the record. Where no final document is available at the time of selection of assessment/restoration measures, the draft may be included in the record if the document contains information not found in other documents in the record but which is considered by the trustee(s) in selecting a restoration approach.

Pre-decisional, deliberative internal agency memoranda will ordinarily not be included in the administrative record. Like draft documents, however, portions of these documents may be included if they contain information that is not included in other documents. Documents relating exclusively to liability will ordinarily not be included in the administrative record unless they are relied upon in selecting restoration measures. The trustee(s) may maintain a confidential file for materials in the administrative record that might be sensitive (e.g., the U.S. EPA Superfund

process allows for Confidential Business Information to be maintained in a confidential appendix to the administrative record for a Superfund remedial action). If the restoration approach is challenged, the judge may review that confidential information in *camera*, i.e., in the judge's chambers in a confidential manner. Scientific data and other information concerning damages to natural resources, however, may not be subject to a claim of being Confidential Business Information. Scientific data that fail appropriate quality assurance/quality control requirements should not be included in the administrative record except where such data are relied upon in some manner in selecting restoration measures.

Ordinarily, the record should include documents regarding the nature of the discharge, preassessment determination, restoration planning, the draft assessment/restoration plan, public comments, response to public comments, transcripts of public hearings, if any, relevant investigation reports, scientific studies, work plans, quality assurance plans, engineering evaluations, decision documents, and an index to the documents in the administrative record.

The volume of material compiled for the administrative record should be consistent with the scope of the assessment/restoration. Compilation of massive documentation for a minor discharge with limited restoration measures would not be appropriate.

Certain types of information will be common to all assessments, regardless of the type of procedure selected. Therefore, each administrative record will contain: (1) Information considered in the Preassessment Phase; (2) a copy of the DARP; (3) any comments received in response to public review of the DARP, with the responses to those comments; (4) a copy of the demand made to the RP(s), including the Report of Assessment; and (5) the costs of conducting that assessment. Other items included in the record will be specific to the particular type of assessment procedure selected. For a Compensation Formula assessment, in addition to the common items listed above, the administrative record should include documentation of the information requirements for use of the formula and identification of the formula used. For a Type A assessment using one of the computer models developed by DOI, the administrative record should include documentation of the information requirements for the Type A model listed in 43 CFR part 11, subpart D, and the computer printout of the application of the Type A model. For an Expedited Damage Assessment (EDA) or Comprehensive Damage Assessment (CDA) the administrative record should include all documentation supporting the restoration determinations required in the EDA or CDA. Determinations in EDA or CDA may include, but are not limited to: the injury determination/quantification component and the restoration component (specifically including the test results of any and all methodologies performed in these phases).

Post-decisional Documents

Occasionally, the administrative record may require supplementing after finalization of the DARP. Supplements to the record may be allowed if: the interested party(ies) did not receive actual or constructive notice of the DARP and the opportunity to comment on the plan; the information submitted does not duplicate information already contained in the administrative record; and the information raises sufficiently significant issues regarding the scope, effectiveness, or cost of the plan as to warrant having the trustee(s) reconsider the plan. If the trustee(s) supplements the administrative record with documents submitted by the RP(s) or the public, the trustee(s) may also add to the record other documents pertinent to the matters addressed by the RP(s) or the public.

Post-decisional documents are generally not part of the administrative record. However, where these documents result in modification of the DARP, the administrative record should be supplemented to include the post-decisional documents. Also, where the DARP provides for the development of certain components at a later date, the information or documents used to develop these components should be added to the administrative record as they become available.

The trustee(s) has the discretion, of course, to modify the plan at any time. However, the public will have the right to review and comment upon modifications that are, in the opinion of the trustee(s), significant.

Availability of the Record

To the extent practicable, the administrative record should be compiled and made available for review as documents are generated or received by the trustee(s). NOAA believes that public information is critical to the credibility of assessments and restoration efforts. However, the degree of public notice and involvement in the administrative record will necessarily vary depending on the choice of damage assessment procedures. NOAA is proposing that the administrative record be open for public review and comment concurrently with the DARP. The availability and review of the administrative record may also be arranged in prespill planning conducted by the trustee(s).

Judicial Review

Under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), review of selection of restoration measures would be conducted on the administrative record. Review on the record would address several major concerns expressed by Congress in passing OPA. First, Congress mandated public participation in restoration planning. Section 1006(c)(5) of OPA requires the development and implementation of the restoration plan "only after adequate public notice, opportunity for a [public] hearing, and consideration of all public comment." A trial *de novo* would circumvent public participation in the selection and implementation of the restoration plan by allowing the litigants and the court to make the decision as to the type of restoration approach. In interpreting similar Congressional intent with respect to the selection of remedial action under CERCLA, courts have held that a trial *de novo* of selection of a response action is inconsistent with meaningful public involvement in selection of remedies for hazardous waste sites. A discussion of these cases was provided in Appendix III of the ANPRM of March 13, 1992 (57 FR 8964, at 8987). Inherent in these decisions is the recognition that the general public does not have the resources or the procedural mechanisms to protect its interests in the courtroom.

Further, a trial *de novo* of assessment/restoration measures creates incentives for parties to withhold scientific data for use at trial. One of the most significant criticisms of the EXXON VALDEZ case noted by commenters was the unavailability of scientific data produced by the parties to the litigation. By contrast, a public administrative process should create the incentive to disclose scientific data. The government will be required to publicly disclose its scientific data and conclusions in the administrative record developed in connection with the DARP. Other parties will be required to publicly disclose their scientific data and conclusions in connection with the administrative development of the DARP or risk waiving their objections to the plan during judicial review.

Second, record review is necessary to carry out the Congressional mandate that the trustee(s), as the resource

manager(s) and expert(s), select assessment/restoration measures. NOAA's interpretation of OPA indicates that Congress intended the Restoration Plan be developed and implemented by the trustee(s) pursuant to an administrative process, not by a courtroom battle of experts. Adequate evaluation of the complex scientific issues involved in assessment/restoration is more likely to result from a public administrative process conducted by agencies with specialized scientific expertise.

Finally, Congress emphasized that assessment of damages be conducted at "reasonable" costs. By requiring the various parties involved in an assessment to submit their findings to a central repository, much duplicative study can be avoided. Limiting the review of the assessment/restoration to the administrative record will greatly reduce the transaction costs.

Administrative Record

Response to Comments

"General"

Comment: A majority of the commenters who spoke to the issue of the administrative record and judicial review "on the record" supported the concept. Several commenters noted that general administrative law principles and case law prior to the Superfund reauthorization of 1986 supported record review of expert agency decisions on injury, restoration, and economic assessments. One commenter explicitly stated that the injury determination, restoration strategies, and economic damage amount would receive both the rebuttable presumption and the deferential standard of judicial review. Some commenters referred to OPA's reference to the rebuttable presumption's use in "any administrative . . . proceeding," as well as OPA's provisions for claims against the Fund in an administrative proceeding, as support for NOAA's creation of an administrative process that would be granted record review. Other commenters, however, objected to NOAA's attempt to allow a standard of review that these commenters perceived to be inconsistent with the rebuttable presumption. Finally, some commenters stated that assessment studies and restoration planning within the context of an assessment should not be made public unless record review were granted.

Response: NOAA notes that the administrative record provisions in the proposed rule are intended to implement several important policy concerns expressed by Congress in OPA. NOAA has considered administrative law principles and various comparable policies found in CERCLA to be relevant to natural resource damage assessment process in several areas. In both CERCLA and OPA, Congress has reflected the public's concern over expeditious recovery of resources injured by pollution. Further, in OPA, Congress has explicitly provided that restoration measures be selected by the natural resource trustee(s) through notice and comment procedures. Therefore, NOAA feels that there is statutory authority to establish review on the record. The administrative record provisions of this proposed rule are intended to create an open assessment/restoration process to allow an objective evaluation of how to restore or replace resources injured by discharges of oil. Whether these provisions would result in "record review" is ultimately the decision of the courts. However, NOAA feels that record review is essential for the type of expeditious, fair assessments called for by OPA. As discussed earlier in this preamble, judicial review on the record would apply to the entire assessment process with the exception of the determination of the compensable value component of damages. Finally, NOAA points out that the "rebuttable presumption" is not a standard of review.

"Advantages"

Comment: Many of the commenters pointed out that an administrative record would avoid the costs associated with a protracted trial *de novo* and result in a more timely restoration of the affected resources. Many of these commenters also noted that an administrative record of an assessment would allow for the availability of scientific information on the effects of oil and the efficacy of various cleanup strategies. Others pointed out that this process would, in effect, allow for peer review of assessments. Quite a few commenters noted that limiting judicial review to the administrative record of the assessment would facilitate the Congressional goal that the agency, as the organization with the expertise, undertake the assessment as well as the restoration. Some commenters noted that creating an administrative record would ensure a more fair and objective process by encouraging participation by the public and the RP(s). One of these commenters pointed out that having such an open process would avoid the public distrust that results from secrecy. Another commenter noted that an "open record" would foster a more cooperative process that could avoid having litigators shield assessment studies and having scientists conduct unnecessary research. Finally, a few commenters were pleased to see an assessment/restoration process that is similar to the Remedial Investigation/Feasibility Study process in Superfund with which so many agencies are familiar.

Response: NOAA agrees with the advantages of an administrative record process outlined by these commenters. In particular, creating an open process that facilitates access to the science in the restoration process is an important advantage. An open process will also allow consideration of a wider range of views. Finally, NOAA relied upon, with some modification, the NCP's administrative record provisions since those provisions have already undergone extensive rulemaking development and are somewhat familiar to most trustee agencies.

"Disadvantages"

Comment: Some commenters stated that an administrative record requirement would result in a slower and more costly assessment process and could seriously prejudice the ability of the trustee(s) to negotiate a settlement. One of these commenters stated that the requirement could overwhelm the ability of the trustee(s) to conduct an effective assessment. Another commenter noted that such an open record may allow parties to influence the results of the assessment and skew the economic data gathered. Some commenters noted that outside information submitted to the record is strictly advisory in nature, and not controlling upon the trustee(s). Yet another commenter warned that a court could decide to conduct a trial *de novo* anyway, which could make the trustee(s) vulnerable. Finally, one of these commenters noted that the RP(s) could totally disrupt the process.

Response: NOAA does not intend an administrative record requirement that would add to the time and/or expense of a damage assessment. The preamble discusses the requirement that the administrative record be tailored to the scope of the assessment. The fact that materials submitted "for the record" would be intended to influence the assessment in a particular way is inherent in an open record. However, the trustee(s) is given responsibility to manage and consider the record in a manner that is consistent with the reasonable cost requirement of the proposed rule, using best professional judgment. With respect to the possibility that the courts might not uphold record review for restoration, NOAA believes that this is unlikely, given the statutory language. Because

lack of record review would undercut a number of the policies underlying the use of an administrative process for selection of restoration measures, NOAA would review the process as a whole if record review were not upheld by the courts.

Comment: Several commenters expressed concern regarding the involvement of the RP(s) in the administrative record. One of these commenters noted that, since the trustee(s) compiles the record, the RP(s) has no incentive to disclose information that the trustee(s) might decide to exclude from the record. Another commenter stated that due process for the RP would require judicial review of the findings and conclusions of the trustee(s), particularly in a tort type action.

Response: NOAA notes that under general principles of administrative law, the RP(s) will be entitled to submit relevant material to the administrative record if timely submitted. The reviewing court will examine the documentation of the assessment/restoration process for any significant omissions.

"Scope"

Comment: Several commenters spoke to the issue of the scope of the administrative record of assessment. Some of these commenters stated that the administrative record should include all data and information gathered for the assessment. One commenter pointed out, however, that confidential information gathered by the RP(s) for use in litigation should not be included. Other commenters also noted that information pertaining to liability, that may be litigated as a separate issue, would not go into the record.

Response: NOAA notes that, with few exceptions, all data and information considered by the trustee(s) in selecting restoration measures would be contained in the record. Also, participants in an assessment must recognize that any document that is put into the record is in fact "public." The RP(s) is free to decide whether to submit information for the record, at the risk that, if he does not do so, the information may not be considered when the court reviews the assessment/restoration plan.

Comment: Other commenters noted specific questions regarding the administrative record. One asked if (1) any documents could remain confidential; (2) all data required by the trustee(s) must be given to the RP(s) and the public; (3) chain of custody procedures would apply; and (4) deliberative documents would be subject to FOIA. Another asked that NOAA clearly identify the kinds of documents to be included in the record, the requirements for public access and comment, and the type of scientific basis for decisionmaking. Finally, one commenter suggested that additions to the record after closure of the public comment period should be carefully and narrowly defined.

Response: NOAA has noted the requests for specific information on the types of documents to be included in an administrative record. The general discussion in the preamble above lists examples of documents that would be included or excluded in an administrative record. Generally, those documents releasable under FOIA would be included in the administrative record. Those documents not releasable under FOIA would be excluded. The preamble and proposed rule provide guidance as to what types of documents would be allowed into the record after the public review period is closed.

"Components"

Comment: Some commenters stated that all documents relied upon by the trustee(s) should be placed in the administrative record. One commenter provided the following as examples of what should be included in the administrative record: (1) Scientific data collected, generated, and analyzed during the assessment; (2) the determination of scope of injury; (3) comments and data provided by the public and the RP(s), and the consideration of that information by the trustee(s); and (4) relevant facts relied on in selecting the restoration plans and calculating the damages.

Response: NOAA agrees that all documents and data forming the basis for the selection of restoration measures, including these in each phase of the assessment leading up to the development of a restoration approach should be placed in administrative record. Additional data and comments that are timely submitted by the RP(s) and the public should also be included in an administrative record. Guidance for documentation is provided in this preamble.

"Additional Components"

Comment: One commenter noted that its state open records law would apply to the administrative record if maintained by a state trustee and that the record requirements are broader than those suggested by NOAA. The commenter noted that the state law requires that the following types of documents be made available for public review: (1) Draft documents; (2) pre-decisional, deliberative internal agency memoranda; and (3) scientific data generated by the state or a contractor and in the possession of the state regardless of whether it fails quality assurance. The commenter noted, however, that documents relating exclusively to liability, if prepared by or for an attorney under client privilege, can be excluded from public view.

Response: NOAA recognizes that some state laws may require broader availability of documents than what is described in this proposed rule for the administrative record. If a state has additional requirements for public availability of documents beyond those outlined in this proposed rule, the state requirements may apply to state trustees. NOAA's proposed rule describes the minimum requirements for public review for the various types of assessment procedures. It should also be noted that because record review of restoration measures selected by federal trustees alone or jointly with state trustees is premised upon the requirements of the federal Administrative Procedure Act, selection of restoration measures by state trustees alone may be subject to different principles of judicial review.

"Conditions"

Comment: Several commenters stated that their agreement with a record review standard was conditional upon having the review available for the assessment and restoration selection/cost decisions, but not for the calculation of economic damages. These commenters stated that the economics determination should then be entitled to the same protection as other work product until trial. One commenter noted that the legislative history of CERCLA (relevant to OPA) makes it clear that Congress, by stressing the restitutionary nature of natural resource damages, intended at least the selection of restoration plans to be reviewed by the court on an administrative record.

Response: NOAA believes that the statutory language clearly contemplates record review of selection of restoration measures. The availability of record review for all aspects of the damage assessment is less clear. The proposed rule provides for an administrative record process only for those aspects of the assessment leading to selection of restoration measures, including the estimate of the costs of such measures. NOAA solicits comment on whether the administrative record provisions should be extended in the final rule to other aspects of the damage assessment.

Comment: Other commenters agreed with the open record so long as the rule

ensured that the RP would be given a joint and meaningful role in the assessment. These commenters stated that the integration of the open record with the later proposed "jointly conducted, phased assessments" with responsible parties, would be essential.

Response: NOAA agrees that the RP(s) would play a major role in the development of the administrative record for the assessment/restoration process. As noted in the section of this preamble on cooperative assessments, NOAA strongly encourages joint work with the RP(s). Also, the administrative record process will work more smoothly where there is a joint assessment in progress. However, there will undoubtedly be instances where such joint efforts will not be possible. In those cases, the administrative record is even more important, because it gives both the RP(s) and the public the opportunity to provide material for the administrative record, and it will require the trustee(s) to address that material if relevant.

"Time of Review"

Comment: Another commenter stated that the record of assessment actions should be final only after the trustee(s) has determined damages and selected a restoration approach. Some commenters stated that NOAA should consider the applicability of the concept of "preenforcement review," which would allow selection, possibly implementation, of the Restoration Plan without first having to prove its validity in court.

Response: NOAA notes in its general discussion above that review on the record would generally take place in an action to obtain damages. Prior to this time, there would be no final agency action subject to review.

"Levels of Documentation Required"

Comment: One commenter noted that, even where there is an expedited damage assessment conducted, an administrative record should be compiled to provide at least some information for public review.

Response: NOAA notes that, in the general discussion of detail of an administrative record, documentation requirements would have to be tailored to the scope of the case. In all cases other than emergency restoration actions, however, final restoration measures would be selected only after public review and comment.

"Support—Legal Arguments"

Comment: Several commenters noted that natural resource damages are not measured by the traditional common law methods. These commenters pointed out that these assessments involve highly technical, scientific findings in which courts have traditionally treated the agency's determination with great deference. A few of these commenters suggested that the federal courts have neither the time nor the expertise to decide these scientific issues. Therefore, the commenters conclude that judicial review of the assessment/restoration plan should be conducted on the administrative record, applying an arbitrary and capricious standard.

Response: NOAA agrees that courts generally defer to agency expertise in cases involving highly technical or scientific content. For this reason, NOAA agrees that review of restoration measures, which involve highly technical judgments, should be on the record.

Comment: Some commenters spoke to the issue of consistency with the provisions for claiming natural resource damages against the Fund. These commenters pointed out that, in presenting such a claim against the Fund, the trustee is entitled to a rebuttable presumption of correctness. The United States is then subrogated to the rights of the trustee in pursuing the claim against the RPs. It follows that the documented determination of injury, selection of restoration plans, and calculation of the costs to assess, restore, and compensate for lost use/nonuse value by the trustee is the only available evidentiary basis on which the United States can proceed in court on behalf of the Fund, to recover the damages paid out to the trustee(s) from that Fund. The commenters then argue that the same standard should apply to assessments reviewed by courts.

Response: NOAA agrees that consistency in the implementation of a statute is a desirable goal. If there were two standards for determining compensation for injuries to natural resources under OPA, expensive and confusing assessments would result. Accordingly, the same standard of review would apply to restoration in actions by the OPA fund as to actions by the trustee(s).

Comment: Other commenters noted that, where the right to sue for damages to private property existed at common law through a tort action, the public's right to sue for restitutionary money to make an injured environment whole did not exist. These commenters pointed out that all components of natural resource "damages" (as defined under OPA) are restitutionary in nature including quantification of lost use/nonuse values. The commenters suggested that, when Congress creates a public right by statute that did not exist at common law (such as the ability to seek money to make whole an environment injured by an oil discharge), it may entrust the determination of such public rights to an administrative body. Therefore, the commenters argued that the right to trial by jury for common law damages would not present an obstacle to record review of a damage assessment.

Response: NOAA notes that Congress, in the legislative history of CERCLA and OPA, pointed out problems with pre-CERCLA common law actions for damages to public resources. This concern resulted in the set of environmental statutes specifically allowing recovery by a public government agency for damages as compensation for injuries to natural resources. Because natural resource damage claims are essentially restitutionary and because Congress has required that trustees (rather than courts in the first instance) select a restoration approach and compute damages to natural resources, NOAA agrees that the right to a jury trial would not apply to damage actions under OPA. Further, most OPA actions are likely to be brought in the courts' admiralty jurisdiction, where there is no right to jury trial.

Comment: Several commenters noted that NOAA has the authority to declare that judicial review of damage assessments would be on the administrative record since there was no explicit statement as to the standard of review in OPA. These commenters pointed out that, where the legislative delegation to an agency on a particular question is implicit rather than explicit, a court will generally defer to a reasonable interpretation made by the agency.

Response: NOAA agrees that Congress' directions to NOAA were not explicit as to the type of judicial review to be accorded to damage assessments. However, the legislative history does note that this proposed rule is to create a system of damage assessment that is expeditious and fair. The report of the Committee of Conference states that these regulations "should be designed to simplify the trustees' task of assessing and recovering the full measure of damages resulting from an incident." See H. Con. Rept. No. 653, 101st. Cong., 2d Sess. at 109 (1990). NOAA feels that providing for record review of damage assessments is necessary to achieve this goal. Further, while the issue of the standard of judicial review will ultimately be decided by the courts, NOAA believes that, as the agency

charged with implementing the natural resource damage provisions of OPA, its views should be entitled to some deference.

"Against—Legal Arguments"

Comment: Several commenters stated that the RP has the legal right to a jury trial in natural resource damage assessment disputes as guaranteed by the United States Constitution. The commenters pointed out that a damage assessment is not a rulemaking under section 553 of the Administrative Procedure Act, but is similar to an adversarial administrative activity that will often result in litigation. The commenters argued that every CERCLA natural resource damage case that has addressed the issue has required a jury trial for these actions at law. These commenters stated that issues related to the selection of assessment/restoration plans must be decided by a trial court.

Response: As stated in the above discussion, the due process rights of the RP(s) will not be sacrificed in the administrative record process. While a few district courts have held that there is a right to jury trial for the lost compensable value aspects of CERCLA natural resource damage cases, at least one court has held that there is no right to jury trial for the restoration aspects of natural resource damage cases. Further, even if there is a right to jury trial, NOAA does not perceive a conflict between a non-jury record review of restoration measures and cost estimates under the "arbitrary, capricious, or otherwise not in accordance with law" standard, and a jury trial on other issues.

Comment: Some of these commenters spoke to the issue of the rebuttable presumption in relation to record review. Some commenters suggested that a court should review the choice of restoration alternatives by the trustee(s) on an "arbitrary and capricious" standard, i.e., the trustee(s) is presumed to be correct unless it can be proven that the trustee(s) acted in an arbitrary or capricious manner. Other commenters argued that Congress would not have offered the favorable rebuttable presumption as a standard of review if the trustees had any underlying entitlement to the "arbitrary and capricious" standard. The commenters contended that Congress was attempting to offer the trustee(s) the slightly more favorable review standard of a "rebuttable presumption" as an incentive for trustees to follow the regulations; failure by the trustee(s) to follow regulations apparently results in their having to prove their case, by a preponderance of the evidence, on the *de novo* review standard. Reconciling the congressional provision of a "rebuttable presumption" with the Administrative Procedure Act's arbitrary and capricious standard of judicial review would require that, to rebut the presumption, the RP would have to point to clear and convincing evidence in the aforementioned administrative record demonstrating that the injury determination, restoration selection, or monetary quantification by the trustee(s) was arbitrary and capricious.

Response: The selection of restoration alternatives by the trustee(s) for a particular incident will either be identified during prespill planning as part of a Regional Restoration Plan (see the discussion of § 990.16) or in an incident-specific restoration plan developed for that incident. NOAA agrees that the "arbitrary, capricious, or otherwise not in accordance with law" standard of judicial review for that choice is appropriate. NOAA points out that the rebuttable presumption is a rule concerning level of evidence, not a standard of review. Therefore, the statutory provision for a rebuttable presumption for the damage assessment as a whole does not preclude the development of an administrative record for the assessment through restoration components of a damage assessment. There is no reason why different aspects of the assessment cannot be subject to different standards of review, which is precisely what the language of OPA appears to require.

Comment: Several commenters stated that NOAA had exceeded its statutory authority in declaring record review of assessments. These commenters contended that Congress was not silent on the issue of the standard of review. These commenters contended that Congress did not delegate to NOAA the authority to determine the standard of review a court will apply when considering a trustee's natural resource damage claim filed before the court. These commenters pointed out that, in section 1006(e)(2) of OPA, Congress specified that: "Any determination or assessment of damages to natural resources for the purposes of this Act made * * * by a * * * trustee in accordance with the regulations * * * shall have the force and effect of a rebuttable presumption. * * *" In contrast, the commenters pointed out that OPA's directive to NOAA for promulgating regulations is limited to the assessment of damages. OPA contains several provisions that address the procedure for the trustee(s) to file a claim(s) against the RP(s). These commenters stated that the issue of the standard of judicial review is determined by the Congress and courts, not by regulation, and that NOAA should not attempt to preempt judicial resolution of that issue.

Response: NOAA agrees that the ultimate decision as to the standard of review for a damage assessment is for the courts. Nevertheless, NOAA believes that its mandate to develop an assessment process that is both fair and expeditious requires it to provide its views on the appropriate standard of review, since this has crucial implications for the assessment process. As noted above, administrative record review is contemplated by OPA's requirement for selection of restoration measures based on notice and comment procedures. Further, this position is supported by the courts' consistent interpretation of CERCLA's provisions with respect to lead agency selection of a response action for a Superfund site. While the issue of the appropriate standard of review is ultimately for the courts, NOAA's views on the interpretation of the statute should be entitled to some deference.

Comment: Some commenters noted that NOAA might wish to explore the possibility that non-RP challenges to an assessment/restoration plan would be subjected to more limited judicial review.

Response: Provided that the non-RP has standing and right to sue, NOAA notes that, to ensure fairness in implementation of OPA, the same standard of review should apply to all who seek judicial review of trustee's(s') actions.

"Miscellaneous"

Comment: One commenter noted that, while the rule might provide that changes in plans or decisions predicated upon public comments should not be available for critical use against an assessment in administrative or court proceedings, a trustee who changes a decision or plan because of public comment should be able to defend that change easily on facts and reasoning, and thus will not feel a constraint to defend a wrong initial determination.

Response: NOAA agrees that a trustee who changes initial findings or plans based upon later information gained through public comment would simply document that change in the administrative record. One of the crucial advantages of an administrative process is the incentive created for disclosure and public participation. The trustee(s) will be required to disclose information relevant to selection of restoration measures in a public record, and the trustee(s) will be required to fairly

evaluate public and RP comments in selecting restoration measures. Based on NOAA's experience in numerous cases, it expects that public comment will be seriously considered by the trustee(s) and in some cases may lead to significant modifications of proposed restoration measures.

Comment: One commenter stated that NOAA should seek to ensure that scientific studies are conducted openly, with full and rigorous scientific peer interaction and review, to avoid a trustee expending large sums of money non-competitively on poor quality science that will not withstand scientific scrutiny.

Response: NOAA believes that an administrative process is the best method of ensuring thorough review of restoration by both the scientific community and public.

V. Prespill Planning

General

In many discharges, multiple trustees have been able to reach agreement on coordinating assessment and restoration activities. In light of that experience, the proposed rule strongly encourages federal, state, tribal and foreign trustees to develop prespill plans at the local area or regional level. In a corresponding effort, these plans might be implemented through a general Memorandum of Understanding (MOU) among trustees on a state level for the state trustee(s), and local area or regional basis for the rest of the trustee(s).

This proposed rule includes, in Appendix A, a sample MOU that has been reviewed in an earlier Notice, that could establish a coordination framework for trustees for prespill planning. Trustees could develop MOUs with provisions for specific areas such as bays, ports, waterways, or areas of special sensitivity concerns.

To the extent practicable, it is strongly encouraged that this planning process mirror the areas covered by Area and/or Regional Contingency Plans authorized by section 4204(a) of OPA under the NCP or could be on a state-by-state basis. The trustees should establish working groups at the regional or local area level to undertake these activities.

Prespill Plans

Without regulating the exact contents of the plans, the proposed rule notes that the plans should identify the responsibilities of the trustees, and other willing participants where appropriate, in the event of a discharge of oil covered by OPA. Suggested prespill planning activities include, but are not limited to, the following areas:

1. *Develop a natural resource damage assessment management and technical team.* The natural resource damage assessment team is responsible for planning and conducting damage assessments in the event of a discharge of oil. The size of the team should be a function of the scope and complexity of the assessment, and may include a natural resource trustee agency coordinator, resource biologist, environmental (petroleum) chemist, resource economist, restoration expert, QA specialist, data manager/sample custodian, statistician, and resource attorney. It is not always necessary to have a different person for each role, but experience has shown that each role is a full-time commitment, especially for highly significant discharges. Each person on the team, to the extent relevant to his or her own discipline, should have a working knowledge of natural resource damage assessment regulations and requirements, and be ready to begin preassessment activities immediately upon notification of a discharge. The team should not be *ad hoc*; members should be knowledgeable in natural resource damage assessment issues and have established working relationships with each other, the co-trustees, and the response community.

2. *Identify outside experts.* Since discharges of oil are sudden and episodic, it is not always possible to maintain sufficient staff to conduct all natural resource damage assessment activities. Depending on the discharge conditions, the trustees will need different experts on the team to assist in designing and conducting of studies for different natural resources and/or services. The trustees should identify the types of natural resource damage assessment expertise needed if there is a discharge in their area, and prepare a list of potential contacts available to provide that expertise. Experts without conflicts of interest should be used as an independent peer review group for potential natural resource damage assessment activities.

3. *Identify support services.* Certain support services, such as analytical and testing laboratories capable of performing the specialized hydrocarbon chemistry, toxicity testing, and histopathology needed for a discharge of oil natural resource damage assessment, should be identified ahead of time. Backup services should also be identified since the needs of both response and damage assessment activities can exceed even regional capabilities. Support activities conducted at the discharge site or potentially affecting any response activities must be coordinated with the OSC or designee. Other types of support services that may be needed include:

a. Field support for reconnaissance surveys by aircraft or vessel;

b. Monitoring logistics for sample collection, handling, preservation, storage, and transport;

c. Data management support;

d. Human health and safety support; and

e. Natural resource damage assessment training support.

4. *Collect information on natural resources and/or services potentially affected by oil discharges along high risk areas.* Area Planning Committees are responsible for the identification of sensitive natural resources and/or services in their areas, and development of protection priorities and strategies for these resources and/or services. The trustee(s) is encouraged to serve on these committees to ensure incorporation of all special concerns and considerations, and ensure consistency with the natural resource damage assessment Prespill Plans. Examples of issues include the seasonality of natural resources, along with unique protection approach questions, the overall effectiveness of cleanup countermeasures and effect versus natural recoveries, etc. These types of response issues are addressed in the Fish and Wildlife and Sensitive Environments Annexes to Area Contingency Plans (ACP). Besides having an opportunity to assist in creating and updating the ACPs, the trustee(s) is also given an opportunity to comment when those ACPs are submitted to the Regional Response Team (RRT) for review. The trustee(s) conducting damage assessment should coordinate with response personnel on issues affecting natural resources and/or services; clarifying the anticipated activities and roles of each during the discharge, and identifying the data needs of the trustee(s) that could be implemented through joint activities. Strategies for data sharing among the trustees, response agencies, and possibly the RPs, should be developed. This is particularly important since damage assessment data are often not made immediately available to the public. The trustee(s) is encouraged to participate in training and coordination activities of the response community, such as drills for the discharge of oil.

5. *Lead Administrative Trustee (LAT).* Whether planned in advance of a discharge or not, when assessments involve more than one trustee, trustees should select a LAT, although the proposed rule does not require that a

LAT must be selected. The selection of a LAT should be by consensus and can be based on such factors as the trustee with a majority of natural resources at risk or the ability of a particular trustee agency to provide administrative support. While the federal trustees are required to select a LAT under E.O. 12777, 56 FR 54757 (October 22, 1991), this proposed rule does not require that the LAT be a federal agency when non-federal trustees are involved. In such cases, the federal trustees will still select a federal LAT, who will coordinate federal efforts with the LAT. Where appropriate, trustees may designate Co-LATs, consisting of a federal LAT and the state, tribal, or foreign trustee(s). It is also possible that, under certain circumstances, it might be appropriate for the LAT to be a single non-federal agency.

The LAT will not have veto or arbitration authority over the other trustees, but should be responsible for activities such as: scheduling meetings of the trustee working group or committee, preparing agendas, procuring space, etc.; acting as a central contact point for damage assessment trustee agencies involved in the incident, liaison with the appropriate OSC or designee; coordinating preassessment data gathering and other activities; and establishing and maintaining the administrative record, as well as other records, for the trustees.

6. *Identify sources of information for background data.* The trustees should develop lists or databases on the types of background information currently collected that may be of potential use in a natural resource damage assessment. If practicable, the trustees should identify and prioritize the most important information, and encourage or support the collection of such information in a cost-effective manner. Types of information considered potentially important include: petroleum hydrocarbon contamination in indicator organisms and exposure pathways; species census and inventory, baseline data on species populations, recreational use statistics, and economic values for selected natural resources and/or services. Familiarity with the types of baseline data available will allow the trustees to formulate better data collection strategies. The trustees should also collect information on successful restoration efforts for trust resources and/or services, and needed restoration efforts in their region.

7. *Design a general approach and develop protocols for data collection and analysis.* The trustees may want to develop scenarios for the types of natural resources and/or services that may be affected by a discharge of oil, and plan for an appropriate study design, including data collection and analysis protocols. Where practicable, protocols should be similar to those used in baseline studies to ensure comparability with the incident-specific assessment. The trustees should prepare standard protocols in a format that allows easy customization for a specific discharge. With prespill planning, initial damage assessment efforts may be better-implemented and generate more useful data. The trustees should prepare field kits for collection of samples and measurements in the early or emergency stages of a discharge.

8. *Establish a centralized data management system for natural resource damage assessment data.* There is a pressing need to have a data management plan in place that provides efficient access to collected data following a discharge of oil. Typical natural resource damage assessment studies are highly multidisciplinary, involving experts from many different organizations, who need access to data collected by various groups. For example, wetlands specialists studying injury to oiled marshes should use the same degree-of-oiling classifications as mapped by shoreline survey teams. The trustees are encouraged to develop a centralized data management system to support natural resource damage assessment needs. At a minimum, the plan should address the type and volume of data, uses of the data, existing data management capabilities, types of analyses conducted, QA needs, reporting requirements, and access to data. The data management plan should also include provisions for distribution of updates to natural resource damage assessment team members on a timely basis.

Regional Restoration Plans

Restoration plans have typically been directed towards a single resource (i.e., species or habitat type). In recent years for example, projects have focused on the preservation of rare and endangered species. The resource by resource management approach tends toward a never ending cycle of salvage operations. There is now a concern for maintaining and conserving genetic diversity. This goal requires that healthy, viable populations be maintained in the environment in which they co-evolved. The essential argument is that the community is the level of hierarchy needed to maintain the level of ecological diversity, ensuring the conservation of threatened/endangered species, gene pools, species diversity, natural community interactions, and known and unknown ecosystem species and processes.

Since human values arise from the attributes that are naturally scaled to the region, it makes sense that such a regional perspective be considered. Regional evaluation can be addressed through the consideration of five technical issues; (1) spatial boundaries (i.e., size of the study required to encompass the range of resources of concern); (2) time scale (i.e., timeframe or lifecycle of the resources); (3) ecological complexity (i.e., identification of ecosystem components based on habitat structure and/or function); (4) ecosystem pattern (i.e., patch size, continuity and contiguity); and (5) increment of the environmental change (i.e., setting goals and limits to restore the resource base). This follows from the proposed approach by Gosselink, J.G. and L.C. Lee, CUMULATIVE IMPACT ASSESSMENT IN BOTTOMLAND HARDWOOD FORESTS; Center for Wetland Resources, Louisiana State University, Baton Rouge; LSU–CEI–86–09 (1987). The area of concern should be evaluated relative to its importance and significance to the regional resource base as well as the special status of the area's components.

Where appropriate, the trustee(s) can develop, as part of the prespill planning, such Regional Restoration Plans. These plans could be developed on geographical or habitat basis to allow the recovery of the system covered by the plan. The trustee(s) may develop these plans as new efforts, but are encouraged to use existing plans that can be modified to meet the needs of this proposed rule. Examples of preexisting plans are Coastal Zone Management or the National Estuary Program Plans. To qualify as an appropriate Regional Restoration Plan pursuant to this proposed rule, a plan would have to be developed, or an existing plan modified, through a public review and comment process consistent with the restoration planning process described in subpart G of this proposed rule. Recoveries from damage assessments pursuant to this proposed rule may be applied to these plans, as provided in § 990.84(b) of this proposed rule. Coordination with Response Agencies: OPA covers inland navigable waters as well as coastal areas. From a federal perspective, as a general rule, the U.S. Coast Guard directs response activities in the coastal zone including the Great Lakes. The U.S. EPA directs response activities in the inland zone. See NCP, 55 FR 8815, 8816 (March 8, 1990). State response agencies may also direct response activities.

Effective coordination with the response activities necessitates that coordination procedures be established prior to a discharge. This proposed rule strongly encourages the trustee(s) to plan and coordinate damage assessment activities prior to a discharge. Similarly, the trustee(s) is encouraged to either develop prespill agreements with the OSC, participate in the OSC's Area Committee planning meeting, and/or attempt to include the OSC in general prespill planning. Agreements or joint plans should address, but are not limited to, the following issues: establishment of communication roles; identification of a damage assessment trustee and OSC contact; human health and safety requirements; development of joint activities, i.e., sampling, spill drills; identification of natural resources of particular concern; and information and data sharing. These issues can be facilitated by the NOAA Scientific Support Coordinator in the U.S. Coast Guard District.

Such coordination has already effectively taken place in the development of the Fish and Wildlife and Sensitive Environments Annexes to the ACPs being developed as part of the NCP. Section 311(d)(2)(M) of the Clean Water Act (CWA), as amended by section 4201(b) of OPA, requires the development of a fish and wildlife response plan, and section 311(j)(4)(B)(i) and (ii) of the CWA, as added by section 4202(a) of OPA, calls for preplanning in area committees to include concerns for sensitive environmental areas as well as fisheries and wildlife.

The trustee(s) recognizes that the OSC should not be unduly hindered by the trustee's(s') requests for use of equipment and/or information. Conversely, response agencies also recognize the trustee(s) as a potential source of information for damage assessment activities.

Coordination With the Public

OPA requires public notice, opportunity for a hearing and consideration of all public comments prior to implementation of the restoration plan. NOAA, however, does not believe that public involvement should always be limited to the restoration plan alone. NOAA is of the opinion that because the natural resource damage assessment process will be enhanced by public comment, the trustee(s) may provide for public review of the natural resource damage assessment component in addition to the restoration plan. The proposed rule, therefore, urges the trustee(s) to provide the public with an opportunity to review and comment on prespill plans discussed elsewhere in this preamble as well as to comment on the natural resource damage Assessment Restoration Plan. Additional public involvement, i.e., oversight or advisory committees, open trustee meetings, etc., will be at the option of the trustee(s). The scope of public participation in meetings would be advisory, not as voting membership. NOAA is also ensuring public involvement and information through the requirement for an administrative record for assessments.

Response to Comments

"Coordination—General"

Comment: All of the commenters who spoke to the issue of coordinated assessments agreed that all natural resource trustees should coordinate their damage assessment activities among themselves and with other interested parties. Many of these commenters supported NOAA's efforts to encourage prespill planning to accomplish this coordination. One commenter stated that there should also be strong incentives for trustee coordination, the implementation of MOUs, and the development of local and regional assessment protocols. Other commenters urged NOAA to develop detailed guidance as to how coordination might occur and explicit details on how prespill plans would be formulated and implemented by an MOU.

Response: NOAA agrees that coordination among parties involved with discharges of oil is crucial. NOAA cannot offer incentives for such coordination within this rulemaking, but notes that the increased efficiency and chances of successful recovery of the environment are incentives in and of themselves. This preamble discussion on the different aspects and avenues of coordination offers guidance on those areas NOAA has identified through this rulemaking process. There are undoubtedly more areas where the various parties can work together.

Comment: Most of the commenters agreed that trustee coordination is crucial to a successful and expeditious damage assessment and that this coordination is strongly encouraged by OPA. These commenters urged NOAA to provide clear but flexible guidance on trustee coordination. They noted that, absent such language, the assessment process is more likely to be adversarial and have the potential for overlapping studies and claims. Another commenter stated that this coordination would help to ensure that all potentially affected trust resources are included in the assessment process.

Response: NOAA agrees that coordinated efforts are best for all parties involved and can spare much wasted time and expense.

Comment: A large number of commenters on this issue pointed out that good coordination among trustees is essential to avoid double recovery, prohibited by OPA. Some of these commenters suggested that the trustees should be required to include in their damage claim a certification of how the assessment avoids double recovery. Several commenters stated that coordination among trustees would do much to improve the efficiency of assessments, particularly to avoid duplicate assessments, and the success of the assessment. Other commenters pointed out that better coordination could avoid prolonged and unnecessary litigation, and speed the actual restoration and recovery of injured resources. One commenter noted that coordination would help avoid competition among trustees for sometimes limited funds available to pay damages. Finally, some commenters noted that when faced with multiple assessments and claims the RP(s) is forced to commission parallel assessments in its own defense.

Response: Coordinated efforts would help avoid double recovery of damages. NOAA does not include in this proposed rule a requirement that the trustee(s) include a certification of how double recovery is avoided. That kind of detail will be resolved through the cooperative process. These cooperative efforts allow trustee agencies to efficiently use limited budget and personnel for a successful effort. These efforts may also foster cooperative efforts with the RP(s) as well.

Comment: Several commenters urged NOAA to prescribe specific sanctions against trustees who do not coordinate assessments. Most of these commenters stated that trustees who do not coordinate their assessments should be denied the rebuttable presumption for the assessment. Others stated that if trustees do not coordinate, they should be required to affirmatively carry the burden of proof to show no overlapping of claims. Finally, some of these stated that they would urge the U.S. Coast Guard, in the promulgation of its claims against the Fund regulations, to deny payment from the Fund to trustees who do not coordinate.

Response: This proposed rule does not contain penalties for failure to cooperate. Since these coordinated efforts are encouraged and not required by the proposed rule, the rebuttable

presumption would not hinge on the presence or absence of coordination. Trustees should recognize, however, that assessments will be more effective and successful if coordinated. The suggestion that disbursements from the Fund be denied to trustees who do not cooperate is clearly outside the scope of this proposed rule.

Comment: Several commenters stated that the rule should encourage, or require, trustees to establish a committee to coordinate resource damage assessment and restoration activities among trustees as well as RPs. These commenters stated that the trustee council should also designate a committee chair.

Response: NOAA points out that past experience has shown the success of, and need for, trustee committees or councils. These councils are discussed in the section of this preamble describing the trustee MOU.

Comment: Several commenters stated that, since federal and state trustees are co-equals under OPA, there should be an equal number of state and federal trustees involved in the assessment activities, each with his own vote or, failing that, the trustees should operate on consensus.

Response: NOAA agrees that natural resource trustees are equal partners in the protection and restoration of the environment. However, the number and type of trustees involved in a particular discharge is entirely incident-specific. NOAA would certainly not like to see trustees jockeying for control of a situation by "stacking" committees with large numbers of representatives. Since decisions should be made through the consensus of the trustees involved, the number of particular representatives is immaterial.

Comment: Although many of the commenters agreed that decisions among trustees should be through consensus, the commenters pointed out that NOAA should provide guidance for the case involving controversial issues where consensus among multiple trustees is not possible. One of these commenters suggested that NOAA might consider having trustees use a mediator or facilitator for these deliberations.

Response: NOAA encourages trustees to decide upon a decisionmaking process before a discharge occurs. Such agreements may easily be modified at a later date, but are extremely difficult to decide during a discharge event. NOAA does not believe that the proposed rule could provide a mechanism that would apply to all discharges.

Comment: At least one commenter indicated that NOAA should develop a list of technical experts that could be called upon to carry out preassessment and assessment/restoration activities in order to ensure efficacy in the process.

Response: NOAA agrees that such a list may be useful. However, since the majority of damage assessments will likely be localized, a list provided by NOAA may not prove useful to the local trustee(s). NOAA encourages the trustee(s) to assemble such lists as part of the prespill planning process, based upon past experience and the qualifications of potential experts. The trustee(s) is advised to be aware of conflicts of interest when developing such lists.

"Lead Administrative Trustee (LAT)"

Comment: Many of the commenters stated that the designation of a Lead Administrative Trustee (LAT) is crucial to the success of an assessment. One commenter noted that the current practice results in a *de facto* LAT in the person of the litigator who conducts the negotiation, a process which takes the issues out of the hands of the resource manager.

Response: NOAA agrees that trustees are in a much better position during a discharge if they can decide among themselves whether a LAT would be useful, and if so, who should serve in that position.

Comment: Some commenters stated that the LAT be a federal trustee, others that the LAT be a state official. Some suggested that the rule allow for the LAT to be either an official from a federal or state agency or a tribe with no restrictions. One commenter suggested that there be appointed co-LATs, with the duties rotating among these accordingly. Another commenter suggested that there may be many cases in which it would be appropriate for there to be a single non-federal LAT. Finally, one commenter pointed out that U.S. EPA is required by E.O. 12777, to amend the NCP to indicate that the federal trustees shall designate one federal trustee to act as the LAT in the event of a discharge of oil.

Response: NOAA points out that any of the possible suggestions for LAT designation could be appropriate. The designation of a LAT is so fundamentally affected by the circumstances of the event that it would simply not be possible for NOAA to decide ahead of time on behalf of the trustees. Finally, a discussion of federal trustee requirements under E.O. 12777 is given in the discussion in this preamble on prespill planning.

Comment: Several commenters stated that where there are both federal and state trustee agencies involved, there should be one federal LAT and one state LAT selected. One commenter noted, however, that the correct allocation would be one federal LAT and one non-federal LAT.

Response: NOAA notes that, as mentioned in an earlier discussion, it is possible that trustees at an incident could decide to appoint co-LATs. Another way to deal with potential multiple LATs would be to rotate or split LAT duties on a mutually agreeable schedule among the trustees.

Comment: Many of the commenters who spoke to the issue of how one would select a LAT stated that the rule should allow for the trustees to make that decision at the time of the discharge, based upon the particular situation. One commenter, however, asked for specific guidance in the rule as to how a LAT would be selected, while another stated that such designation would take place in the prespill planning. Some of the commenters suggested that the trustees consider such things as the habitat affected, the experience of the trustees involved, or the liability limits of possible state law as opposed to OPA. Other commenters pointed out that the scope of the effects should be the deciding factor. A state agency may have the majority of concerns in a particular situation, but in other situations the effects may extend well beyond the state's borders so that the federal trustee may be the logical choice. Finally, one commenter suggested NOAA adopt the provisions found in 43 CFR 11.32(a)(1)(ii), which suggests appointment of a lead official based upon the trusteeship of the resources most affected or upon the ownership of the waters or land upon which the incident occurs.

Response: Again, NOAA notes that all of these suggestions may be considered in the selection of a LAT, but that it would be impossible to require a particular designation within the proposed rule.

Comment: Several commenters stated that the LAT's duties should be ministerial, i.e., scheduling meetings, coordinating communications with the OSC and the RP(s), serving as a central contact for information exchange and data collection. Some of the commenters noted that the nature of the LAT's duties should not be allowed to usurp or interfere with the rights of the other trustees. Other commenters, however, suggested that the LAT should have a true leadership role.

Response: NOAA agrees that the LAT's duties should be mainly administrative unless all trustees agree otherwise.

Comment: Commenters on the issue of arbitration authority for the LAT were split. Many of the commenters stated that the LAT must not have the authority to preempt the other trustees' exercise of their trustee responsibilities. These commenters noted, as support, that OPA requires the various classes of trustees be responsible for conducting assessments for their own resources. These commenters also pointed out that arbitration authority in one trustee would be an impossible situation where that trustee is also the response agency or the RP.

Response: NOAA points out that the intent of Congress is quite clear on the issue of any trustee having preemptive authority over other trustees. The OPA Conference Report, at 209, states that "[o]ne class of trustees cannot preempt the right of other trustees to exercise their trustee responsibilities."

Comment: The other side of the argument was presented by quite a few commenters. These commenters noted that a LAT with arbitration authority is a necessity for any assessment. They pointed out that there must be someone with the authority to settle disputes, or the integrity and effectiveness of the assessment are lost. These commenters argued that any assessment without a decisionmaker would break down into a contentious, ineffective process. Some endorsed 43 CFR 11.32(a)(1)(ii) as an effective way to appoint an arbitrator LAT.

Response: NOAA agrees that some process should be worked out for settling disagreements or disputes. However, as stated earlier, this rulemaking could not dictate that process. Also, as mentioned elsewhere in this proposed rule, there is no prohibition against trustees doing parallel assessments so long as there is no double recovery of damages.

Comment: Some commenters expressed concern over the trustees' ability to reach agreement by consensus. One commenter even suggested that the LAT be vested with the sole decisionmaking authority. One suggested that the LAT should have arbitration authority, and one suggested that all trustees always acknowledge NOAA in that role.

Response: No trustee can abrogate another trustee's(s') responsibility. Experience has shown that once the trustees have become fully informed of the facts of a particular incident, their common interests lead to consensus decisionmaking. NOAA agrees that in any incident an agreement upon the appointment of a LAT should be an early order of business. For the reasons discussed regarding agreement by consensus, giving arbitration authority to the LAT would not be workable. Since the selection of the LAT is usually dependent upon the circumstances peculiar to each incident, advance designation of NOAA, or any other trustee in that role, would not appear to be a prudent procedure.

Comment: One area that some commenters felt needed clear language in the rule was where a trustee is also the RP. In such cases, these commenters stated that the trustee/RP should never be allowed to serve as the LAT, unless, as suggested by one commenter, there is unanimous consent of the other trustees.

Response: NOAA notes that trustees at the time of an incident may need to decide whether another trustee who is also an RP could serve as the LAT. Such selection is not impossible, but should be considered at the time.

Comment: Some commenters suggested that in some cases no LAT may be designated, at the option of the trustees.

Response: NOAA agrees that there may be cases where there is no LAT selected, but only where there are state and no federal trustees.

Comment: Various commenters agreed with appointing a LAT. Many suggested that all trustees should agree upon a LAT prior to receiving funds from the OPA trust fund, so that all would have the necessary incentives to meet reasonable and responsible guidelines for their expenditures.

Response: Federal trustees, under E.O. 12777, may need to agree to designate a federal LAT before receiving monies from the OPA Fund. The management of that Fund, however, is not within the scope of this proposed rule.

Comment: Several commenters agreed that trustees should coordinate the assessment/restoration process, but pointed out that OPA does not preclude different trustees from conducting parallel assessments with individual plans, so long as there is no double recovery of damages.

Response: NOAA notes that these commenters are correct. The trustee(s) may, under OPA and this proposed rule, conduct separate, parallel assessments so long as there is no double recovery of damages.

Comment: One commenter suggested that NOAA should propose guidance on when a foreign trustee could serve as the LAT, particularly when the LAT's duties require spending U.S. public funds.

Response: Like so many of the other issues in trustee situations, the option of selecting a foreign trustee to serve as LAT is best decided by parties involved in a particular discharge.

Comment: Quite a few commenters suggested that NOAA has the technical expertise and experience to assume the role of LAT for assessments conducted pursuant to OPA.

Response: NOAA appreciates the commenters who suggested that NOAA should serve as the federal LAT at discharges. However, it would clearly be inappropriate for NOAA, within this rulemaking, to appoint itself LAT.

"Model MOU"

Comment: A number of commenters recommended increased coordination between state and federal agencies through a Memorandum of Understanding (MOU). One commenter suggested that MOUs should be generic enough to cover any applicable discharge, but specific enough to avoid conflict. Some were concerned that a state would be given only one voice or participant pursuant to an MOU. Some cited the need for multiple-state, and state-by-state/regional MOUs, or even MOUs based upon tribal jurisdictional areas. Another commenter noted that the model MOU should not require unanimous decisionmaking.

Response: The model MOU contained in NOAA's notice was included as an illustration of the type of agreement that would facilitate and coordinate the trustees' activities. The nature of an MOU developed by trustees would need to be as general or specific as deemed necessary by the particular trustees. It is understandable that each region and/or incident would require some modification to adapt to local circumstances. For example, the inclusion in the model MOU of one state signature line was not intended to preclude the situation where more than one state agency exercises trustee responsibilities, or the situation where more than one state or tribe might be involved in the same incident or region. Also, with consensus decisionmaking, the number of voices (or "votes" in the words of one commenter) speaking for any given trustee is essentially immaterial.

Comment: One commenter suggested that an MOU should be developed through prespill planning to include provisions for the establishment of: damage assessment working groups, trustee responsibilities, trustee notification, coordination with the OSC or designee and trustees' activities in the response structure, opportunity for participation by all affected trustees, designation of a lead trustee, decisionmaking procedures, contracting objectives and guidelines, maintenance and use of damage recoveries, and other such provisions.

Response: To the extent practicable, NOAA agrees that all parties would benefit from having such provisions included in a prespill MOU.

Comment: Another commenter suggested that NOAA, in particular, should enter into MOUs with state trustees concerning every important aspect of the state trustee's assessment process.

Response: NOAA has worked with certain state trustees under MOUs for particular discharges and would hope to reach agreement on the model MOU language with as many states as possible.

Comment: The concept of prespill planning and development of an MOU between the potentially affected trustees was favorably received and encouraged by those who commented upon it.

Response: NOAA agrees fully and through this proposed rule is encouraging prespill planning in order to reduce, to the extent reasonably practicable, the waste of precious time in start-up activities when an incident occurs.

Comment: Two commenters suggested that failure to participate in an MOU, or failure to coordinate efforts between the trustees, should result in the loss of the rebuttable presumption that the trustees' assessments were conducted in accordance with the regulations. Another commenter noted that the MOU should provide for the loss of the rebuttable presumption if NOAA's rule is not followed.

Response: A trustee cannot be forced to enter into an MOU, and the failure to do so cannot result in the elimination of a right granted to it by statute. Further, the use of this proposed rule is optional, not mandatory. Therefore, although the trustees may agree on an MOU to use this proposed rule, such an agreement would be optional to the trustee(s).

Comment: One commenter suggested that development of local and regional assessment protocols or MOUs be required by the proposed rule.

Response: The proposed rule recommends that such agreements be developed.

Comment: One commenter addressed the "confidentiality" provision contained in the model MOU, and expressed concern that its inclusion would hinder public participation in the decisions to be made by the trustees.

Response: NOAA is committed to public participation to the greatest extent possible in all of these situations. However, on a case-by-case basis, some provision for confidentiality may be necessary in the event of a potential adversarial proceeding against the RP(s).

"MOUs With Potential RP's"

Comment: Some commenters suggested that potential RPs should be involved in the development of, or included as parties to, the trustees' MOUs. Another commenter pointed out, however, that the RP MOUs should be developed separately from the trustee MOUs because the responsibilities of the parties are so different. One commenter specifically suggested that a generic enforceable agreement be drafted and negotiated with a large group of potential RPs. This agreement could then be offered to an RP following a specific discharge to allow early RP involvement without wasting time negotiating. The commenter noted that the agreement would be enforceable and would allow the trustee(s) to oversee all work done by the RP(s). Finally, the commenter noted that the development of such an agreement prior to a discharge would allow meaningful public comments on the contents of the agreement.

Response: The basic concept underlying these MOUs is an attempt to organize and coordinate the efforts and duties of the various trustees at the time of an incident or, hopefully, prior to the occurrence of an incident. The trustee(s) is encouraged, where appropriate, to consider potential RPs in this process, or to negotiate separately with potential RPs to develop prespill enforceable agreements.

"Advantages of Prespill Planning"

Comment: The vast majority of the commenters agreed that prespill planning would be advantageous. Some of the advantages included: helping to define the response priorities of the damage assessment activities to be accomplished during response; presenting a united front to the RP(s); increasing the public's perception of a coordinated effort; improving the transition from "cleanup" to "restoration;" sorting out organization and administrative responsibilities in advance; increasing chances of a successful recovery; increasing timeliness of the natural resource damage assessment; and improving chances of involving more interests in advance of a discharge.

Response: NOAA agrees that all of these goals are in the best interest of the public and environment.

"Disadvantages"

Comment: Some of the commenters pointed out potential problems associated with the concept of prespill planning. These possible problems included: The potential for conflicting provisions with the existing response structure; adding another layer of planning activities that would burden smaller companies, and the personnel and budget constraints of many states; and adding another layer of plans that might cause confusion during a response. Some commenters noted that the prespill planning process would be quite expensive, diverting millions of dollars that could be used for true environmental purposes, and would not be practical for all locations, but should be limited to endangered species, sensitive areas, or areas where large discharges or effects are likely to occur. Another commenter noted that such plans might identify unnecessary studies that might be carried out in the event of a discharge, with little or no connection to the actual or anticipated effects related to that specific discharge.

Response: NOAA notes that engaging in prespill planning is not intended as an empty exercise. Where prespill planning would complement preparedness plans already in place, or create such a plan not yet in existence, the planning would be a worthwhile effort. It would not be worthwhile, however, to go through the effort if the result is not beneficial or would interfere with other duties. The level of effort and expense should depend upon the need. Also, the purpose of the prespill planning is to clearly identify the types of concerns and possible solutions that the trustee(s) is likely to encounter when the oil hits the water.

"Optional"

Comment: Several commenters stated that the prespill planning should be discretionary, particularly if funding is not available, and should not lose the rebuttable presumption argument for an assessment conducted in an area where there are no applicable prespill plans in place. Another commenter suggested that these plans should be funded by the federal, e.g., Oil Spill Liability Trust Fund, and/or state governments.

Response: NOAA agrees that the prespill planning is optional and recognizes that agencies need funding for such activities. Trustees will undoubtedly need to draw to some extent from their budgets to develop such plans. The management of and disbursement of some funds, e.g., Oil Spill Liability Trust Fund, will be dependent on the regulating agency and is outside the scope of this rule.

"Other Plans"

Comment: Many commenters spoke to the issue of other existing or future plans under OPA, particularly the NCP. Some commenters stated that the

damage assessment prespill plans should be appended as discrete documents to the various contingency plans, such as the Spill Prevention Control and Countermeasure Plan program for oil storage facilities (U.S. EPA, 40 CFR 1 12, 1974). Other commenters stated that the trustees should defer to the new NCP, especially the fish and wildlife response plans, and not require a separate level of planning that might be duplicative and counterproductive for trustee concerns. Other commenters stated that the NCP would not be the appropriate vehicle for trustee plans because the contingency plans are focused on response scenarios, not resource concerns. Many of the commenters suggested that the trustee planning would fit in well with the contingency planning at the local area committee level since these area committees are to be formed in logical geographical areas and many of the personnel and agencies involved in a discharge will have a chance to meet and discuss issues of common concern at the local level. This prespill interaction at the local level will provide increased response and cooperative actions during both spill drills and actual discharge events. One commenter even suggested that Local Area Plans be amended to provide for assessment procedures.

Response: NOAA agrees that some trustees may want to have damage assessment prespill plans referenced by or attached to response contingency plans so that the OSC would have the broadest possible base of information available during a discharge. Such decisions would be left to the trustee(s), in coordination with the OSC. However, NOAA does not agree that this type of planning is unnecessary for the purposes of response cleanup and natural resource concerns occurring as part of the response phase of a discharge incident. Resource planning is a vital part of ACPs. Prespill plans will be needed to address the damage assessment coordination issues of the natural resource trustees. NOAA does agree that the Area Planning Committees called together for response planning would, in many cases, be a logical starting point for setting up follow-up meetings of the trustees for damage assessment planning activities. It should be left to the trustee(s) to choose the appropriate vehicle and areal extent of trustee planning exercises.

"Parties Involved"

Comment: Many of the commenters agreed that representatives of federal, state, tribal, and foreign trustees in logical geographical areas should meet to develop prespill plans. Several commenters, however, noted that prespill planning should involve not only the various trustees, but members of the response agencies and representatives from industries that may be involved in transport or storage of oil in those areas covered by the plans. Some commenters noted that private response contractors should also become involved and not only gain from meeting and establishing relationships with agency personnel, but also through becoming more aware of environmental concerns associated with various response strategies.

Response: NOAA agrees that the broader the planning and information base the better for prespill planning purposes. However, the most appropriate forum for relaying the issues would be as technical working group members of the OPA Area Committees. Additionally, NOAA again cautions that the scope of these planning actions is left to the judgment of the trustees.

"Specific Response-Related Prespill Planning Issues"

Comment: Some commenters specifically noted certain areas of common concern to both the trustee(s) and OSCs. For example, it was suggested that prespill agreements could be worked out with the OSC-chaired area response structure to cover: establishing communication roles; identifying trustee damage assessment and OSC contacts; human health and safety requirements; conducting spill drills that include damage assessment components; working with the Fish and Wildlife and Sensitive Environments working groups of Area Committees to identify resources of particular concern; and issues of sampling, information, and data sharing.

Response: NOAA agrees that there are numerous areas of overlapping interests between the damage assessment trustee(s) and OSC coordinated response structure. These issues are discussed at length in the section of this preamble concerning coordination between damage assessment trustees and the OSC coordinated response structure.

"Public Involvement"

Comment: Many commenters stated that the trustee(s) should involve the public in the prespill planning activities. Some commenters stated that this involvement could be accomplished through a review and comment process of drafted prespill plans. Other commenters suggested that members of the public could be helpful in developing those plans. One commenter noted that public involvement in the prespill plan is important to avoid litigation.

Response: NOAA believes that public involvement in prespill planning is important to the success of these plans. Public awareness is generally high during an actual discharge. Much public anxiety could be avoided if the public is informed of the operations of the network of agencies during a discharge. As these commenters noted, vital information can be gained by those members of the public most familiar with the natural resources.

"Scope"

Comment: Several commenters suggested that the prespill plans be as broad as possible to cover as many trustee concerns as possible before the oil hits the water. Another commenter, however, recommended that damage assessment prespill plans not be rigidly drawn. The commenter cautioned that the plan could become a liability where the nature of a particular discharge is not contemplated in the prespill plan. Further, the commenter stated it could be an unwise expenditure to develop a contingency plan broad enough in scope to address an endless array of possible discharges.

Response: NOAA agrees that such plans should be as broad as possible. However, as noted previously, there are many demands upon the time and resources of trustee agencies. The plans, therefore, should be tailored to meet the needs of the trustee(s) and must, of necessity, be flexible.

"Contents"

Comment: Most of the commenters had specific suggestions as to the particular items to be included in prespill plans. These items included: identification of sensitive areas; appropriate response techniques that would have the least adverse effect on resources of concern; location, types, and level of detail of baseline information; identification of the types of data needs of trustees during a discharge and subsequent assessment; agency contacts for the purpose of notification and information sharing; surveillance and monitoring schemes; sampling protocols; sensitive ecological, economic, and social areas and priorities for protection; resource inventories; avenues for trustee input on response actions; response plans for trustee actions; methods for public information and involvement; socioeconomic effects; prespill drills; and a compilation of various environmental and safety laws that

might apply to a damage assessment effort.

Response: NOAA agrees that the components listed in these comments are the types of concerns that should be addressed. However, the items mentioned for inclusion in prespill plans mixes: (1) Issues that should be covered in the ACPs and only referenced in the natural resource damage assessment prespill plans; (2) issues that should be covered in both (but normally collected only once, sometimes by working groups of the Area Committees and others by the natural resource damage assessment prespill plan working groups); and (3) items belonging only in the damage assessment prespill plans. In the first group belongs: appropriate response technologies, priorities for protection, avenues for trustee input on response actions, response plans for trustee actions, and most of the surveillance and monitoring. In the second group belongs: identification of sensitive areas, public information, contacts notification and information sharing. The remainder falls in the third group.

Comment: A commenter proposed that NOAA establish a centralized database that can be accessible to all trustees nationally. The Lead Administrative Trustee at each incident should be obliged to ensure that the data are collected and submitted to the central database in a compatible manner. Several states are now implementing and upgrading Geographical Information Systems (GIS) that could be the repository of this data. Such a database would save time and money for both the trustee(s) and RP(s). It would be a useful way to build a history of scientific information and costs.

Response: NOAA agrees that a centralized database would be helpful to trustees in the future, but has no plans for such a project at this time. However, NOAA has conducted a comprehensive literature survey of restoration techniques that is available as an additional guidance document.

Comment: One commenter stated that NOAA should emphasize the need for involvement of experts on the fate, behavior, and ecological effects of oil and various cleanup and restoration options. One commenter noted that scientific literature is available to guide decisionmakers. Another commenter recommended that the trustee(s) refer to area contingency plans in determining environmentally sensitive areas.

Response: NOAA agrees that the trustee(s) should take advantage of existing sources of appropriate information. The Area Contingency Plan's Fish and Wildlife and Sensitive Environments Annex is also the repository of trustee(s) input for response actions and should contain a mechanism for ongoing input during the spill's response phase to the OSC about response actions affecting natural resources.

Comment: One commenter suggested NOAA, with its extensive experience and expertise in habitat and species restoration, offer the services of NOAA's "Restoration Center" or NOAA's HAZMAT group to the trustees as necessary.

Response: NOAA appreciates the opinion of the commenter and notes that NOAA, in appropriate circumstances, may lend any expertise it has to the other trustee(s). However, there may be discharges in which NOAA does not have experience to share.

"Restoration"

Comment: One commenter stated that trustees might include in prespill planning the development of an overall restoration approach.

Response: NOAA agrees that the earlier the trustee(s) begins to think in terms of restoration, where possible, the better. Elsewhere in this preamble, NOAA states that, where the trustee(s) has adopted a regional restoration plan for a specific area, recoveries of several discharges may be pooled to help fund such plans. This option for use of recoveries will likely be most useful in areas with long-term pollution effects where damages recovered from a single discharge would be too small to improve the ecosystem.

"Limits/Exclusions"

Comment: Several commenters pointed out that even comprehensive prespill plans will not be able to foresee the multitude of possible unique circumstances and events associated with a particular discharge. One commenter pointed out that the trustee(s) should stress that there may be some data requirements for a particular discharge that might not be covered by generic prespill plans. Another commenter suggested that, instead of trying to list within prespill plans specifics on sampling, data collection, baseline studies, and specific contract obligations and performance standards, the trustee(s) could reference the locations of such items in a supplemental document format. Another commenter stated that long-range damage assessment and restoration management plans should be developed only after a discharge, when the specifics of the resource injury are known.

Response: NOAA recognizes that no plan can ever encompass all possible events. Therefore, any plan must be flexible and recognize that it is subject to change in the event of a discharge. NOAA also agrees that any long-range damage assessment would have to be tailored to the specific discharge, but points out that certain components, such as administrative management, will likely need to be addressed for all discharges. As to restoration management, as noted previously, some restoration planning for areas frequently affected by discharges might be possible.

"Guidance"

Comment: One commenter suggested that prespill planning activities should include the development of a "generic" damage assessment "initiation" workbook. Such a workbook could include a general list of the types of information that the trustee(s) would routinely need during the early stages of response and damage assessment. Another commenter stated that the trustee(s), in prespill planning activities, should recognize the importance of developing socioeconomic damage assessment responsibilities, guidelines, and procedures. Finally, one commenter stated that prespill plans should reflect the fact that planning officials from agencies may not be the trustee officials who would actually be involved in the assessment and restoration activities.

Response: NOAA encourages the development of guidance documents or workbooks wherever possible. Such knowledge should be documented so that one is not "reinventing the wheel" with each discharge. NOAA also notes that socioeconomic damage assessment issues might be covered in prespill planning, should the trustee(s) desire. Finally, NOAA recognizes that in some entities, contingency planning and response personnel may not be the same personnel involved in damage assessment and activities. Therefore, it is important that all those concerned in a discharge, both from the response side and the trust resources side, become familiar with the various responsibilities of each other before the oil hits the water.

Coordination With Response Agencies Response to Comments

"General"

Comment: Commenters were almost unanimous in agreeing that the actions of OSC response agencies and the response and damage assessment

trustees should be coordinated to ensure effective and efficient cleanup and minimize the environmental effects of the discharge. Some of these commenters urged NOAA to clearly define each agency's role in the cleanup and assessment processes. Others noted that such coordination is already addressed in section 1011 of OPA and, therefore, should not be repeated within NOAA's rule. These commenters were concerned that another layer of required coordination would add possible confusion and conflict. Therefore, these commenters suggested general, non-binding guidance for this proposed rule.

Response: NOAA agrees that trustee agencies should work closely with OSC agencies to minimize the effects of a discharge through cleanup strategies. Although NOAA cannot dictate to OSC agencies their roles in cleanup, NOAA does give guidance to the damage assessment trustee(s), in this proposed rule, on interaction with the response structure regarding damage assessment issues. NOAA recognizes that coordination between the OSC and trustee agencies is covered in section 1011 of OPA and that such duties will be covered in other rulemakings under OPA. Any guidance in this proposed rule is intended to supplement the explanation of the damage assessment trustee's concerns about efficient coordination. As such, NOAA agrees that any guidance in this proposed rule is not binding.

"Role of OSC"

Comment: Many commenters pointed out that, during a response to a discharge, the On-Scene Coordinator (OSC) is the government's authorized source of information and directions to the RP(s). As such, the OSC must be advised of and retain oversight over all activities occurring during that response phase. Other commenters, however, noted that the OSC cannot divert his attention from the response to coordinate damage assessment. Also, any concerns over litigation, whether for response costs or natural resource damages, should not come up during the response where the common goal should be prompt and effective response.

Response: NOAA agrees that only the OSC is the spokesperson for response purposes at a discharge and, as such, has oversight of all response activities. However, the OSC has quite enough to do during a response without needing to be burdened with assessment duties as well. In any event, the trustee(s) has these assessment duties as statutory requirements and cannot pass those duties off to an OSC.

"Response Preeminent"

Comment: Several commenters stress that coordination between the trustee(s) and the OSC must not deter the OSC from overseeing the response effort, or undermine the cleanup as effectively and promptly as possible or hamper free flow of information.

Response: NOAA agrees that the trustee(s) should not disrupt the cleanup directed by the OSC.

"Role of Trustee(s) During Response"

Comment: Several commenters pointed out that the trustee(s), because of resource expertise, has an advisory role to provide input in the response planning process and help influence response priorities and techniques for protection. These commenters noted that, during the response, the trustee(s), not the OSC, has the responsibility for damage assessment issues and should be the one collecting information for the damage assessment, not the OSC or the RP(s). Some commenters stated that the trustee(s) does not, in fact, have a response role as such and should not issue orders to the RP(s) during a response. One commenter noted that, if the trustee(s) is involved in natural resource damage assessment activities during a discharge, he should not have a part in decisionmaking since there may be a conflict of interest or conflict of mission when one agency has both responsibilities. Another commenter noted, however, that there is no conflict of interest if one agency is both trustee(s) and response agency since the role of the response agency is to protect, enhance, and restore the environment, which is consistent with the mission of the trustee(s).

Response: NOAA agrees that the trustee(s) when acting as the resource expert, has an advisory role, as the resource expert, to the response planning process and that the trustee(s) has the responsibility for damage assessment. However, in the interest of efficiency, if an OSC or the RP(s) is collecting samples, those samples may be shared with the trustee(s) if all parties are agreeable. NOAA believes that the trustee(s) should always be involved with response decisions. As one of the commenters pointed out, both the trustee(s) and OSC agencies have the same basic mission—protection of the environment. These roles complement, not conflict with, each other.

"Decisionmaking"

Comment: Several commenters noted that an emergency response cannot be directed by committee or consensus. One of these commenters suggested that the goal of coordination is to involve the most knowledgeable discharge experts, not simply to involve the greatest number of interested parties. Finally, this same commenter noted that the Advance Notice of Proposed Rulemaking was not clear as to the extent to which NOAA is recommending participation of trustee agencies in discharge response decisionmaking.

Response: NOAA acknowledges that emergency decisions cannot be directed by outside committees and did not mean to suggest differently. NOAA agrees that decisionmaking should be focused through knowledgeable advice. NOAA also points out that discharge response decisions are the ultimate responsibility of the OSC, but the OSC does not make these decisions without foundation. The trustee(s), in their response role, have a consultation role to play in the decisions.

"Notification/Consultation"

Comment: One commenter pointed out that to fulfill the statutory obligation of section 1011 of OPA, the OSC will need to initiate immediate contact after a discharge with all affected trustees and will also need to communicate with them throughout the removal process. Some commenters stated that they wanted to be notified of every discharge. One commenter noted that this kind of notification would ensure that only the trustee(s) would be deciding if the discharge warrants a damage assessment or not. Another commenter stated that, even if the affected trustee(s) does not take damage assessment action at each discharge, the notification requirement is important to build a comprehensive history of a particular site. Some commenters suggested that a routine notification procedure, for example, once a week for most discharges, with basic information sent to all potential trustees, would be sufficient for a trustee(s) to determine whether trustee resources may suffer significant injury. However, for significant oil discharges that may affect trustee resources, the trustee(s) will still require simultaneous notification. One commenter suggested that, to differentiate those discharges that would require weekly rather than simultaneous notification, resources could be categorized hierarchically in terms of value. One commenter stated that the DOI rules suggest that the most likely federal or non-federal trustee could receive the notification and be responsible for notifying other trustees. Another commenter suggested that NOAA consider the creation of a Damage Assessment Officer position, through NOAA resources, to work with

OSC for the purpose of notification and communication. This person would augment the resources targeted to the notification process and allow expeditious determination of the discharge's significance.

Response: NOAA agrees that the OSC will notify the trustee(s) of discharges. It is also understood that it is the statutory duty of the trustee(s) to determine whether a discharge warrants a damage assessment, especially since the trustee(s) cannot assign this duty to the OSC or any other entity. NOAA also notes that notification of discharges helps the trustee(s) build an important history of the area's exposure to discharges of oil. NOAA notes that a weekly notification of the numerous relatively small discharges might be a good arrangement to establish in the prespill planning. However, this proposed rulemaking cannot dictate the timing or manner of notification for either the small discharges or the larger ones. Nor can NOAA establish in this proposed rulemaking that one or another trustee agency will have the duty to notify all other trustees. There are several problems with that kind of assumption of responsibility. First, that duty to notify is already conferred upon the OSC by OPA. It is unclear that it would be beneficial for some other agency to assume that duty. Second, any trustee agency that might agree to serve such a function as a surrogate for the response agency would have to recognize the budget and personnel costs of such a duty. NOAA believes that prespill planning is essential for working out such notification requirements.

Comment: Other commenters noted that there are numerous regulations to be promulgated by the response agencies pursuant to OPA that would address, among other things, multiple duties in consultation with the natural resource trustee(s). These commenters pointed out that the OSC should not be burdened with the responsibility of determining all the trustees to notify for a particular discharge.

Response: NOAA agrees that the consultation procedures should be worked out during other pertinent rulemaking efforts. The identification of trustees requiring notification is a good example of the kind of process that should be developed in the prespill planning.

Comment: Some commenters cautioned that the current statutory requirement that the RP(s) notify the National Response Center when discharges occur does not include notification of such discharges to the trustee(s). These commenters noted that the trustee(s) and OSC must establish communication roles and identify contacts for purposes of such notification. These commenters pointed out that the RP(s) should not have trustee notification added to its responsibilities.

Response: NOAA acknowledges the fact that the only reporting requirement of the RP(s) is to the National Response Center. There is no duty to notify the trustee(s) over and above what is provided in OPA. This proposed rule would not be an appropriate vehicle for such a requirement.

"Data Sharing During Response"

Comment: Many commenters noted that information should flow freely between response and damage assessment trustee agencies during an event.

Response: NOAA agrees with these commenters and will encourage such information sharing as much as possible.

Comment: One commenter suggested that the OSC may be able to gather data on samples more efficiently than the damage assessment trustee agencies and save time and avoid additional effects. Another commenter, however, suggested that there should be damage assessment trustee data collection teams separate from the OSC's response structure.

Response: NOAA agrees that it would be more efficient and less risky to the natural resources to have the OSC-coordinated response structure collect all information needed at the site of a discharge. However, in most cases, such data collection is simply not possible. Separate data collection teams may be a good idea so long as there is no interference with the response and no "unreasonable" costs associated with it.

Comment: Commenters noted that the OSC relies primarily upon information about sensitive or valuable resources contained in the appropriate ACP, but that this information can be augmented by the advice of the trustee(s) during a discharge. Many of these commenters noted that any information requested by an OSC to make a response decision must be immediately provided, if available. These commenters stated that withholding information due to litigation concerns does not outweigh the need to minimize environmental damage. Some of these commenters noted, however, that such information will become public information through the OSC.

Response: NOAA notes that all of these concerns are valid.The fact that some information may be used in some future litigation is not a good reason for possibly impeding a response action.

Comment: Many commenters noted that the OSC, by nature of being on scene, has information critical to the trustee's(s') preassessment work and that this information should be shared with the trustee(s). One of these commenters pointed out that by sharing such information with damage assessment trustee(s), the OSC is allowing the trustee(s) to spend time compiling any additional information it needs rather than duplicating efforts. Other commenters noted that where the trustee(s) damage assessment data needs are clear and not burdensome, the OSC might be able to collect additional information on behalf of the damage assessment trustee(s), so long as such efforts do not interfere with the response effort.

Response: NOAA agrees that the OSC may be able to share much information with the damage assessment trustee(s), thereby improving the efficiency of both. The possibility that the OSC could actually collect additional information beyond what is needed for response might be worth exploring in the prespill plans and ACPs so long as the parties understand that the OSC could not conduct such work if it would interfere with the response.

Comment: Several commenters pointed out that the trustee(s) should not exclusively rely upon the OSC to collect information necessary for an assessment, but should be allowed to gather additional information during the discharge.

Response: NOAA is of the opinion that where OSC-collected information is relevant to the damage assessment process, such information should be used to avoid redundancy and double counting. However, it is ultimately the responsibility of the damage assessment trustee(s) to collect the necessary data for a damage claim.

Comment: Some commenters noted that the OSC should seek early involvement of the trustee(s) in order to share information about the characteristics of the discharge and the potential effect to the environment, particularly information on local conditions and resources. Several commenters pointed out that this sharing of information would also allow the trustee(s) to evaluate and make recommendations on the response activities themselves, so that the damage caused by the discharge is not worsened by the type of response and cleanup techniques, but that the cleanup might accelerate the recovery of the resources.

Response: NOAA points out that there is currently a mechanism for funneling

important resource information to the OSC, providing technical advice and recommendations to minimize the effects of the oil and response activities. The OSC accomplishes this by soliciting input from trustee agency experts, academia, etc. The mechanism for relaying this information is already in place through the ACPs, but could be restated in the prespill plans.

Comment: One commenter stated that high-impact cleanup methods that remove living organisms and greatly modify the habitat are not justified when the oil left in the environment has already lost most of its toxicity. There may be less injury and faster recovery with limited or no removal and natural recovery. The commenter stated more research is needed in all areas of restoration ecology. Several commenters urged trustees to help plan response and cleanup actions that will have lesser effects on the resources.

Response: NOAA agrees that more research is needed in the field of resource restoration. The commenters are correct in pointing out that trustee input to cleanup decisions may greatly reduce resource effects to be corrected by restoration. NOAA agrees that the ecological effects of any planned action should be considered in the restoration planning. There may be certain instances where the public uses of an area may require removal of residual oil in order to restore the services provided prior to the discharge.

"Funding"

Comment: Some commenters were encouraged that there would be provisions for the use of the Oil Spill Liability Trust Fund for trustee activities, including the initiation of natural resource damage assessments and time-sensitive damage assessment activities where other funding is not available. Another commenter noted that agencies within a state might not be the ones designated to apply for funding, but still need access to the Fund to participate in the process.

Response: NOAA points out that the procedures for the management of the Fund are the subject of different rulemaking efforts by the U.S. Coast Guard and are outside the scope of this proposed rule. The problem noted by one commenter as to different agencies within a state having different roles is an internal state issue, clearly not within this rulemaking. Hopefully, such problems can be identified and resolved within the prespill planning.

"Define When 'Cleanup' is Over"

Comment: Quite a few commenters requested guidance on when the removal portion of a response would be deemed to have ended, and when remedial and/or assessment activities might be more appropriate and suggested criteria for the OSC to use in making this determination. Some of these commenters noted that this determination is important since liability for restoration measures can only be determined to be necessary if natural resource injuries still exist after the legal conclusion of the "removal" phase. Another commenter pointed out that, although data on the scientific effects of a discharge should be collected as soon after the discharge as possible, damage assessment activities should occur only after the response and cleanup activities are completed.

Response: NOAA notes that the end of the removal portion of a response is defined by the OSC and it would not be appropriate for this proposed rule to try to dictate the criteria for making that decision. NOAA does note that there is a clear line of division, legally, between removal and restoration. The commenters are correct in noting that restoration is residual to response efforts. The trustee(s) must determine what, if any, further actions beyond response work are necessary for the recovery of the system. However, the trustee(s) cannot always wait until the end of all response work before beginning assessment/restoration activities. Such a delay would not be in keeping with OPA's policy of expeditious actions on behalf of the environment.

"'Cleanup' vs. 'Restoration'"

Comment: Several commenters were concerned with the issue of allowing the trustee(s) to undertake emergency restoration during response. These commenters were concerned that the proposed rule might blur the distinction between cleanup and restoration. Some of these commenters noted that in practice the distinction between cleanup and restoration eventually becomes difficult to maintain. These commenters pointed out that failure to make the distinction clear could result in: (1) Trustee-directed damage assessment activities conflicting with ongoing cleanup operations; (2) restoration money spent to reimburse cleanup activities; and (3) RP(s) requesting credits for "restoration" projects against assessed damages, when in fact those restoration projects were actually cleanup activities. As an example, one commenter pointed out that NOAA implied that physical removal of contaminated sediments and bioremediation are restoration techniques, whereas these were both considered to be cleanup methods during the EXXON VALDEZ response.

Response: NOAA agrees that, although there must be a separation under OPA between response and restoration because of the liability provisions and different implementing authorities, in the practical sense the two can sometimes involve the same type of activities. NOAA notes that "emergency restoration" (discussed in the section on the Preassessment Phase) should not conflict with on-going activities so long as they are part of the OSC-coordinated response. NOAA also notes that damages recovered for emergency restoration actions are not reimbursements for response actions, but are to reimburse the trustee(s) for actions deemed necessary due to the exigencies of the situation. Also, the RPs is not granted a "credit" to offset damages for funding emergency restoration. The effect of these emergency actions is to lessen, perhaps dramatically, increased effects and, therefore, larger future damages.

In some circumstances, the same action could be considered either a removal or restoration action, depending upon the purpose of the action and agency that is carrying it out. For example, if dredging is done for human health concerns by the response agency, it is a removal action. However, if the trustee(s) decides that cleanup to lower levels of contamination is needed to take care of resource concerns, then additional dredging may be necessary by the trustee to be able to "restore" the system.

Comment: One commenter pointed out that the natural resource trustee(s) currently has authority under 43 CFR part 11 to undertake emergency "restorations" to avoid, prevent, or mitigate certain imminent threats to particular natural resources. However, this commenter noted that restorative efforts, though important, cannot be allowed to physically interfere with emergency response.

Response: NOAA is familiar with the 43 CFR part 11 provision for emergency restoration and is hoping to foster consistency with this proposed rule. As mentioned earlier, trustee actions are not to interfere with response actions.

Coordination With the Public

Response to Comments

"Advantages"

Comment: One commenter pointed out that openness that allows for broad participation encourages directness. Another commenter pointed out that the public has the right to ensure that the assessment and restoration are done accurately and thoroughly. Some

commenters noted that such participation will help find the most cost-effective actions and equitable damages. Other commenters noted that the public has an important and legitimate interest in the process and, in many cases, members of the public have expertise in a particular area of concern and can help with the assessment as well as restoration process. This commenter also noted that public participation is needed as a counterweight to the RP's participation. One commenter pointed out that withholding information would impede public and scientific input into the assessment process. Several commenters noted that every effort must be made to ensure that the assessment and restoration process is conducted in an objective manner to preserve public confidence in the process.

Response: NOAA agrees that each phase of an assessment/restoration process, including prespill planning, should involve the public to the extent practicable. Members of the public are an excellent source of information about particular natural resources and available expertise in the community. The public, as the owners of the natural resources, have a real interest in the assessment and restoration and might provide a balanced representation of the public interest.

"Not Necessary"

Comment: Some commenters stated that there is no need for extensive public involvement in the assessment process since the public natural resource trustees are, after all, the representative of the public. One of these commenters stated that the trustees' involvement in developing plans and assessments satisfies OPA requirements of public involvement. Another commenter pointed out that OPA directs the trustees to act on behalf of the public.

Response: NOAA recognizes that the trustee(s) is, in fact, acting on behalf of the public. However, this relationship does not mean that the trustee(s) is not accountable to the public. The involvement of the public in the assessment/restoration process does not mean the trustee(s) is abdicating fiduciary duties to the public. One of these duties is to adequately ascertain the wishes of the public concerning the management of the public's natural resources.

"Scope/Extent"

Comment: One commenter stated that public participation should be limited to safeguarding the trustees' accountability. Some commenters stated that there should be some exceptions to the amount of public participation allowed for an assessment. For example, one commenter suggested that members of the public should be allowed access to raw data if they demonstrate they have the resources to carry out the analysis. One commenter stated that providing for less than full review and comment by the public might appear that the trustee(s) is trying to exclude the public from the process. Another commenter stated that public review of purely scientific data would probably not interfere with litigation or negotiations. Other commenters stated, however, that the public review and participation should be mandatory for the entire process, including any modifications of plans that have already been available for public review and comment.

Response: NOAA notes that there will undoubtedly be some exceptions to the public involvement in this process. After all, the trustee(s) simply may not have the budget or time to allow for extensive public involvement. There are times when quick action is necessary, in which cases it would be unreasonable for the trustee(s) to wait for an opportunity for a public meeting before acting. In fact, this need for expediency is another reason for involving the public in the prespill planning. Also, there may well be sensitive information that is simply not possible to make public, e.g., litigation-sensitive material relating to liability. NOAA agrees that public review of data would not, in many cases, delay litigation or the assessment/restoration process. Also, NOAA agrees that significant modifications to materials that have already undergone public review should also be reviewed wherever possible.

"Levels of Review"

Comment: Several commenters pointed out that the extent and degree of public involvement on a particular discharge would depend upon the particular situation and the type of activity. One commenter suggested that the trustee(s) could inform the public through press conferences, press releases, open meetings, and Federal Register notices. Other commenters pointed out that public participation in each stage of an assessment may be impossible due to the dynamics of the discharge and would overburden the trustee(s) staff and budget.

Response: NOAA has stated elsewhere that the extent and degree of public involvement must be left to the judgment of the trustee(s). There will undoubtedly be discharges in which public review of documents would be quite expensive when compared to the effects caused by the discharge. Costs associated with dissemination of information for review must be reasonable.

Comment: A few commenters suggested that NOAA is proposing greater public participation in the assessment process than is provided for in OPA.

Response: OPA describes the assessment process in terms of the restoration planning process. Therefore, NOAA believes the trustee(s) has the discretion to determine the level and extent of public involvement.

"Timing"

Comment: One commenter suggested that the public have notice and opportunity to comment after the Preassessment Phase, after the full assessment, and before the adoption of a restoration plan. Another commenter stated that OPA provides the public with an opportunity to comment before restoration plans are developed and implemented. One commenter suggested that the public should have the option to review any modification of the Assessment/Restoration Plan. Another commenter stated that even preliminary plans for discharges into sensitive areas should be open for public review and comment. Another commenter stated that public comment should not be requested until after the post-recovery restoration plan is developed. One commenter stated that public participation should be sought at the prespill stage, not during a discharge investigation. Finally, one commenter stated that public comment at any stage should be at the discretion of the trustee.

Response: NOAA is leaving the timing and scope of public involvement to the judgment of the trustee(s). Clearly, in most oil discharge cases, the trustee(s) will be unable to delay action to allow for public review of all actions. However, at the first sensible opportunity, the trustee(s) should inform the public of the state of the process and seek public review as appropriate. NOAA agrees that the best time for public involvement is in prespill planning when the trustee(s) is not engaged in actual discharge activities. This does not mean, however, that this prespill involvement would substitute for appropriate public involvement in the case of an actual discharge. NOAA also notes that the discussion of the assessment/restoration planning process, found in subpart C of this proposed rule, provides for the review of "significant" revisions.

"Notice of Meetings"

Comment: One commenter noted that notice of public meetings concerning an assessment should be timely and posted in a publication of general circulation.

Response: NOAA agrees that, to be successful, notice of any meeting seeking public input must be published in a timely and visible manner and in a local publication of general circulation.

"Delays"

Comment: Several commenters noted that public involvement should take place during the response planning stage, not during an incident when such involvement might delay the response. These commenters noted that opening up the entire assessment process would significantly decrease efficiency and could interfere with an objective evaluation of the situation. Some of these commenters also noted that such public involvement in early restoration planning could delay the early start on restoration actions that may be possible. One commenter noted that delays caused by public involvement might increase the damages owed by the RP(s).

Response: NOAA emphasizes that the overall goal of this proposed damage assessment rule is to get from a discharge to the recovery of affected natural resources and services as quickly as possible. Therefore, unnecessary delays should be avoided wherever possible. However, as discussed elsewhere in this preamble, public involvement does not necessarily mean holding a large public meeting for each and every discharge. The same principle works in restoration planning and implementation. The trustee(s) is not serving the public if his actions slow down the healing process. However, the RP(s) is responsible for all reasonable damages caused by the discharge. When public natural resources are affected, it is reasonably foreseeable that the trustee(s) must comply with certain administrative processes and may have the duty to inform and involve members of the public during that time.

"Litigation Concerns"

Comment: One commenter noted that public comment specifically on the issue of the economic damages would strengthen those figures and increase the likelihood of successful recovery. However, another commenter noted that the trustee(s) needs free and open discussion of options with staff, outside of the public domain, as part of litigation approach. Another commenter noted that putting out the proposed restoration plan that would show proposed acquisition of land as an approach would cause a sharp increase in the price of that land.

Response: NOAA recognizes that public review and comment on various aspects of a study plan is a desirable goal. However, public information laws, such as the Freedom of Information Act (FOIA), take note of the fact that there is an exception to public review where a free discussion of litigation strategies or other sensitive issues are necessary. Also, any descriptions of land to be acquired as part of a restoration plan should remain general so that the prices would not be elevated.

"Limits on Public Involvement"

Comment: Several commenters noted that public involvement should be limited to the Congressional intent as shown by section 1006(c)(5) of OPA, which calls for opportunity for public involvement in restoration planning.

Response: NOAA notes that the section 1006(c)(5) requirement for public involvement in restoration planning is read as a minimum requirement in OPA. The clear Congressional intent revealed in OPA and its legislative history is that the public be involved in a meaningful way. Therefore, NOAA hopes to ensure that goal is met.

"Public Involvement in Restoration Planning"

Comment: Most of the commenters agreed that public involvement is necessary in the development of restoration plans.

Response: NOAA agrees that the development of restoration plans should be open to public involvement as noted above.

"Rebuttable Presumption"

Comment: One commenter noted that an assessment based upon a restoration plan that had not been developed with public review and comment would not receive the rebuttable presumption.

Response: NOAA points out that OPA specifically requires public review and comment on restoration plans. As noted earlier, however, full restoration planning for hundreds of small discharges may not be possible for all trustees. In such cases, the trustee(s) should consider developing regional or local plans that would go through the public review and comment process, receive the rebuttable presumption, and be ready to implement when funding is available.

"Citizen Oversight Committees (COC)"

"COC: Advantages"

Comment: Many of the commenters noted that allowing representatives of local groups to either attend trustee meetings to monitor the assessment process or participate in oversight committees will further the goal of meaningful public participation. One commenter pointed out that such participation is needed to gain a full understanding of effects on the affected community. Another commenter stated that such public involvement is crucial if jointly conducted, phased assessments are permitted. Another commenter suggested that assessment groups or teams should give adequate notice to and be open for public participation.

Response: NOAA agrees with the goal of involving the public and keeping the public informed of progress of the assessment and restoration of its natural resources. It is also expected that such public participation will add to the information pool available to the trustee(s). The point raised by the commenter that public involvement is needed in joint RP-trustee assessments, is well taken. If such efforts are to succeed, they must be conducted in the open. Finally, NOAA agrees that the public must be aware of the opportunities for involvement. Notice of meetings should be given in the manner most appropriate for any particular assessment.

"COC: Disadvantages"

Comment: Several commenters argued that there is no need for such groups since the trustee(s), the source of expertise in this area, is the representative of the public. Others warned that such oversight would impede the assessments, negotiations, and subsequent restoration efforts, if for no other reason than the sheer numbers of persons involved. Another commenter noted that this involvement would also greatly add to the cost of the assessment and restoration.

Response: NOAA agrees that the resource management agencies do have a wealth of expertise concerning their natural resources. Because no trustee can be omniscient, agencies must remain open to new sources of information. It is also unlikely that the process would be overwhelmed by vast numbers of citizens wanting to participate. In most cases, citizen or environmental groups represent the general views of the community and serve as focal points for interaction. Any discharge that invokes the personal interest of large numbers of people is

clearly a discharge that needs public involvement. NOAA does not wish to suggest that these groups are being given the responsibility of running the assessment/restoration process. NOAA does not read the term "oversight" to mean "control." The trustee(s), by law, cannot give up their trust duties. Therefore, the citizen groups cannot have decision or arbitration authority. The term "oversight" in this context simply means participation, not authority. Public participation in this rule does not include "oversight" of management functions. Although the costs of preparation of materials and distribution of such materials would be considered part of the regular costs of an assessment, the costs borne by citizens interested in attending meetings or other citizen-borne costs of participation would not be included in the assessment costs.

"COC: Makeup of COC's"

Comment: Several commenters noted that Citizen Oversight Committees (COCs) should involve groups with environmental expertise in a systematic way to increase the collective knowledge available during an assessment. Another commenter suggested that a group similar to the National Science Foundation or the National Academy of Sciences could help minimize decisions and associated expenditures founded on poor science or made for political reasons.

Response: NOAA notes that the makeup of any group representing the public interest is highly incident-specific. The types of interest groups or organizations noted in these comments are good examples of groups that are likely to contribute the most to an assessment and restoration.

"COC: Optional"

Comment: Several commenters noted that, if NOAA decides to include a provision for a COC in the rule, this involvement should be strictly optional at the discretion of the trustee(s). Several other commenters, however, pointed out that, even if such provisions were optional, groups would come to see this participation as an entitlement and would demand it in each case.

Response: NOAA notes that the fear of some kind of "entitlement" specter should not prevent the trustee(s) from carrying out their duties in the most appropriate manner for a particular discharge. This proposed rule strongly encourages public involvement in assessments, but leaves the timing, scope, and extent of such participation to the judgment of the trustee(s). No national rule could possibly cover all scenarios that might arise due to a discharge of oil; therefore, this proposed rule must leave the trustee(s) with the flexibility to tailor the process to fit the discharge.

VI. Participation of the Responsible Party

While liability and responsibility of the RP(s) for removal and/or response activities are addressed clearly in OPA, little guidance is given in either the statutory language or the legislative history concerning the role of the RP(s) in the assessment process.

The degree of involvement of the RP(s) in the assessment process will likely have a direct bearing on several aspects of the assessment. For instance, active and early involvement of a cooperative RP(s) may eliminate some of the problems trustees have encountered immediately following a discharge of oil, such as the lack of funding, personnel and equipment. In addition, a joint trustee/RP assessment may be more cost effective and avoid duplicate studies by the trustee(s) and RP(s).

After reviewing and analyzing all comments concerning this issue, NOAA's proposed rule strongly encourages RP involvement but leaves the ultimate decision with the trustee(s) and RP(s) on a case-by-case basis. The reasons were many, varied, and well argued by the numerous commenters that expressed an opinion on this issue ranging from full to no involvement, but it is impossible to dictate through this proposed rule a one-size-fits-all solution for all discharges. The trustee(s) is entrusted by Congress in section 1006 of OPA to assess natural resource damages and develop and implement restoration plans. While active RP involvement is the preferred method of conducting assessments, the trustee(s) can ill afford to delay assessment activities while attempting to entice RP involvement.

In determining the nature of RP involvement in the assessment/restoration process, the trustee(s) and RP(s) have many opportunities for cooperative participation, from preassessment activities to implementation of restoration activities.

Preassessment Phase: As noted in this preamble and in subpart B of the proposed rule, this step requires the collection of preliminary data concerning the circumstances of the discharge, characteristics of the oil, nature of the receiving environment, and characteristics of the affected natural resources and services potential for further injury to natural resources. Based upon this information, the trustee(s) will determine which, if any damage assessment procedure to proceed. While there is no specific time limit for the Preassessment Phase, the effectiveness of this phase will depend on how early the trustee(s) is able to gather that information. Since time is critical, the proposed rule does not require that the trustee(s) invite the RP(s) to participate in this phase. It is the option of the trustee(s) whether to invite the RP(s) to participate and enter into an agreement to gather Preassessment Phase information. In making this determination, the trustee(s) should consider, but not be limited to, the following factors: whether the RP(s) has been identified; the willingness of the RP(s) to participate in the preassessment; the willingness of the RP(s) to pay preassessment activities; and the ability of the trustee(s) to conduct the Preassessment Phase in a timely and cost-effective manner.

The completion of the Preassessment Phase includes written notification to the identified RP(s), by the trustee(s) of the decision to proceed with further damage assessment procedures. The proposed rule provides that the trustee(s) must invite the RP(s) to participate in the assessment process, if it is reasonably practicable to do so. The RP(s) has ten calendar days in which to respond. If the response is positive, the trustee(s) and RP(s) begin negotiations as soon as practicable on an agreement detailing the RP(s) involvement. Should the trustee(s) determine that the RP(s) is no longer participating in good faith, but is using participation as an opportunity to obstruct the assessment, the trustee(s) may terminate the agreement. The trustee(s) may proceed with necessary assessment actions such as the assessment/restoration plan and necessary data collection during those negotiations, although the initial plan may have to be modified before public review, once RP involvement is established. It is expected that all parties will negotiate in good faith, realizing that a cooperative assessment will likely result in the implementation of assessment and the resultant restoration activities as soon as possible. If, however, some type of agreement (including a phased joint agreement discussed later or an agreement to agree in the future) cannot be reached within 45 calendar days, the trustee(s) may terminate the negotiations.

Phased Joint Assessments: To encourage cooperation between the trustee(s) and the RP(s), the proposed rule authorizes the trustee(s) and the RP(s) to enter into a phased joint assessment administrative procedure for conducting assessments. A phased approach to conducting joint assessments is authorized due to the

apparent reluctance of the trustee(s) and RP(s) to agree to work together before the actual assessment process begins. The phased approach may allow a working relationship to develop between the trustee(s) and RP(s) yet allow maximum freedom to both parties should the joint process be determined unworkable.

The assessment process may be divided into distinct phases and components, and the RP(s) may be invited to participate in the various phases and components. Prior to the beginning of each phase or component, the RP(s) and trustee(s) may enter into an enforceable agreement to conduct that particular phase or component. The responsibilities of each party, including financial contributions by the RP(s), will be identified in the agreement with provisions for termination of the agreement and for nonperformance. The agreement should identify who should collect the data and under what guidelines. The agreement should also include provisions for actual possession and ownership of data jointly collected and for funding. In addition, the parties could agree who will analyze the data, and what criteria will be used in the analysis. The use of oversight groups or public involvement might also be addressed.

While it may be most expedient for the trustee(s) and RP(s) to use internal personnel for data collection and analysis, such use may not be possible. Should both parties not be able to agree upon the use of joint internal personnel, the data gathering and/or preliminary analysis of the data may be contracted out to an agreed upon third party. Regardless of who conducts the assessment activities, the trustee(s) maintains management and control of all such activities. Once each phase or component is complete, the data collected and analyzed will be provided in the administrative record, and will eventually become part of the Report of Assessment.

The key incentive to a phased joint assessment is the agreement that the trustee(s) and RP(s) are limited to the use of the jointly collected data for that phase or component, even though they might not enter into an agreement for the next phase or component. For example, the trustee(s) and RP(s) may enter into an agreement to jointly collect data for all injury determination studies. Once the data are collected, the parties decide to forgo any other joint ventures. However, both parties are barred from introducing collateral data collected outside the assessment process for the injury determination studies covered by the agreement. Each may conduct his own analysis of that existing data, but the injury determination data collected outside the joint venture could not be entered in the administrative record of the assessment, and thus remain outside the assessment process and any judicial determination under OPA. The purpose of the bar on collateral data is to encourage cooperative assessments instead of the trustee(s) and RP(s) conducting separate, duplicative assessments. Where a joint phase or component is completed, it is a waste of time and money for either party to repeat the study. To make this provision clear and enforceable to all parties and equally enforceable, the regulations suggest that the bar be spelled out in the enforceable agreement as well as provided for in § 990.17 of the proposed rule.

Assessment Phase

Assessment Component: The agreement to conduct portions of the assessment component of the Assessment Phase should be as specific as possible, with trustee and RP activities identified. NOAA suggests that the following steps of the assessment component be considered for joint agreements for Expedited and Comprehensive Damage Assessments: Injury data collection and/or analysis of injury determination data to quantify loss of natural resources' services. When practicable, the trustee(s) and RP(s) are encouraged to combine data collection and analysis into one agreement, resulting in a more efficient assessment process.

Restoration Component: As with the rest of the assessment process, the degree of participation of the RP(s) in developing the restoration component is discretionary with the trustee(s) and RP(s). However, the use of the knowledge and expertise of many RPs could be useful to the trustee(s) and is encouraged. The proposed rule provides that the trustee(s) must invite the participation of the RP(s) in the restoration planning process if the RP(s) has participated in the earlier assessment activities to date. In determining whether to invite the RP(s) into the restoration process, the trustee(s) should consider, but not be limited to, the following factors: (1) The willingness of the RP(s) to participate and the reasons the RP(s) was not involved in the earlier assessment activities (an uncooperative RP may have delayed the earlier assessment process, or was unable to participate, but is able to do so in the restoration effort; if the RP(s) has already indicated no interest, it would be a waste of time to invite him to join in the process); (2) the ability, i.e., knowledge, expertise, unique natural resources, etc., of the RP(s) to participate in the restoration process; and (3) the willingness of the RP(s) to pay for restoration activities and for trustee costs.

If the RP(s) is involved in restoration, the trustee(s) and the RP(s) shall develop a joint agreement describing the specific responsibilities of the RP(s) and trustee(s). The agreement should cover the activities of the RP(s) related to determination and implementation of restoration activities. Since it is likely a range of possible restoration activities and costs will be identified early in the injury determination component, the development of a restoration component of the DARP is actually initiated in the Assessment Phase. Some RPs may want to actively assist in developing and implementing a restoration plan. Others may prefer to pay the damages and leave the restoration activities to the trustee(s). Again, agreements should include specific responsibilities of the trustee(s) and RP(s). Such agreements could cover the determination and implementation of restoration alternatives.

Management Structure: NOAA does not propose a specific management structure in order to conduct either a trustee or joint trustee-RP assessment. However, NOAA recommends that the trustee(s) establish committees or teams to manage the assessments. The core members of these committees may already be selected in the prespill plans. As discussed earlier, the committees should have a lead administrative trustee and include representatives from all affected trustee agencies and provide opportunities, ad hoc, for involvement from response agencies and other interested parties, as deemed necessary by the trustee(s).

Other Party Involvement: A great number of commenters indicated a real concern that RP involvement will result in less than complete recoveries through less than comprehensive assessments. To ensure that the assessment and recoveries are adequate, the proposed rule authorizes and encourages the trustee(s) to provide for "outside" review of assessment/restoration plans by the scientific and economic communities. Comments as a result of the "peer review process" will be a part of the administrative record. Peer reviewers will be selected by the RP(s) and trustee(s). The trustee(s) should consult local and/or national interest groups, scientific agencies, and universities for suggestions of appropriate reviewers.

Also, the joint-management team will keep the public informed of the progress

of the assessment/restoration process and will allow public review and comment of the on-going assessment and restoration plans. In addition, at the discretion of the trustee(s), representatives of local interested groups may be invited to attend assessment management meetings to monitor the decisionmaking process.

Participation of the Responsible Party

Response to Comments

Comment: Some commenters recommended that all prespill planning efforts be channeled through the development of the Area Contingency Plans under section 4202 of OPA.

Response: NOAA agrees. When practicable, the trustee(s) and potential RP(s) should use existing planning mechanisms to coordinate their efforts. To do otherwise would be inefficient and duplicative. Industry should be strongly encouraged to participate in and/or coordinate with the technical working groups of the Area Committees (including appropriate trustees) in the development and update of Area Contingency Plans. Such plans identify and rank sensitive environments and define appropriate protective strategies and removal technologies. In addition, such prespill meetings with industry would allow the trustee(s) to clarify the damage assessment process. Where prespill planning is appropriate, the trustee(s) is still encouraged to involve potential RP(s) in prespill planning and identification of potential natural resources at risk.

RP(s) Involvement in the Assessment Process (General): While the comments were very numerous and often very detailed on this subject, they largely fell into two categories: (1) No RP involvement vs. unlimited RP involvement and (2) RP involvement is possible under some circumstances, with appropriate trustee oversight. The comments and responses for this section follow these general categories.

Comment: Commenters indicated a wide range of views on this issue, from unlimited RP involvement to no RP involvement, except to pay the required damages. In this vein, many commenters stated that the RP(s) will approach the damage assessment process with the goal of minimizing the injury and resulting damage assessment. A multiple trustee conducted assessment is difficult enough, but allowing the RP(s) into the process could disrupt the assessment. Others indicated further potential problems, claiming that allowing the RP(s) in the assessment process is tantamount to allowing the RP(s) to determine its own damages. In any assessment, it is in the public's interest to conduct a full and fair assessment. It is in the interest of the RP to show little injury so that the damages will be lessened. Others were concerned that consultation and involvement of the RP in the assessment process may seriously prejudice the trustees' ability to recover damages, particularly through negotiations. Any involvement of the RP should require unanimous approval of the trustees.

Many commenters expressed the opposite view, claiming that the opportunity for RP involvement in a damage assessment is a legal necessity as well as fortuitous. Since the damage assessment process determines the amount of damages the RP will pay, it would be unfair to exclude the RP from the process. In addition, the RP would serve as a control on "state and federal bureaucrats," ensuring that assessments would be cost-effective. At least one commenter indicated that assessments conducted without providing the RP the opportunity to participate should not be awarded the force and effect of a rebuttable presumption. Others indicated that while the RP's interests may be different than those of the trustees, involvement of the RP will likely encourage the RP to pay the damages rather than challenge the assessment in court. Other possible advantages of RP involvement included: Elimination of costly duplication of studies; ensuring that studies/investigations are planned to answer pertinent questions; and providing another source of funding for studies that must be conducted in a timely manner. RPs are fully aware of the legal responsibilities under OPA and are quite willing to cooperate with the trustee(s) to resolve them in a fair and timely fashion. Others justified substantial and preferential involvement of the RP based upon the ruling in *Ohio* v. *Department of the Interior*, which upheld DOI's decision to allow greater RP participation than the public as a whole. Other commenters insisted that any participation by the RP is at the discretion of the RP and/or the trustee(s).

Other commenters stressed that cooperation must work both ways. The trustee(s) should also be willing to cooperate with the RP. The commenters noted that it can be more expeditious for the RP to fund the work, with oversight or "audit" by the trustee(s). Some RPs (either foreign or domestic based) may have neither the motivation nor the resources for close cooperation with the trustee(s). Such RPs should not be penalized for not participating to the fullest possible extent. Some suggested that public perception of the RP conducting the assessment might be helped by agreeing in advance upon a list of "pre-approved" consultants to assist in "peer review" and/or to carry out the actual studies. The use of assessment "over-sight" groups consisting of RPs, scientists, environmental groups and the public was also suggested. One commenter suggested that a generic agreement be drafted by representatives of trustees and RP and be provided as a model agreement for use in the event of an actual discharge. This agreement would identify the activities of the RP and trustees leaving little need for additional negotiations for specific discharges. This model agreement would have gone through a public review process and the roles of the respective parties would be already identified, thereby reducing the time needed to negotiate specific activities and ensuring that the public's concerns were addressed.

Response: Many of the concerns over RP involvement represent actual discharge scenarios where involvement of the RP(s) was difficult and frustrating to the trustee(s). On the other hand, the advantages of a cooperative RP in an assessment have resulted in smooth assessments and a focus on the environment, not the courthouse. It is virtually impossible for the proposed rule to dictate the level of involvement of the RPs in every possible assessment. Each discharge will present a different set of circumstances, with different RPs and trustees. As explained elsewhere in the preamble the eventual degree of involvement of the RP(s) is at the discretion of all the trustees involved in the assessment and RP(s). On the whole, cooperative involvement of the RP(s) will likely provide many benefits to the assessment process, but currently trustees and RPs have little experience in conducting cooperative assessments. The proposed rule reflects this lack of experience, and strongly encourages that the trustee(s) first look to a cooperative assessment, even if such cooperation can only be fostered through the use of a series of joint agreements. However, OPA does not necessitate the loss of the rebuttable presumption due to lack of RP involvement and neither does the proposed rule. Since participation of the RP is optional on the part of the RP(s) and trustee(s), those opting not to participate are not penalized. The assessment remains under the direction of the trustee(s).

NOAA agrees with the suggestion that a model agreement would be beneficial and provides a sample of such an agreement for comment in Appendix B.

Such an agreement, however, would not be mandatory. NOAA perceives that trustees and potential RPs are on the verge of conducting a new generation of cooperative assessments, but they need time to work out the details and provide for adequate checks in the process. The proposed rule provides for that period of testing and adjustment.

A large number of commenters also expressed the opinion that RP involvement is helpful in some phases of the assessment if conducted under the oversight of the trustee(s). However, there was little agreement over which phases of an assessment might be appropriate for RP involvement and the appropriate degree of oversight. Various phases of the assessment and respective comments are discussed below.

Comment: Some commenters were strongly opposed to allowing the RP(s) more access to the assessment process than the public in general. Others indicated that additional access was a right accorded the RP(s), because of the financial stake of the RP(s). One commenter contended that the RP could serve in an "advisory" role to avoid duplication of effort and studies. Another commenter noted that, although the RP has the constitutional right to participate in the assessment, participation is discretionary on the part of the RP and cannot be mandatory.

Response: The proposed rule does provide the RP(s) with more access to the assessment process than the general public. This is consistent with other provisions in connection with oil discharges, i.e., the response and cleanup. The greater access is not because of the financial stake of the RP(s), it is NOAA's position that a cooperative RP can assist in restoring the environment in as short a time as possible and, like the cleanup, may be able to provide services, funding and/or personnel not available to the trustee(s) in either a cooperative or advisory role. However, the trustee(s) is required to keep the public informed of the participation of the RP(s) and provide an opportunity for meaningful public participation, not only regarding the involvement of the RP(s), but for the entire assessment process. Also the RP(s) does have the right to refuse participation.

"Preassessment"

Comment: Concerning the preassessment, several commenters indicated that since preassessment decisions need to be made quickly, involvement of the RP would likely delay the process. Involving the RP in the preassessment may prevent the trustee(s) from fully exploring all the options for the assessment and resulting restoration activities. Others indicated that the RP should be invited to participate from the onset of the discharge, since it is possible that the RP can provide data necessary for use in the preassessment to determine the nature and extent of subsequent assessment activities. A cooperative preassessment would likely foster a cooperative assessment and possible early settlement of claims. In addition, early RP involvement does not prejudice public participation, since the assessment/restoration plan will be available for public review.

Response: The proposed rule encourages the trustee(s) to involve known RPs in the Preassessment Phase. However, because of the constraints in the Preassessment Phase, the proposed rule does not require the trustee(s) to invite the RP(s) into the preassessment. The various affected trustee agencies must focus the initial efforts into coordinating their early efforts and coordinating with the OSC agency. Efforts to involve the RP(s) should not detract from this focus.

"Assessment/Restoration"

Comment: Commenters who agreed with the general principle of RP involvement indicated that the assessment and restoration components of the assessment are the most appropriate for such involvement. However, the nature and extent of this involvement were widely contested. Concerning the initial invitation and acceptance, many commenters indicated that the thirty-day waiting period after Notice of Intent To Perform An Assessment provided in 43 CFR part 11 is not practicable for discharges of oil and some recommended a ten-calendar day period for response from the RP. Considering the degree of involvement, some commenters indicated that the RP can provide very useful information and financial resources for planning the assessment/restoration that might be unavailable to the trustees. An assessment/restoration plan developed with the full involvement of the RP will likely be cost effective and efficient. In addition, the RP would likely be more willing to participate in the assessment and restoration activities if involved in the planning process. One commenter noted that participation by the RP should also allow for keeping the RP informed as to how monies recovered are spent in restoration. Some commenters recommended the RP's role be similar to response actions, where the RP could develop and submit plans to assess natural resource damages to the trustee(s) for their approval. Once approved, the RP could implement the plans under the direction and monitoring of the trustee(s). One commenter recommended that the degree (size, duration, etc.,) of the discharge is immaterial to the involvement of the RP in the assessment process. Another commenter asked for clarification of what circumstances might justify denial of RP participation.

Others recommended a more limited role for the RP, i.e., the up-front funding or the conduct of actual assessment and restoration activities planned and approved by the trustee(s). However, such involvement must be tempered by the realization that under OPA the trustee(s) is ultimately and continuously responsible for all assessment/restoration activities, regardless of who pays for and/or conducts them. Some commenters indicated that OPA requires that the trustee(s) develop and implement a restoration plan, and any involvement of the RP contravenes this statutory mandate. One commenter noted that a "requirement" to invite RP participation contradicts the statement in the proposed rule that such participation is at the discretion of the trustee.

Response: The nature of these comments and past experience with oil discharges indicate to NOAA the wide range of concern as well as support concerning RP involvement in any natural resource damage assessment. In some instances, extensive participation of the RP(s) has led to an early settlement of claims. In other assessments, RP involvement has, from the trustee's point of view, resulted in undue delays and a laborious process. The proposed rule follows NOAA's general philosophy of active involvement of the RP(s), but leaves the degree of that involvement up to the trustee(s), since it is the trustee(s) who is ultimately responsible for the conduct of the assessment/restoration process. The trustee(s) is encouraged to invite the known RPs to be involved in the assessment/restoration process. If not contacted during the Preassessment Phase, the trustee(s) should contact the known RPs as soon as practicable following the determination to proceed with some form of assessment procedure. The RP(s) should indicate a willingness to participate within ten days of receipt of the invitation. The trustee(s) and interested RP(s) should begin negotiations concerning the degree of involvement as soon as possible following that ten-day period.

Incentives for the trustee(s) to involve the RP(s) are numerous, including a less litigious atmosphere, possible immediate funding for assessment

activities, and additional data and personnel support. The RP(s) should also recognize the advantages of involvement, including lower costs since dual assessments may be avoided. The RP(s) can also often provide considerable expertise in the effects of oil upon natural resources and benefit from the public perception that there is a real interest by the RP(s) in restoring the environment.

Both parties should negotiate in good faith, with restoration of the environment as the ultimate goal. The participation of the RP(s) throughout the entire assessment/restoration process need not be established, and parties are free to negotiate a series of agreements as the assessment/restoration continues. The involvement of the RP(s) should be clearly identified in the DARP, so that appropriate review and comment will be accorded. All assessment/restoration activities must remain under the direction and responsibility of the trustee(s), although the trustee(s) may allow the RP(s) to conduct all or part of an assessment. As with all restoration components and assessment components under EDA and CDA, appropriate peer review must be provided to ensure that the components are adequate. In addition, the trustee(s) is reminded that the ultimate responsibility and results of the damage assessment rest with the trustee(s).

While the size of the discharge may be immaterial to the basic decision of RP involvement, it is relevant to the degree of RP involvement. Discharges appropriate for the compensation table or the Type A model require minimal assessment activities; therefore possible RP activity would be limited to restoration planning and implementation, unless the RP(s) opted to finance and possibly conduct either an EDA or CDA.

"Phased Joint Assessments"

Comments: During the workshops and the March 13, 1992, ANPRM, NOAA presented the concept of a "phased joint assessment," allowing the trustee(s) and RP(s) to jointly conduct certain phases of an assessment. Commenters indicated that, for joint work, industry would need some assurance that the damages amount determined by the process is reasonable and supportable. Others indicated that such agreements should be designed to avoid the conduct of dual assessments and provide provisions for nonperformance. Some commenters indicated that nonperformance provisions should only apply to RPs and not trustees, since the financial obligations for the assessment always rest with the RP.

Others suggested a dispute resolution mechanism involving impartial third parties. At least one commenter stressed that it must be absolutely clear that completion of one phase indicates no obligation to proceed with another phase. Such agreements would give the RP(s) the greatest incentive to participate in and fund the assessment work, and still allow the trustee(s) to ensure that the assessment is carried out in accordance with OPA. Some commenters indicated that the joint assessment process may work well for data collection and analysis or for determining the extent of injury to the natural resources. However, some thought this cooperation would be unacceptable in the economic valuation portion of the assessment process where the actual amount of damages is determined based upon that injury because of the controversial nature of such damages in the RP community.

Response: The proposed rule authorizes the trustee(s) and RP(s) to enter into enforceable agreements in order to conduct any phase or component of a natural resource damage assessment. The purpose of these agreements is to foster cooperation when practicable and provide incentives to both the trustee(s) and RP(s) to meet their respective obligations. The phased joint assessments are not mandatory and may cover any phase or component in the assessment process. The completion of one agreement does not obligate either the trustee(s) or the RP(s) to any further joint activities. Since these agreements can cover distinct phases, NOAA does not deem it necessary for third party dispute resolution, although non-binding mediation has been suggested. If disputes could not be settled through regular trustee and RP channels, parties could agree to terminate the agreement and not participate in any further joint activities.

These agreements seem most appropriate for the conduct of assessment/restoration activities, but are certainly allowed for preassessment activities. The trustee(s) and RP(s) will most likely use these agreements for the EDA, since a cooperative RP is important to that procedure, and there is a limited suite of studies upon which agreements could be negotiated and finalized in a reasonable amount of time. However, these types of agreements may also be applicable to a CDA, where the trustee(s) and RP(s) wish to eliminate dual assessment studies.

NOAA disagrees with the general notion that nonperformance provisions should only apply to RPs. Trustee agencies should also meet their agreed upon duties.

VII. Compliance/Conflict With Applicable Laws

Section 990.18 pertains to the relationship of this proposed rule to other laws. Section 990.18(a) requires that the trustee(s) comply with all human worker health and safety requirements, as specified in the NCP. In many cases, the conduct of an assessment will require extensive field work during an actual discharge and/or cleanup. The trustee(s) is responsible for ensuring that the assessments are conducted in accordance with those applicable laws.

Section 990.18(b) provides that other environmental and procedural laws also apply to the assessment/restoration process. This proposed rule mentions some of the more well-known laws, but the indicated list is for the purpose of example and is not inclusive.

Subsection (c) mirrors the OPA provision that OPA does not preempt state oil spill laws and related regulations, thus allowing for the potential for possible duplicative and conflicting claims and recoveries. Since section 1018 of OPA does not prevent states from establishing additional liability as a result of a discharge of oil, this proposed rule cannot require state trustees to adopt or follow the procedures promulgated by NOAA in lieu of other state laws or damage assessment schemes. However, since OPA also prohibits the double recovery of natural resource damages, all trustees will be encouraged to conduct joint assessments and present a total unified claim for damages. Such claims should be deemed sufficient by the trustees to restore the injured natural resources and/or services and for diminution in values until restoration is complete.

As discussed in the "Use of Sums Recovered" section of this proposed rule, any monies received under OPA must be used to restore, rehabilitate, replace, or acquire the equivalent of the affected natural resources and/or services. In this proposed rule, NOAA encourages the trustee(s) to concentrate upon "fixing the resources" and not be distracted by ill-fated ventures of attempting to divide the natural resources and pursue individual claims.

The unified trustee approach will also encourage participation from the RP(s), instead of a multi-assessment process that would encourage the RP(s) to pursue litigation in order to lessen the number of claims. In addition, unified trustees will allow the pooling of resources for a more effective assessment and, if necessary, litigation.

While NOAA cannot require the coordination and cooperation of all trustees, there are some incentives for such cooperation. For example, state trustees should be encouraged to coordinate with federal trustees, since section 7 of E.O. 12777, 56 FR 54757 (October 22, 1991), requires that monies from the Fund for the "initiation of assessments" are provided to the federal trustees. The federal trustees may then distribute such monies to other trustees.

As discussed in "Trustee Coordination" and "Prespill Planning," many of these potential conflicts could be settled in advance of an actual discharge.

Response to Comments

Compliance With Applicable Laws and Statutes

"Double Recovery"

Comment: Many commenters were concerned that since OPA does not preempt state laws, the trustee(s) would pursue claims under both state law and OPA, thereby using conflicting methodologies and enhancing the possibility of double recovery. Some suggested that the NOAA regulations should preclude recovery under OPA if damages were being pursued under state law. Others suggested that NOAA require that the trustee(s) proceed under either state law or OPA and thereby waive all claims under the statutory scheme not selected. Some commenters, recognizing that NOAA could not direct the trustee(s) to forgo claims under applicable state or federal statutes, suggested that early coordination among the trustees be strongly encouraged to avoid parallel assessment and claims procedures. Other commenters suggested that double recovery can be avoided by the trustees conducting joint assessments resulting in a single unified claim.

Response: NOAA agrees with the last commenters. Where Congress has specifically declined to preempt state law in section 1018 of OPA, NOAA's proposed rule cannot force trustees to limit their options under applicable state or federal law. However, the regulations do encourage early coordination among the trustees and, in accordance with section 1006(d)(3) of OPA, prohibit double recovery. Congress, in the Conference Report accompanying OPA, encourages coordinated assessments but does not preclude parallel assessments. (H. Con. Rep. No. 101–653, 101st Cong. 2d Sess. 109 (1990).) Accordingly, NOAA has determined that the proposed rule cannot require joint trustee assessments. NOAA emphasizes, however, that trustees must recognize the potential of violating the double recovery prohibition if separate assessments are conducted, and trustees are encouraged to avoid even the appearance of double recovery by conducting a single joint assessment. In addition, the possibility of multiple assessments will likely foster litigation between the trustee(s) and the RP(s), thus delaying the assessment and restoration process. NOAA also notes that the trustee(s) could address many of these concerns through prespill planning and coordination.

Comment: While double recovery is clearly disallowed under OPA, NOAA received comments that argued that natural resource damage assessment regulations must guard against "counting any resource for two purposes."

Response: Injury to a given natural resource and the attributable cost of restoration, rehabilitation, replacement, or acquisition, can only be assessed once for purposes of a compensable claim. However, OPA also provides for recovery of diminution in value during the interval between the discharge and complete restoration. Any number of "service flow" costs, attributable to the natural resource injury, may be appropriately claimed, under OPA rules. These compensable losses would be additive, and would not constitute double recovery. Therefore, it would be incorrect to suggest, as the comment cited above seems to, that the OPA rules disallow counting any resource for two purposes.

Comment: One commenter expressed concern over the lack of discussion of the applicability of the National Environmental Policy Act (NEPA) to the assessment/restoration process.

Response: NOAA, in a change from the earlier notice, has determined that NEPA does apply to the assessment/restoration actions conducted by the trustee(s) following a discharge of oil. NEPA requirements should not pose an additional burden in time and effort on the trustee(s), but will be incorporated into the assessment/restoration process.

Comment: Some commenters pointed out that certain states are in the process of completing, or have completed, procedures for conducting natural resource damage assessments. Concerns were raised over the possibility of conflicting procedures.

Response: NOAA fully recognizes that states have the authority to develop their own assessment procedures under applicable state law. NOAA has attempted to consider the different procedures in the course of the rulemaking, but since many state statutes do not require that the measure of damages be the same as OPA, many procedures are not applicable to this rulemaking or OPA. When possible, NOAA has attempted to be as consistent with the applicable state procedures. It is also expected that the states currently contemplating developing assessment procedures will attempt to be consistent with this proposed rule.

Comment: One commenter was concerned that a unified trustee approach may not always be practical, particularly where the RP is also a trustee.

Response: If those circumstances would arise, a unified approach may still be possible, but different representatives of the trustee/RP may need to be identified for either RP or trustee purposes. Of course, there may be circumstances where parallel assessments would be preferable until liability issues were settled with the RP/trustee.

Comment: Commenters also raised the issue of trustee conflicts over ownership of a particular resource, and that the regulations should attempt to clarify which resources should be appropriately claimed by which trustee. Other commenters indicated the regulations should not attempt to address the issue.

Response: NOAA agrees with the latter approach. Congress provided very broad authority for federal, state, tribal and foreign trustees to claim trusteeship over natural resources. Section 1006 of OPA states that each trustee entity may exert trusteeship over natural resources "belonging to, managed by, controlled by or appertaining to" that trustee entity. See 33 U.S.C. 2706(a). Additionally, many natural resources fall within the trusteeship of two or more trustees. For example, a salmon spends part of its life in federal waters, and part in state waters. Further, a tribe may also have certain rights over the salmon. Thus, rather than waste time and resources on negotiations and litigation in allocating natural resources into federal, state, tribal, and possible foreign categories, NOAA encourages the trustees to conduct unified assessments, complete with restoration plans that address the affected natural resources as a whole and not as a trustee-specific piece-meal process. Trustees are encouraged to remember that the purpose of the OPA assessment/restoration process is to restore affected natural resources and/or services in an efficient and orderly manner. Arguments over such things as the ownership of a duck merely delay this process and, from the duck's point of view, are immaterial. As mentioned

earlier, trustee prespill planning and coordination could alleviate this concern.

VIII. Review of Regulations

Although OPA does not contain a specific provision for the update of this proposed rule, NOAA strongly believes that the proposed rule must be reviewed on a regular basis to keep the procedures current with new developments. Therefore, NOAA is recommends that this proposed rule be reviewed and revised as appropriate at least every five years.

Preassessment Phase

Subpart B Preamble

General

Purpose/Scope

Natural resource damage assessment begins with the Preassessment Phase. The Preassessment Phase provides guidance to the natural resource trustee(s) for early action in the case of a discharge of oil through a two step process: (1) Preassessment Determination; and (2) Damage Assessment Determination. The first step or Preassessment Determination requires a decision by the trustee(s) to continue with the Preassessment Phase. Once preassessment is justified, the trustee(s) proceeds to the Damage Assessment Determination. In this second step, the trustee(s) decides which damage assessment procedures to undertake, if any. The trustee(s) may conduct limited data collection and analysis during these steps. The Preassessment Phase also identifies the conditions for notification, coordination, estimation of assessment costs, reporting, and emergency restoration. Additional guidance on conducting preassessment can be found in the Preassessment Phase Guidance Document. Michel, J., and E. Reinharz. 1993. Preassessment Phase Guidance Document. Research Planning Inc., Columbia, SC & NOAA-Damage Assessment Regulations Team, Washington, DC.

Notification: A natural resource damage assessment begins with notification of a discharge of oil. Notification should be consistent with the NCP. According to the NCP, the OSC or lead response agency generally provides notification to the natural resource trustee(s) when natural resources and/or services may be injured by a discharge of oil. If the trustee(s) learns of an unidentified or unreported discharge of oil, the trustee(s) must report that discharge to the appropriate authority as designated in the NCP.

After learning of a discharge of oil, the trustee(s) should attempt to notify all other known potential trustees of the possibility of a natural resource damage assessment. Actions taken by the trustee(s) must be consistent with the NCP and this subpart.

In addition, in accordance with section 1011 of OPA, the OSC or lead response agency must consult with the affected trustee(s) concerning removal actions.

Coordination: To the extent practicable, the Preassessment Phase should be coordinated with the response agency(ies) (consistent with the NCP), trustee(s), and possibly RP(s). Such coordination fosters cooperation and early and effective implementation of the Preassessment Phase. While the proposed rule encourages the trustee(s) to contact the RP(s), the trustee(s) cannot afford to delay the Preassessment Phase while negotiating with the RP(s). Although not required by this proposed rule, prespill planning, as outlined in § 990.16, will facilitate the coordination of the Preassessment Phase and other assessment/restoration actions.

Preassessment Phase Costs: Preassessment Phase costs include and are recoverable only for trustee-approved activities that deal directly with preassessment. Examples of Preassessment Phase costs include, but are not limited to, costs necessary for: (1) Notification; (2) coordination; (3) preassessment determination; (4) damage assessment determination; (5) data collection and analysis; (6) report preparation; and (7) emergency restoration. Excluded from preassessment costs are strictly response-related actions, and costs that reflect non-incident specific activities performed by the trustee(s) in the management of natural resources and/or services. Preassessment costs should be supported by appropriate and sufficient documentation.

Preassessment Phase Report: At the conclusion of the Preassessment Phase, the trustee(s) should document: preassessment actions, estimated costs related to those actions, and decisions whether to proceed with preassessment and damage assessment/restoration actions. These materials become the Preassessment Phase Report. The report should provide sufficient information for use in the damage assessment/restoration process, if necessary. If no additional actions are undertaken, the Preassessment Phase Report becomes the Report of Assessment. If the trustee(s) conducts further assessment/restoration actions, the Preassessment Phase Report becomes part of the Report of Assessment. If the trustee(s) decides to proceed with damage assessment and restoration actions, the next step involves the development of a DARP to guide the trustee(s).

Preassessment Phase Process

Preassessment Determination: Following notification of a discharge of oil, the trustee(s) must conduct a Preassessment Determination to decide whether to continue with the Preassessment Phase. The determination is intended to be primarily a "desktop" exercise that is based upon readily available information on the nature of the discharge and environmental setting; namely the circumstances of the discharge incident, oil characteristics, nature of the receiving environment, and natural resources and/or services characteristics.

Using this information, the trustee(s) should determine if: (1) The discharge of oil does not qualify for the exclusionary conditions as set forth in section 1002(c) of OPA; (2) the trustee(s) has authority under OPA to assert damage claims for natural resources and/or services that may be adversely affected by the discharge of oil; and (3) there is a reasonable probability that the trustee(s) can make a successful damage claim based on the scientific, economic, and legal merits of the case (i.e., potential for injury resulting from the discharge of oil and successful and meaningful restoration and/or compensation).

If these conditions are met, the trustee(s) may proceed with preassessment actions. If the trustee(s) determines that all three conditions are not met, further preassessment activities should not be conducted. Costs incurred to this point are not recoverable as damages if the discharge meets the exclusionary conditions of section 1002(c) of OPA. Otherwise, the costs up to this point are recoverable from the RP(s) or Fund. Damage Assessment Determination: Following the decision to proceed with the Preassessment Phase, the trustee(s) collects data sufficient to decide which damage assessment procedures to conduct, if any. The proposed rule provides that the trustee(s) should follow the steps outlined below in Damage Assessment Determination:

(1) Characterize Discharge and Environmental Setting. Based on data collection and analysis, the trustee(s) should first characterize the discharge and environmental setting. These characterizations encompass the following categories: circumstances of the discharge incident; oil

characteristics; nature of the receiving environment; and natural resources and/or services characteristics. These activities are similar to those undertaken in the Preassessment Determination, but are now conducted in greater detail. Characterization of the discharge and environmental setting will serve as the basis for the analysis of the following steps.

(2) Determine Potential Exposure. Once the trustee(s) has characterized the discharge and environmental setting, he should then determine the potential for direct exposure from the discharge of oil. The exposure pathway through which the oil may be transported should also be determined. The potential for exposure may be based upon fingerprinting or chemical analyses of the pathway, bioaccumulation information, and transport/fate models. The trustee(s) is further required to consider the indirect adverse effects in a natural resource and/or service, such as the reduction or elimination of higher trophic level resources not exposed to the discharge of oil which rely on affected lower food chain resources exposed to the discharge of oil, e.g. birds that feed on fish. In the absence of exposure, the trustee(s) should determine impaired/diminished use of a natural resource and/or service, such as a recreational beach threatened by a discharge of oil. Such injury determinations are conducted in the following step.

(3) Determine Potential Injury. Simultaneous with the above step, the trustee(s) should determine those natural resources and/or services that may be directly or indirectly injured from the discharge of oil. Potential injury determination requires that the trustee(s) describe the manner in which the physical, chemical, biological, or other attributes of natural resources and/or services may be adversely affected. Chemistry, toxicity and ecological effects information, and effects models may be useful in determining potential injury to natural resources and/or services. If there is no potential for injury, preassessment actions should cease and no further damage assessment procedures should be conducted.

(4) Characterize Potential Risk to Natural Resources and/or Services. Characterizing risk requires that the trustee(s) evaluate the potential cause-effect associations from the weight of evidence developed in the previous steps as well as using best professional judgment. A formalized risk assessment procedure may be used, but is not required. Potential risk of injury to natural resources and/or services may occur if it is likely to result from the discharge of oil as defined in this proposed rule.

The correlation of field and laboratory information is the best means of establishing potential risk. If such correlation is not possible, potential risk may be determined relative to established standards or criteria, health advisories, bans on the use or consumption, or limits on harvesting applicable to the resource. Where literature or regulatory information is insufficient, transport/fate/effects models may provide evidence of possible links between the discharged oil and predicted injuries.

Once the trustee(s) determines that there is the potential for risk of injury to natural resources and/or services, the trustee(s) should continue with the Damage Assessment Determination. If there is no potential for risk, preassessment actions should cease and no further damage assessment activities should be conducted.

(5) Estimate Extent of Injury to Natural Resources and/or Services. The trustee(s) should estimate the current and future extent, i.e., magnitude and duration, of injury to natural resources and/or loss of services after establishing potential risk to those resources and/or services. This determination requires that the trustee(s) define the spatial and temporal boundaries of the discharge and its effects on natural resources and/or services. This information should be described or mapped in such a way as to provide a sequential summary of the discharge and associated effects.

Defining boundaries for potentially affected natural resources and/or services requires comparison of affected to unaffected conditions using baseline, reference, and/or control data. Current trends can be based on measurements and/or model predictions of existing conditions. Future trends can be based on model predictions of anticipated conditions. Identification of boundaries makes it more likely that all natural resources and/or services affected by the discharge of oil will be included.

If estimates on the extent of injury to natural resources and/or services can be determined in a cost-effective manner, the trustee(s) should then proceed with the damage estimation using any of the procedures in the proposed rule. If such estimates cannot be determined in a cost-effective manner, the trustee(s) should cease preassessment activities.

(6) Estimate Damages. Damage estimation should encompass: (1) the environmental and/or economic values of a natural resource and/or service potentially injured until recovery; (2) the likely cost of restoration actions, if any; and (3) all assessment-related costs. As with all estimates during the Preassessment Phase, such estimates are strictly preliminary and subject to change as more information is obtained.

If damage estimation is practicable, the trustee(s) should then proceed with selecting the most appropriate damage assessment procedure. However, if the Preassessment Phase results in a determination that further data collection and analysis are not necessary, no additional assessment actions are to be taken.

The proposed rule authorizes the trustee(s) and RP(s) to agree to undertake limited injury determination studies to determine that no significant injury to natural resources and/or services has resulted from the discharge. While this may seem to be an unlikely scenario, there may be circumstances when the trustee(s), possibly in conjunction with the RP(s), would like to conduct additional studies for scientific or public information purposes. Where no injury is identified, the costs of these studies are not recoverable under this subpart and must be borne by the trustee(s). Should such additional studies indicate that significant and quantifiable injury has occurred to natural resources and/or services, the trustee(s) may reinitiate the Preassessment Phase, and the costs are then part of the assessment costs.

Select Damage Assessment Procedures

Following the decision to continue damage assessment, the trustee(s) is encouraged to use the damage assessment procedure that is most appropriate to the discharge. To assist the trustee(s) in making this decision, the proposed rule identifies general considerations and specific factors when selecting the procedure(s). These proposed considerations and factors are not rigid, nor does the proposed rule require the trustee(s) to select a particular procedure for a particular discharge. The trustee(s) shall generally consider the following in determining which type of damage assessment approaches to utilize: (1) The size and nature of the discharge and environmental setting; (2) the extent to which the discharge of oil is expected to cause injury to natural resources and/or services; (3) the expected environmental and/or economic values provided by the affected natural resources and/or services; (4) the extent to which response actions carried out or planned will avoid further injury to natural resources and/or services without further action; (5) the extent to which the discharge meets the conditions for using the potential

damage assessment procedures; (6) the extent to which injury to natural resources and/or services can be determined with available information and quantification methods; (7) the extent to which restoration alternatives can return injured natural resources and/or services to their baseline or comparable conditions; (8) the extent to which damages based on injury to natural resources and/or services can be determined with available information and quantification methods; and (9) whether the anticipated damage assessment procedure(s) is cost-effective. Specific selection factors for each damage assessment procedure are provided below.

The trustee(s), using his best professional judgment, has the option to use any of the four procedures, singly or in combination, to craft an assessment process that is most appropriate for the situation at hand. The assessment designed by the trustee(s) would receive the rebuttable presumption, so long as the procedures included in that assessment are encompassed by this proposed rule and there is no double recovery.

NOAA is specifically requesting comments on the advantages or disadvantages of proposing such a range of procedures. It is hoped that the trustee(s) can use this set of standard procedures in a beneficial manner to craft an assessment that is most appropriate for the particular discharge of concern.

Compensation Formulas: The estuarine/marine and inland waters compensation formulas proposed are applicable to the vast majority of discharges of oil. These compensation formulas are available for use by the trustee(s) for relatively small discharges, particularly when assessing discharges that occur in areas where it would be difficult or very costly to ascertain precise environmental effects, e.g., small discharges in open water or occurring in areas that are subject to frequent environmental insults. Where the circumstances of the actual discharge are determined by the trustee(s) to be far out of bounds of the compensation formula, then the trustee(s) should use one of the other assessment procedures.

The formulas assume various effects to natural resources likely to occur as a result of a discharge of oil. These assumptions take into account the amount and type of oil discharged and region and habitat type in which the discharge occurs. This approach allows both a national consistency and regional specificity. Also, the use of dispersants cannot be factored in since there likely will be additional effects in the water column as a result of using them. For the purposes of the compensation formulas, residual and tidal currents are assumed to be zero, the discharge is assumed to be instantaneous at the water surface, seasonal temperatures and wind speed are "set at average values," as explained in volume I of the technical document, and wind direction is controlled to avoid having the discharge move into a different habitat. Also, the ranges of discharge sizes covered by the formulas are: 10 gallons to <1,000 gallons; 1,000 gallons to <5,000 gallons; 5,000 gallons to <10,000 gallons; and 10,000 gallons to 50,000 gallons.

However, if there are significant differences between the assumptions in the formulas and incident of concern, then the formulas may not be appropriate for the discharge of concern. Finally, these formulas allow an estimate of damages per gallon, taking into account average restoration costs plus average lost direct use values pending restoration. Passive use (nonuse) values are currently not included in the formulas. Therefore, discharges under 50,000 gallons that are likely to result in a significant loss in passive use values should be assessed under another procedure.

The Type A model: When considering using the Type A model for an assessment under OPA, the trustee(s) should consider several factors. Basically, the Type A may be appropriate when the trustee(s) determines that the compensation formulas of subpart D of this part alone are not sufficient to estimate the injury and damages resulting from the discharge, and that there is no other cost-effective procedure available to estimate the injury and damages resulting from the discharge.

Key factors involved in the decision to use the Type A model for an assessment under OPA are found at 43 CFR 11.33. In the preamble to the final rule incorporating the Type A model, DOI stated:

> The rule requires that whenever an injury to a natural resource due to an incident occurs in the coastal or marine environment a Type A assessment shall be performed unless the limitations of the Natural Resource Damage Assessment Model—Coastal and Marine Environments (NRDAM/CME) make it inappropriate to the given incident. The assumptions and data bases contained in the NRDAM/CME constrain its applicability to only selected types of discharges or releases and resources. For example, the discharge or release must occur in, or enter into, a coastal or marine environment; the substance discharged or released must be contained in the chemical data base of the NRDAM/CME; and estimates of the type and quantity of biological resource potentially injured should not differ significantly from the averages listed within the biological data base for the area in which the discharge or release occurred.
>
> Whether certain of these conditions exist will necessarily be a subjective decision required by the authorized official in some incidents. The NRDAM/CME, including its data bases, is based upon averaged values and may not necessarily reflect the actual events of any specific incident (52 FR at 9048 (March 20, 1987)).

The factors discussed at 43 CFR 11.33 include the following requirements: the substance discharged or released is contained in the database of the model; the estimated quantity and species type of biological resources potentially injured are not expected to differ significantly from the average biomass listed in the database of the model, for the season, province, and bottom type in which the discharge or release occurred; the discharge or release was of a short duration; the discharge or release was minor; the discharge or release was a single event; the estimated injury to biological resources due to the discharge or release is expected to be primarily due to mortality of a species listed in data base of the model; the discharge or release resulted in the closure of a fishing area, a beach area, or a hunting area; the discharge or release occurring outside the coastal or marine environment resulted in the substance entering the coastal or marine environment; the use of chemical dispersants or other agents or management actions used in a cleanup of a discharge or release is not estimated to have caused significant injury to natural resources; the discharge or release occurred at or near the water surface of the coastal or marine environment or in the intertidal area; the discharge or release is not expected to cause a significant change in the price of species categories by season, province, or bottom type contained in the data base of the model; and the expected injury to the biological resource due to the discharge or release is not expected to have been primarily due to exposure through the air pathway (43 CFR 11.33).

Expedited Damage Assessment: Included in the range of proposed damage assessment procedures is the expedited damage assessment (EDA). EDA reflects a damage assessment approach that is intermediate between the current Type A model and proposed Comprehensive Damage Assessment (CDA) procedures. This approach recognizes that the trustee(s) may want to address more effects than currently available in the Type A model or the proposed compensation formula,

particularly for inland discharges. The approach also recognizes that the size, location, and timing of a given discharge may not warrant the complex, prolonged procedures associated with a CDA.

The trustee(s) may determine that the use of an EDA is appropriate after considering the factors discussed below. (1) The use of the compensation formulas or Type A models alone would not sufficiently account for the injury and damages resulting from the discharge. This decision may be influenced by the following data: The volume of the discharge is not known or readily estimated; the discharge occurred over a period greater than a few days; injuries to unique habitats or species occurred and are readily quantified; a complex discharge trajectory that covers very large areas that are not readily modeled; the distribution and/or abundance of affected biota are known to differ significantly from seasonal averages (e.g., usually large concentrations of wintering waterfowl were present and affected); the ecosystems affected are not addressed by the model (e.g., rivers, small lakes); and there are known, readily determined injuries resulting from chronic discharges.

The injury and damages resulting from the discharge may be adequately calculated using a combination of the Type A Model, and limited, focused injury determination/quantification and compensable values studies. For some discharges, the Type A model may address most of the potential injuries and damages, with a few notable exceptions that can be readily determined from limited data collection efforts. The most cost-effective approach is the use of components of the Type A model to calculate damages for those natural resources and/or services that are appropriate, and conduct the limited studies needed to address the remaining injuries to natural resources and/or services. For example, the Type A model may be used to calculate damages to fisheries, assuming the conditions of the discharge generally meet the assumptions in the model. Recreational losses from beach closures may be calculated separately based upon incident-specific, baseline data on user days, and surveys conducted after the discharge.

(2) There is readily available information on the nature of the discharge and its effect on natural resources and/or services. To the extent practicable, the trustee(s) should rely on existing information regarding natural resources and/or services at risk when undertaking an EDA. This is particularly true for information that helps establish a baseline for natural resources and/or services. Such data enable the trustee(s) to: (a) Establish background levels and types of hydrocarbons in key exposure pathways prior to the discharge; (b) characterize the physical and chemical parameters prior to the discharge; (c) characterize the status of the biological and habitat resources prior to the discharge; and (d) identify other information sources, such as population surveys or catch statistics that may be useful in quantifying injury and determining lost services. In addition to baseline data, other information useful for an EDA includes literature that documents injuries to similar natural resources and identifies the level and flow of services provided by injured natural resources.

Sources of information include government, academia, and private organizations. Existing federal monitoring programs that may provide the data for environmental parameters include NOAA's National Status and Trends (NS&T), U.S. Fish and Wildlife's Biological and Environmental Status and Trends (BEST), U.S. Geological Survey's National Water Quality Assessment Program (NAWQA), the U.S. EPA's Environmental Monitoring and Assessment Program (EMAP), and Fisheries of the United States (NMFS, NOAA). Abundant baseline information in each of the categories may not always be available to the trustee(s). Failure to locate relevant information, however, does not preclude the trustee(s) from selecting an EDA. An EDA may still be appropriate provided that the trustee(s) can obtain the necessary data from limited focused studies.

Selection of an EDA may depend on general categories and characteristics of oil. The physical and chemical properties of oil may help determine the exposure pathway, natural resources likely to be injured, and duration of that injury. The nature and extent of injury to natural resources, in turn, will depend on the type of petroleum hydrocarbons. Many types of oil have been studied extensively and their particular characteristics and effects upon natural resources are often well established in scientific literature. Discharges of such oil are most suitable for an EDA. In circumstances where the trustee(s) determines that the characteristics and effects of the particular discharge are not well known or are uncertain, an EDA may yet be appropriate provided that injury can be established by limited, focused studies.

Petroleum hydrocarbons can generally be organized into the categories of: (1) Very light refined products (i.e., gasoline and jet fuel), (2) light oil (i.e., diesel, No. 2 fuel oil, and certain light crudes), (3) medium crude oil, and (4) heavy oil (i.e., No. 6 fuel oil and Bunker C). For each category, some generalizations can be made regarding the volatility, degree of persistence, and toxicity associated with oil. These characteristics should assist the trustee(s) in determining whether an EDA is appropriate. See Appendix C for a discussion regarding the attributes of each of the categories and the suitability of each category for an EDA.

Size and location are other important factors to be considered in determining whether an EDA is appropriate. Accordingly, the proposed rule encourages the trustee(s) to take both size and location of the discharge into account when selecting the relevant damage assessment procedure.

Discharges smaller than 50,000 gallons in open water generally either disperse, contaminate small areas, or have limited effects. Compensation formulas or the Type A model may adequately address damage assessment needs for these discharges. Discharges larger than 1,000,000 gallons may spread over large areas and lead to extensive contamination and effects to natural resources and/or services. Accordingly, discharges greater than 1,000,000 gallons may require a CDA with greater emphasis on injury determination and quantification. The EDA approach, therefore, may be most appropriate for most discharges between 50,000 and 1,000,000 gallons. These guidelines do not preclude the trustee(s) from conducting an EDA for discharges below 50,000 or above 1,000,000 gallons. A discharge less than 50,000 gallons that occurs in a unique or sensitive habitat, for example, may lead the trustee(s) to conclude that the Type A model should be supplemented with limited, focused studies. Likewise, injury determination and quantification for a discharge of 1,000,000 gallons in open water may be adequately addressed by an EDA. Accordingly, the trustee(s) will have to assess the size of the discharge in the context of the location of the discharge and natural resources and/or services affected when selecting the appropriate damage assessment procedure.

When discharges occur in unique or sensitive habitats, such as marshes, mangroves, or coral reefs, or where there are synergistic effects, the effects relative to the size of the discharge may be disproportionately large. Under those circumstances, selection of an EDA will be based upon the trustee's(s') determination that the procedure can accurately account for this injury.

Where there are studies documenting important aspects of a unique or sensitive habitat, for example, the existence of this data may be relevant in a trustee's(s') decision to select an expedited approach.

Occasionally, a single location may be plagued by consecutive discharges in a relatively short time frame. Likewise, a discharge may occur in a chronically degraded location where multiple pollutants have been discharged over long periods of time. Under either of these two scenarios, it may be difficult for the trustee(s) to differentiate effects resulting from each discharge with only minimal field data. Designing and implementing a study to differentiate effects pursuant to the CDA procedures, however, is likely to be very costly. Accordingly, where the trustee(s) expects that the costs of a CDA under such circumstances are likely to greatly exceed the estimated damages, the trustee(s) may wish to consider an EDA.

(3) The injury and damages resulting from the discharge can be adequately calculated by conducting limited, focused injury determination/ quantification and compensable values studies. These studies are generally limited in two ways. First, the trustee(s) should be able to limit the types of natural resources for which injuries will be sought to those of recreational, commercial, or ecological importance as well as resources of special significance. Second, the scope of injuries the trustee(s) will examine should be limited to mortality, sublethal effects that can be determined with limited and focused studies, and/or lost services.

Natural resources and/or services of commercial, recreational, or ecological importance, or resources of special significance are most appropriate for an EDA because such resources are often being managed, conserved, or protected. Accordingly, extensive data on life history, population, distribution, abundance, and economic values for services may already exist for these resources. Further, concern regarding the effects of oil on these resources may have stimulated studies that document certain effects. Extensive new data collection requirements to establish injury for these natural resources and/or services, therefore, may not be necessary.

The scope of injuries addressed in an EDA should be more limited than that of a CDA. For an EDA, the trustee(s) should focus primarily on mortality, sublethal effects that are considered significant and can be documented with limited, focused studies, and loss of services provided by natural resources.

(4) Potential restoration actions can be implemented without complex (i.e., multiple habitats/biological resources), prolonged (i.e., multi-year) injury determination/quantification and compensable values studies. One of the main objectives of an EDA approach is to speed the damage assessment process so that restoration is initiated more quickly. Thus, the restoration alternatives for the affected resources and/or services should be technically feasible, have a high probability of success, are cost-effective, and result in a net environmental benefit. In addition, the injury determination/quantification and compensable values studies should be cost-effective when compared to the likely level of damages. Where, for example, the costs of a CDA greatly exceed the expected damages, the trustee(s) should consider narrowing the scope of studies and using an EDA. Finally, restoration actions should be derived from the limited, focused injury studies.

Comprehensive Damage Assessment: Comprehensive Damage Assessment (CDA), by its nature, is complex, requiring extensive field and/or laboratory studies to document and quantify injury, plan a restoration approach, and estimate compensable values. Such studies usually require scientifically valid study designs so that the resulting data and analyses meet the standards of litigation-quality products. The key factors for selection of CDA are summarized below.

(1) The injury and damages resulting from the discharge can best be determined through a complex, prolonged process, involving a broad scope of injury determination/ quantification and compensable values studies. The discharge conditions that would not be sufficiently considered by any of the other damage assessment approaches include, but are not limited to: the extent of exposure and injury is large spatially and temporally (e.g., affecting many habitats and species through multiple pathways that are pervasive and persistent); injury via chronic toxicity is likely to comprise a significant component; the discharge conditions are likely to result in significant bioaccumulation; community- and ecosystem-level effects are likely; and there are no standards or criteria with which to make comparison. Injury at discharges where ecosystem-level effects may be significant can only be assessed from in-depth, incident-specific studies. Further, when chronic exposure via contaminated sediments and food webs resulting in sublethal effects is believed a significant component of the injury, the only approach for determining and quantifying is through detailed studies. For these conditions, there are seldom sufficient baseline data or a basis for calculating damages.

(2) Information concerning the nature of the discharge and its effects on natural resources and/or services is not readily available. All of the other approaches only consider effects that are well-documented or readily determined. There are many conditions of a discharge that are not adequately studied in the past and would require detailed studies to determine natural resource and/or service injuries and damages, such as: discharges of an unusual oil type for which there were insufficient data on behavior, fate, and toxicity; when the exposure pathway is not clearly identifiable; significant effects are likely to occur to natural resources that were not previously studied, e.g., there are little data on the effects of oil on terrestrial mammals, reptiles, or amphibians; and economic valuation techniques are not well-developed for the affected natural resources and/or services.

(3) Potential restoration actions cannot be determined or implemented without substantive injury determination/ quantification and compensable values determination studies. Where the distribution and abundance of injured natural resources and quality and quantity of services are poorly understood or considered unique, more complex and prolonged assessments may be needed as a basis for restoration. Limited injury studies may be insufficient to determine the feasibility, effectiveness, success, and cost-benefit of various restoration alternatives in such cases. Quantitative information on injury may be critical to recovery, monitoring (especially if more than one generation of a natural resources is injured), and potential restoration research (new approaches to restore natural resources and/or services not recovering or recovering at lower than expected rates).

Data Collection and Analysis

Purpose/Scope: The proposed rule allows the trustee(s) to conduct limited data collection and analysis (data collection) throughout the Preassessment Phase. The purpose of data collection is to ensure that there is sufficient information to evaluate the risk to natural resources and/or services resulting from the discharge of oil. Selection of protocols and Quality Assurance (QA) for data collection in preassessment should be based on the guidance provided in subpart C.

Only information that provides a connection to natural resources and/or services injury or is considered necessary to the assessment process, likely restoration alternatives to be implemented, and/or compensable values should be collected. Where practicable, such information should be collected from other sources such as response agencies in order to avoid or, at least, minimize duplication of efforts. Appropriate data collection in the Preassessment Phase include: (1) Data necessary to make a determination to proceed with the Preassessment Phase; (2) ephemeral or perishable data that may be lost if not collected immediately; and (3) necessary data that serves as the basis for the selected damage assessment procedure, the absence of which data would prevent the trustee(s) from proceeding with damage assessment determination of § 990.23 (i.e., input into the compensation formulas or Type A models, or the study design for the EDA or CDA).

Baseline and Reference/Control Information: Data collection encompass baseline and reference/control information. Baseline information refers to on-site data of conditions prior to the discharge that are compared to incident-specific information of those same conditions subsequent to the discharge. Reference and control information refers to off-site data of unaffected conditions that are compared to similar or the same on-site conditions affected by the discharge. Case histories of previous discharge events or other relevant studies, although not considered as baseline or reference/control information, may also prove useful where conditions of the case or study are comparable in some manner to the actual discharge.

When available, the trustee(s) should collect baseline data. Baseline data is important because it provides a temporal comparison of conditions on natural and other (human-induced) variability. The value of baseline information depends on the: (1) Corresponding quality of baseline and incident-specific data; (2) absence of intervening events such as ancillary contamination, storms, droughts, etc.; and (3) comparability of the study design between baseline and incident-specific activities. In many circumstances, though, the quality or quantity of baseline data may not be adequate or sufficient to determine the potential risk of injury to natural resources and/or services. When such baseline information is lacking, the trustee(s) may need to rely on historical data, if available, that may serve to identify preexisting trends.

In contrast to baseline information, the value of reference or control data lies in the ability to make spatial comparisons. Reference and control conditions should be selected based on their resemblance and proximity to the affected conditions of the discharge, and exclusion from potential impact from the discharge. However, such conditions may not always be available because of the nature or size of the discharge relative to natural resources and/or services affected, or the special status of specific natural resources and/or services (protected natural resources and/or services). In such cases, the trustee(s) may need to rely on other comparable measures, such as case histories or other relevant studies.

The trustee(s) is encouraged to collect both baseline and reference/control information when practicable. Together, such collection efforts provide the optimal means of determining potential risk and estimating damages to natural resources and/or services.

Emergency Restoration

Section 990.25 of the proposed rule provides authority for the trustee(s) to conduct emergency restoration to be taken by the trustee(s) under limited circumstances. Emergency restoration is not considered to be an actual part of the Preassessment Phase, but is included in this discussion and the proposed rule since it will likely occur during the time frame of the Preassessment Phase. Ideally, emergency restoration would be addressed through the response actions authorized by the OSC. Emergency restoration is intended for those limited situations where immediate action is required to avoid an irreversible loss or prevent or reduce any continuing danger to natural resources and/or services. Emergency restoration may be taken following notification and during response with the approval of the OSC such that it does not interfere with response actions. The proposed rule does not augment the existing authority of the trustee(s). For example, if the trustee(s) has independent authority to undertake emergency restoration, the trustee(s) should exercise that authority. This provision creates no additional authority to take actions on lands or waters the trustee(s) would not otherwise have authority to take.

If practicable under the circumstances, the RP(s) should be invited to participate prior to the trustee(s) proceeding with emergency restoration. However, the trustee(s) cannot delay such restoration for any reason. The costs for conducting emergency restoration are recoverable as damages and are not considered response-related costs.

As consistent with section 1012(j)(2) of OPA, emergency restoration is an exception to the requirement that actions be subject to prior public review and comment. Because of this exception, the proposed rule requires that the trustee(s) demonstrate that any emergency restoration taken under this authority are reasonable and necessary, and conducted in a cost-effective manner as defined in the proposed rule. Any costs associated with emergency restoration may be claimed as part of the damage claim or as uncompensated claims under section 1012(a)(4) of OPA. The appropriateness of such claims against the Fund is currently under consideration.

Response to Comments

Comment: Several commenters discussed the concept that the trustee(s) must meet certain criteria in the Preassessment Phase before proceeding with additional assessment actions. Those criteria mentioned were: (1) A discharge of oil has occurred; (2) natural resources for which the trustee(s) may assert trusteeship have been or are likely to have been injured by the discharge of oil; (3) the quantity and concentration of the discharged oil are sufficient to potentially cause injury to those natural resources; (4) data sufficient to pursue an assessment are readily available or likely to be obtained at reasonable cost; and (5) response actions carried out or planned do not or will not sufficiently remedy the injury to natural resources or the public has not been adequately compensated for a loss of natural resource services.

Many commenters strongly supported the notion that the proposed rule should require that all five criteria be met. One commenter indicated that the fifth criterion should be eliminated, since it is premature, unduly vague and subjective and duplicates the first four criteria. Some commenters were concerned that the meeting of all five criteria was unnecessary and contrary to OPA. In addition, the fourth criterion is unwarranted since lack of data or its cost is irrelevant to the extent of injury and should not prevent the assessment from proceeding. Some commenters stated that only significant and compensable injuries to natural resources must exist before proceeding with additional assessment procedures. One commenter was concerned that NOAA would allow the trustee(s) to continue assessments "if the public has not been adequately compensated for a

significant loss of natural resource services." This language was thought to be vague and subjective.

Response: NOAA is proposing a two-step Preassessment Phase to determine: (1) if preassessment is should continue, and (2) with which assessment procedure to proceed, if any. While no longer identified as five separate criteria, the trustee(s) will have to determine that it is legally, scientifically, and economically justified to proceed with some form of damage assessment. In the first step, the trustee(s) will likely rely upon readily available data. In order to proceed with a preassessment, the trustee(s) must determine that: (1) the discharge does not qualify for an exclusion under section 1002(c) of OPA; (2) natural resources and/or services under trusteeship may be adversely affected by the discharge; and (3) there is a reasonable probability that the trustee(s) can make a successful damage assessment claim based on the scientific, economic, and legal merits of the case (i.e., potential for injury resulting from the discharge of oil and successful and meaningful restoration and/or compensation).

If these conditions are not met, the trustee(s) must discontinue any further preassessment activities. Once the trustee(s) has met these conditions, additional data collection and analysis may be conducted to determine the most appropriate damage assessment procedure.

The previous five criteria are incorporated in this proposed rule at different steps, and should still be addressed by the trustee(s) during the Preassessment Phase. The first two criteria are two of the conditions for the Preassessment Determination of § 990.21(c). The essence of the other three "criteria" would be considered during the Damage Assessment Determination of § 990.22.

Comment: Most commenters indicated that the trustee(s) should initiate the Preassessment Phase as soon as possible following a discharge. Some commenters thought that the Preassessment Phase should be merely a desktop determination of whether to proceed with additional assessment activities. These commenters were concerned that NOAA's initial proposal would require the trustee(s) to engage in more than a desktop review. If so, one commenter suggested that time limits should be placed upon the trustee(s), to ensure timely decisions regarding assessments. Other commenters indicated that any preassessment process must allow flexibility to the trustee(s) to gather sufficient data in order to proceed with and decide upon damage assessment. Some data may not be available immediately following the discharge, but will have to be collected later in the process in order to make such decisions.

Response: NOAA agrees that preassessment should begin as soon as possible after the discharge occurs. However, the proposed rule, as stipulated in the above response, provides for more than a desktop review. The Preassessment Phase provides a mechanism for initiating a damage assessment. The Preassessment Phase is not intended to be extensive, expensive, or time-consuming. The Preassessment Phase may indicate that the use of the compensation formula, Type A model, expedited damage assessment, or comprehensive damage assessment will appropriately address injuries to natural resources and/or services. For some discharges, the trustee(s) might also determine that no further damage assessment actions are necessary.

This preassessment process also allows the trustee(s) to collect ephemeral or perishable data that may be lost if not collected immediately, data that are necessary to make a determination required in the Preassessment Phase, and data necessary for any of the damage assessment procedures. The extent of data collection is left to the discretion of the trustee(s). Since the circumstances surrounding any discharge will vary, only general time frames can be suggested for completing the Preassessment Phase.

Comment: Some commenters indicated that, where the RP(s) is adequately remedying injuries to natural resources, considerable effort and expense of conducting any part of an assessment are unnecessary. Another commenter noted that small offshore discharges that pose no threat to natural resources do not justify the trustee(s) conducting a preassessment.

Response: NOAA disagrees with the general thrust of these comments. While many discharges will not require a comprehensive damage assessment in order to fulfill the mandate under OPA, the trustee(s) must make some type of determination shortly following a discharge of what type of damage assessment should be completed, if any. Further, even if the RP(s) responds adequately to the discharge, the lost use value pending restoration is still recoverable.

Comment: Many commenters suggested developing a plan that allows the trustee(s) to make decisions based on data collection efforts. Such a framework should address the nature and extent of injuries to natural resources and/or services. Another commenter was concerned that preassessment should not be distinct from data collection and early sampling.

Response: NOAA considers identification and extent of injuries to natural resources and/or services as essential and is incorporating those factors into the Preassessment Phase. In the Preassessment Phase, the trustee(s) will consider the: Nature of the discharge and environmental setting; potential for exposure, injury, and risk; extent of injury; and estimated damages. Such a framework will aid the trustee(s) to select the most appropriate damage assessment approach, if any. Data collection and analysis may be conducted throughout the Preassessment Phase.

Comment: One commenter indicated the importance of realizing that the quantity of oil estimated during the preassessment is only an estimate and is certainly subject to change.

Response: Oil quantity and other estimates made during the preassessment are preliminary and subject to change as additional information is collected by the trustee(s).

Comment: Most commenters indicated that both data collection and early sampling activities are helpful in defining the need for potential damage assessment and restoration and were supportive of such efforts so long as they were relevant to existing or anticipated injury to natural resources and/or services. A few commenters questioned the utility of baseline data collection, and others questioned the usefulness of early sampling efforts as originally outlined in the ANPRM. Another commenter indicated that baseline data collection might be redundant to other ongoing efforts.

One commenter suggested that all compiled information be put in a form that would also prove useful in future prespill planning. Some commenters offered examples of the type and sources of information that should be used.

Response: NOAA agrees that only information on natural resources and/or services (current or planned) that the trustee(s) considers relevant should be collected. The information should provide a connection to the damage assessment process and likely restoration actions.

Baseline collection efforts could provide a basis for information needed during the Preassessment Phase. Baseline data collection should not be

redundant, but should be coordinated with other data collection efforts.

NOAA agrees that the information collected could be useful in future prespill planning activities and is recommending such integration. NOAA is also providing information on the types and sources of information that might be required in the Preassessment Phase in the proposed rule and the Preassessment Phase Guidance Document.

Comment: Several commenters stressed the importance of baseline data and reference areas over background data. If these areas are properly selected, then such data may provide the best type of information to estimate injury than are baseline and historical comparisons. Both baseline and reference information serve as the basis for damage assessment and restoration.

Response: NOAA agrees with these comments and has incorporated this notion in the proposed rule.

Comment: At least one commenter stressed that preassessment activities must be consistent with the NCP or other response plans developed under OPA.

Response: NOAA agrees. The Preassessment Phase stresses coordination and following all applicable plans (i.e., area contingency plans, etc.) in order to ensure consistency and efficiency.

Comment: Some commenters encouraged the early participation of the RP(s) in the preassessment and assessment process. Early cooperation could set the tone for a productive joint assessment and allow the trustee(s) and RP(s) to settle major issues, including the scope of the damage assessment and funding. The lack of early participation and cooperation could result in parallel assessments. Others were concerned that early participation by the RP(s) might encourage the trustee(s) to delay the process while negotiating with the RP(s). In addition, the RP(s) could influence the trustee(s) to lessen the scope of the preassessment and eventual assessment. Other commenters indicated that it should be the option of the RP(s) whether to participate in preassessment, and the RP(s) should not be forced to do so. To encourage participation early in the damage assessment process, one commenter suggested that the RP(s) have an active role, if desired, in the development and implementation of data collection and early sampling activities, and that the information and cost be shared on a mutually acceptable basis. Another commenter suggested that the trustee(s) should take the lead role with the RP(s) having the opportunity to review and comment on proposed activities.

Response: To the extent practicable, NOAA encourages the trustee(s) to invite cooperative RP(s) participation early in the damage assessment process. Such an invitation is in line with NOAA's goal of fostering cooperation and early resolution rather than litigation. The trustee(s) will maintain oversight over all activities so that the quality and integrity of information are ensured. NOAA is also recommending that, when appropriate, all data collection and analysis be coordinated with the RP(s) so that there is no duplication of effort. The RP(s) can provide immediate financial and technical support to the preassessment process that might be unavailable to the trustee(s). However, OPA provides that the overall responsibility for any part of the assessment resides with the trustee(s). It will be up to the trustee(s) in each preassessment to determine the appropriate involvement of the RP(s). Where the RP(s) is known, the trustee(s) may contact the RP(s) and invite the RP(s) to participate in the preassessment. However, the trustee(s) cannot significantly delay the onset of the preassessment while waiting for a response from the RP(s). The proposed rule does not require participation of the RP(s). Thus, the RP(s) may always opt not to participate.

Comment: One commenter argued the RP(s) must be allowed to conduct a full scientific assessment to determine actual damages, regardless of the assessment procedure chosen by the trustee(s). Another commented that the RP(s) must be in agreement with the selection of modeling to assess damage.

Response: Section 990.23 of the proposed rule allows the RP(s) to request a more comprehensive damage assessment than the trustee(s) selection if the RP(s) is willing to bear the additional costs at the outset of the more comprehensive assessment. The RP(s) is also free to fund a separate assessment.

Comment: Another commenter argued that the RP(s) should not be allowed to conduct a different type of assessment to be presented in court when they are dissatisfied with the trustee's damage assessment selection. If the RP(s) does disagree with the selection, he should be required to submit a contrary position early in the administrative process in an attempt to persuade the trustee to reconsider. The trustee's selection should be reviewed on the administrative record. Another commented that the RP(s) should not be allowed to challenge simplified methods of assessment based on the fact that more accurate data exist, since protracted litigation would defeat their very purpose.

Response: As mentioned above, the proposed rule does allow the RP(s) to request and fund a more comprehensive damage assessment. NOAA agrees that the trustee(s) should be notified of the RP's(s') request early in the process and provides for that early notification. In addition, the trustee(s) decisions must be documented in the administrative record, including the choice of an assessment procedure. NOAA's proposed rule establishes that a reviewing court will be limited to the administrative record.

Comment: At least one commenter indicated that public participation in the preassessment is vital and that preassessment decisions should be available for public review.

Response: Since discharges of oil are dynamic and rapid events, the early activities of the trustee(s) will necessarily be conducted without concurrent public review and comment. As indicated in the prespill planning of the proposed rule, the trustee(s) is encouraged to involve the public in the formation of plans of what to do in case of a discharge. In addition, § 990.20(e) of the proposed rule requires that the trustee(s) prepare a Preassessment Report, which will be available for public review as part of the assessment record.

Comment: One commenter indicated the requirement in 43 CFR 11.23(b), which calls for a "reasonable probability of making a successful claim," is noticeably lacking from the proposal in the ANPRM of March 13, 1992.

Response: NOAA agrees. This proposed rule provides language based on the potential for injury resulting from the discharge of oil. The trustee(s) should first seek to recover damages from the RP(s). If the RP(s) is insolvent or unreachable under OPA, NOAA's position is that such claims may then be pursued from the Oil Spill Liability Trust Fund under section 1012(a)(4) of OPA.

Comment: Another commenter suggested that "reasonable cost" be more clearly defined.

Response: NOAA has revised the definition of reasonable cost. All costs of conducting the overall assessment in accordance with this proposed rule are reasonable. Although no longer included in the definition of reasonable cost, the trustee(s) should be cautious about proceeding with assessments in which the anticipated costs of conducting the total assessment (not individual studies) are more than the anticipated damages.

Comment: One commenter suggested that a RP who responds quickly to the discharge and is cooperative should be awarded good faith points and reduced assessment costs.

Response: The RP(s) that has adequately responded to the discharge may, in effect, have reduced the damages for injuries to natural resources since rapid containment and cleanup would likely reduce the effect of the oil in the environment. However, OPA does not provide the trustee(s) the authority to reduce damage claims for any RP(s) on this basis. It is expected that the overall costs of conducting assessments will be lower to the RP(s) when the RP(s) is cooperative, since both the RP(s) and trustee(s) will not be conducting separate assessments.

Comment: Several commenters suggested that funding be available to the trustee(s) to conduct data collection and early sampling and that funding not be subject to a lengthy approval process. In addition, some commenters suggested that NOAA establish a fund through the proposed rule that would provide funds for emergency response/restoration actions.

Response: OPA does not authorize NOAA to establish such a fund for either purpose. It is NOAA's position that uncompensated costs of emergency restoration actions authorized under § 990.25 may be pursued as uncompensated claims under section 1012(a)(4).

Comment: A commenter argued for allowing the use of increased costs required to protect natural resources at risk from a discharge to be recoverable, if these costs are not covered by private claimants. The commenter concluded that, often such increased costs are a reasonable estimate of the value of natural resources at risk.

Response: The proposed rule allows recovery of such increased costs. However, it would not be correct to suggest that such additional costs are, in any way, a measure of the true value society places on natural resources at risk. For example, if a discharge of oil were to occur in an area adjacent to a breeding and rearing habitat for an endangered or threatened species, the cost of preventing the oil from fouling that habitat, and thus injuring the resident population of animals, would have no obvious or direct relationship to the "value" society places on those endangered or threatened species.

Comment: Several commenters cautioned against NOAA requiring the trustee(s) to estimate costs of assessment and restoration activities. Many indicated that this practice would lead to a strict cost/benefit analysis and such estimates are preliminary and may be substantially revised as new information is collected. Others indicated that such estimates are not needed in the Preassessment Phase.

Response: Since the costs of conducting an assessment and restoration are a part of the measure of damages under OPA, NOAA feels that preliminary estimates of both are necessary for determining cost effectiveness and for planning purposes. However, such estimates at this stage are merely preliminary and are to be used in determining whether to proceed with further assessment procedures. Estimates are subject to change as more information is collected. The trustee(s) is cautioned against using these preliminary figures for other purposes since they are subject to change. A strict cost/benefit analysis is not required by OPA or this proposed rule.

Comment: At least one commenter indicated that the regulations should identify the recoverable costs and require the trustee(s) to document such costs.

Response: NOAA agrees, and § 990.20(e) of the proposed rule identifies examples of preassessment costs and requires adequate documentation.

Comment: Several commenters indicated the usefulness of emergency restoration activities in reducing injury and future restoration costs. Others recommended limited public review of such actions due to the emergency situation, yet noted efforts should be made to keep the public informed of such activities.

Response: NOAA agrees and provides for emergency restoration in § 990.25 of the proposed rule. Since these actions would only be taken in emergency situations, full public review and comment would be impossible. However, to the extent practicable, the trustee(s) should keep the public informed of such actions. Of course, such actions will be a part of the Preassessment Report and eventually part of the Report of Assessment. As part of prespill planning, generic restoration/protective plans could be developed with public review.

Comment: One commenter requested that the rule should not limit emergency restoration to situations involving endangered or threatened species and their habitats.

Response: NOAA agrees, and no such limitation is proposed in § 990.25.

Comment: Some commenters raised concern over a trustee(s) conducting emergency restoration without coordinating with the response agency. Others indicated that such actions should be part of the established response mechanism.

Response: NOAA agrees with this concern. In the proposed rule, the trustee(s) is to take emergency restoration only after notification and/or consultation with the response agency and the trustee's(s') determination that current or anticipated response actions are insufficient. The response agency(ies) and where identified, the RP(s), should be given an opportunity to address the emergency situation before the trustee(s) takes such actions. In addition, NOAA recognizes that the possibility of needing to conduct such emergency restoration should be greatly reduced following the completion of the Fish and Wildlife and Sensitive Environments Plan required under section 4201 of OPA. However, emergency restoration will be incident- or resource-specific and may not be specifically identified in the Fish and Wildlife and Sensitive Environments Plan.

Comment: Other commenters indicated that emergency restoration was not properly part of the Preassessment Phase.

Response: NOAA has included this subpart under the Preassessment Phase because that is the time-frame during which the trustee(s) may likely be faced with the possibility of conducting emergency restoration.

Comment: A number of commenters provided support for the development of national, regional, and local protocols; each respectively being more specific. Others cautioned against a strong emphasis on the use of local plans and protocols, since a discharge may never occur in many areas.

Response: NOAA does not require the development of such protocols, but encourages the trustee(s) to develop appropriate protocols for assessment activities through prespill planning in order to avoid confusion and lengthy delays in a damage assessment. It is the determination of the trustee(s) whether such protocols should be developed for specific area(s). Areas that have a history of oil discharges will likely benefit from the development of such protocols.

Draft Assessment/Restoration Plan (DARP)

Subpart C Preamble

General

The proposed rule authorizes the trustee(s) to use a variety of assessment procedures, depending on the nature and extent of potential effects of the discharge of oil. Although each assessment will be incident-specific

there are many common elements. For example, the trustee(s) will always conduct the Preassessment Phase as outlined in subpart B and develop a DARP under this subpart. The purposes of the DARP are to ensure that the assessment/restoration is performed in a planned, cost-effective, and systematic manner, and provide for public review and comment of the restoration plans as required under section 1006 of OPA. The DARP should be developed in accordance with the requirements and procedures in this subpart and in subparts D, E, F, and G.

In addition, NEPA and ESA compliance shall be incorporated into the restoration planning process and be made part of the DARP. NEPA complements the purposes of OPA to develop an integrated approach to environmental planning and decisionmaking. NOAA encourages the trustee(s) to integrate NEPA procedures with the DARP procedures described below at the earliest possible time. The DARP should be combined with the appropriate NEPA document to create a single integrated environmental planning tool for the trustee(s) and the public. The scoping and public review procedures of these regulations should be implemented to provide compliance with NEPA.

NEPA compliance should not impose additional burdens upon the trustee(s). Rather, those procedures normally contemplated as part of the DARP can be framed as NEPA analysis and full NEPA compliance achieved without additional paperwork or data gathering. The regulations of the Council on Environmental Quality (CEQ) require environmental impact statements (EIS) to be analytic rather than encyclopedic (40 CFR 1502.2) and encourage the discussion of impacts in proportion to their significance. The DARP need not be expanded in scope or length to achieve NEPA's goal of producing an environmental decision document useful to the trustee(s) and the public. (40 CFR 1502.14, 40 CFR 102.15) Rather, concise analysis of available restoration alternatives, and the consequences of their implementation in the post-spill environment is at the heart of the DARP as well as any NEPA document with which it may be combined.

As mentioned throughout this preamble and proposed rule, the trustee(s) is strongly encouraged to develop prespill plans for conducting an assessment and restoration. Those prespill plans could be so specific as to identify the type of assessment procedure and restoration actions likely to be conducted under certain discharge scenarios. If so, the DARP should be consistent with the actions identified in the prespill plan to the maximum extent practicable. NOAA also encourages the trustee(s) to view the prespill planning process as an opportunity to develop broad or programmatic NEPA documents to which future site or project specific NEPA documents may be tiered. (See 40 CFR 1502.20, 40 CFR 1502.40) The inclusion of the NEPA analysis with the prespill plan will assist both the trustee(s) and the public to anticipate necessary restoration actions, their impacts and successes, and promote early resolution of oil spill incidents.

The DARP, along with any significant modifications and associated comments and responses, shall be placed in the administrative record. The DARP shall also become the Report of Assessment. The trustee(s) shall have final approval as to the content and development of the DARP. The DARP shall be developed in order to fulfill applicable NEPA requirements. Those restoration actions that do not individually or cumulatively have a significant effect on the human environment may be categorically excluded from NEPA compliance by a federal trustee through its NEPA implementation regulations. (See 40 CFR 1508.4) The federal trustee(s) should also consider the need for coastal states consistency evaluations and rulings, pursuant to the Coastal Zone Management Act for the DARP.

NOAA specifically solicits comments upon NEPA compliance and the availability of the "functional equivalence" doctrine to federal trustees.

Content

Just as each assessment/restoration will have common elements, each DARP will address the same components of each assessment/restoration. The DARP will address each of the four components of the Assessment Phase: (1) The injury determination component, i.e., results of injury determination studies, to the extent they are known, with documentation of those results; (2) the injury quantification component, i.e., the results of quantification studies, to the extent they can be calculated, with documentation of those results; (3) the restoration component, i.e., the evaluation, selection, and estimated cost of planned restoration actions; and (4) the compensable values component, i.e., valuation studies planned, subject to some exceptions, with the results of those studies if deemed appropriate by the trustee(s). It is recognized that, for CDAs, where there are prolonged (multi-year) studies, the trustee(s) need not develop all components of the DARP simultaneously, but may develop annual reports to update the DARP as the assessment progresses.

Each DARP should include the following common elements. First, the DARP shall identify the discharge of concern and give descriptions of the natural resources and/or services involved. The trustee(s) should include a statement of authority for asserting trusteeship, or co-trusteeship, for those natural resources and/or services considered in the DARP. The DARP shall also include the Preassessment Phase Report and the information requirements of each of the assessment procedures, as described in subparts D, E, F, and G. For example, for a Type A assessment, subpart E requires that the trustee(s) provide a copy of the inputs used to apply the model. These are the types of information requirements that would be included in a DARP for a Type A assessment. Therefore, the level of detail for each component of the DARP shall be consistent with what is appropriate for the type of assessment procedures being conducted.

Development

Because of the dynamic nature of discharges of oil, the trustee(s) should begin implementation of the injury determination and quantification components of the assessment/restoration as soon as practicable after these components are developed and approved by the trustee(s). As data are produced in the injury determination and quantification components, the trustee(s) should then complete the restoration component and design of the compensable values component for the injured natural resources and/or services. However, except as provided for in prespill plans (§ 990.30(c) of the proposed rule) or for emergency restoration (§ 990.25 of the proposed rule), the restoration planning and compensable values components may not be implemented before public review and comment, as discussed below.

Where there are multiple trustees, these trustee(s) should also jointly develop the DARP. The proposed rule provides that, where there are multiple trustees, a lead administrative trustee should be designated to administer the DARP. The lead administrative trustee should act as coordinator and contact regarding all aspects of the DARP. The trustees are encouraged to cooperate and coordinate any DARP that involves coexisting or contiguous natural resources or concurrent jurisdiction, but they arrange to divide responsibility for

implementing the components of the assessment in any manner that is agreed upon by all of the affected natural resource trustees.

The proposed rule requires public involvement in various aspects and stages of the assessment/restoration process. Therefore, the proposed rule does not require the trustee(s) to seek public review and comment of injury determination/quantification studies proposed in the DARP except those undertaken pursuant to a CDA. For the compensation formula, the Type A model, and the EDA, the trustee(s) need only notify the public as to the type of assessment procedure being conducted. The trustee(s), however, always has the option to provide for formal public review and comment should the trustee(s) deem this appropriate. For a CDA, the trustee(s) must provide for public review and comment of the injury determination and quantification studies.

The trustee(s) must provide an opportunity for public comment on the restoration component of the DARP. Where there is no Regional Restoration Plan developed and adopted following public review and comment pursuant to prespill planning, as described in §990.16 of this part, the trustee(s) must provide for public review and comment of the restoration component of DARPs developed pursuant to the compensation formula, Type A model, EDA, and CDA. However, where a Regional Restoration Plan has been developed and adopted, following public review and comment pursuant to prespill planning, as described in §990.16 of this part, the trustee(s) must notify the public of the availability of a DARP for a compensation formula or Type A assessment and seek comment on that decision. The trustee(s) may provide for such public comment on each assessment using a compensation formula or Type A assessment or may provide periodic notice (e.g., once a month) of the intent to apply several recoveries from these assessments to a Regional Restoration Plan. The trustee(s) must provide for public review and comment of the restoration components of DARPs developed pursuant to an EDA or CDA.

It is at the discretion of the trustee(s), however, to provide for notification, review, and comment of those portions of the DARP concerning the calculation of compensable values. The trustee(s), at his discretion, may withhold the description of studies and methodologies for determining the damages for the compensable values from public review and comment. Such damages are still afforded the rebuttable presumption, but may not be eligible for judicial review on the record.

Where the trustee(s) is required to provide for public review and comment, the trustee(s) must provide a minimum of 30 calendar days. The trustee(s), in his discretion, may grant reasonable extensions for that review. Notification or publication of a DARP may be provided in a publication of local, state, regional, or national circulation, as deemed appropriate to the scope of the assessment/restoration by the trustee(s).

The proposed rule states that the DARP may be modified at any stage of the assessment/restoration process as new information becomes available. Any modification to the DARP that is significant in the judgment of the trustee(s) shall be made available for review and comment for a period of at least 30 calendar days, with reasonable extensions granted at the discretion of the trustee(s), before tasks subject to modification are begun. However, any modification to the DARP that is not significant in the judgment of the trustee(s) may be made available for review at the discretion of the trustee(s), but the implementation of such modification need not be delayed as a result of such review.

The proposed rule provides that the trustee(s) must review and respond to public comments during preparation of the restoration component of the DARP. In addressing comments received concerning the proposed restoration approach, it is not necessary for the trustee(s) to respond to each comment received. Comments may be summarized in like-subject areas and responded to only once.

Finally, the proposed rule provides that, at the option of the trustee(s), and if agreed to by any RP(s) acting jointly, the RP(s) or any other party under the direction, guidance, and monitoring of the trustee(s) may implement all or any part of the DARP as approved by the trustee(s). Any decision to involve the RP(s) shall be documented in the DARP.

Other Common Elements of a DARP

Protocols: Selection or development of specific data collection protocols in the preassessment and assessment/restoration activities is left to the discretion of the trustee(s) because of the incident-specific nature of discharges and broad range of natural resources and/or services potentially affected. Therefore, only general guidelines for protocol selection are provided to the trustee(s) in this preamble and proposed rule. Protocols should be chosen that: (1) Are applicable to the discharge and environmental setting; (2) are cost effective; and (3) will provide information consistent with data quality requirements. Factors that should be considered in selecting the protocols include, but are not limited to: (1) The nature of the discharge and environmental setting; (2) applicable study design requirements, such as that developed by Green, R.H., Sampling Design and Statistical Methods for Environmental Biologists; John Wiley & Sons, New York, NY (1979); (3) QA and data management requirements; (4) potential human health and safety; and (5) benefits and costs of alternative protocols.

Where practicable, the trustee(s) should use protocols that are scientifically verified, well documented and standardized by the U.S. Environmental Protection Agency (U.S. EPA), U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, American Society for Testing and Materials, American Public Health Association, Organization of Economic Cooperation and Development, or other government or scientific agencies. Some protocols may not be standardized but nevertheless are appropriate for incident-specific evaluations or may be the only protocols available at the time. Other protocols may need to be modified or developed. The trustee(s) should have the option to use whatever protocols may be relevant to the discharge.

Quality Assurance (QA): When practicable, data collection in preassessment and subsequent damage assessment should be consistent with the QA guidance developed by the U.S. EPA, Guidelines and Specifications for Preparing Quality Assurance Program Plans; Office of Monitoring Systems and Quality Assurance, Washington, DC, EPA–QAMS–005/80, (1980); U.S. EPA, Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans; Office of Monitoring Systems and Quality Assurance, Washington, DC, EPA–QAMS–005/80, (1980); and U.S. EPA, Preparing Perfect Project Plans; Office of Research and Development, Cincinnati, OH, EPA/600/9–89/087, (1989). The Program Plan outlines the overall quality of assessment activities; addressing QA issues in regard to policy, planning, review, and implementation. Project Plans, a vital part of the Program Plan, serve as guidance on aspects of data collection for the individual studies comprising the damage assessment. Preassessment project plans should serve to assess suppositions for the damage assessment process. EDA project plans may be combined among studies with similar scope and substance. CDA project plans

should be of sufficient scope and substance that they can stand on their own. The trustee(s) should develop both Program and Project Plans in an EDA and a CDA.

It is understood that due to the nature of oil discharges, certain QA requirements as prescribed by the U.S. EPA may not be practicable. Therefore, the trustee(s) is encouraged to develop his own QA plans to allow for relevant data collection. Data collection involving actual measurement may also be subject to the provisions concerning human health and safety and applicability of natural resource protection statutes.

Data Management: Where appropriate, the trustee(s) should also develop a data management plan. This is most appropriate for an EDA or a CDA. Establishment of a data management system provides efficient access to collected data and information. The trustee(s) is encouraged to develop such a centralized data management plan, if not done so during prespill planning, to accommodate the volume and complexity of data. An effective data management plan should address, at a minimum, the following: (1) Type and volume of data; (2) uses of the data; (3) existing data management capabilities; (4) types of analyses conducted; (5) QA needs; (6) reporting requirements; and (7) access to data further information is available in the Preassessment Phase Guidance Document referenced earlier in this preamble.

Responses to Comments

Comment: One commenter recommended that damage assessment contingency plans not be rigidly drawn. The commenter cautioned that such a plan could become a liability where the nature of a particular discharge is not contemplated in the plan. Further, it could be an unwise expenditure to develop a contingency plan broad enough in scope to address an endless array of possible discharges.

Response: NOAA agrees that damage assessment and restoration plans should not be rigidly drawn.

Comment: One commenter stated that NOAA must guard against the frivolous spending of company funds, when the company has little or no input into how that money is spent.

Response: NOAA agrees. The assessment/restoration guidance procedures allow for public notice, comment, and consideration of all public comment before a final restoration plan is developed. These procedures should mitigate against any frivolous expenditures.

Comment: Most commenters indicated that the trustee(s) should follow quality assurance (QA) procedures developed by or similar to those of the U.S. EPA. Some commenters, however, indicated that the full QA procedure may add more expense without necessarily increasing the quality of the data.

Response: NOAA agrees that, when appropriate, the trustee(s) and RP(s) together should develop and implement QA plans. However, NOAA suggests that the trustee(s) determine those components of the U.S. EPA's QA procedures that are relevant to the discharge.

Compensation Formulas

Subpart D Preamble

General

Through this proposed rule, NOAA is providing the trustee(s) with a variety of assessment procedures in recognition of the need for flexibility in dealing with situations that, by their nature, are incident-specific. The criteria for the selection of any procedure are not rigid, nor does the proposed rule require the trustee(s) to select a particular procedure for a particular discharge. To assist the trustee(s) in making this decision, NOAA is providing guidance to the trustee(s) in selecting the procedure most appropriate for a particular discharge. The trustee(s) is then able to choose among the various procedures based upon the circumstances of the discharge or the resources and/or services involved. However, due to the large number of small discharges, it is expected that the trustee(s) will use the compensation formulas or the Type A model to determine damages more frequently than either the EDA or the CDA.

The availability of a compensation formula or a computer model for a particular discharge, for example, would not necessarily rule out the use of an expedited or comprehensive damage assessment procedure where the trustee(s) finds that either the formula or the model would not be the best method for assessing damages. Parallel assessments using a combination of more than one procedure may be allowed, provided there is no double recovery. NOAA is suggesting that the trustee(s) may exercise best professional judgment in fashioning an approach to an assessment using the four proposed procedures singly or in some combination. This approach is consistent in concept with the parallel assessments provided for under the current CERCLA rule.

The compensation formulas were developed after extensive review of the scientific and economic literature, with particular emphasis on restoration of various habitat types. This information was then compiled to be used with both the current Type A model for Coastal and Marine Environments and a draft version of the Type A model under development for the Great Lakes Environment in developing the compensation formulas. NOAA is proposing these formulas for use in certain circumstances as a reasonable approach to natural resource damage assessment. NOAA is specifically seeking comments on the reasonableness and appropriateness of such an approach.

Range of Formulas

The estuarine/marine and inland waters compensation formulas proposed are applicable to the vast majority of oil discharges. An analysis of reported coastal oil discharges from 1973 through 1990 shows that 99.8% of the discharges were less than 50,000 gallons (99% were less than 10,000 gallons). These compensation formulas are available for use by the trustee(s) for these relatively small discharges, particularly when assessing discharges that occur in areas where it might be difficult or very costly to ascertain precise environmental effects, e.g., small discharges in open water or discharges occurring in areas that are subject to frequent discharges.

The compensation formulas cover a range of sizes by volume of discharge. These ranges are broken down into four categories: 10 gallons to <1,000 gallons; 1,000 gallons to <5,000 gallons; 5,000 gallons to <10,000 gallons; and 10,000 gallons to 50,000 gallons. Ten gallons is the lower limit on discharges covered by the compensation formulas. NOAA is not saying that discharges of less than 10 gallons do not cause injury. However, after evaluating thousands of simulations of scenarios involving very small spills, NOAA determined that ten gallons is a statistically valid lower limit for this type of assessment procedure.

An analysis of the data used to develop the formulas showed that the smaller discharges, i.e., fewer than 10 gallons, were statistically meaningless, i.e., too much scatter, from which to draw "average" assumptions. However, this lower limit is not meant to preclude recovery for these smaller discharges. There are several options available to the trustee(s). In some cases, it may be reasonable for the trustee(s) to linearly extrapolate downward from the lower damage figure contained in the formulas for the 10-gallon discharges. On the other hand, where the environmental

conditions at the time of the discharge indicate that extrapolation from the averages in the formulas is inappropriate, the trustee(s) may apply the Type A model at 43 CFR 11 to the discharge. Finally, if there are unusual circumstances that indicate the need for site-specific analysis, the trustee(s) may decide that an EDA would be more appropriate.

As for the upper limit of 50,000 gallons, experience indicates that discharges over 50,000 gallons are likely to result in injury that would be more appropriately addressed by another assessment procedure, e.g., the Type A or EDA. These large discharges do not typify the "small" discharges described by the scenarios used to develop the compensation formulas. Determining the "volume" of oil discharged is dependent upon whether the trustee(s) is using the estuarine/marine formula or the inland formula. This distinction is due to the different treatment of cleanup between the two types of water systems. Therefore, the discussion concerning estimating the volume discharges is given below within the discussion of each formula.

Damage Formula

Generally, with increasing volume discharged, damage totals increase while damages per gallon decrease. However, this relationship between damages and volume discharged is a complex non-linear function that varies by scenario. The results of the scenarios showed a definite damage curve. The goal then was to define as accurately as possible the shape of that curve. Breaking down the scenarios into the four ranges of size defined earlier gives a linear interpolation of the scenario results. The formula itself is designed to place the incident of concern on a given point of the curve. The formula is given as "1991$=m(VOL)+b." In this formula, "m" is multiplier, multiplied by the number of gallons discharged, that represents the change in dollars per gallons discharged, and "b" (positive or negative) represents the number of dollars added to that product to arrive at the actual damages for the volume discharged. Both "m" and "b" are given in the tables in Appendix A of each of the technical documents. "(VOL)" is the amount of oil discharged, as defined in the proposed rule. This formula, as applied, defines damages as a function of volume discharged.

The dollar figures produced by applying the compensation formula described above represent 1991 U.S. dollars. These damages calculated in 1991 U.S. dollars may be translated to U.S. dollars for another year using the gross national product price deflator price index. This index may be obtained from the Economic Report of the President, issued annually, or the Survey of Current Business, issued monthly, for years not yet in the Economic Report.

These formulas allow an estimate of damages per gallon, taking into account average restoration costs plus average direct lost use values pending restoration. The following types of damages are included in the formulas: fishery species consumptive use values (fishing), wildlife species consumptive use values (hunting) and nonconsumptive (viewing) use values, restocking costs and direct restoration costs of affected habitats. Restoration costs are included for restoration activities that are technically feasible and cost-effective.

Passive use (nonuse) values are currently not included in the formulas, since, at the time of their development, NOAA determined that sufficient information did not exist concerning average passive use values applicable to the compensation formula approach. NOAA has decided to propose the formulas without passive use values so that they would be available for use by the trustee(s) rather than delay proposing to a future date. Even though passive values are not included in the proposed compensation formulas, NOAA is considering how such values may be included. Therefore, NOAA specifically requests comments on how such passive values might be included in the compensation formulas. Until that time, discharges under 50,000 gallons that are likely to result in a significant loss in passive use values should be assessed under another procedure.

Variations in Type of Oil, Region, Habitat, and Seasons

The formulas assume degrees of injuries to natural resources likely to result from a discharge of oil. These assumptions take into account the amount and type of oil discharged and the region and habitat type in which the discharge occurs. The scenarios consider the various discharges in each of the four seasons. The proposed rule defines the four seasons as: Winter being from January 1 through March 31; spring being from April 1 through June 30; summer being from July 1 through September 30; and fall being from October 1 through December 31. These seasonal boundaries correspond closely with biological seasonal variations. The trustee(s), therefore, identifies the correct scenario by locating the season in which the date of the discharge falls. This approach allows both a national consistency and a regional specificity.

Damage Claim

Section 1017(a) of OPA provides:

Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

Because the compensation formulas are being developed as a regulation through public review and comment, any challenges to the data or models used to develop the formulas would have to be made within ninety days of the promulgation of this regulation rather than in a particular natural resource damage case, as provided in section 1017(a) of OPA. If a trustee(s) uses one of the compensation formulas in a particular damage case, the RP would still have an opportunity to challenge the damage claim; however, that opportunity would be limited to challenging the applicability of the formulas and the accuracy of any site-specific input data used by the trustee(s). The damages calculated by the use of the compensation formula are conclusive for the injuries included in that formula.

The damages computed by using the compensation formulas may be combined with damages determined for beach and/or shoreline closure. These damages, along with the reasonable costs of assessing those damages, are included in the demand presented to the RP(s) pursuant to § 990.81 of this part. Additional damages determined by conducting a parallel assessment may be added to the damages determined with the compensation formula so long as there is no double recovery.

The trustee(s) shall document the data required to use a compensation formula. This documentation shall be included in the Report of Assessment required by § 990.80 of this part.

Final Restoration Plan

The trustee(s) shall develop a Final Restoration Plan based upon the damages recovered through the use of a compensation formula. This plan shall be developed pursuant to subpart H of this part.

References

The proposed formulas and supporting documents for both the Estuarine and Marine Environments and the Inland (Freshwater) Environments are incorporated into the proposed rule by reference. They are: "Compensation Formula for Natural Resource Damage Assessment under OPA: Oil Spills Into Estuarine and Marine Environments, Volumes I–IV" and "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills Into Inland (Freshwater) Waters, Volume I–III." Copies can be obtained from the address at the beginning of this preamble.

Estuarine and Marine Compensation Formula

General

The estuarine and marine compensation formula is based upon the various coastal provinces with representative habitat types for each of these provinces, giving a total of 55 province/habitat combinations. Each possible province/habitat combination has an associated set of damage estimates based upon each of the four seasons, five representative oils, and five possible discharge sizes. The compensation tables given in Appendix A of Volume I of the "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Estuarine and Marine Environments Document" (the Document) are based upon simulated discharge scenarios of the possible combinations listed above, for a total of 5,500 resulting damage estimate ranges. Each of these 5,500 scenarios has certain environmental and other conditions that were specified at a predetermined level to allow for representation of relatively "simple" discharges. Basically, the fates and effects portions of the NRDAM/CME were run, augmented with updated biological and economic data bases and a restoration cost data set. These scenarios were run with an augmented natural resource damage assessment model, Coastal and Marine Environments, Version 1.2 (NRDAM/CME) found at 43 CFR part 11 subpart D.

For the purposes of the compensation formulas, residual and tidal currents are assumed to be zero, the discharge scenario is assumed to be instantaneous at the water surface, seasonal temperatures and wind speed are "set at average values" for the scenario location as explained in volume I of the document, and wind direction is controlled to avoid having the discharge move into a different habitat. The oil products contained in the formulas are: heavy crude oil; light crude oil; No. 2 fuel oil, diesel, and gasoline. However, there is a conversion table to determine which commonly discharged oil products correspond to the types of oils covered in the formulas.

Using the Formula

To use the formulas, the trustee(s) must identify: (1) Whether the discharge occurred in a marine, estuarine, subtidal, or intertidal area, as defined in Volume I of the Document; (2) location of discharge, using the boundaries and definitions of the provinces provided in Volume I of the Document; (3) the habitat type that typifies the habitat affected by the discharge, as described in Volume I of the Document; (4) type of oil discharged; (5) amount discharged (the user may subtract from the discharge amount the volume of oil that is cleaned up *if* the cleanup is from the water and conducted within 24 hours of the onset of the discharge. Because the compensation formulas are intended for relatively small discharges, it is expected that in these smaller discharges much of the toxic constituents or the surface slick will dissipate within 24 hours of discharge. Most of the effects of the discharge will occur within that 24-hour period. Therefore, cleanup must be carried out quickly to be effective in avoiding or minimizing impacts. For these reasons, NOAA is proposing that any oil removed from the environment within 24 hours from the onset of the discharge may be subtracted from the total amount discharged to determine the volume of oil to which the formula is applied. Cleanup from shorelines shall not be subtracted since the majority of impacts on shore are immediate. Also, the use of dispersants cannot be factored in since there likely will be additional effects in the water column as a result of using them.); and (6) season of discharge based upon date of discharge and the definitions of the seasons given in the proposed rule.

Determining Damage Figure

For the purposes of valuing the effects of discharges, the estuarine and marine waters compensation formula is based upon the probability of effects in particular province/habitat combinations from oil discharges through a range of discharge sizes. To determine the damage figure for a particular discharge, the trustee(s) would first locate the appropriate table in Appendix A of the Document based upon province and habitat type using the guidance in Volume I of the "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Estuarine and Marine Environments." The trustee(s) would then select from that table corresponding to the season of the discharge, the substance discharged, and the size of the discharge. The trustee(s) would then compute the dollar figure based on linear interpolation from the range of discharge sizes listed. To do this, the trustee(s) takes the "m" figure and multiplies that figure by the number of gallons discharged. The trustee(s) then adds the "b" figure number to this first total to get the final damages figure.

For example, for a discharge of 500 gallons of diesel fuel discharged in the area covered by scenario M01 (NEW ENGLAND OFF SHORE) on November 1, the trustee(s) would locate the table representing a discharge of diesel in the fall, follow the M01 line to the appropriate column (spills between 100 and under 1,000 gallons) and apply the following formula derived from that table: 500(7.87)+0 = $3,935.00. A 1,000 gallon discharge of heavy crude on November 1 in the same area would be computed as follows:
1,000(19.7778)+4481 = $24,258.00.

Volume III of the Document provides guidance to the trustee(s) in calculating losses due to beach and/or shoreline closure. Such losses would be in addition to the damage figure arrived through the formulas.

Unlike inland (freshwater) systems, there were no data that could be used to develop damages for lost recreational boating opportunities within the estuarine/marine compensation formula. However, the trustee(s) may add such damages to the formula where there is information to develop such estimates.

Inland Waters Compensation Formula

General

The compensation formula for the freshwater systems covered by OPA was developed using the same concept as the Estuarine and Marine Formula. The compensation tables given in Appendix A of Volume I of the "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters" (the Document) are based on simulated scenarios of a total of 100 province/habitat combinations. These scenarios cover Great Lakes habitats, fast and slow flowing rivers, streams, brooks, lakes, ponds, and wetlands. In addition, the tables are grouped by provinces, including: Each of the Great Lakes and connecting channels, Northeast, Southeast, South Florida and West

Indian, North Central, South Central, Mountain, Pacific Northwest, Southwest, Alaska, and Pacific Islands. Each possible province/habitat combination has an associated set of damage estimates based upon each of the four seasons, five representative oils, and five possible discharge sizes. The compensation tables given in Appendix A of the Document are based upon simulated discharge scenarios of the possible combinations listed above, for a total of 10,000 resulting damage estimate ranges. Each of these 10,000 scenarios has certain environmental and other conditions that were specified at a predetermined level to allow for representation of relatively "simple" discharges. The computer model used to develop the formula was a draft of the Type A model for the Great Lakes Environment.

The Natural Resource Damage Assessment Model for the Great Lakes Environments (NRDAM/GLE) is scheduled for publication in 1994 as a proposed rule, and thus will not be available to the public at the same time as the inland waters compensation formula is published. In order to ensure adequate public review, the version of the draft NRDAM/GLE used to develop the inland waters formula, along with the technical documentation, is available from the address given at the front of this Notice. Anyone wishing to review this material should call the contacts listed in this Notice and indicate whether a hard copy or electronic version is preferred. NOAA encourages requestors to ask for the electronic version [as a WordPerfect 5.1 document in IBM format] to reduce the expense of printing.

The version of the NRDAM/GLE that is eventually published as a proposed rule by the U.S. Department of the Interior (DOI) may differ somewhat from the version used by NOAA to develop the inland waters formula. Moreover, the NRDAM/GLE will undoubtedly be revised as a result of the public review and comment of the DOI's rulemaking effort. Therefore, once the NRDAM/GLE has been issued as a final rule, NOAA will revise, as necessary, the inland waters compensation formula to reflect the final version of that computer model. Because NOAA's proposed rule may be published as a final rule before the NRDAM/GLE is promulgated as a final rule, NOAA is considering three options: (1) Publish the inland waters formula as a final rule, with the option to revise once the NRDAM/GLE is promulgated as a final rule; (2) publish the inland waters formula as an interim final rule, pending revision based upon the completion of the NRDAM/GLE; or (3) reserve the inland waters formula as a proposed rule pending the completion of the NRDAM/GLE, with the rest of the NOAA rule being published as a final rule. NOAA seeks comments on these options.

For the purposes of the compensation formulas, residual and tidal currents are assumed to be zero, the discharge scenario is assumed to be instantaneous at the water surface, seasonal temperatures and wind speed are "set at average values" for the scenario location as explained in volume I of the document, and wind direction is controlled to avoid having the discharge move into a different habitat. The oil products contained in the formulas are: heavy crude oil; light crude oil; No. 2 fuel oil, diesel, and gasoline. However, there is a conversion table to determine which commonly discharged oil products correspond to the types of oils covered in the formulas.

Using the Formula

To use the formula, the trustee(s) must identify: (1) Location of discharge to determine in which province the discharge occurred; (2) the habitat type that typifies the habitat affected by the discharge, as described in Volume I of the Document; (3) substance discharged; (4) amount discharged (the user may subtract from the discharge amount the volume of oil that is cleaned up in certain large river and large lakes specified in Volume I of the Document *if* the cleanup is from the water and conducted within 24 hours of the discharge. Cleanup from shorelines shall not be subtracted. Also, the use of dispersants cannot be factored in since there likely will be additional effects in the water column as a result of using them.); and (5) season of discharge based upon date of discharge and the definitions of the seasons given in the proposed rule.

Determining Damage Figure

For the purposes of valuing the effects of discharges, the inland waters compensation formula is based upon the probability of effects in particular province/habitat combinations from oil discharges through a range of discharge sizes. To determine the damage figure for a particular discharge, the trustee(s) would first locate the appropriate table in Appendix A of the Document based upon province and habitat type using the guidance in Volume I of the "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters." The trustee(s) would then select from that table corresponding to the season of the discharge, the substance discharged, and the size of the discharge. The trustee(s) would then compute the dollar figure based on linear interpolation from the range of discharge sizes listed. To do this, the trustee(s) finds the "m" figure and multiplies that figure by the number of gallons discharged. The trustee(s) then adds the "b intercept" number to this first total to get the final damages figure.

For example, a discharge of 6,000 gallons of road oil would result in the following. The representative oil product for road oil is heavy crude. The season is spring and the province and habitat are represented by scenario N73, a Pacific Northwest stream. Using the formula, m=2.18 and b=13969 for the range of discharges between 5,000 and under 10,000 gallons. The calculation is (6,000)(2.18)+13969=$27,049. A same size discharge of diesel in the summer would result in a calculation of: (6,000)(2.255)+16616=$30,146.

Volume III of the Document provides guidance to the trustee(s) in calculating losses due to beach and/or shoreline closure and boating closures. Such losses would be in addition to the damage figure arrived through the formulas.

The trustee(s) may also recover for lost recreational boating opportunities. Volume III of the Document describes how the trustee(s) may estimate these losses. Volume III contains average figures for densities of boating trips for several types of lakes. These densities are given both for those lakes that provide year-round boating and for seasonal boating sites.

Volume III of the Document also has an analysis of various freshwater boating values that sets the average value of an inland boating day at $36.48. The trustee(s) can then use the densities and value given in Volume III, together with the area closed to boating to compute damages for the lost boating opportunities. The formula used to compute these damages is: $V_2A_2T_2$ ($36.48) where V_2=density (given in Volume III) of boating trips per square kilometer per day, A_2=area closed in square kilometers, T_2=time area was closed in days, and $36.48=the value per trip per day.

Responses to Comments

Comment: NOAA received several comments concerning the average costs of restoration. One commenter asked if it was currently possible to accurately model the costs of restoration, particularly in Alaska. One commenter asserted that NOAA should institute a comprehensive data collection program to acquire sufficient baseline information. Only then could NOAA

implement reliable desktop assessment options in Alaska. Were NOAA to pursue this course, data collection activities should be concentrated in high risk areas, such as Cook Inlet and Prince William Sound.

Another urged assessment procedures to be inexpensive but as accurate as possible, and based on science. Another commenter asserted that multiple assessment costs should only be compensable up to the reasonable cost of a single assessment.

Response: NOAA agrees that economical and accurate scientific assessment procedures are in the best interest of every party. In determining the "average" costs of restoration for the compensation formula, an extensive research study was conducted of information concerning restoration of natural resources in several environments, including Alaska (See "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Estuarine and Marine Environments, Volumes I–IV" and "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters, Volumes I–III"). This information was factored into the formula in order to reflect the best available information to date. Of course, all simplified assessments are based upon average conditions. If the trustee(s) decides that the use of the formulas does not adequately address the specific circumstances surrounding a particular discharge, another assessment procedure should be used. Concerning the reasonable costs of assessments, costs of parallel assessments are allowed, provided the separate assessments do not result in double recovery.

Comment: Some commenters were concerned that traditional comprehensive damage assessment techniques would be inefficient for small discharges. One commenter recommended an established de minimis discharge volume that would not lead to a recovery of damages.

Response: The proposed rule provides guidance and criteria for the trustee(s) to determine the appropriate procedures for a particular discharge. The decision to proceed with a claim is left to the discretion of the trustee(s) based upon the information and data collected through the Preassessment Phase. NOAA's proposed rule does not adopt the use of a rigid de minimis standard to excuse liability. OPA addresses the effect and not the nature of a discharge—the characteristics of a particular environment may render it vulnerable to even a small discharge of oil. The range of assessment procedures available to the trustee(s) should ensure that an appropriate type of assessment will be conducted. NOAA's proposed rule does provide, however, that the compensation formula is appropriate for determining damages for discharges of ten or more gallons, up to 50,000 gallons.

Comment: NOAA received several comments recommending specific factors to include in the simplified assessments, such as season and location of the discharge, and wind and surface currents present at the time of the discharge.

Response: NOAA agrees that the inclusion of these factors is helpful in the assessment. These types of variables are accounted for in the Type A model. In the compensation formula, wind and surface currents are predetermined to maintain the scenario of a "small" discharge.

Comment: A number of commenters challenged the use of computer models and compensation tables for damage assessment. One commenter was opposed to these methods because of insufficient data. Another commenter speculated that trustees would not use the models for fear of the passive use valuations being challenged.

Response: NOAA believes that the computer model and compensation formulas provide a reasonable means for conducting rapid and economical damage assessments. Based upon extensive review of available literature, NOAA believes that the data collected for the formula are sufficient to make a reasonable determination of damages. If the trustee(s) determines that there are insufficient data for an appropriate assessment based on the model, an incident-specific analysis may be appropriate, such as an EDA or CDA. The compensation formula does not include passive use values at this time. Discharges that are likely to have resulted in significant reduction for passive use values should be assessed through a CDA, and possibly an EDA.

Comment: Several commenters supported the development of compensation tables for the assessment of small discharges. Some conceded that the tables were in some instances less accurate than incident-specific assessments but were justified by their cost effectiveness.

Response: NOAA agrees. Not only is the reduced cost a factor, but there is a more predictable outcome following a discharge and the trustee(s) and the RP(s) are able to focus on the actual restoration or acquisition of the equivalent resources as soon as possible.

Comment: One commenter questioned the reliability of desktop models that require highly technical, current environmental information that is not always available. Another commenter agreed and stressed that such assessment methods must meet clearly defined criteria of scientific validity. One commenter noted that, although compiling scientific information would be cumbersome at first, trustees would come to appreciate the efficiencies of the structured tables that would facilitate expedited settlements.

Response: NOAA concurs that desktop models are most effective when the averages that are produced reflect the most current and detailed information available. For regions where little data are known, however, models are still capable of producing reasonable estimates. Although the proposed rule only requires revision of the rule every five years, the computer model and formulas will be the subject of continuing evaluation. As new scientific literature becomes available which enables further refinements to the models by DOI, NOAA will evaluate whether revisions to the formulas are appropriate in advance of the five-year requirement.

Comment: One commenter charged that tables and models are based on statistical averages and by their nature cannot produce values that are reasonably related to actual costs. As such, they are not authorized by OPA. However, the commenter continued to state that small discharges with limited effects may not call for a Comprehensive Damage Assessment (CDA).

Response: NOAA believes that the development of formulas and models is within the scope of its authority under OPA. Although based on statistical averages, the values do reasonably assess restoration/replacement costs and are therefore authorized by OPA. The computer models and compensation formulas are appropriate for small discharges of limited effect where a comprehensive damage assessment may be impracticable.

Comment: One commenter noted that restoration is a new and rapidly changing field where there are few case studies from which to draw information and calculate damages. Therefore, restoration costs may have to be determined on a case-by-case basis.

Response: NOAA agrees with this statement when the trustee(s) is conducting either an EDA or CDA.

Comment: One commenter recommended that NOAA's proposed regulations should address only the framework for comprehensive and expedited damage assessments,

especially where OPA, unlike CERCLA, does not specifically call for the preparation of regulations for simplified assessment methods. Further, the feasibility of simplified assessment procedures should be explored in the context of a negotiated rulemaking, comprised of representatives from industry, insurers, environmental groups and other trustees.

Response: NOAA disagrees with the notion that OPA limits this rulemaking to EDA or CDA procedures. Simplified assessments provide an opportunity for quick recoveries and therefore lower transaction costs to both the trustee(s) and the RP(s). The use of negotiated rulemaking for development of the compensation formula was considered to be very time consuming, expensive, and potentially resulting in damages based more upon compromise than restoration costs and compensable values.

Comment: One commenter noted that areas that are presently "biologically degraded" will be retarded in the recovery following a discharge. NOAA's suggestion that the compensation table could be used where there may be difficulty in ascertaining precise injury, seems to equate difficulty with insignificance. This approach will encourage the trustee(s) to use a cookbook approach rather than a fact-based assessment.

Response: In the selection of the appropriate assessment procedures, the trustee(s), at the time following the discharge, will be in the best position to determine the most appropriate procedure for the discharge conditions.

Comment: Two commenters expressed concern that tables may under-value resources in industrialized or biologically degraded areas. Another commenter particularly noted that any table should fully value urban resources. One commenter felt that NOAA is being optimistic in that the tables can cover many issues.

Response: The Estuarine and Marine Environments Compensation Formula is based upon 55 representative province/habitat combinations, ranging from Northern Maine to the Alaska Coast, the Hawaiian and Pacific Islands. Since the compensation formula is based upon averages, it is impossible to include all known coastal habitats and every combination of discharges. However, several industrialized areas are specifically represented, i.e., Boston Harbor, New York Harbor, Mobile Bay, etc.

The Inland (Freshwater) Waters Compensation Formula is based upon 100 representative province/habitat combinations representing the Great Lakes and other inland waters by type, i.e., river, lake, fast flowing stream, etc.

By comparing the habitat of the actual discharge with the province and specific habitat used to estimate the damages in the formula, the trustee(s) should, in most cases, find the most applicable scenario. NOAA emphasizes that the primary advantages of a compensation formula are for simplicity and cost-effectiveness. In addition, any time a simplified assessment is used, it is unlikely that the exact circumstances of an actual discharge will be represented, only approximated. In cases where the circumstances of an actual discharge are determined to be far out of the bounds of the compensation formula, the trustee(s) should consider the use of another assessment procedure, i.e., EDA or CDA.

Comment: One commenter suggested using tables in small discharges to establish base damages, and conducting more incident-specific assessments for larger discharges or sensitive areas. Others indicated that tables would be too simplistic and have limited value.

Response: The compensation formula is specifically designed for use in most discharges of under 50,000 gallons. It is likely that discharges over 50,000 gallons would result in injuries that would be more appropriately addressed by another assessment procedure. Again, the trustee(s) will determine if a specific discharge may be appropriately assessed by the compensation formula. It is well within NOAA's statutory authority to include compensation formulas with the proposed rule.

Comment: One commenter was concerned with the formulas that give no credit for responsible cleanup. Another commenter cited that no adjustment is made for short-term versus long-term injuries. This commenter also stated that there is no difference for companies that take remedial action to clean up or reduce injuries of a discharge. The commenter stated that the lack of these adjustments is a disincentive to RPs. Others indicated that the tables should be based upon the assumption that the total cargo was discharged, requiring the RP to produce evidence to the contrary.

Response: The formulas introduced in this proposed rule provide that the gallon amount used is the estimated amount of oil left in the water environment 24 hours after the onset of the discharge. Hence, if oil is immediately contained and cleaned up, the ten gallon threshold of the compensation formula may not be reached. Discharges of highly volatile oil products may result in significant negative injuries to the environment, even if cleaned up within 24 hours. Such discharges would be more appropriately assessed using another assessment procedure. This should provide a significant incentive for RP(s) to begin immediate cleanup and yet allow for the assessment of injuries resulting from the actual discharge. Discharges that may result in long-term injuries may be more appropriately assessed through the use of another assessment procedure. NOAA is confident that the lead response agency and the RP(s) can and will identify the amount of oil discharged to a degree of confidence necessary to conduct a damage assessment, either through the formulas or other assessment procedure.

Comment: Some commenters stated formulas should not be based simply on mortality counts or gallons discharged. Yet another stated that, if a dollar per gallon formula is used, NOAA should consider toxicity of discharged oil as well as persistence. Another indicated that any compensation formula based on destroyed flora or fauna ignores the rate of natural replenishment. This commenter also stated that damages should not be based on artificial valuation of "commercially valueless creatures."

Response: The compensation formulas introduced in the proposed rule are based upon gallons discharged, restoration costs (where appropriate), restocking costs, and average direct use values of the affected resources. Restoration costs are only included when the scenario is one in which anticipated habitat restoration efforts would have lessened the overall damage figure, i.e., done more good than harm. Since the formula represents small discharges few scenarios resulted in habitat restoration costs. However, restocking costs of fish, shellfish, and wildlife are included when it is expected that there would be a loss of those resources. Restocking costs and direct use values could only be calculated for resources that had a current value that could be determined.

In addition, the formulas provide for five different representative types of oil: (1) Heavy crude; (2) light crude; (3) No. 2 fuel oil; (4) diesel oil; and (5) gasoline. If the oil discharged is not one of those types of oil, the trustee(s) is given guidance on which representative oil is the closest to the type of oil discharged. The data used to develop the formula recognize the different toxicity properties of each representative oil.

Comment: Some commenters strongly objected to the inclusion of passive use values in simplified assessments. One noted that passive use values are "particularly ill-suited" in the context

of small discharges, but NOAA should not rule them out for those discharges. The model or table will not capture passive use losses well, but NOAA should continue to explore inclusion of them in such a table or model as the number of passive use value studies is rapidly increasing.

Response: Through a lengthy, deliberative, and exhausting process for the review of contingent valuation, NOAA has determined that the formulas in the proposed rule will not include passive use values. In addition, the formulas are designed for small discharges that would generally not have a significant effect upon passive use values. Small discharges likely to have a significant effect upon passive use values, as determined by the trustee(s), should be assessed through a different procedure.

NOAA is considering how passive use values might be included in the compensation formulas and is requesting comments on this issue.

Comment: One commenter stated that use of a compensation table would avoid the cost of performing an assessment and represent a savings to the RP. The commenter stated the RP should not have the ability to challenge a table by using "real data." However, some collection of "real data" between the RP(s) and trustee(s) should be allowed. RP-collected data should not be admissible in court, unless submitted to the trustee(s) as a part of the administrative record.

Response: One of the advantages of using the compensation formula is the reduced cost. However, the proposed rule specifically allows the RP(s) to request a more comprehensive damage assessment, provided those costs are borne up front by the RP(s). Where the trustee(s) and the RP(s) determine it necessary to collect additional data, another assessment procedure can be used. As outlined in this proposed rule, all data to be considered in the restoration process must be submitted to the administrative record. Once the formulas are final, including possible judicial review, NOAA believes that the bases of the formulas will no longer be subject to challenge, although the trustee(s) may be challenged concerning the data inputs, i.e., size of discharge, type of oil, etc. To avoid unnecessary litigation, NOAA encourages the RP(s) and the trustee(s) to enter into enforceable agreements to use the formulas to determine the appropriate damages.

Comment: One commenter stated that any compensation formulas or computer modeling must include a continuous "reality check" of observed effects and results for assessment awards. Another commenter took the opposite view, favoring compensation tables only if they are not subject to unilateral "reality checks."

Response: NOAA believes that the proposed compensation formulas represent the best available information at the time of compilation in terms of the fate and effect of oil, the likely biological effects, and the average restoration costs and direct use values, for a variety of discharges. As stated earlier, if the circumstances of an actual discharge are significantly out of the parameters of the formulas, an alternative assessment procedure should be used. Again, any simplified assessment procedure will not mirror reality in every single discharge. The proposed rule does provide, however, for NOAA to review the procedures every five years. This will allow the formulas to be kept current on biological, toxicological, and valuation information.

Comment: One commenter stated that formulas should not be used as an assessment tool. Another cited a compensation formula as a theory of "liquidated damages" or "worker's compensation" recovery, being contrary to the statutory injunctions of OPA. Also cited was the *Zoe Colocotroni* case as discrediting compensation formulas.

Response: NOAA disagrees that compensation formulas are not appropriate as assessment tools, provided the formulas are based upon the measure of damages required by OPA. These include: The costs of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged resources; the diminution of value; plus the reasonable costs of conducting the assessment. The proposed formula is based upon that premise, although it is likely that costs of conducting the assessment will be very low. As stated throughout the proposed rule, the formula is one of four procedures available to the trustee(s). If the particular circumstances of the discharge are beyond the scope of the formula, another procedure should be used.

Comment: One commenter recommended that any simplified damage assessment technique be based on the equation that: Total Damages = Cost of Restoration + Diminution of Value of the Resource Pending Restoration + Cost of Conducting the Assessment.

Response: NOAA agrees that a simplified damage assessment procedure based on such an equation satisfies the criteria of being simple, accurate, reliable, and understandable and is in accordance with OPA.

Type A Model

Subpart E Preamble

NOAA is proposing that a natural resource trustee(s) may use the Natural Resource Damage Assessment Model for Coastal and Marine Environments (NRDAM/CME), Version 1.2, known as the Type A model, developed by the U.S. Department of the Interior (DOI), for damage assessments under OPA. The Type A model is described at 43 CFR Part 11, subpart D. The Type A model may be used when the conditions of the discharge are sufficiently similar to the conditions of 43 CFR 11.33(b) to make the Type A model a useful method for the discharge of concern. The trustee(s) shall publish the DARP stating the intent to use the NRDAM/CME and identifying the inputs to be used in that application. The public will have thirty calendar days in which to comment on the use of the NRDAM/CME. If the trustee(s) has set out, as part of prespill planning, the circumstances under which the NRDAM/CME would be used and a different process for public input in that use, the process identified in the prespill plan may be used, subject to the provisions for prespill planning in § 990.16 of this part.

It is likely that NOAA will also recommend the new set of computer models being developed by DOI for use in estimating damages for injuries to natural resources resulting from relatively minor discharges of oil. The current computer model for use in coastal and marine environments is being revised by DOI to comply with the court's decision in *Colorado* v. *DOI* and as part of the statutorily-mandated review and update. The court in *Colorado* v. *DOI*, held that natural resource damage assessments should be based upon costs to restore, replace, rehabilitate, or acquire the equivalent of the injured resources, plus the diminution of all reliably calculated compensable values pending recovery. The current model is still in effect pending those revisions. DOI is also developing a second computer model for use in the Great Lakes and their connecting channels.

These computer models use the same basic approach to estimating damages. Each model is composed of several major components modeling the physical and chemical fate of the substance discharged, spread of the substance throughout the environment, the present and future biological effects of the discharge, the restoration approach and its costs where

appropriate, and the value of natural resources and services lost pending recovery.

These new computer models, are under development through DOI, but are not yet available for public review. NOAA is working closely with DOI in its development of these computer models. Based upon an initial evaluation of these models, it is likely that NOAA will recommend that they are available procedures that the trustee(s) may choose to use under OPA.

Response to Comments

"Use of Computer Models"

Comment: Several commenters noted that simplified procedures are most applicable for small discharges that would otherwise not be addressed because the cost of conducting an assessment might be greater than the ultimate recovery. Commenters noted that the use of simplified procedures would be less costly to the trustee(s) as well as the RP(s), and will result in more timely recoveries.

Response: NOAA agrees that a major advantage of a simplified assessment procedure like a computer model would allow for more timely and cost-effective assessments for a majority of oil discharges.

Comment: Concerning the use of a computer model, commenters indicated that it would more accurately evaluate variables than a simplistic formula. Models incorporating a number of key variables could be a useful assessment tool and provide a cost-effective, reliable, and rapid assessment.

Response: NOAA agrees that a computer model that allows a large range of variables to be considered in a standardized fashion is a valuable assessment tool.

Comment: Several commenters indicated that a computer model must be based upon an accurate estimate of restoration costs and that such costs must bear a reliable relationship both to actual injuries to natural resources as a result of the discharge and restoration actions.

Response: NOAA agrees that a computer model would look at the most appropriate type of restoration action typically considered for the type of incident being modelled. This action would be based on the average types of expected injuries. The model would then calculate the average, regional costs of carrying out such an action.

Comment: Several commenters expressed concern about the use of a model because of the possibility that it would underestimate the damages. Commenters in this category, therefore, argued for the inclusion of passive use values. According to these commenters, even if the resource does recover, there will be some diminution in value over the recovery period. Similarly, passive use values may remain impaired/diminished until recovery.

Other commenters, however, argued that the factors taken into account by a model should be limited. Since OPA is compensatory and not punitive, a model should not incorporate values that may be difficult to measure. Accordingly, these commenters would not allow the use of any passive use values. Also, one commenter stated a model would be improper for large values.

Response: NOAA points out that the court's direction in the *Ohio* and *Colorado* decisions was to include in all types of assessments all reliably calculated values. Therefore, to the extent possible, these values would be included in a computer model.

Comment: One commenter stated that, where multiple trustees are involved in one discharge, the RP is unlikely to agree to a damage figure derived from a computer model or compensation table until all the trustees agree that the resulting damage figure is the sole measure of damages for all injuries. Otherwise, the commenter noted that the RP would be faced with paying damages to satisfy the computer model or table figure while still facing claims for specific restoration projects, all resulting from the same discharge.

Response: NOAA notes that the danger of double recovery can be avoided by the RP(s) scrutinizing a natural resource and/or injury upon which damage claims are made by several trustees. Such review would show whether the same resource injury is being claimed by the various trustees.

Comment: Some commenters suggested NOAA develop and propose a similar computer model for rivers, streams, lakes, and interior wetlands.

Response: NOAA is currently developing the inland compensation formula for relatively minor discharges in inland waters (see discussion elsewhere in this preamble). DOI is also investigating possible additional damage assessment methods for use as inland Type A procedures. NOAA will work with DOI in this effort to the extent possible.

"DOI's Type A Model"

Comment: Several commenters stated that the revised Type A model, under development by DOI, must contain more accurate data than the current Type A model. It should be area specific and reflect the actual species densities and distributions, as well as variations in those distributions and densities. The commenter noted that entire coastlines should not be classified within the model as one biologically homogenous unit. Some commenters identified factors that the table or model should take into account. These factors include: The scarcity of a resource or the presence of a critical species in a given area; seasonal differences; the size of the discharge; and the cumulative effects of small discharges over time. In addition, the data should be periodically updated.

Response: NOAA notes that DOI is updating the data considered in the Type A model and collecting all available information. As for including such things as regional or local information on species densities and distributions, NOAA is helping to gather such data, but notes that such detailed information is only available for certain well-studied areas that represent a relatively small portion of the entire coastal and marine environments of the United States and its territories.

Comment: Some commenters noted that the original Type A model severely underestimated damages in its use of a flawed economic valuation and that the damages should be significant enough to act as a deterrent.

Response: The court in *Colorado* v. *DOI* instructed DOI to include in the Type A models, damages based upon costs to restore, replace, rehabilitate, or acquire the equivalent of the injured resource, plus the diminution of all reliably calculated direct use and passive use values pending the recovery of the injured natural resources and their services. DOI has stated that the Type A models will incorporate these components of the damages to the extent practicable. The Type A models are compensatory, not punitive, so they are not intended to serve as deterrents.

Comment: One commenter stated that the model should provide for frequent information updating, and should require public input in the process.

Response: NOAA agrees that the Type A model should be periodically updated through a public review and comment process. In fact, section 301(c) of CERCLA requires a review and revision, as appropriate, every two years. DOI is currently conducting such a revision of the Type A model for coastal and marine environments, along with the *Colorado* court's suggested revisions.

Expedited Damage Assessment

Subpart F Preamble

General

Purpose/Scope

Included in the range of proposed damage assessment procedures is the expedited damage assessment (EDA). EDA reflects a damage assessment approach that is intermediate between the current Type A model and proposed CDA procedures. This approach recognizes that the trustee(s) may want to address more effects than currently available in the Type A model or proposed compensation formula, particularly for inland discharges. The approach also recognizes that the size, location, and timing of a given discharge may not warrant the broad, extensive procedures associated with a CDA. An EDA encompasses a variety of methods that permit the trustee(s) to determine and quantify injury based on limited, focused studies. The trustee(s) is accorded considerable discretion in determining which methods are the most suitable for a given EDA. Accordingly, the EDA should be viewed as a dynamic process rather than a rigid, step-by-step approach.

The goal of an EDA is to initiate restoration as quickly as possible. This goal can be achieved by truncating the injury determination and quantification process. Using limited, focused studies, the trustee(s) may determine and quantify injury in one of two general approaches. First, the trustee(s) may supplement the Type A model with additional injury or compensable value studies for those natural resources and/or services not specifically included in the model's assumptions. Second, the trustee(s) may undertake an attenuated CDA. The latter approach involves the trustee(s) selecting only certain key resources and/or services that warrant injury assessment and conducting focused studies to quantify injuries to determine the restoration approach and compensable values. The proposed rule encourages the trustee(s) to begin initial restoration planning early in the assessment/restoration process in order to focus efforts on developing a restoration approach. These early restoration alternatives, however, may be modified as the injury determination and quantification data is refined.

The EDA process allows the trustee(s) to exercise his best professional judgment to narrow the scope of studies conducted during the Assessment/Restoration Phase to a few key natural resources and/or services. To help select the appropriate resources for inclusion, the proposed rule recommends that the trustee(s) focus on those natural resources and/or services that are of commercial, recreational or ecological importance, or of special significance. The trustee(s) may determine, for example, that studies focusing only on one, or few resources (i.e., murres or wetlands), will produce a restoration approach sufficient to restore the affected resources and/or services. The proposed rule also provides guidance for focusing the injury determination and quantification components.

In examining the relationship of the EDA with the other proposed assessment procedures, it is helpful to think in terms of what EDA is not. Large or unusually destructive discharges may require a broad suite of extensive studies over a multi-year period to determine the nature and extent of the injuries to natural resources and/or services and calculate compensable values. While it is important to have a comprehensive damage assessment option, NOAA believes that most assessments will not require an extensive, often litigation-driven, approach. Through this proposed rule, NOAA has interpreted Congress' apparent desire to spend less time rediscovering that a discharge is harmful to the environment, and focus more efforts on restoration measures. EDA provides a vehicle for that purpose.

Finally, the proposed rule provides that the trustee(s) should complete the natural resource and/or service injury determination/quantification process and develop a restoration approach within two years from the date of the discharge, where possible. This time-frame is not required, but an assessment taking longer to reach this point is not expedited.

Guidance in Selecting the EDA Approach

In evaluating whether an EDA is appropriate for a given discharge, the trustee(s) should take into account the guidance provided by the proposed rule. This guidance is not intended to be rigidly applied. Rather, the trustee(s) should exercise best professional judgment in evaluating the usefulness of this guidance for any given discharge.

Near the close of the Preassessment Phase, the trustee(s) will examine the information regarding the discharge in light of the guidance and decide whether to select the EDA approach or another assessment procedure. In all cases, this decision is reserved for the trustee(s). See discussion earlier in this preamble.

The Expedited Damage Assessment Approach

EDA Objectives: The steps involved in the EDA or CDA damage assessment are similar. The scope of effort associated with each step, however, differs considerably between the two procedures.

The objectives of an EDA are to: (1) Expeditiously determine and quantify injuries to selected natural resources and/or services resulting from a discharge using limited, focused studies and baseline or reference/control information, and (2) provide the basis for restoration and recovery of natural resources and/or services. To achieve these objectives, the EDA procedure consists of: (1) Injury determination; (2) injury quantification; (3) restoration component; and (4) compensable value determination.

Injury Determination

General

Injury resulting from (or caused by) the discharge of oil has been determined when the trustee(s) has demonstrated that: (1) With direct exposure, (a) the natural resource was exposed; (b) there is a pathway between the discharge and exposed natural resource; and (c) the exposure of oil, its components, or by-products has been shown by rigorous and appropriate scientific methodology to have an adverse effect on the natural resource in laboratory experiments or the field; or (2) in the absence of direct exposure, (a) the adverse effect on or impaired/diminished use of a natural resource has been shown by rigorous and appropriate scientific methodology; and (b) the adverse effect on or impaired/diminished use of the natural resource would not have occurred but for the fact of the discharge or threat of a discharge. The trustee(s) should establish baseline or reference/control conditions from which changes in environmental and biological parameters may be measured.

Contributing Factor: Where multiple factors may have contributed to an indivisible injury to a natural resource and/or service, the discharge of oil may be considered a contributing factor to the injury.

Exposure

Once the discharge of oil has been documented, the next step involves either confirmation of exposure or threat of exposure to the natural resources to the oil. Confirmation and exposure entails determining the amount of product discharged into the environment. Initial estimates developed in the Preassessment Phase

should now be verified or modified as appropriate. Where practicable, the trustee(s) should rely on figures developed by the On-Scene Coordinator (OSC) and request continual updates. The OSC may also be requested to provide a final estimate of the amount discharged, recovered, or removed. The trustee(s), however, may conduct additional surveys to determine the amount of oil discharged into the environment, should the figures provided by the OSC prove insufficient.

Using field data collected thus far, the next step should be to identify exposure pathways. Field data that may help the trustee(s) accomplish this step include documentation of the areal extent of the oil and collection of water samples along the oil contamination gradient. The trustee(s) may rely on models, in conjunction with limited field data, to document exposure pathways. These models should be relatively simple and acceptable to the scientific and regulatory community. The trustee(s) should confirm that natural resources were in fact exposed to oil.

Where the injury is an indirect-adverse effect or impaired/diminished use, the trustee(s) should begin to document the nature and extent of such injury. An example of impaired/diminished use is where a recreational beach is closed in anticipation of oiling. An example of an indirect adverse effect is where exposure to oil has resulted in the reduction or elimination of food chain resources thereby resulting in starvation of a higher trophic level resource (e.g., birds). If such injuries are readily quantifiable, studies that document the injury are appropriate for an EDA. Determination of impaired/dimished use or adverse effects is addressed in the section entitled Injury Determination: Scope of Injuries.

Identify Natural Resources: The trustee(s) should identify those natural resources for which injury determination and quantification will be conducted. Eligible natural resources will include those which are of commercial, recreational, ecological importance, or of special significance.

Initiate Early Restoration Planning: At this point in the process, the trustee(s) should initiate early restoration planning. To supplement the information on restoration provided in this section, the trustee(s) should refer to the restoration discussion in subpart G of the preamble, in the proposed rule, and the Restoration Guidance Document.

The trustee(s) should develop a restoration scoping statement to focus the planning process. The scoping statement should identify those restoration alternatives that the trustee(s) may consider to remedy discharge effects, including source control and remediation where appropriate. The "natural recovery" alternative should be specifically addressed. In addition, the trustee(s) may consider acquisition of the equivalent natural resources as an alternative, but only in light of OPA's preference for the other alternatives. The scoping statement will rely on information derived from the Preassessment Phase and exposure determination, and may be developed along a roughly parallel time line as the DARP. (See preamble discussion of the DARP in subpart C.)

Scope of Injuries

The scope of injuries in an EDA are limited relative to a CDA. Injuries to natural resources and/or services that may be appropriate for an EDA include, but are not limited to, mortality, and sublethal effects that are relatively easy to document. Categories of injury that meet the acceptance criteria in § 990.71(e) of the proposed rule and are appropriate for an EDA are currently being developed.

With respect to fish and wildlife resources, the trustee(s) should estimate direct mortality using body counts in the affected areas in accordance with standard field procedures (such as the "fish-kill" investigation methods described by the American Fisheries Society). (See Part II (Fish-Kill Counting Guidelines) of "Monetary Values of Freshwater Fish and Fish-Kill Counting Guidelines," American Fisheries Society Special Publication Number 13, 1992.) The trustee(s) should correct the estimates using established procedures in the literature along with "off-the-shelf" models. Published water and sediment toxicity data can be used in the models. In addition, toxicity tests may be conducted on the discharged oil to provide specific information for the model on the effects of the discharged oil at the estimated concentrations on the species and life stages of concern. The toxicity tests, however, should be time- and cost-effective. Mortality may also be determined by baseline and reference/control comparisons.

Mortality estimates may be less applicable to vegetation associated with natural resource habitats. Oiled vegetation may suffer considerable sublethal injury including, but not limited to, reduction in growth rates, loss of above-ground biomass, and reproductive impairment. These injuries, especially the loss of plant biomass, may result in changes in species diversity and abundance utilizing the habitat. Nevertheless, chronic contamination or a severe discharge may result in direct mortality. The trustee(s) may need to undertake limited surveys to verify early vegetative mortality, as well as mortality likely with time.

As mentioned earlier, mortality resulting from a discharge may also be indirect. The trustee(s) may include indirect mortality in the injury focus provided there is baseline information documenting such injury or the indirect mortality can be determined with limited, focused studies. Measures of indirect mortality include, but are not limited to, starvation; failure to nest; hatching failure; and loss of critical habitat.

Sublethal effects as measures of injury should be carefully selected in an EDA. Only those that can be determined using limited, focused studies and that are expected to result in quantifiable injuries should be included. Sublethal effects that may meet these requirements include, but are not limited to, impairment of growth, reproduction, development and behavior.

The trustee(s) should also consider injuries to services. The first step in determining injury to the services is to inventory the services provided by a natural resource prior to discharge and identify those services affected or expected to be affected by the discharge. Services commonly affected by a discharge of oil to the natural environment include recreational, commercial, ecological, and those of special significance as defined earlier in this proposed rule. Recreational services provided by natural systems include, but are not limited to, provision of recreational fishing, boating, boat mooring, bathing, beach use, wildlife viewing, sightseeing, and hunting opportunities. Commercial services include finfish and shellfish harvest, as well as marine transportation, marine development, and industrial and municipal water use. Commercial services differ from recreational, ecological, and passive use services in that some parties other than the trustee(s) (e.g., commercial fishermen) may make claims related to the diminution of value. Therefore, the potential for overlap between the trustee's(s') and a private claim should be carefully considered. Typical ecological services (i.e., biological diversity, habitat protection, food chain transfer, contaminant control/assimilation, water quality/quantity aesthetics) could include wetland functions, such as water quality enhancement, waterfowl nesting sites,

and estuary functions, such as provision of nurseries for fin and shellfish or habitat to endangered or threatened species. Services provided by resources of special significance include, but are not limited to, subsistence fishing, education, scientific and cultural research.

Not all services inventoried will suffer injury or a reduction in their flow. The trustee(s), therefore, must identify those services to be addressed by the EDA. For example, wetlands provide a range of services including, but not limited to flood control, fish nurseries, and recreational opportunities. A discharge that results in oiling of above ground wetland vegetation may leave the roots intact, therefore leaving the flood control service unaffected. The oiling of the emergent vegetation, however, could substantially reduce the bird viewing opportunities. The trustee(s) should include in the EDA only those services that have actually been interrupted or lost.

Injury Quantification

General

The trustee(s) should quantify injuries to natural resources and/or services identified through injury determination. Based on the services identified as interrupted or lost, the trustee(s) should select a subset of this list for detailed analysis. The trustee(s) should determine the duration of lost or diminished services. This is accomplished by comparing the level of baseline or reference services (i.e., the conditions as they existed prior or adjacent to the discharge and would have continued to exist in the future but for the discharge) to the level of services after the discharge. In some cases, baseline or reference service flow estimates may not be available. For example, state and federal agencies may not maintain data on commercial fish catch at the level of detail required for economic damage assessment. Where critical information is lacking, the trustee(s) must decide whether to: (1) Continue with the EDA in the absence of the compensable value estimate for the given service flow; or (2) reconsider the appropriateness of the EDA approach, given the magnitude or importance of the service flow in question.

Develop Restoration Component

The trustee(s) should develop the restoration component of the DARP at this phase in the process. The restoration component should include an analysis of restoration alternatives and the preferred restoration approach for each injured resource or service. The trustee(s) should refer to subpart G for a full discussion on the restoration component of the DARP.

Compensable Values Component

The compensable values component for an EDA contains the study design to estimate the values of the lost services. In this part of the EDA, the trustee(s) will consider the interim lost services associated with the restoration component and identify available methodologies for estimating these values.

While an EDA does not necessarily preclude large-scale original studies such as a site-specific travel cost model, economic assessment of lost values should be accomplished by limited, focused efforts where possible. The EDA, therefore, may rely on simplified valuation models or the applications of benefits transfer. As discussed here and in the "Compensable Values" section of the preamble accompanying subpart G, a wide range of methods exist for estimating lost resource values.

Applicability of market valuation techniques will depend on site-specific factors, such as the types of services affected and data availability. Important and commonly-applied approaches include: Market price and appraisal value; travel cost models; random utility models, and hedonic property valuation models. The trustee(s) may determine that economic methods currently do not exist to estimate the damages resulting from the loss or reduction in one or more of the important service flow categories. Where the trustee(s) anticipates that implementing a particular technique will exceed a reasonable time to accomplish an EDA or will result in implementation costs that are unreasonable relative to the expected level of damages, the trustee(s) should consider selecting another damage assessment technique. Factors influencing this decision will include increase in the precision of the damage assessment, and the time and budget required to complete such research.

Once the extent of the lost services has been estimated, economic values must be assigned to these services to estimate the compensable values. For some categories of economic damage, it will be possible to conduct site-specific analyses. For example, the damages associated with the closure of a marine transportation corridor will, in most instances, be estimated using site-specific data. In other cases, the trustee(s) will apply estimates, equations, models, or data from existing valuation studies, through the use of benefits transfer. Benefits transfer may be used where the trustee(s) determines that benefit estimates are available to support a defensible benefits transfer (see discussion of benefits transfer in the preamble discussion of valuation methodologies). If such estimates do not exist, the trustee(s) may undertake a cost-effective study at the site.

The EDA procedure is a new concept, that is designed to facilitate the damage assessment process for a large number of discharges. It represents a hybrid approach that entails either supplementing the Type A model with limited, focused studies, or studying key natural resources and/or services for which limited, focused studies will be undertaken. NOAA wishes to solicit comments regarding the scope and applicability of the EDA.

Response to Comments

Comment: NOAA received comments supporting the use of an Expedited Damage Assessment (EDA) procedure so long as it could make accurate estimates and meet, in an expedited way, other natural resource damage assessment criteria.

Response: The proposed rule provides for an EDA in this subpart and meets those criteria.

Comprehensive Damage Assessment

Subpart G Preamble

General

Purpose/Scope

The Comprehensive Damage Assessment (CDA) is the most detailed of the assessment procedures available to the trustee(s). The purposes of a CDA are to: (1) Comprehensively determine the nature and extent of injury to natural resources and/or services; (2) develop a restoration plan to remedy that injury; and (3) determine the total compensable values for discharges requiring a complex, prolonged assessment/restoration process as deemed necessary by the trustee(s). Since there is no single CDA approach appropriate for every discharge, the trustee(s) must tailor each CDA to the specific oil discharge circumstances.

A CDA consists of four components, including Injury Determination, Injury Quantification, Restoration Planning, and Compensable Values Determination. After completion of a CDA, a Report of Assessment, which includes the determinations made in each of these components, must be prepared.

CDA Costs

CDA costs include those costs associated with injury determination

and quantification, restoration planning, and compensable values determination. Costs incurred should be limited to those the trustee(s) considers necessary. Such costs should be supported by appropriate records and documentation in the administrative record, and must not reflect regular activities performed by the trustee(s) in the management of natural resources and/or services not related to the discharge of oil.

Report of Assessment

At the conclusion of a CDA, the natural resource trustee(s) should document all pertinent activities and decisions in the administrative record and prepare the Report of Assessment. The Report of Assessment is the basis of the CDA claim. The Report of Assessment is the DARP, as modified based upon comments received during the public comment period. The Report of Assessment contains the trustee's(s') selected restoration approach. The administrative record should contain the rationale for conclusions regarding each component of the CDA process.

Injury Determination

Purpose/Scope

The purpose of Injury Determination in a CDA is to verify or modify the nature of the injury to natural resources and/or services resulting from the discharge of oil. Injury determination in a CDA should be made for natural resources and/or services that can be restored or for which the public can be compensated.

Should the trustee(s) be able to document the nature of the injury to a natural resource and/or service resulting from the discharge of oil, he should then proceed to Injury Quantification. If the trustee(s) is unable to determine such injury, further assessment efforts should be terminated and the results of the Injury Determination documented in the Report of Assessment.

Objectives and Study Designs

Based on the information regarding the discharge and environmental setting collected in the Preassessment Phase, the trustee(s) should first develop objectives governing the overall CDA and for the individual component studies comprising the CDA. These objectives provide direction for the design of the CDA and each study. Once the objectives are defined, the trustee(s) should develop appropriate study designs. Study designs address the level of effort for each given study. The study design may include, but is not limited to, identification of: (1) The hypotheses or questions posed; (2) changes in injury that may be considered statistically and environmentally significant; (3) expected endpoints, i.e., effects, for each resource and/or service; (4) the appropriate assessment methods for each endpoint; (5) data quality objectives to ensure that data are collected and analyzed effectively; (6) sampling design that provides the logical structure on how to collect the data; and (7) the statistical analyses to test the hypotheses. Guidance on study designs can be found in the Injury Determination and Quantification Guidance Document, currently being prepared.

Injury Determination

Once the individual study designs are complete, the trustee(s) should then document the nature of the injury resulting from the discharge of oil. Injury resulting from (or caused by) the discharge of oil has been determined when the trustee(s) has demonstrated that: (1) With direct exposure, (a) the natural resource was exposed; (b) there is a pathway between the discharge and exposed natural resource; and (c) the exposure of oil, its components, or by-products has been shown by rigorous and appropriate scientific methodology to have an adverse effect on the natural resource in laboratory experiments or the field; or (2) in the absence of direct exposure, (a) the adverse effect on or impaired/diminished use of a natural resource has been shown by rigorous and appropriate scientific methodology; and (b) the adverse effect on or impaired/diminished use of the natural resource would not have occurred but for the fact of the discharge or threat of a discharge.

Where multiple factors may have contributed to an indivisible injury to a natural resource and/or service, the discharge of oil may be considered a contributing factor to the injury.

The trustee(s) should identify the pertinent exposure pathways, and relevant injuries to natural resources and/or services. The definitions of exposure, injury, and causality in the proposed rule are different, but not inconsistent, than that found in the CERCLA natural resource damage assessment rule, known as the Type B rule (43 CFR 11.62(b)-(f)). Guidance on natural resource and service injuries exclusive to oil discharges can be found in the Injury Determination and Quantification Guidance Document, currently being prepared.

The method for determining injury in this proposed rule is also different than that of the CERCLA rule. These methods should be chosen based on the capability of the method to demonstrate an effect on or impaired/diminished use of a natural resource. For any injury to be considered such under this proposed rule, it must satisfy the following acceptance criteria: (1) For natural resources, (i) the exposure to oil, its components, or by-products has been demonstrated to cause an adverse effect on the natural resource in laboratory experiments or the field; and (ii) the measurement for a natural resource adverse effect is cost-effective and can be obtained through the application of a scientifically rigorous and appropriate methodology. Categories of natural resource and service injury for the CDA (as well as the EDA) that meet the acceptance criteria specified for discharges of oil are also currently being developed.

The public is asked to review these changes relative to the CERCLA rule. Constructive comments should reflect the flexibility and discretion accommodated to the trustee(s) throughout the OPA proposed rule.

Injury Quantification

Purpose/Scope

The purpose of injury quantification is to determine the effects on natural resources and/or services resulting from the discharge as defined in the proposed rule. The proposed rule allows the trustee(s) to measure the change in either a natural resource itself, or directly in a service. The trustee(s) is encouraged to use whichever approach proves to be most appropriate for a natural resource and/or service being considered. In either case, Injury Quantification usually requires comparisons to baseline or reference/control conditions, or some other known measures. Such comparisons are based upon the completion of any response actions, and will depend on the recovery period of both resources and/or services.

Should the trustee(s) be able to quantify injury to natural resources and/or services resulting from the discharge of oil, the trustee(s) should then proceed to the restoration component. If the trustee(s) is unable to quantify such injury, further assessment efforts should be terminated and the results of the Injury Quantification documented in the Report of Assessment. Quantification of Injury: In certain circumstances, the trustee(s) may decide to quantify natural resource injury and translate that injury to the reduction in services. If the trustee(s) bases quantification on natural resources injury, he should determine the: (1) Extent to which a natural resource injury has occurred; (2) extent to which the injured natural resources

differ from baseline or reference/control conditions; (3) services normally produced by the injured natural resources and (4) reduction of services resulting from the discharge of oil.

However, where there are insufficient data to quantify natural resource injury or where there is no associated injured natural resource, the trustee(s) may directly quantify the reduction in the services resulting from the discharge.

Even where natural resource injury does occur, direct quantification of the reduction in services may be the approach of choice. In these cases, the reduction in services may be a measure of injury when the: (1) Extent of change in the services resulting from natural resource injuries can be determined without also calculating the extent of change in the resources; and (2) services to be determined are expected to provide a better indication of compensable values caused by the natural resources injury than would direct quantification of the resources themselves.

If the trustee(s) bases quantification on injury to services, he should determine the: (1) Extent of impaired/diminished services; and (2) extent to which the level of impaired/diminished services differs from baseline and/or reference/control conditions.

Quantification Methods

Guidance on quantification methods can be found in the Injury Determination and Quantification Guidance Document, currently being prepared. Quantification methods generally include before/after (using baseline data) and reference/control-impact study designs, using combined (at the community/population level) and/or individual (at the organism/biomarker level) injuries. Since particular quantification methods cannot be recommended to the trustee(s) at this time, guidance on specific natural resources and/or services to quantify can be provided. Such selection can be based upon the: (1) Extent to which a particular natural resource and/or service is affected; (2) extent to which a given natural resource and/or service can be used to represent a broad range of related resources or services; (3) consistency of the quantification method with the requirements of the compensable values determination component to be used; (4) ability to quantify changes in a given natural resource and/or service at reasonable cost; and (5) preliminary estimates of services.

Injury quantification for a CDA requires information on the extent of injured natural resources and/or services. Information needed for natural resource injury includes: (1) Total area or volume, if appropriate, or quantity of natural resources and/or services affected; (2) degree to which natural resources and/or services are affected; (3) ability of a natural resources and/or service to recover; (4) proportion of a natural resources and/or service affected; and (5) services that the injured natural resources provide to other resources and humans. Information needed for injured natural resource services include: (1) a list of the relevant natural resource services; (2) availability and characteristics of those services; and (3) information on past and current services. Sources for this information include government agencies, trade associations, academic organizations, resident population, response personnel, RP(s), experts, databases, and the open literature.

Recovery Analysis

The trustee(s) should estimate the time necessary for natural recovery without restoration efforts and beyond response activities. Recovery is defined as a return of natural resources and/or services to baseline or comparable conditions within the limits of natural or other (human-induced) variability. It is possible for the recovery of resource services to occur long before or after natural resources recovery is complete. However, in many cases, resource services are directly derived from natural resources and the recovery of resource services should correspond closely with the recovery of the natural resource.

Response to Comments

Comment: Some commenters suggested that injury should be hypothesized or justified within a reasonable period (e.g., one to two weeks).

Response: NOAA disagrees. A good faith effort to expeditiously complete an injury hypothesis should be made following a discharge. Nonetheless, it would be unreasonable to require completion of such an initial assessment within a specific interval, because conditions and circumstances will vary widely from site-to-site and situation-to-situation. Further, all concerned should recognize that an initial hypothesis of injury is just that. Because not all injuries will occur immediately following a discharge, and those that do may not be discernable until some time later, the hypothesis may be subject to significant, and perhaps repeated, revision over time.

Comment: One commenter was concerned that statistical analysis be used judiciously and also indicated that although specific statistical analysis cannot be prescribed, statistical criteria can be set forth.

Response: NOAA agrees with this comment and is suggesting judicious use of statistics.

Comment: Many commenters wanted NOAA to carefully consider the ultimate use of the data collected so as to be cost- and time-effective.

Response: NOAA understands this concern all too well. Data use is integral to the development of damage assessment strategies and designs. Therefore, NOAA is recommending that data use be specified early on in the process as part of the objectives of the study as well as in data quality objectives in the study design.

Comments: One commenter indicated that NOAA does not adequately address the assessment of the impact on services on natural resource injury. Another commenter contends that actual, proven services are all that are included in OPA for quantification purposes. Some commenters suggested that natural resource damage assessment should include injury to archaeological and historical services in particular.

Response: To assert natural resource damages under OPA, injury to natural resources and/or services must be demonstrated. NOAA recognizes that there is both direct and indirect injury. The trustee(s) should account for both forms so long as such injuries are relevant to restoration and compensation efforts. Further, all damages, except those that are considered speculative, are included under OPA. Injuries to natural resource services may include archaeological sites and other resources of historical significance.

Comment: One commenter stated that natural resources are valued in terms of the services or functions they provide to society, either directly by providing services to humans or indirectly by providing services to other natural resources.

Response: NOAA agrees and states in the definition of "services" that natural resources provide a wide range of functions that include, but are not limited to, functions provided to society.

Restoration

Subpart H—Preamble Language

General

Purpose

OPA provides the trustee(s) with the following range of alternatives to remedy injury to natural resources and/

or services: restoration, rehabilitation, replacement, or acquisition of the equivalent natural resources and/or services. The proposed rule provides that natural recovery is also an alternative that must be considered. If the trustee(s) deems that natural recovery is not an acceptable alternative for a particular incident, i.e., cannot be achieved given the scope, scale, and timing of natural recovery, then restoration, rehabilitation, replacement, or acquisition of equivalent natural resources and/or services should be examined. For each alternative, there may be various options or procedures to accomplish that alternative. Each of the alternatives and options mentioned above may be considered by itself or combined in a number of ways.

The purposes of the restoration planning process are to: (1) Determine the most appropriate restoration alternatives for the recovery of injured natural resources and/or services resulting from a discharge of oil; and (2) estimate the costs of implementing restoration.

The goal of restoration is to return the injured natural resources and/or services to their baseline conditions. Site-specific restoration objectives should be established and prioritized throughout the assessment/restoration planning process to provide a blueprint for restoring the injured natural resources and/or services to baseline or comparable conditions. These objectives should be clear and identify the desired outcome.

Restoration Component

The first step in the development of a restoration component by the trustee(s) is to develop a scoping statement. The scoping statement identifies natural resources and/or services of concern, as well as potential restoration alternatives to focus the restoration planning process. The trustee(s) should develop preliminary restoration alternatives that address specific injuries.

As the assessment process progresses and significant new information becomes available, the trustee(s) should begin developing the restoration component of the DARP. The restoration component, incorporating preliminary results of the injury determination and quantification studies, should be based upon the scoping statement. The DARP will provide the means for soliciting public comments on the proposed restoration alternatives.

Coordination

Early coordination and cooperation is essential in restoration as well as assessment where multiple trustees are involved. When multiple trustee involvement is indicated, a Memorandum of Understanding (MOU) should be considered to clearly delineate trustee responsibilities. An example of such an MOU is given in appendix A of the proposed rule.

Participation of the RP(s) early on in restoration planning is also encouraged in the proposed rule, particularly if the RP(s) is active in the assessment process. The knowledge and expertise of the RP(s) could be useful to the trustee(s). The trustee(s), however, has the ultimate responsibility for all restoration activities and should develop a joint enforceable agreement or Memorandum of Agreement (MOA) describing the specific responsibilities of all parties if the RP(s) is selected to participate. An example of such an MOA is given in appendix B in the proposed rule.

Emergency Restoration

Emergency restoration prior to the development of the restoration component is permitted where immediate action is necessary to avoid irreversible loss, or to prevent or reduce continuing danger to natural resources and/or services. These actions are described in detail in the preamble discussion of subpart B—Preassessment Phase.

Restoration Costs

Restoration costs include the costs of implementing the restoration plan. Both direct and indirect restoration costs, including those associated with pre-settlement, will be used in the determination of the total damages.

Restoration Component Development

Requirements

In developing the restoration component for a CDA, the trustee(s) should: Develop a restoration scoping statement; develop the restoration component of the DARP; and estimate the costs of implementing the restoration component described below. The trustee(s) should also address NEPA implementation requirements relative to the restoration component.

Scoping Statement

During the preliminary stage of the assessment/restoration planning process, the trustee(s) should develop a restoration scoping statement. The scoping statement is intended to serve as a tool to focus the restoration planning process. The scoping statement should identify those potential restoration alternatives that the trustee(s) may consider as potential actions to remedy the effects of the discharge of oil. The scoping statement will rely on information provided during the injury determination and quantification studies and may be developed along a slightly delayed but parallel time line as those components. This offset but parallel development will facilitate coordination between the injury determination/quantification and restoration planning, thereby encouraging the collection of data for both processes.

The scoping statement should include a summary of the natural resources and/or services of concern, an evaluation of the circumstances of the discharge, and the expected injured natural resources and/or services. Next, the scoping statement should identify the range of alternatives available to the trustee(s). Where appropriate, source control and remediation should be considered. Finally, the scoping statement should identify any opportunity to pool the recovery with other similar recoveries in a given region in order to develop a more encompassing restoration plan.

As a tool for the trustee(s), the scoping statement should help identify the most appropriate restoration alternatives as well as clarify additional information needs for the restoration component. While some of this information may be gathered from existing sources, much may be gleaned from the results of injury determination and quantification studies. It is expected, therefore, that the alternatives identified in the scoping statement will evolve as new information from the assessment process becomes available. The scoping statement should be included in the administrative record of the assessment.

If prespill plans or similar supporting documents have been developed that address the injured natural resources and/or services and the public was fully involved in the prespill planning, the trustee(s) may decide that a scoping statement is not needed. However, the trustee(s) should begin developing the restoration component at an early stage.

Restoration Component of the DARP

The restoration component of the DARP should be developed during the latter stage of the injury quantification component. It should be based upon the scoping statement as well as the results of injury determination/quantification studies, and feasibility or pilot studies that may affect the analysis of a given restoration alternative.

The restoration component of the DARP should consist of three broad components. First, it should include an analysis of the restoration alternatives considered for each natural resource

and/or service and provide the basis for estimating the restoration costs associated with each alternative. Included in this analysis should be an estimate of the rate and degree of recovery for the injured natural resources and/or services depending upon a given restoration alternative. Second, the restoration component should identify the preferred approach for each injured natural resource and/or service under consideration for restoration. Finally, the restoration component should include the results of any feasibility or pilot studies proposed. To the extent practicable, the restoration component should consider opportunities for pooling recoveries from multiple cases and identify other statutory review and consultation requirements.

The restoration component of the DARP will be made available for at least a thirty calendar day public review and comment period, as provided by § 990.32(c)(4) of the proposed rule. The trustee(s) should consider the comments received on this plan and make any revisions necessary. Significant changes, in the judgment of the trustee(s), should also be made available to the public.

The restoration component will be the basis for the Post-Assessment Restoration Plan that will be developed after compensation is received. The Post-Assessment Restoration Plan must reflect the amount of the actual damage award. This Final Restoration Plan is discussed in detail in the preamble discussion of the Post-Assessment Phase.

In order to provide for the timely development of the DARP, the injury determination, quantification, and restoration components should be conducted concurrently, where practicable. The proposed rule provides that the trustee(s) will develop, where practicable, the restoration component early in the assessment/restoration process so that the trustee(s) can focus efforts towards restoring, rehabilitating, replacing, or acquiring the equivalent natural resources and/or services.

Estimate Restoration Costs: Costs of restoration will include direct, as well as indirect (e.g., overhead) costs. Both direct and indirect restoration costs will be incurred by the trustee(s) throughout the damage assessment/restoration process. The costs of the trustee's(s') recommended restoration component will be used in the determination of damages. Also, the anticipated costs of the public review of the Post-assessment Restoration Plan, the plan refined after the damage award, should be included in the damage figure that the trustee(s) presents to the RP(s). These are part of the planning and implementation costs estimated by the trustee(s) when developing the restoration component.

Direct costs are those that the financial management system of the trustee(s) records on a site-specific basis and hence are costs that are readily allocated to the damage claim made against the RP(s) for that incident. Examples of direct restoration costs associated with preliminary survey work and planning prior to implementation of restoration include: Site visits; chemical/physical/biological analyses; restoration plan development; human health and safety plan; and community relations program; trustee oversight of restoration activities by the RP(s); and site plan. Examples of direct costs associated with specific restoration actions include: contaminant removal; habitat reconstruction and creation; replanting and restocking; physical and chemical treatment; any trustee oversight of any restoration activities of the RP(s); and bioremediation. Other examples of direct restoration costs include salaries and benefits, travel costs, materials and supplies purchased specifically for the implementation of the selected alternative, equipment lease costs, building related costs if a building is leased or purchased for the sole purpose of implementing the selected alternative, and payments for goods and services furnished by private companies or other government agencies under contract with the trustee agency. Direct costs can include all costs of other entities performing actions for the trustee agency. These costs include a contractor's overhead, labor and material costs, which the contractor bills directly to the trustee agency, if such costs are paid by the trustee(s). Other direct costs might include capital, labor, and materials, as well as administrative costs associated with the development of task orders for engineering design, evaluation and selection of contractors for project management and implementation, provision of relevant QA, and other independent technical/analytical support functions. The cost estimates for restoration shall include not only the cost of planning and implementing the recommended restoration component, but the costs of a monitoring program, mid-course corrections, and feasibility studies, and other elements the trustee(s) determines appropriate to carry out his restoration activities, including the oversight of any actions taken by the RP(s).

Indirect costs are support costs, compared to a private company's overhead, which support assessments or restoration actions, but which cannot be directly accounted for on a site-specific basis. Such indirect costs may include support services to those involved in the assessment and restoration process, e.g., facilities or personnel, budgeting, procurement, auditing, or other administrative management services, as well as policy formulation and assessment/restoration program costs that are not accounted for on a site-specific basis. In the related context of cost recovery under CERCLA, the courts have upheld the recovery of indirect costs. See, e.g., *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1502–04 (6th Cir. 1989); *United States* v. *Hardage*, 750 F. Supp. 1460, 1504 (W.D. Tex. 1990), *aff'd*, 982 F.2d 1436 (10th Cir. 1992); *United States* v. *American Cyanamid Co.*, 786 F. Supp. 152, 159 (D.R.I. 1992); *United States* v. *Bell Petroleum Services, Inc.*, 734 F. Supp. 771, 782-83 (W.D. Tex. 1990). The trustee(s) may calculate indirect costs in accordance with any reasonably sound method.

The estimated restoration costs make up that component of the damage claim representing the costs to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and/or services. These estimates are to be documented in the administrative record and included in the DARP.

Phased Restoration Planning

Because of the large scale and present rudimentary knowledge of the science of restoration, the trustee(s) should consider undertaking restoration planning in phases. Phased planning and implementation is proposed through an Adaptive Management Approach (AMA). AMA considers the following steps: (1) Design and implement the initial phase; (2) monitor the results; (3) evaluate and interpret the results; (4) recommend and prioritize follow-up studies; and (5) decide needs for next phase. This process will facilitate the learning process because early phases will generate information about how well procedures work, what problems develop, and what unforeseen benefits might be capitalized upon in designing future phases. AMA will allow the trustee(s) to make reasoned assessments of the outcome of the actions taken so as to protect existing resource values and ensure likelihood of successful restoration. This approach is a mechanism for dealing with uncertainty and variability in managing resources. It involves a process whereby alternatives can be suggested and tested (i.e., pilot projects) often in small scale before undertaking full scale restoration.

Results of initial experiments are then evaluated to select the approach for later projects. Later phases will benefit from information generated in earlier phases. While adaptive management depends on results from previous work, new projects can be started before previous phases prove successful, provided the new phase contains everything thought necessary for successful restoration.

Significant costs may be incurred as a result of the phased approach to restoration simply as a result of repeated mobilization and demobilization of necessary equipment, personnel and support functions. However, the needs of the resource should outweigh any need for human expediency. The phased approach was developed to respond to a complex planning milieu as is often the case in a CDA. A programmatic NEPA Environmental Impact Statement (EIS) with subsequent environmental assessments serves as the appropriate framework for timely restoration. A phased approach will allow the trustee(s) to work within funding constraints, which may enable them to implement complementary projects more easily than collaborating on a single, large project.

Analysis and Selection of Restoration Alternatives

Restoration Alternatives

The trustee(s) may choose natural recovery, restoration, rehabilitation, replacement, acquisition of the equivalent, or a combination thereof in deciding on the most appropriate restoration alternatives to select for particular natural resources and/or services injured by the discharge of oil. These alternatives are described herein and in the Restoration Guidance Document available from the address given at the front of this preamble.

(1) *Natural Recovery:* The natural recovery alternative (comparable to the "No Action Alternative") is based upon the process of natural succession following a discharge whereby the injured resource is left to recover without any intervention by man. This alternative may not always result in restoring natural resources and/or services to their baseline conditions, but should always be considered. Natural recovery may be selected when: (1) There is evidence that the natural recovery process will be more effective than other available restoration alternatives; (2) the resulting natural resources and/or services are predicted to resemble the original, within the constraints of natural or other (human-induced) variability, in a time frame not significantly different from that resulting from human intervention; (3) other natural resources and/or services will not be adversely affected prior to the recovery of those originally injured resources and/or services; and (4) there are no threats to human health and safety from the length of time for natural recovery.

Where it is clear that natural recovery can restore injured natural resources and/or services to baseline conditions, additional restoration measures may not be justified. Nevertheless, because some natural resources and/or services will eventually recover on their own does not necessarily mean that restoration should be excluded. Since one intent of OPA is restoring the environment from the effects of a discharge of oil, the public should not unduly bear the burden of natural healing if there are reasonable alternatives available to hasten the recovery. The trustee(s) should document the decision on the adequacy of natural recovery in the administrative record.

The ability to determine when natural recovery is optimal may be constrained by the quality and quantity of baseline information. Nevertheless, the trustee(s) should attempt to estimate the rate of natural recovery for each relevant injured natural resource and/or service based on the information derived from damage assessment and restoration studies, the scientific literature, and other sources. If it appears that natural recovery may effectively restore natural resources and/or services without significant, concomitant adverse effects, then the trustee(s) should select the natural recovery alternative. However, if it appears that natural recovery may not effectively achieve baseline or comparable conditions, the trustee(s) should consider other restoration alternatives.

(2) *Restoration:* "Restoration" means actions undertaken to return injured natural resources and/or services to their baseline conditions. Generally, restoration relates to man's efforts to enhance the recovery process. Restoration is usually distinguished from response as being performed after the completion of cleanup activities. Response is commonly defined as action to contain and clean up oil immediately following a discharge or to protect natural resources and/or services by a response agency. Restoration actions, such as the removal of contaminated resources, may be performed during and after response to facilitate the recovery of relevant natural resources and/or services. In the present context, restoration performed at the location of impact is referred to as "direct restoration." The other alternatives identified below may result in beneficial, but not duplicative, natural resources and/or services to those injured, and are therefore described as "compensatory restoration."

(3) *Rehabilitation:* "Rehabilitation" refers to actions to bring injured natural resources and/or services to a state different from baseline conditions but still beneficial to the environment and public. This alternative is particularly important when direct restoration is technically or economically infeasible, but the affected site retains the potential to support alternative valuable natural resources and/or services. The definition of rehabilitation encompasses enhancement actions taken on an affected site to increase one or more values, possibly at the expense of other values. This alternative should be distinguished from the "natural recovery" alternative, which relies exclusively upon natural recovery unassisted by man.

(4) *Replacement:* "Replacement" refers to actions that substitute natural resources and/or services that provide the same or comparable natural resources and/or services as those injured. Replacement, as opposed to "direct" restoration, results from restoration actions taken away from the affected site to furnish or create equivalent natural resources and/or services within the region. For example, habitats away from the discharge site may be created to provide equivalent services within the region in terms of fish and wildlife production. Injured services provided by natural resources that might be replaced include those of recreational, commercial, or ecological importance, or those of special significance.

(5) *Acquisition of Equivalent:* "Acquisition of equivalent resources" refers to obtaining natural resources and/or services that the trustee(s) determines are comparable to those injured. Equivalent natural resources should be acquired to hasten recovery, and protect and maintain the natural resources affected by a discharge. Acquisition of equivalent resources is distinguished from replacement of resources by the fact that the acquired resources already exist rather than being created or enhanced. "Acquisition of equivalent resources" addresses specifically "resources," not "services." Acquisition of equivalent resources should only be used when the trustee(s) has determined that restoration, rehabilitation, or replacement of specific natural resources is technically infeasible or the cost is grossly disproportionate to the value of the resources involved.

(6) *Combination of Alternatives:* Each alternative discussed above may be considered individually or combined in various ways; depending upon feasibility, environmental-effectiveness, and relative cost considerations. Also, each alternative may be implemented through one or more options or procedures selected by the trustee(s). When mentioned, alternatives imply associated options. Differences among combinations of alternatives and the related options within each alternative could be based upon the severity of the natural resource injuries, quality and quantity of knowledge about recovery, expected effectiveness of the alternatives, or the environmental or human significance of the injured natural resources and/or services.

Analysis of Restoration Alternatives

As the results of the injury and quantification studies become available, the trustee(s) should revise the list of restoration alternatives developed. As this list is revised, the trustee(s) should analyze each alternative taking into account not only the feasibility, but also the effectiveness and relative cost (described below). The choice of restoration alternatives is influenced by the nature of the injuries to the natural resources and/or services, and the extent to which immediate action is taken to remedy those injuries. Also, the restoration alternatives should seek to ensure the recovery of injured natural resources and/or services. Examples of services provided by the natural resources that might be returned to baseline conditions include human uses (e.g., recreational, commercial), ecological, or those of special significance. Certain services that are of cultural significance (e.g., archaeological sites) are not typically living, renewable resources and have no capacity to heal themselves. Therefore, such services cannot recover "naturally" and, to the extent restoration is practicable, will need human intervention.

Certain factors should be considered for each restoration alternative. If, based upon these considerations, an alternative is unacceptable, it will be eliminated from further consideration. The evaluation of the relevant factors should be documented in the administrative record. When the DARP is made publicly available, the trustee(s) should provide for the administrative record a brief description of how the restoration alternatives contained in the DARP comply with these factors.

(1) *Feasibility:* The key factor to consider in selecting restoration alternatives is feasibility. Feasibility depends upon whether an action is possible given certain constraints. These constraints include, but are not limited to: Availability of services, materials and equipment; expertise; construction and operational limitations; need or capability for future restoration; and administrative, legal, or regulatory requirements.

Where practicable, the trustee(s) should consider methods currently available, i.e., proven methods should take preference over unproven methods. Under many circumstances, however, existing methods will need to be modified for a given discharge. For example, the trustee(s) may propose providing artificial nesting sites for a particular species of bird to replenish the population. While there is ample information on the nesting requirements of a similar species of bird, little information is available about the nesting requirements of the injured bird species. The trustee(s), therefore, may have to rely upon the requirements of the similar species in designing nesting site alternatives for the injured species.

(2) *Environmental Effectiveness:* Once the trustee(s) determines that a restoration alternative is feasible, the trustee(s) should then evaluate the environmental effectiveness of the alternative. Effectiveness deals with the general question of whether an action accomplishes the goals and objectives of restoration. Effectiveness is dependent upon the: (1) Extent to which the proposed alternative can return natural resources and/or services to acceptable conditions; (2) extent to which the proposed alternative causes additional injury; (3) extent to which the proposed alternative improves the rate of recovery and success; and (4) level of risk and uncertainty in the success of the proposed alternative.

(3) *Relative Cost:* Simultaneous with the environmental effectiveness determination, the trustee(s) should evaluate the relationship of the expected costs of implementing the alternative relative to other alternatives and to their anticipated benefits. This requires that the trustee(s) consider, among other things, the: (1) Significance of the natural resource and/or service to the environment and public; (2) extent to which the proposed alternative benefits more than one natural resource and/or service; (3) cost of the proposed alternative; (4) relationship of the expected costs to the expected benefits; and (5) level of risk and uncertainty in the cost-benefit analysis.

Total damages will depend on the sum of compensable value and restoration costs. Often, there will be tradeoffs between compensable value and restoration costs. For example, faster-paced and more-intensive restoration activities may reduce the associated compensable values, e.g., interim lost use values, but may do so at the expense of substantially higher restoration costs. In some cases, there may be sufficient data to demonstrate that some (combinations of) restoration alternatives would result in substantially lower total damages than others. NOAA seeks comment on the following questions. Where restoration data on costs and benefits are sufficient, should the trustee(s) be required to select the (combination of) restoration alternatives that minimize total damages? If not, should the trustee(s) be required to explain the rationale for selecting (a combination of) restoration alternatives that do not minimize total damages?

Cost evaluation is not a straight economic cost/benefit analysis. Rather, it is primarily a consideration of qualitative, rather than quantitative, factors. There may be overriding policy considerations that would cause the trustee(s) to consider certain "collateral benefits." For example, if a scenario involves certain non-renewable natural resources, i.e., an endangered species or a resource of cultural significance, the costs of restoration may appear, under a straight cost/benefit analysis, to be grossly disproportionate to the value of the benefit of restoration over natural recovery. However, the possibility of continuing or additional effects to these nonrenewable resources may require that restoration actions be taken.

In this regard, NOAA's approach is similar to the one proposed earlier by the U.S. Department of the Interior (DOI). In April of 1991, DOI proposed revisions to its damage assessment rule to comply with the ruling in the *Ohio* decision. In those proposed revisions, DOI stated that the trustee(s) should:

> consider the relationship of the expected costs of an alternative to the benefits from the implementation of that alternative, both in terms of the recovery of the resource and the benefits to the public that would result. This consideration is not intended to be a straight cost/benefit analysis. The trustee should weigh circumstances unique to each assessment against the expected alternative costs.

56 FR at 19758.

Basically, the trustee(s) must judge the advantage or desirability of a particular restoration alternative in terms of the expected costs of implementing the alternative compared to the benefit of that alternative. When possible, the trustee(s) should attempt to quantify such benefits. However, NOAA recognizes that situations will arise

when it is more reasonable for the trustee(s) to forgo such quantification. For example, if the cost of restoration is $3 million, and it will cost more than that to quantify the benefits, the trustee(s) should rely on a qualitative approach, i.e., one that considers the other factors discussed in this subpart. Those factors include technical feasibility, effectiveness of the restoration component, nonrenewability of the resource (i.e., archaeological resource), and the significance or uniqueness of the resource (i.e., an endangered species or a resource of cultural significance). Further, any analysis must take into account discounting and uncertainty, as well as other factors deemed relevant by the trustee(s). (These concepts are discussed in a later section of this preamble.)

Depending upon the type of discharge and nature and extent of the injury, the proposed alternatives and related costs may vary significantly. A determination that expected costs are reasonable when compared to the anticipated benefits includes a careful comparison of direct and indirect expenses. Of all alternatives that achieve similar benefits and meet the goals and objectives of restoration, the most cost-effective alternative should be chosen. A restoration alternative will be cost-effective if it is determined to have the lowest costs expressed in present value for a given amount of benefits. If the benefits can be quantified in dollars, that dollar figure should be discounted to present value. However, should the benefits be quantified in terms other than dollar values, those benefits should also be discounted to present value.

This proposed rule does not define the term "grossly disproportionate" as a numeric ratio. Instead, NOAA adopts the approach recommended by DOI in its April 1991 proposed rulemaking. The trustee(s) must consider all of the factors discussed in this subpart in selecting the most appropriate alternative. However, it is not required that each factor be given the same weight for each discharge situation or even for each alternative considered. As stated in the DOI proposed rule,

> * * * the various alternatives considered may address and balance these factors in different ways. In practice, the alternative selected by the trustee as the most appropriate might not satisfy all the considerations, yet still be "correct" for the purposes of the assessment. The trustee, after considering all the relevant factors, may make a selection that gives greater weight to some factors over others.

56 FR at 19757.

In addition, the trustee(s) must document this consideration in the administrative record. Such documentation will constitute the grossly disproportionate determination. Selection of Restoration Alternatives: Based upon the analysis of the restoration alternatives for each category of injured natural resources and/or services, the trustee(s) should select the alternative or some combination thereof that best meets the needs of each injured natural resource and/or service based upon the factors listed above. The trustee(s) should then develop the restoration component of the DARP based upon this selection for each natural resource and/or service.

The restoration component is that part of the DARP that will be used to estimate the restoration costs. The restoration component should also contain the site-specific objectives of the restoration and an initial listing of priorities of natural resources and/or services of concern. The restoration component and its estimated costs of the DARP then goes out for public review and comment.

Feasibility (Pilot) Studies

Because restoration science is continually evolving, and injuries to natural resources and/or services may be unique on a site-specific basis, restoration alternatives for certain natural resources and/or services may be limited. Therefore, the scoping statement may conceptually identify small-scale, focused feasibility or pilot studies where the trustee(s) finds that a particular restoration alternative needs to be tested to determine whether implementation is not only technically and economically feasible, but also effective. The costs associated with the implementation of these studies are part of the costs of developing the DARP.

Where possible, the scoping statement should conceptually identify feasibility or pilot studies the trustee(s) may require to evaluate alternatives. The scoping statement should also provide the public with notice that additional feasibility or pilot studies, associated with the development of restoration alternatives, may be conducted throughout the development of the DARP.

As appropriate, the trustee(s) should coordinate with the OSC prior to proceeding with any feasibility or pilot studies during the response phase to ensure that such studies are not incompatible with response activities. Anticipated studies become part of the DARP and costs of these actions become part of the trustee's(s') damage claim.

Evaluation of Recovery and Success of Restoration

Definition

Recovery is defined in the proposed rule as the return of the injured natural resources and/or services to baseline or comparable conditions, within the limits of natural or other (human-induced) variability. This definition recognizes the inherent tendency for natural resources and/or services characteristics to vary over space and time. Defining restoration goals, selecting appropriate criteria for monitoring goal achievement, identifying appropriate performance standards (endpoints), and measuring levels of achievement of these standards are necessary to determine success in restoration. Particular attention should be paid to reestablishing and maintaining the diversity of the site(s) as evidence of the total health of the recovering system. The recovered condition is not required to be identical to the baseline or reference/control condition; however, it should not be functionally different from that condition.

Monitoring

Monitoring should be an integral part of the recovery implementation process. Recovery cannot be properly established without a well-designed and executed monitoring plan. Every natural resource and/or service is unique, which makes it inappropriate to propose fixed monitoring plans for a generic habitat or biological resource. Nevertheless, there are several general principles that apply to any such effort: (1) Monitoring should be sufficiently long to ensure recovery to a stable condition; (2) all relevant components of the affected environment should be monitored, as it relates to the restoration alternative; (3) the progress of recovery should be compared with natural changes occurring in similar unaffected reference or control areas; (4) sampling should be designed to provide statistically significant and defensible results; and (5) the monitoring plan should be sufficiently flexible to permit mid-course corrections if the need arises. In the event that maintenance is required to ensure success, the decision on the need for such maintenance should be part of the restoration component.

Mid-Course Corrections

The restoration component should incorporate provisions allowing for mid-course corrections. Monitoring and evaluating recovery will enable the trustee(s) to determine when mid-course corrections are necessary. Mid-course

corrections should be based upon, but not limited to, the nature and extent of injuries suffered by the natural resources and/or services, actual effectiveness of the restoration alternatives, and results of monitoring.

The possibility of the need for mid-course corrections should be considered in the restoration component. It could be that feasibility or pilot studies will obviate the need for mid-course corrections. In some cases, settlement agreements have specifically addressed this issue. One possible approach is to include in a settlement agreement a "reopener" clause, i.e., a specific provision to revisit an issue if it becomes necessary at a future time. Another possibility is for the RP(s) to deposit an agreed-upon amount of money in an escrow account to cover future restoration actions that could not be fully developed at the time of the settlement. These funds would then be used for these future actions, or would revert to the RP(s) if not needed for restoration.

Responses to Comments

Comment: One commenter indicated there may be some confusion with semantics in the terms used for and hierarchy of restoration, rehabilitation, replacement, or acquisition of the equivalent.

Response: NOAA hopes to minimize confusion by defining all terms in the proposed rule. Further, the proposed rule does not suggest a hierarchy of restoration alternatives, except in the case of acquisition of equivalent resources, and leaves such prioritization to the discretion of the trustee(s) on a case-by-case basis.

Comment: One commenter suggested that the assessment process should focus on natural resources that may actually benefit from restoration. The commenter noted that such an approach would reduce contention between the trustee(s) and RP(s), and reassure the public that its resources are receiving attention.

Response: NOAA agrees with the suggestion that restoration should be implemented only where the trustee(s) determines that such efforts would benefit the natural resources and/or services. However, the trustee(s) cannot totally ignore those natural resources that either will recover naturally or are not recoverable. The trustee(s) must still seek restoration of or compensation for these interim lost services.

Comment: One commenter stated that the primary objective of the restoration process should be the timely restoration of the affected natural resources to levels that are adequate to support the services they normally provide to the biological community in general and humans in particular.

Response: NOAA agrees with the commenter based on the assumption that "normally" means baseline or reference/control conditions.

Comment: A few commenters noted that restoration, beyond what is needed to return to baseline conditions and specific numeric levels, would be an inefficient use and an over-investment of society's economic resources. Such efforts would result in a net loss in economic welfare, which is inconsistent with section 1006(d)(1) of OPA.

Response: The goal of restoration is the recovery of the natural resources and/or services to baseline conditions in the most cost-effective and beneficial manner. Recovery refers to structural or functional equivalence, which is left to the discretion of the trustee(s). If the result of the trustee(s)' actions are to somewhat enhance the level of services to a level higher than existed before the discharge, such an action may be justified. These actions are appropriate so long as the public is made whole for those services denied from the time of the discharge until recovery is complete.

Comment: Many commenters indicated that the trustee(s) should choose a restoration procedure on a case-by-case basis.

Response: NOAA agrees that restoration procedures must be chosen on an incident-specific basis, except for those situations where an approach has been developed through prespill planning pursuant to § 990.16(c).

Comment: Several commenters urged that plans be revised as the restoration progresses and new information becomes available to provide the greatest potential for recovery of all its natural resources. Several commenters stated that the trustee(s) should base decisions on previous studies and restoration efforts.

Response: The proposed rule does allow for revision of the restoration component as new information becomes available. NOAA agrees that access to information on previous restoration studies would be beneficial to the trustee(s). The restoration literature survey that NOAA has compiled will assist the trustee(s) in this regard.

Comment: One commenter noted that when total restoration is impossible, NOAA should, at a minimum, require: (1) The use of sites identical to the site of the discharge that are adversely affected by other oil discharges; (2) the use of sites identical to the site of the discharge that are assured success as a mitigation bank; or (3) the consideration of alternatives to a mitigation bank.

Response: NOAA chooses not to "require" the suggestions listed by the commenter and leaves this to the discretion of the trustee(s). The Restoration Guidance Document does give some guidance on what might be "identical" sites. The trustee(s) has many possibilities on how to approach restoration. If total restoration is not possible, the trustee(s) can estimate lost compensable values, discount to present value, and use that sum to acquire equivalent services.

Comment: One commenter noted that restoration science is relatively new and this science is not yet sufficiently developed to assure the success of human-initiated restoration of resources over natural recovery.

Response: NOAA notes that restoration is a relatively new science and that there are no absolute guarantees that any planned effort will succeed. However, the trustee(s) cannot afford to wait for such assurances before acting to help systems recover from discharges. The trustee(s) should be mindful of the overall goal of restoration. The restoration component should be designed to come as close as possible to that goal.

Comment: One commenter stated that biologic resources exhibit natural variability. Biological communities are not static. They are drastically affected by natural forces such as weather, food supply, and predation. The commenter argues that despite these adverse forces, biological systems are accepted as "healthy and vibrant" if the plants and animals characteristic of that community are present and functioning normally.

Response: NOAA agrees that certain biological communities have a high degree of natural variability. In such cases, only restoration that allows the natural cycle to continue as before should be considered.

Comment: One commenter noted it may not always be appropriate to give preference to sites closest to the discharge area since this may increase use pressures on already injured ecosystems.

Response: NOAA agrees that such factors as possible increased pressures on the affected system should be considered by the trustee(s).

Comment: One commenter argued that the RP(s) has a discretionary right under the Fifth Amendment to take part in any of the trustee(s) assessment activities. Another strongly opposed the RP(s) having sole responsibility for monitoring the affected area.

Response: NOAA points out that participation by the RP(s) in either the assessment or restoration is

discretionary with the trustee(s). The proposed rule does not require participation. The trustee(s) has the right to offer the RP(s) the chance to participate, and the RP(s) has the right to decline.

Comment: One commenter noted oil removal activities are mentioned as feasible restoration alternatives, and that restoration activities should be confined to those needed after response is completed.

Response: NOAA points out that a particular action, e.g., removal of contaminated sediment, might be considered as either a response action or restoration action. The dividing line for such classifications is dependent upon timing and authority of the person carrying out the actions. The response agency is acting under the NCP to respond to incidents to protect human health and the environment. The trustee(s) may be directed under other statutory schemes to take similar actions for the protection of its trust resources. For example, the response agency might remove a certain amount of contaminated sediment to bring concentrations to a certain level set for human health reasons. The trustee(s), however, may determine that an additional amount of contaminated sediment may need to be removed to attain concentrations that will not result in bioaccumulation in fish populations.

Comment: One commenter suggested that empowering the trustees to pursue emergency restoration outside response under the direction of the OSC will lead to chaos.

Response: NOAA notes that the OSC does not have the authority to implement restoration of natural resources. The trustee(s) is ultimately responsible for that duty. If response actions are continuing while the trustee(s) is developing the restoration component, the two entities should work closely together.

Comment: Many commenters recommended NOAA require the trustee(s) to identify and consider a full range of restoration alternatives, including cleanup or remediation actions. Some commenters also recommended limits on the range of restoration alternatives the trustee(s) can consider for final selection. A number of commenters suggested a preference for restoration, rehabilitation, and replacement over acquisition of the equivalent. One commenter noted inclusion of the four alternatives is consistent with DOI's proposed definition of restoration. One commenter thought the descriptions of the restoration alternatives should be contained in guidance material, rather than in regulatory language.

Response: NOAA does not agree with the commenters who recommended a limit on the range of alternatives the trustee(s) should consider. The trustee(s) should consider a range of alternatives that is "reasonable" for the discharge of concern. The consideration of a "reasonable number" of alternatives should give a full range of options that might be suitable for the specific natural resources and/or services. NOAA notes that, although the alternatives might include acquiring equivalent natural resources, acquisition of equivalent resources should be considered appropriate in those cases where restoration is technically infeasible or costs are grossly disproportionate to the value of the resources. Guidance on the types of alternatives and how they might be considered is given in the Restoration Guidance Document.

Comment: Several commenters noted some discharges will not require full action. These commenters requested an alternative requiring no action (except, perhaps, for monitoring) beyond the cleanup actions taken or planned. Other commenters recommend "No Action Natural Recovery" as the preferred restoration alternative, e.g., prohibiting human activity, and that all other alternatives be compared to it for cost-effectiveness, reasonableness of costs, technical feasibility, rate of restoration of lost services, and ecological sensitivity. A number of commenters questioned whether human intervention will result in more rapid recovery than would occur naturally.

Response: NOAA agrees that "Natural Recovery" should be an alternative considered in every case. This proposed rule does direct the trustee(s) to consider such an alternative in each restoration component drafted.

Comment: A few commenters stated a restoration alternative should not be selected unless the trustee(s) had included in the administrative record evidence the trustee(s) used to determine that that alternative is both possible and preferable to the other alternatives considered.

Response: NOAA is sensitive to the concern regarding the public's opportunity to have access to information available to the trustee(s). Therefore, documentation of the trustee's(s') decisionmaking process is one of the reasons behind NOAA's decision to provide for the administrative record process established in § 990.15 of the proposed rule. A discussion of the types of documentation available to the public in this record can be found in the earlier section of this preamble that discusses subpart A of this proposed rule.

Comment: Several commenters believe acquisition should not be a last resort, while others suggested that acquisition should never be considered as an alternative. Exceptions to acquisition as a last alternative were indicated when natural resources or services are subject to intense or continuous pressures, or unique habitats or threatened/endangered species are involved not under the protection of another regulatory program. The rationale for eliminating acquisition altogether was based on the notion that this alternative would diminish the underlying benefit of resource sustainability as a result of restoration, accelerating depreciation of natural resource assets.

Response: NOAA does not agree that "acquisition of the equivalent" should be eliminated from consideration by the trustee(s), and retains this alternative in the proposed rule. NOAA points out that the legislative history of OPA states that acquisition of equivalent natural resources should be chosen if restoration is infeasible or its costs are grossly disproportionate to the value of the resources.

Comment: One commenter noted that NOAA provides different standards for replacement and acquisition of natural resources. The commenter recommends NOAA define "substantially similar" to meet the mandate in OPA requiring equivalence between the affected natural resource and "new" natural resource. The commenter also stated that NOAA should recognize the fact that, although acquisition may be necessary, it only protects the status quo and will not replace the lost functions of the affected area.

Response: NOAA did not intend to suggest different standards for replacement and acquisition of equivalent natural resources. The term "substantially similar" is defined to ensure that the services provided after the event are as close as possible to baseline conditions. In response to the suggestion that acquisition of equivalent natural resources simply preserves the status quo, NOAA notes that the evaluation of restoration alternatives should seek to ensure return to baseline or comparable conditions of natural resources and/or services. Therefore, acquisition of equivalent resources might also include some improvement of the acquired resources to make up for what the public lost.

Comment: A number of commenters suggested a screening process for selecting a restoration alternative to ensure the selected alternative is

technically feasible, environmentally-effective, and has costs that are not grossly disproportionate to the anticipated benefits. In the screening process, the trustee(s) should identify all restoration alternatives that could be pursued. The trustee(s) should then eliminate those that are not technically feasible, inconsistent with applicable federal and state laws and policies, not cost-effective, or have costs that are grossly disproportionate to the anticipated benefits of restoration, but not using a numerical criterion. The "grossly disproportionate" criterion should apply to incremental, not marginal, costs and benefits as well as total costs and benefits. Finally, from the remaining alternatives, the trustee(s) should select the one most suitable for restoring the natural resource injuries. One commenter cited one court, in *Commonwealth of Puerto Rico* v. *Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980), that suggested similar factors be considered in the planning of restoration.

Response: NOAA notes that the selection factors indicated by the commenters are incorporated in some form in the proposed rule and Restoration Guidance Document.

Comment: One commenter opposed the promulgation of any rule that allows the use of mitigation banking. The commenter noted mitigation banks have not been successful in restoring other affected natural resources such as wetlands, and urged NOAA consider other methods of restoration where total restoration of the affected area is not possible. The commenter stated no preference should be given to sites that have similar resources in another watershed since it has no restorative effect on the affected area, and would potentially result in the total sacrifice of the discharge area.

Response: NOAA notes that the concept of "mitigation banking" has met with criticism in recent years. However, NOAA does not wish to preclude the use of any tool that may be useful to the trustee(s). Therefore, although not required, mitigation banking would still be an option to consider where the trustee(s) feels it may be appropriate. The location of the activity, i.e., one watershed or another, would be a factor that the trustee(s) should consider.

Comment: Some commenters noted that pilot projects prior to full restoration are appropriate in some cases, but should not be required. Several others agreed pilot projects should be used, but only prior to restoration. Another noted that pilot studies are unnecessary under any circumstances.

Response: NOAA points out that the proposed rule allows feasibility or pilot studies to determine the effectiveness of restoration actions. However, the such efforts should be carefully defined and their need documented.

Comment: Many commenters stated that both early and long-term monitoring is essential to evaluate the recovery of the affected resource. One commenter recommended that the affected area be monitored for a minimum of five years.

Response: NOAA agrees that the restoration component should consider monitoring, but leaves the details to the trustee(s) regarding the nature and extent of such activities. NOAA does not agree that there should be an absolute time requirement for monitoring since these plans are site-specific.

Comment: A number of commenters agree that mid-course corrections be used as a gauge for measuring the effectiveness of restoration. Another agreed that such corrections should be required until the system has stabilized. Several commenters supported the inclusion of mid-course corrections, so long as the RP(s) is not held accountable for additional costs, unless the RP(s) participated in the original restoration plan, or unless there was a stipulation for mid-course corrections previously included in the restoration component of the damage settlement.

Response: NOAA notes that the proposed rule does allow for mid-course corrections in restoration. However, it would not be reasonable to expect a damage award to have reopeners in perpetuity for taking new approaches to restoration of a system following one discharge. Therefore, the trustee(s) needs to design the restoration component carefully to spell out the conditions under which mid-course corrections would be called for and try to anticipate an endpoint to the restoration process.

Comment: One commenter pointed out that OPA does not mention "grossly disproportionate" costs. The commenter noted that the phrase is only discussed in OPA's legislative history in terms of a factor to consider in choosing between restoration and acquisition of the equivalent. As such, the phrase cannot be used to relieve the RP(s) from the obligation to either restore or acquire equivalent resources, as seems possible under the *Ohio* decision.

Response: NOAA agrees that discussion of the phrase "grossly disproportionate" in OPA's legislative history is different from the discussion found in the *Ohio* decision. Under OPA, the trustee(s) is to consider whether the costs of restoration, rehabilitation, or replacement would be grossly disproportionate to the value of the injured natural resource only in deciding to acquire equivalent natural resources.

Comment: Several commenters indicated that the selection of a restoration alternative not be "grossly disproportionate" to the benefits derived from the action.

Response: NOAA agrees with this comment to the extent that it uses the term "grossly disproportionate" as discussed in this proposed rule. As previously noted, NOAA believes that the OPA proposed rule should not strictly define a numeric ratio delimiting the term "grossly disproportionate." Instead, NOAA has established a number of factors that the trustee(s) must consider. NOAA concludes that this is the most appropriate approach for meeting OPA's strict objective of complete "restoration, rehabilitation, replacement, and/or acquisition of the equivalent resources, * * *," following the discharge of oil.

Comment: Several commenters discussed the earliest treatment by a court of the issue of grossly disproportionate restoration costs, *Commonwealth of Puerto Rico* v. *Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980). The court in *Zoe Colocotroni* stated that the appropriate measure of damages would be the cost reasonably incurred to restore or rehabilitate the injured resources to as close to baseline condition as is feasible without grossly disproportionate costs. The court suggested that where such restoration is either physically impossible or disproportionately expensive, the measure of damages might be the acquisition of comparable lands. The commenters suggested that NOAA should use the standards given by the *Zoe Colocotroni* court.

Response: NOAA notes that the standards listed in the *Zoe Colocotroni* decision are, in fact, included in the factors to be considered in evaluating restoration alternatives under OPA.

Comment: Several commenters proposed that the OPA rule provide for restoration cost estimates in tabular format based historical data. One other commenter noted the dearth of restoration cost information from which to draw estimates.

Response: NOAA feels there is sufficient information to proceed with the development of damage cost estimates in tabular format, i.e., compensation formulas. The data on costs will be based upon a "dollar-per-gallon" formula, taking into account average restoration costs, plus average

lost direct use pending restoration. NOAA recognizes, however, that for certain incidents or types of natural resources and/or services, site-specific restorations must be planned for which detailed cost estimates could then be established.

Comment: One commenter stated that it is premature to limit the quality or quantity of restoration to the ability of the RP(s) to pay. The RP(s) must, in principle, be held to fully offsetting the damages that was caused by the discharge. Another commenter noted that because of the limited liability of the RP(s) in section 1004 of OPA, all costs may not be recovered from the RP(s). Therefore, restoration priorities must be made and funded by the proven claimants.

Response: NOAA does believe that the RP(s) should be liable for all reasonable damages. However, NOAA also notes that the trustee(s) must develop realistic plans if any benefit is to be expected rather than spend time and effort on unrealistic plans. Also, the trustee(s) may be able to fund necessary restoration actions through an "uncompensated claim" submission, pursuant to section 1012(a)(4) of OPA.

Comment: One commenter pointed out that intervening outside influences and their effects must not be charged against the RP(s).

Response: NOAA notes that ordinarily independent, intervening actions or conditions may not be within the liability of the RP(s).

Comment: One commenter noted that if there is no impairment of the services of a natural resource, then society suffers no damage. Following, if society suffers damage due to impairment of a resource's services, that damage is fully remedied when the resource's services are restored, since society's welfare is then returned to the state in which it would have been in the absence of the injury.

Response: Damages include the value of lost services pending recovery of the natural resources and/or services. Return to baseline levels of services does end the current losses of values but does not address the past losses to the public pending that return. Therefore, those past losses are recoverable as a part of the damage figure.

Comment: One commenter agreed that NOAA's ANPRM correctly recognizes that the measure of natural resource damages is based on the services provided by the affected natural resources. Another commenter, however, stated that restoring services is not the same as restoring natural resources and, therefore, should not be the preferred measure of damages.

Response: NOAA agrees that the value of lost services is one component of the damage figure. However, restoration of the injured natural resource is always preferred where practicable.

Comment: Several commenters objected to the suggestion that the trustees "improve" access to the injured site or another site as a method of restoration. These commenters argued that use of sums recovered for such purposes would be inconsistent with OPA.

Response: NOAA did not intend to suggest that increased use of an injured natural resource is a viable restoration alternative. NOAA suggests that one way of providing services for interim lost use pending recovery might be to provide public use of a substitute site. The substitute site would have to be capable of sustaining such use without impairment. This suggestion of alternative services may also be a way to use those sums recovered representing diminution of use in a way to make the public whole for its loss.

Compensable Values Determination

I. Introduction

Section 1006(d) of OPA authorizes the trustee(s) to recover: The cost of restoring, rehabilitating, replacing or acquiring the equivalent of the injured or lost natural resources and/or services; the diminution in value of the injured or lost natural resources pending restoration; plus the reasonable cost of assessing those damages. Guidance on estimating restoration costs is discussed previously in this preamble. This discussion provides guidance to the trustee(s) for estimating the total diminution in value of resources and/or services affected by a discharge, hereinafter referred to as compensable values.

For the purposes of this proposed rule, compensable values include all reliably calculated values that comprise the total diminution in value of lost or diminished services of trust resources as a result of a discharge, from the onset of the event until recovery to baseline conditions is deemed complete by the trustee(s), i.e., interim lost values. If the resources and/or services will not fully recover with the implementation of the Restoration Plan, the calculation of compensable values will include the value of a perpetual stream of lost services. Failure to include all relevant categories of damages in a claim would understate the true loss to the American public attributable to the discharge of oil. In accordance with the Congressional Conference Report (H. Conf. Rep. No. 653, 101st Cong., 2nd Sess. at 108), "diminution of value" refers to the standard for measuring resource damages cited in the D.C. Circuit Court decision on *Ohio* v. *DOI*. The *Ohio* opinion defines "use values" broadly, to encompass both direct use and passive use values that can be reliably calculated, i.e., calculated in a manner that is trustworthy or worthy of confidence. (See 57 FR at 23067.)

Direct use values are defined as the value individuals derive from direct use of a resource. Direct uses of resources include both consumptive uses, such as fishing and hunting, in which resources are harvested, and nonconsumptive uses, in which the activity does not reduce the stock of resources available for others at another time, such as birdwatching and swimming.

Passive use values are defined as the values individuals place on resources independent of direct use of a resource by the individual. The term "nonuse values" has also been used to refer to the same concept, but NOAA prefers the term "passive use values." Passive use values include, but are not limited to: the value of knowing the resource is available for use by family, friends, or the general public; the value derived from protecting the resource for its own sake; and the value of knowing that future generations will be able to use the resource. Passive use values pertain to the provision of, improvement to, or prevention of injury to natural resources.

The total value of a resource to an individual consumer encompasses both direct use and passive use values. When an injury occurs to a resource, the measure of damages to an individual is the change in the individual's utility or level of well-being, as measured in monetary terms (i.e., monetized changes in utility). Economic analysis provides two exact monetary measures of any change in individual's well-being: Willingness to pay (WTP) and willingness to accept (WTA). WTP is the maximum amount of money that an individual would be willing to give up to ensure access to, provision of, improvements to, or prevention of injury to a natural resource. WTA is the amount of money that would be needed to compensate an individual for the loss of access to or for the injury of a natural resource. To calculate the monetized change in an individual's utility resulting from a resource injury, net willingness to pay or willingness to accept is calculated. Net willingness to pay or willingness to accept is total WTP or WTA minus the costs an individual incurs to use the resource services, including travel and time costs.

An approximation for the exact measures of the change in utility or well-being is the Marshallian "consumer surplus," the value of which generally falls between WTP and WTA. Marshallian consumer surplus is the difference between the maximum sum of money an individual would be willing to pay for a good or service, as calculated from a Marshallian demand function, and the amount the individual is actually required to pay. The Marshallian consumer surplus is calculated directly from observed behavior in market or market-like transactions. This measure of value of a good or service incorporates the income effects of changes in its price or quality; for example, a reduction in price or an increase in quality would have the effect of increasing real buying power. As a result, Marshallian consumer surplus does not measure value from a fixed baseline level of utility. In contrast, the exact measures of WTP and WTA are so labeled because they calculate the monetized change in utility or well-being from a fixed baseline level of utility.

In any given context, the more appropriate choice between the exact value measures depends upon the allocation of property rights. Because the government is holding natural resources in trust for the public, the WTA criterion is conceptually the more appropriate measure of damages for natural resource damage claims. However, in some circumstances it may be infeasible or impractical to provide reliable measures of WTA. In those circumstances, the more conservative measures of WTP or the Marshallian consumer surplus are appropriate for measuring damages.

In addition to losses in value to individuals, compensable values also include losses to trustee agencies or Indian tribes that protect and manage the resources for the individual members of the public. The losses include the reduction in fees collected for the use of natural resources in the public domain by government agencies or Indian tribes that are designated as trustees of the natural resources. Similarly, the reduction in economic rent accruing to a private party because the government or Indian tribe does not charge a fee equal to the value of the resource in that use also represents a loss to the public. In this context, economic rent refers to the difference between the fees that users would be willing to pay for the use of a public natural resource, and the fees actually paid. Finally, the loss to the public includes the reduction in net revenues to public enterprises controlled by the trustee(s) as a result of the injury to natural resources.

In summary, the compensable values that may be claimed by a trustee for the losses to the public include, but are not limited to: (i) The value of losses to all public uses of natural resources (including passive use) as measured by changes in (a) monetized changes in utility, or consumer surplus, (b) fees or other payments collectable by the government or an Indian tribe for use of the natural resource by a private party, and (c) any economic rent accruing to a private party because the government or Indian tribe does not charge a fee or price for the use of the resource equal to the value of the resource services, provided such economic rent is not recovered under a private cause of action; and (ii) in instances where the natural resource trustee(s) is the majority operator or controller of a for-profit or not-for-profit enterprise, and the injury to the natural resource results in a reduction of net income to such an enterprise, that portion of the lost net income due the trustee(s) from this enterprise resulting directly or indirectly from the injury to the natural resource.

Although section 1002 of OPA allows other types of recoveries for damages resulting from a discharge of oil, this proposed rule covers only damages recoverable by natural resource trustees for injuries to natural resources and/or services resulting from the discharge. Therefore, damages assessed in accordance with this proposed rule do not include: (1) Taxes forgone, because these are transfer payments from individuals to governments; (2) wages and other income lost by private individuals, except for that portion of income that represents uncollected economic rent, because these values do not accrue to the trustee(s) and may be the subject of lawsuits brought by the individuals suffering the loss; or (3) any speculative losses.

II. Economic Valuation Process

Natural resources can be viewed as long-lived assets that provide flows of services through time; for example, fisheries and forests provide continuing opportunities for commercial harvests of fish and timber, as well as for fishing, hiking, and other recreational activities. A fundamental principle of asset valuation is that the current value of an asset is equal to the present discounted value of the stream of future services from the asset. When a discharge injures trust resources and/or services, the diminution in value will equal the sum of the changes in the present discounted values of all affected services.

The basic types of services associated with natural resources include: (1) Recreational; (2) commercial; (3) cultural/historical; (4) ecological; (5) subsistence; and (6) passive use. A discharge may affect any or all of these services.

Injuries resulting from a discharge may reduce either the quality or the quantity of services and resources available to provide services. For example, if a municipal beach is oiled by a discharge, recreational beach use will be identified as a category of services to be analyzed. If the beach is closed for some period, the quantity of recreational beach services available to the public is reduced. In addition, after the beach is reopened, the continuing presence of tarballs on the sand and in the water may reduce the quality of services available at the beach. The reduction in service quality may result in a lower value to the user from a visit, and consequently individuals may reduce their visitation at the beach, with some stopping visitation entirely during the affected period. In summary, damages during the period of injury after the reopening of the beach may include lost values due to reduction in visitation and decreased value per trip for trips that do occur.

Where resources are used as inputs into a production process, a reduction in the quantity or quality of the resource may effectively increase the costs of the input. For example, a closure or a fish kill in a commercial fishery may increase the transportation costs of achieving a given commercial catch level. As a result, the injury may reduce the economic rent accruing to the producer from use of the public trust resource, the fishery. If the producer is able to pass part of the effective cost increase onto the consumer, the injury will reduce consumer surplus as well.

The first step in measuring compensable interim lost values is to identify the services provided by the natural resources before the injury. For example, wetlands provide a wide range of services including, but not limited to, flood control, habitat for plants and animals (particularly during early life stages), and recreational opportunities. Any given discharge may not affect all of these services. For example, a discharge that results in oiling of wetland vegetation above ground may leave the roots intact. As a result, the flood control services may be relatively unaffected, while the quality of habitat for plants and animals may be significantly reduced.

Once a list of services potentially affected by the discharge has been developed, the trustee(s) will identify

which services to consider in the damage assessment process and the methods for quantifying economic damages due to those lost or diminished services. As discussed below, a variety of valuation methodologies are available to the trustee(s). However, for a given service affected by the discharge, there may be only one or two methods that are suitable for valuing the specific type of loss. The availability of data can also affect the choice of methodology.

The next step involves estimating the change in the quantity and quality of services attributable to the discharge. This effort requires information from the Injury Quantification portion of the damage assessment that identifies the change in the quantity or quality of resources available to provide services. Users' behavioral responses to the quantity or quality changes can be estimated, where relevant. For example, when a fish kill affects a recreational fishery, the lost recreational services result in the reduction of angler days at the site. To calculate the change in participation, the change in fish stock needs to be translated into the resulting change in anglers' hourly catch rate. Then, the anglers' behavioral response to the change in quality can be modeled to determine the reduction in recreational fishing at the site attributable to the discharge.

Once the magnitude of the lost services has been estimated, economic values are assigned to these services. For example, with recreational demand models, the change in consumer surplus attributable to the discharge is calculated directly from the model along with the change in number of trips. Alternatively, where welfare losses accrue due to increased input costs, the full welfare loss can be captured by measuring the reduction in factor income (or surplus).

The diminution of value pending full recovery of the resource is calculated as the present discounted value of services in the absence of the injury minus the present discounted value of services with the injury. To determine the present discounted value with the injury, the choice of restoration method must be explicit: If no restoration actions are planned, the with-injury calculation will be based on a natural recovery scenario. If restoration actions are planned, the with-injury calculation will need to take into account the effect of restoration actions on resource recovery paths.

When the recovery period for a resource extends over multiple time periods, it is important to adjust the damage calculations for each period for the increases in the quantity and/or quality of the resource prior to full recovery: In most cases the services will be increasing toward baseline as the quantity and/or quality of the resource recovers. The recovery path may differ for each service, so each may need to be considered separately. For example, in the wetland context cited above, individuals may choose to return to the wetland to view wildlife in a matter of weeks, whereas recovery of the habitat to support a fish hatchery may take months or years.

For some categories of economic damage, it will be possible to conduct site-specific analyses. For example, the economic damages associated with the loss of access to a marine transportation corridor due to closure of a waterway can be estimated using existing site-specific data in most instances. In other cases the trustee(s) may employ benefits transfer procedures to apply valuation estimates or valuation functions from existing valuation studies from other contexts to estimate losses in the present incident.

III. Measurement Techniques

A. Introduction

Several methodologies exist to measure direct use and passive use values. This proposed rule provides maximum flexibility to the trustee(s) for selecting any methodology that can provide reliable and valid estimates of resource values and that is appropriate for valuing the injuries associated with a particular discharge. The trustee(s) will have broad discretion in selecting among existing and potential new methodological approaches that may be employed in damage assessment. The flexibility to exercise professional judgment in selecting and applying specific analytical techniques is necessary because of the "site-specific" nature of discharges of oil. Further, the trustee(s) may use different methodologies to produce separate damage estimates for different resource services, so long as there is no double recovery of losses. Either market or nonmarket resource methodologies may be employed, as relevant to the specific valuation issues in a given context.

To measure consumer values economists often rely upon directly observable data on prices and quantities from transactions in private markets. By definition, nonmarket goods and services are not traded in traditional markets, generally because such exchange arrangements are not practical or efficient. For example, national defense, the interstate highway system, and national parks are nonmarket commodities provided by the public sector and generally are not traded in private markets. For goods that are not provided through private markets, alternative means of determining values have been developed.

The proposed rule identifies reliable valuation techniques for assessing the economic value of natural resources and/or services including: The travel cost method; the factor income approach; the hedonic price model; market models of demand and supply; and the contingent valuation method. The trustee(s) is not limited to these methods, and may use any method suitable for calculating compensable value. Where the circumstances are such that a site-specific application of one of these valuation methods is not appropriate and/or does not meet the reasonable lost criterion, the trustee(s) may estimate compensable values using benefits transfer or may estimate damages for interim lost services using the habitat or species replacement cost method. The choice of approach(es) in a particular context will depend upon the types of injuries associated with a discharge.

B. Measurement Techniques

1. Site-specific valuation methods—a. *Travel cost method.* The travel cost method is principally employed to model demand for recreational experiences. This measurement technique evolved from the insight that the travel costs an individual incurs to visit a site are like a price for the site visit. In essence, the travel cost method assesses an individual's willingness to travel further (and thereby incurring higher travel costs) in order to recreate at more highly valued sites. A site demand function for a sample of households can be estimated with information on total trips to the site and travel cost to the site. With trip participation data for before and after a discharge, it is generally possible to estimate the shift in demand induced by the discharge (holding all other factors constant) and calculate either the resulting change in the exact welfare measures of willingness-to-accept or the Marshallian consumer surplus approximation. However, if recovery of the resource will occur in increments over an extended time period, it will not be feasible to collect site-specific participation data for the full period of the recovery within the timeframe of the assessment. Adjustments to the immediate decline in site-specific participation will need to be made to capture the incremental recovery in participation throughout the period of resource recovery.

Recent advances in the travel cost method may allow the trustee(s) to value the variation in quality at a site due to a discharge even when before and after participation data are not available. Instead of focusing on the number of recreation trips to a given site (or to all sites) in a season, the random utility method focuses attention on the recreationist's choice among alternative recreational sites. This version of the travel cost model is particularly appropriate where many substitutes are available to the individual and when the discharge affected quality at multiple sites.

b. Factor income approach. This approach relies upon the production function model, which relates the contribution of inputs to the production of an output. (Inputs are also referred to as factors of production.) Changes in the availability or price of inputs will affect the availability and price of the output and hence the level of income accruing to the producer. Where unpriced natural resources are an input in the production process, producer income will include both economic profit (the amount of profit a producer requires to keep capital in this use in the long run) and economic rent (the income accruing to a producer as a result of access to an unpriced resource). For example, fish stocks allocated to commercial fisheries are inputs to the production of commercially sold fish; access to navigable waterways is an input into the transport of raw materials and processed goods. Though the government generally does not charge fees (or charges only a nominal fee) for the use of fishery or navigational channel resources or their services, the producer does incur labor and equipment costs to acquire the services of the natural resource.

A discharge may decrease the quality and/or quantity of a resource and thereby effectively increase the cost of acquiring the natural resource input. For example, closure of a fishery may force commercial fishermen to travel farther to obtain catch, or closure of a commercial waterway may force vessels to travel longer distances or may delay docking at port; in both cases, producer costs have increased. As a result, the injury may reduce the economic rent accruing to the producer from use of the public trust resource. The change in economic rent attributable to a discharge can be evaluated by calculating the change in surplus either in the product market or in the input markets. Where the output price is not affected, the change in economic rent is simply the sum of the change in factor costs (or factor income) for each affected input.

c. Hedonic price model. The hedonic price model relates the price of a marketed commodity to its various attributes. In the natural resource damage assessment context, it may be used to determine the change in value of some nonmarket services from public trust resources (for example, environmental amenities such as water or air quality) where they function as attributes of private market goods, such as property. For example, the value of beach front property may be directly related to the quality and accessibility of the adjacent coastline. Reduction in the quality or accessibility, as may occur due to a discharge, will be captured in the value of the property. All else equal, the decrease in property values as a result of a discharge measures the change in use value of the injured coastline resources accruing to a subset of the potentially affected public, i.e., the local property owners. This measure is only a partial accounting of the reduction in value of coastline resources because it does not capture the loss in value of the resources accruing to members of the public who own no property in the area.

d. Market models of demand and supply. For those goods and services regularly traded in markets, economists typically rely upon market transactions to reveal the values that individuals place on the goods and services and the costs of producing them. When the quality of the resource directly affects the value individual consumers place on a good or service, the correct measure of damage is the change in consumer surplus, or individuals' willingness-to-accept compensation for the injuries associated with the discharge. The standard method for valuing injuries that affect consumers' value of a marketed resource is to estimate models of market supply and demand for the resource and/or service. Assuming the injury does not affect the production side of the market, the damages are calculated as the difference between the total consumer surplus for the marketed resource with and without the injury, holding all else constant. The calculation is more complicated when the production side is also affected. With some demand models, it is possible to calculate exact willingness-to-accept measures from the demand analysis; in other cases, the more readily available measure of Marshallian consumer surplus is used as a proxy.

When the supply of the resource is fixed (or quasi-fixed), then the observed or predicted change in market price may be used as a proxy for the change in resource values. An example of a quasi-fixed resource would be land—the supply of land is fixed in the short-run, but in the medium-run, improvements to the land may change the flow of services (agricultural, floral/faunal habitat, housing) available from individual parcels of land. Market-based methods only capture the reduced value of services accruing to owners of the resource, and will not capture the lost value of services provided to the members of the public with no ownership rights in the resource.

When the resource is regularly traded in the market, the change in market price may be readily observable. If the injured resource is not regularly traded in a market, but similar or like resources are traded, the trustee(s) may use the appraisal technique. The appraisal technique also will only capture the reduced value of services accruing to owners of the resource, and will not capture the lost value of services provided to the members of the public with no ownership rights in the resource. To the extent possible, all appraisals should conform to the "Uniform Appraisal Standards for Federal Land Acquisitions" (Uniform Appraisal Standards), Interagency Land Acquisition Conference, Washington, DC, 1973. In those instances when state statutes may be in variance with these standards, a state trustee(s) should follow the applicable state guidance on performing appraisals.

e. Contingent Valuation Method. Contingent valuation (CV) is a survey-based approach to the valuation of nonmarket goods and services, that relies on a questionnaire for the direct elicitation of information about the value of the good or service in question. The value obtained for the good or service is said to be contingent upon the nature of the constructed (hypothetical or simulated) market and the good or service described in the survey scenario. This aspect of CV gives the approach great flexibility, allowing valuation of a wider variety of nonmarket goods and services than is possible with any of the other aforementioned techniques. Indeed, it is the only method currently available for the express purpose of estimating passive use values. In the area of natural resources, CV studies generally derive values through elicitation of respondents' willingness to pay (WTP) to prevent injuries to natural resources or to restore injured natural resources.

The first published CV study, valuing outdoor recreation, appeared in 1963. There are now over 1,400 documented papers, reports and books on CV. In recent years, it has become one of the

most widely used methods of nonmarket valuation.

Four basic elements common to CV questionnaires are: (1) An explanation of the structure and rules of the market in which the good or service being valued is either bought or sold; (2) a description of the good/service and how it is to be provided; (3) the value elicitation question; and (4) validation questions, to verify comprehension and acceptance of the scenario and to elicit socioeconomic and attitudinal characteristics to interpret the variation in responses to the valuation question across respondents. There are no universal rules on how each of these elements of a CV questionnaire should be designed, since the appropriate formulation of each depends on the good or service being valued and its context and, consequently, will vary across applications.

CV surveys generally measure total value of a good or service, which includes both direct use value and passive use value. Because passive uses of resources leave no behavioral record, they are difficult to validate externally. A number of criticisms of CV pertain specifically to its use in valuing the passive use component of total value and the difficulty of external validation of that component of total value. Among the most commonly cited criticisms are: The stated intentions of willingness to pay in CV surveys may exceed "true" willingness to pay; CV may produce results that appear inconsistent with the tenets of rational choice; respondents to CV surveys on passive use may be unfamiliar with the good/service being valued and therefore may not have an adequate basis for articulating their true value; CV respondents may be expressing a value for the satisfaction ("warm glow") of giving rather than the value of the good/service in question; and respondents may fail to take CV questions seriously because the financial implications of their responses are not binding. Most proponents of CV acknowledge that poorly designed and administered CV studies can produce results that reflect the potential problems identified above. However, proponents also assert that these problems are not inherent to the method and that well designed and well executed CV studies can eliminate them or render them inconsequential. Further, survey design, development and administration standards will promote quality control for CV surveys. NOAA proposes standards on survey design, development and administration, and the nature of results below.

There is considerable interest over the inclusion of passive use values as part of a natural resource damage claim and the use of CV to measure such values. NOAA received many, often conflicting, comments on this issue. To provide a thorough analysis, NOAA convened a Contingent Valuation Panel (Panel) of economic and survey experts to evaluate the reliability of CV to measure passive use values. By establishing this Panel, NOAA attempted to provide an atmosphere in which an unbiased academic analysis of CV could be conducted. The Panel received hundreds of pages of comments and conducted a public meeting to hear all sides of the issue. Upon completion of its study, the Panel submitted its report to NOAA. That report constitutes a public comment and as such is part of the administrative record of this rulemaking. A copy of that report can be found at 58 FR 4601 (Jan. 15, 1993). NOAA considered that report along with the comments received from economists, industry representatives and other interested parties in the development of this proposed rule.

Based upon consideration of all comments received, NOAA believes that the trustee(s) should have the discretion to include passive use values as a component within the natural resource damage assessment determination of compensable values. This position is consistent with OPA legislative history that specifically refers to diminution in value as a part of damages and cites the *Ohio* decision definition of value, which includes both direct use and passive use. Further, NOAA believes that reliable estimates of lost passive use value due to discharges of oil can be estimated using CV so long as the CV study follows the standards provided in the proposed regulations. NOAA worked closely with the Department of the Interior during the development of the proposed standards for CV in order to ensure consistency between the two sets of natural resource damage assessment regulations. NOAA understands that the Department of the Interior will soon propose identical standards for inclusion in its damage assessment regulations.

NOAA believes that the proposed standards are necessary when CV surveys are used for natural resource damage assessment, because such studies will be given a rebuttable presumption in litigation over the specific amount of money a particular party must pay as compensation for liability. However, this same level of precision for CV surveys is not necessarily required for other applications of CV.

In proposing its standards for the use of CV in the damage assessment context, NOAA has relied heavily on the recommendations of the Panel. NOAA bases this reliance on the fact that the Panel reviewed a number of studies and considered the viewpoints of many individuals in reaching its conclusions.

The Panel's recommendations fall into two categories—those that should be met to assure reliability and those that must be met. Regardless of the category in which the recommendations are included, almost all the recommendations deal with survey design, development and administration. Because NOAA believes that a properly designed and administered survey is essential to ensure reliable responses, NOAA has proposed a number of standards in these areas.

There is also considerable interest in "performance standards." Performance standards would be those tests that can be used to determine whether reliable measures of passive use value were obtained. The Panel briefly addresses this issue in its discussion of whether CV results violate assumed properties of rational choice. The Panel returns to this area only in the form of one of the five conditions CV surveys must meet—responsiveness to the scope of the environmental insult. NOAA proposes a performance standard for this condition, which is discussed in more detail below.

The standards for passive use value estimation in the proposed rule cover three distinct aspects of a CV study: (1) Survey instrument design and development, (2) survey administration, and (3) the nature of the results. The regulatory standards proposed by NOAA are intended to provide flexibility to the trustee(s) so that it can take advantage of new developments that may occur in CV methodology. Further, the standards are subject to amendment as new research is conducted and additional knowledge is achieved.

Survey Instrument Design and Development. The reliability of a CV estimate of passive use value begins with the design and development of the survey instrument. The proposed rule contains a number of standards for the design and development of the survey instrument, including standards regarding the selection of a choice mechanism. Past CV studies have used different methods to elicit values. These methods include open-ended WTP questions; bidding cards; and voting formats typically termed "referenda." In the damage assessment context, the survey will be offering a public good in

one of two forms—prevention of injury or restoration of the injured resource. NOAA proposes that the trustee(s) use a choice mechanism and payment vehicle that are both credible and incentive compatible, i.e., do not impose strategic bias. The trustee(s) is to use his discretion in selecting the choice mechanism, and is to document the rationale for the choice and explain how it is incentive compatible.

However, NOAA would encourage the trustee(s) to consider the Panel's recommendation to pose the valuation question as a vote on a referendum. NOAA believes that there are many advantages for using a voting format for a CV survey for natural resource damage assessment purposes. NOAA believes that the method of elicitation should be one with which people are familiar and one which provides a realistic context in which respondents can choose to increase levels of public goods. Local jurisdictions and state governments often ask voters to increase taxes on themselves so that public goods may be increased (i.e., school bond issues; special assessments for public infrastructure). Thus, the voting mechanism is both a familiar and realistic context for individuals to make choices regarding public goods. Second, in our society, most goods are offered using posted prices. Asking an individual to reveal his or her maximum WTP for a good is both unfamiliar and unrealistic. Third, it is important that respondents should believe that they will receive the program offered in the CV survey. To CV respondents, the cost of the program naturally determines the price they must pay. If no set price is offered, the respondents may perceive uncertainty regarding the program's costs and therefore uncertainty regarding the provision of the program. Finally, the voting format is incentive compatible. If respondents desire the program at the stated price, they must reveal their preference and vote for the program. Voting against or refusing to vote will only lower the probability of obtaining the program.

Survey Administration. The most carefully designed CV survey can produce unreliable results if the survey administration is faulty. Therefore, NOAA proposes standards for survey administration. For the most part, the standards specified for survey administration are similar to those one would expect any high quality survey to meet.

One of the aspects of survey administration dealt with in the proposed rule is determination of an appropriate response rate. NOAA proposes that the trustee(s) should obtain as high a response rate as possible consistent with the requirements of reasonable cost in order to ensure reliable inferences to the general population. Low response rates pose a risk of compromising the statistical validity of the survey when nonrespondents have systematically different passive use values than respondents. Another risk associated with low response variance may be significantly affected such that the indicated confidence of survey results is questioned. Since the likelihood of this risk cannot be determined unless nonrespondents have been surveyed, the trustee(s) should minimize nonresponse in the final survey to the extent practicable. For example, the trustee(s) may design the survey instrument so that individuals must decide whether to respond before the exact nature of the environmental insult is revealed.

Balancing the desirability of a high response rate against cost considerations, NOAA has proposed that response rates should not fall below 70%. NOAA is interested in further comments on whether there should be a specified response rate and, if so, whether 70% is a reasonable floor.

Another aspect of survey administration addressed in the proposed rule is selection of the mode of administration. The three generally used CV survey administration modes are in-person, mail and telephone. Recently, mixed mode surveys have combined mailed information with telephone interviews. There are advantages and disadvantages of each method, and often the selection of the appropriate method is dependent on a number of factors such as cost, turn-around time, desired response rate, type of information to be conveyed, use of visual aids, required population coverage and the ultimate use of the survey results. For example, telephone surveys can approximate simple random sampling of households through random digit dialing; can produce fast results; are relatively easy to administer; and are less expensive than in-person interviews. On the other hand, visual aids cannot be used; interviews need to be relatively short; interviewer bias may be involved; and individuals without telephones are necessarily omitted from the sample. Self-administered mail surveys are the least costly of the three methods. However, probability sampling is exceeding difficult; respondents can review the survey before deciding to participate (imparting self-selection bias); there can be no random selection within the household and no control of question sequencing; and a higher number of incomplete responses are likely to result because there is no interviewer to motivate the respondent. Finally, in-person interviews permit random selection of the respondent within the household; maintain control of question ordering; allow the use of visual materials; and generate high response rates. In-person interviews, though, are the most costly method to administer and may involve interviewer bias. Administration requires complex field operations and involves the use of many documents and forms (i.e., calling cards, interviewer evaluation forms, verification forms). For a more in-depth discussion of each method, see EPA, "Survey Management Handbook," vol. II, pp. 24–35, 230/12–84–002, December 1984.

In analyzing the advantages and disadvantages of the use of each method for CV surveys of natural resource damages, NOAA considered the Panel's report. In that report, the Panel stated that "[i]t is unlikely that reliable estimates of values could be elicited with mail surveys. Face-to-face interviews are usually preferable, although telephone interviews have some advantages in terms of cost and centralized supervision."

While recognizing that mail surveys can provide invaluable information for many academic studies and regulatory purposes (e.g., U.S. decennial census), NOAA believes that mail surveys at this time lack certain features that are desirable for use in the natural resource damage assessment area. In deciding between the use of telephone and in-person surveys, NOAA suggests that the trustee(s) consider seriously the use of in-person interviews for the final survey because of the characteristics of a survey needed for damage assessment purposes. A CV survey designed for natural resource damage assessment purposes is likely to impart a large amount of information to respondents causing interviews to be lengthy and often complex. In-person interviews offer the opportunity to motivate the respondents and to hold their interest by providing important information in a graphical and pictorial format and asking interactive questions regarding the respondents' understanding and acceptance of key features of the instrument. It also permits interviewers to record verbatim responses to important open-ended questions. Such information may be critical in demonstrating that the trustee(s) has adhered to the regulatory standards proposed by NOAA.

Even though NOAA recommends the use of in-person interviews for the final

survey, it recognizes that there may be instances where other modes of administration may be appropriate. Therefore, under the proposed rule, selection of the mode of administration is left to the discretion of the trustee(s); however, the trustee(s) must document the rationale for the selected mode of administration. NOAA anticipates that this documentation would include a discussion of the factors that led the trustee(s) to reject use of in-person interviews.

NOAA also encourages the trustee(s) to consider the use of modes of administration other than in-person interviews during the survey instrument development stage. For example, a telephone survey may be an appropriate and cost-effective method to test a design feature such as question ordering or the understanding of technical terms. Further, NOAA is interested in comparative empirical testing of other administration modes, such as random digit dialing for initial contacts, followed by mailed descriptive information and visual materials, culminating with a telephone survey. If such testing demonstrates that other modes can produce the type of information and results comparable to in-person interviews, NOAA would encourage the trustee(s) to consider the use of those methods for the final survey.

Regardless of the mode of administration, NOAA proposes that all surveys be administered by a survey research organization because the preparation and administration of a general population survey require practical survey expertise and substantial logistical support. NOAA also recommends that the trustee(s) select a survey research organization that has implemented procedures to meet the standards outlined in either the Council of American Survey Research Organizations' Code of Standards for Survey Research or the American Association for Public Opinion Research's Code of Professional Ethics and Practices. Use of such an organization will help to maintain reliability and confidentiality. Further, such organizations are likely to have proven track records and the staff necessary to conduct a survey in accordance with the proposed regulatory standards.

Nature of Results. In addition to the standards for survey instrument design and development and for survey administration, the proposed rule contains a standard for evaluating the results of CV surveys. The Panel report stated that one indication that a CV study is unreliable is when respondents show inadequate responsiveness to the scope of variations in the environmental insult. This statement suggests that the Panel was concerned that WTP be sensitive to characteristics of the described natural resource injuries and of methods of preventing those injuries or restoring the injured resources. The proposed rule includes a performance standard to address this concern.

The scope of an environmental insult such as a discharge of oil is multi-dimensional, where the dimensions are influenced by biological and social attributes. A discharge can affect all or part of an ecosystem. Its effects can be short- or long-lived, lethal or sublethal, geographically contained or widely dispersed. From the human perspective, the effects of a discharge may be directly visible and disturbing, or out of sight and perceived only indirectly once there is knowledge about the loss of natural resources.

In the first phase of the scope analysis, the many dimensions of the scope of the discharge under investigation need to be identified. Once the trustee(s) has defined the dimensions of scope deemed to be important to passive use losses, the trustee(s) shall employ a split sampling technique where some respondents are provided with an alternative survey instrument. The trustee(s) begins the analysis with the primary survey instrument that will be used to estimate the passive use losses due to the discharge in question. This instrument is designated the base instrument. It is assumed that the trustee(s) has pre-tested and performed field pilot tests on the instrument and is convinced that the instrument meets the design or guidance criteria laid out in the proposed rule. Analyses performed using incompletely developed or tested preliminary instruments cannot be considered evaluations of scope sensitivity because in these situations it is not possible to distinguish the effects of variations in instrument design from those effects on respondent decisions of changes in the scope of injury or the proposed program.

In designing a CV survey instrument, the trustee(s) must determine the dimensions of scope that are relevant to the discharge under investigation and decide whether there exists a subset of dimensions that are important to passive use value or whether all of the dimensions are linked and therefore equally important. In cases where a subset is deemed important, the trustee(s) must choose whether to scale these dimensions up or down in relation to the levels described in the base instrument and by how much to scale the dimensions. If all relevant dimensions are to be scaled, the trustee(s) must still decide in which direction and magnitude to scale each dimension. The dimensions should be designed to be ordinal in scope, i.e., A>B>C, unless such ordinal scope is infeasible.

After the trustee(s) has decided on the dimensions to be scaled, in what direction and by how much, the trustee(s) shall produce second and third instruments that differ from the base instrument only with respect to the scope dimensions. NOAA recognizes that the trustee(s) may choose to scale dimensions regarding the injury description, dimensions concerning the CV prevention or restoration programs offered to respondents, or both.

After the scaled instruments are pre-tested, all three instruments should be employed in a split sample design. Since inferences to the relevant population will not be part of a scope analysis, true probability sampling is not required and convenience samples may be employed so long as random assignment of the two treatments is maintained. The trustee(s) should endeavor to employ large samples in these analyses since scope effects may be small and large samples will be needed to attain the desired 95 percent confidence levels of statistical significance. The trustee(s) is free to demonstrate sensitivity to scope using statistical techniques of its choosing; however, pooling both samples and employing a simple dichotomous variable (analysis of covariance) framework allowing general differences in the WTP valuation function will usually be a sufficient basis for testing. In some circumstances, more complex designs may be required.

The validity of the scope analysis depends upon the respondents' perception of differences in the scope dimensions across the three treatments. It is incumbent upon the CV designer to include questions that can be used to determine whether the understanding and credibility criteria laid out in these regulations have been met. This determination is vitally important and, if it is found to be violated, the analysis may lead to unreliable results.

The three-scenario approach is not required when the trustee(s) provides a reasonable showing that it is infeasible due to considerations of cost or lack of plausibility of the scenarios. In such circumstances, the trustee(s) may perform the analysis using only the original scenario and one alternative scenario. However, as CV surveys of passive values are routinized and their costs fall, the trustee(s) may find that

the three-scenario analysis is feasible in most cases.

Concern was expressed that differences between the scenarios not be so large that passing the total value test would be a foregone conclusion, nor so small that it would be very difficult to demonstrate statistical differences without extremely large (and costly) split samples. The issue is complicated by the possibility, based on the State of Alaska-sponsored study of the Exxon Valdez spill, that a significant minority of the population may be insensitive to any reasonable differences in scenarios: some individuals may not be willing to pay anything for any environmental cleanup, others may be willing to pay unrealistically high (and invariant) amounts for any size environmental cleanup. The trustees are to develop procedures for identifying these people, so that the demonstration that the scenarios are meaningfully different would rest on the remaining participants. To accept the scenarios for the total value test, no more than 95% of the remaining participants may indicate that the differences between the scenarios are real and meaningful—i.e., that the values of the respective commodities differ. NOAA is seeking comment on whether it is feasible to design such a procedure to demonstrate differences in scenarios, and if not, on alternative schemes to achieve a comparable goal. For example, the total value test is to be performed on split samples: how should "insensitive" individuals be excluded? If so, how should the threshold defining "meaningful differences" be characterized? Is it feasible to identify scenario differences also using a split sample procedure? If not, should the threshold criterion for determining "meaningful difference" be adjusted, since individuals impose internal consistency on their answers in the face of direct comparisons (recognizing much finer differences than in split samples)? Once a procedure has been developed to determine if individuals are sensitive to the scope of the injury, should this information be incorporated into the selection of the sample for the total value test?

While the proposed rule requires a split sample with multiple scenarios for demonstrating the total value test, NOAA seeks comment on the option of alternatively using an indirect test to explain variation in WTP as a function of independent variables, including belief in the size of the damage scenario, and/or effectiveness of the avoidance policy. Commenters should consider under what circumstances an indirect test should be allowed for performing the scope test. An indirect approach examines the sensitivity to scope indirectly through the use of a WTP valuation function, relying entirely on the base instrument. In the context of a single dichotomous choice referendum (or a double bounded formulation), a WTP valuation function may relate the probability of a yes vote to a list of variables assumed to underlie the voting decision (e.g., the amount the household is asked to pay, household demographics, etc.). The indirect approach may expand this list to include variables based on information collected from respondents that are related to the scope dimensions of the discharge. These measures must be meaningful to the respondent given the information provided in the survey. For example, a useful question following the WTP elicitation question is one that asks whether the respondent believed the injuries caused by the discharge were more severe or were less severe than described. All other things equal (i.e., similar preferences, budget constraints, etc.), respondents believing the injuries to be worse than described, and having equal confidence in the prospects for restoring the injured resources through the offered plan, might be willing to pay more. Such a finding would be an indirect verification of scope sensitivity.

"Calibration"

Estimates of hypothetical willingness-to-pay (WTP) may incorporate biases in opposite directions. On the one hand, the appropriate measure of damages is willingness-to-accept (WTA) not WTP, although the former is not recommended in the proposed rule because of a concern for limited reliability of current procedures for eliciting WTA. There are theoretical arguments for why WTA may exceed WTP by a substantial margin in a natural resource context with relatively few substitutes, although there is debate on this point. On the other hand, several experimental studies (of a lower quality survey design than proposed in this rule) suggest that stated intentions of WTP in CV surveys exceed observed responses in simulated markets or in solicitations for charitable contributions. (There is, however, debate as to whether the simulated markets or charitable contribution solicitations capture "actual" WTP in the available studies.)

Because of the various possible biases, a discount factor is included in the proposed rule to apply to estimated WTP. The proposed rule gives a default factor of fifty percent for the purposes of soliciting comment. However, the trustee(s) may adopt a different calibration factor if it can be shown that a different factor is appropriate for a specific application of CV. NOAA is asking commenters to propose other reasonable calibration tests. In particular, NOAA requests comment on how such calibration could be done consistent with the framework of these proposed regulations and for the type of public goods likely to be injured by an oil spill. Commenters should consider adopting a stringent discount factor while at the same time suggesting relaxing some of the other standards contained in the proposed rule.

Reporting. Because a well-designed study will include questions that assist in the interpretation of responses to the WTP elicitation, the final report should include a breakdown of WTP by various categories such as income, belief in the scenario, and attitudes toward the environment. Data from the survey should be retained by the trustee(s) and ultimately made part of the administrative record once the trustee(s) considers the survey a public document.

Additional Guidance. NOAA recognizes that implementation of a CV survey requires decisionmaking about a variety of features, not all of which are specifically addressed in the standards in the proposed rule. In many instances, the trustee(s) can turn to established economic theory and survey research for guidance, but in other instances economic theory and survey research provide little or no guidance and reasonable decisions must be based on other criteria. In these circumstances, NOAA recommends that the trustee(s) follow a conservative approach. That is, when one is deciding among alternatives, and economic theory or survey research cannot inform the decisions, the trustee(s) is encouraged to choose that alternative that would understate the natural resource damages rather than overstate the damages.

The following examples are instructive. Suppose the trustee(s) selects a referendum framework for the elicitation of willingness-to-pay values from respondents. Using such a framework, respondents might be asked to vote on a program that would be paid for in a one-time (or lump-sum) payment, or annually over a period of years. Economic theory does not generally differentiate between these two alternatives, viewing each as equally appropriate. However, because it is less financially burdensome for credit-constrained individuals to make installment payments than to pay for a good in a single payment, requiring payment only for a proposed restoration or protection program in a lump-sum

may provide a smaller value than if the same individuals were asked to pay in installments. In this case, the adoption of a conservative approach would lead to the use of the lump-sum payment. Similar decisions involve the selection of photographs for use in the description of injuries or the proposed prevention or restoration program in a CV survey. While a picture of dead, oiled sea otters might accurately depict an injury, NOAA believes that more neutral photographs would be the appropriate and conservative approach. Additional examples of conservative design and guidance can be found in the Response to Comments section of this preamble.

Request for Comments

NOAA requests comments directed toward additional tests for determining the reliability of CV results that could be considered for inclusion in a more detailed guidance document. NOAA intends to work with the Department of the Interior to develop a guidance document on use of CV to estimate passive use values. This document will provide additional technical information on possible means of satisfying the standards contained in the proposed rule as well as other issues involved in conducting CV studies. In order to evaluate any additional tests, NOAA requests that commenters proposing such tests address four issues. First, NOAA requests that commenters provide a complete list of the behavioral assumptions underlying their theoretical framework of rational choice. NOAA assumes that all commenters will begin with the generally accepted axioms of neoclassical consumer choice theory or revealed preference theory. NOAA requests that commenters clearly state all further assumptions underlying the test and describe the sensitivity of the test's results to the assumptions presented. Second, if commenters are proposing tests that rely on marginal or infra-marginal changes in the scope of the injuries, the commenter should define the variation of quantity dimensions of injuries involved in the test. Third, and perhaps most important, NOAA asks that commenters demonstrate that any proposed test can be accomplished feasibly within the CV design and administration standards specified in the proposed rule. Tests causing CV surveys to violate these design and administration standards are themselves unreliable tests. Finally, the commenter should give examples of how these tests would be structured in the context of an oil spill.

"Prior Knowledge"

The objective of conducting a CV study in connection with these regulations is to determine the damages suffered by the public as a result of a discharge of oil into the environment. For consideration of passive use values, the relevant public may include the entire U.S. population, or may include a regional subset of the population. Damages may be sustained by each individual in the relevant public, but only a small fraction of the public will actually participate in the survey. The damages an individual suffers from an oil spill depend on many factors. These include the effects of the spill on the natural environment, how much the individual uses the services provided by the injured environment, individual preferences, and the individual's information about the spill and the world in general.

In conducting the survey, it is necessary to educate the respondent about the natural resource itself, the facts surrounding a spill and the impacts of the spill on the environment. This education process greatly changes the respondent's information set. Upon gaining this new information, respondents are then asked to place a value on the damages suffered. There is general agreement that the losses an individual experiences from the spill after learning the new information are likely to be systematically different than the losses they would experience prior to learning the new information. The fact that the CV method itself actively changes the information set of an individual prior to valuing the good or service makes it fundamentally different than other economic valuation methodologies.

Some commenters have questioned whether it is appropriate to extrapolate value estimates based on post-survey information to the general population. Given the assessment's objective of estimating damages to the public at large, the small fraction of the public that actually participates in the survey, some have argued that the relevant information set for the purposes of extrapolating to the general population is the pre-survey information set. One way to move towards value estimates that reflect the information set of the general public is to obtain information in the survey itself regarding respondents' pre-existing knowledge about the resource and injury to it. Regardless of the value a respondent states after learning information from the survey, those respondents who were not aware of the resource or an injury to it or both would be assigned a value of zero. The rationale for assigning a zero value is that if X percent of the survey respondents did not know about the resource or injury, then X percent of the relevant public is likely to be similarly uninformed. (Implicit is the assumption that individuals who are unaware of the injury at the time of the survey would continue unaware, but for the survey, for the foreseeable future.)

Other commenters have articulated the point of view that the level of respondents' prior information about the injury is irrelevant to the determination of natural resource damages. The basis for this position is that the resources being injured are common property resources, for which governments and Indian tribes are the trustees for the public. Consequently, to determine fair compensation for injury to property held in the public trust, the responsible parties should contract to provide full compensation to all members of the public ex ante, based on information about expected injuries. By this logic, it is inappropriate to require that respondents' values only be counted if they were aware of the injured resources before the survey.

NOAA seeks comments on whether or not it is appropriate to use information regarding pre-existing knowledge of respondents to reassign to zero any positive values expressed by individuals who were unaware of the injuries prior to the survey in the calculation of natural resource damages. Commenters who believe that it is inappropriate to assign zero damages to individuals with limited prior knowledge should articulate their rationale for using the post-survey information set to extrapolate damages to a public that only has pre-survey information.

"Screening or Threshold Factor"

Because of a concern by many commenters that CV surveys may be undertaken in damage cases where expected damages may be too small to justify the costs of the CV survey, NOAA is seeking comment on the concept of a screening factor the trustee(s) should apply in deciding whether to conduct a CV survey in a particular case. Factors currently limiting the use of contingent valuation include the high costs for surveys to meet the proposed requirements, trustee budget and staff limits, trustee desire for speedy judgment to enable expeditious restoration activities, and the procedures necessary to justify a Comprehensive Damage Assessment (the only assessment procedure incorporating contingent valuation surveys). To employ an additional screening factor, expected damages

might be estimated using a small sample with protocols designed to minimize survey costs and, therefore, not necessarily subject to the standards contained in this rule. Alternatively, expected damages might be estimated by scaling damages estimated in other contingent valuation studies. Other methods may be possible. Several/ possible thresholds have been suggested. These possibilities include setting the threshold for a particular case at the greater of twice the expected cost of a full CV survey or the product of multiplying $5.00 per household by the number of households expected to hold passive values for the resource of concern. NOAA is specifically seeking comment on the concept of setting such a screening factor and, if so, what form such a factor might take, and whether it should apply to total damages or only to passive use losses.

2. Alternative methods—a. Benefits transfer approach. Given the expense and time associated with designing and implementing site-specific studies or models to value resource services, "benefits transfer" may be a reasonable alternative method to determine interim lost values. Benefits (or valuation) transfer involves the application of existing valuation point estimates or valuation functions and data that were developed in one context to address a similar resource valuation question in a different context. Benefits transfer provides a less time consuming and less expensive procedure than original valuation analysis, but may not provide as accurate results.

Where resource values exist that have been developed through an administrative or legislative process, the trustee(s) may use these values, as appropriate, in a benefits transfer context. An example of such values is found in the approach to use in estimating recreational benefits given in Chapter II, Section VIII, Appendix 3 (pp. 83–87) of Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies; U.S. Water Resource Council, February 1983. Other values may be used so long as three basic issues are considered in determining the appropriateness of their use: the comparability of the users and of the natural resource and/or service being valued in the initial study(ies) and the transfer context; the comparability of the change in quality or quantity of resources and/or services in the initial study and in the transfer context (where relevant); and the quality of the study(ies) being transferred.

It may be possible in some contexts to tailor the results from a prior study to the site of the discharge by transferring or creating a valuation function characterizing willingness-to-pay as a function of socioeconomic, demographic, or discharge characteristics. Where data from the site of the discharge are available, the valuation function may be used to calculate site-specific resource values.

Comparability of the Resource/Services

To evaluate whether existing data are sufficiently similar to the conditions of a particular assessment to allow a benefits transfer, the trustee(s) should consider at a minimum the following questions: Are the markets for the services in the original study similar to those services being valued, in terms of size of the user population and availability of substitutes? Does the existing study consider the same or a similar geographic area in terms of demographic and socio-economic characteristics? Were baseline environmental (and other) conditions in the existing study similar to baseline conditions in the case at hand? Did the existing study address a specific or unique problem that may have influenced the magnitude of the estimates obtained? Have general attitudes, perceptions, or levels of knowledge changed in the period since the existing study was performed in a way that would influence the value of the benefit estimate? If the value being considered is for a generic resource category (e.g., common song birds), are the species considered in the original study relevant to the case at hand?

Comparability of the Change in Quality or Quantity

To evaluate the comparability of the changes in quality or quantity of resources and/or services in the existing study and in the incident of concern, the trustee(s) should consider at a minimum the following questions: Was the original analysis conducted to value all organisms of a given species, a sub-population, individual members of the species, or some other grouping? Is this level of analysis suited to valuing injuries at the site(s) of impact? Is the discharge-related change in the resource and/or service in question within the range of changes valued in the original study?

Quality of the Study

To evaluate the quality of the existing study, the trustee(s) should consider at a minimum the following questions: Was the initial study based on proper survey design and sampling procedures, sound economic analysis, and appropriate statistical techniques? Was the study peer reviewed? If current "best practice" was not used to generate the value estimate(s), can the estimate(s) be adjusted to reflect changes in the state-of-the-art?

In all cases the trustee(s) should evaluate all available estimates and/or valuation functions, based on the factors described above, to determine which are the most appropriate for benefits transfer. Consideration should be given to the range of value estimates generated from alternative methods. If the value estimates in the relevant studies differ significantly, or if values generated using alternative models within the same study differ significantly from one another, consideration should be given as to whether the values differ in a predictable and consistent manner. Such predictable variation may indicate that a more selective choice of studies or models would be appropriate for the specific context.

It is recommended that use of benefits transfer by the trustee(s) in a natural resource damage assessment be predicated on guidance from the professional and academic economics community on the current minimum conditions for quality assurance of the benefits transfer.

The Economic Analysis and Research Branch of the U.S. EPA, Office of Policy Planning and Evaluation has prepared a data base, Environmental Economics Database, of some of the existing natural resource or environmental resource valuation studies that are available to the trustee(s). This database may be obtained from the Economic Analysis and Research Branch, Office of Policy Planning and Evaluation, U.S. EPA.

b. Habitat or Species Replacement Cost Method. Alternatively, the habitat or species replacement cost methodology may be used to estimate damages for lost services from injured habitats and/or biological resources. This method is suitable for use when the trustee(s) determines that the human services provided by the habitat or species are difficult to quantify. This method involves estimating damages in terms of the cost of obtaining from alternative sources the equivalent of the value of services diminished by the injury until full recovery of the resource and/or services. The recovery process may occur through natural recovery or may be expedited or enhanced by human intervention. If full recovery is not expected to occur, then the "interim" loss in services continues in perpetuity. Depending on the nature of the injury, damages may be calculated as the cost of replacing individual species or of replacing entire habitats that support multiple species and

provide a variety of resource services. This methodology provides a practical alternative to the sometimes difficult estimation of consumer value in the valuation methods identified above.

In order to ensure that the scale of the compensatory restoration or replacement project(s) on which the cost calculation is based does not over- or under-compensate the public for injuries incurred, the trustee(s) must establish an equivalency between the present discounted value (PDV) of the quantity of lost services and the PDV of the quantity of services provided by the replacement project(s) over time. The trustee(s) is to incorporate a factor reflecting any differences in the efficacy of replacement habitat or resources in providing services from that of the injured habitat or resources in absence of the injury. If the value of the additional units of services provided by the replacement project is expected to be reasonably comparable to the value of units of services lost due to injury, then equivalency may be established by comparing total services without actually estimating a dollar value of those services. However, the values may not be comparable, for example due to changes in the scale of total services or the temporal pattern of replacement services. In this case, an adjustment factor reflecting the relative values should be included in the calculation of equivalencies. Alternatively, another measurement technique may be employed.

It may be useful to consider a specific scenario where the habitat or species replacement cost method might be used. If ten acres of a habitat were completely destroyed and no recovery is expected through natural processes or restoration activities, the goal of the restoration program would be to provide a replacement project equivalent to the lost ten acres of habitat. However, since the replacement project may not provide baseline levels of services for several years at a minimum, the public will experience interim lost services for which they are entitled compensation. Additional acres will need to be replaced to make the public whole.

In another context with ten injured acres of habitat, the resources and services may recover fully in five years with natural recovery, and this may be the most appropriate recovery option. In this instance, there will be no formal restoration program for this resource, but the compensation for the five years of losses prior to full recovery can be calculated in terms of the costs of a compensating restoration program. Such a program might consist of acquisition and creation or enhancement of habitat to provide a flow of services equivalent to the lost services equivalent to the lost services.

Establishing the resource equivalencies necessary to ensure the proper level of compensation is a four-step process. First, the trustee(s) must quantify a total discounted measure of lost services over the full duration of the injury, taking into account the extent to which the resource and/or service will recover over time. These lost services can be expressed in a resource-time measure, such as lost "acre-years" of services provided by an oiled wetland, where an acre-year of services is the total level of services provided by one acre of wetland over the course of a single year. Factors to be considered in quantifying the level of services lost include, but are not limited to: The severity of the initial injury (i.e., did the injury result in a full or partial loss of services); the duration of injury; and the rate of recovery of services.

The second step in establishing resource equivalency is to determine the total discounted measure of services provided by the proposed restoration or replacement projects over the full life of the relevant habitat or species. Again, these services may be expressed in a resource-time measure, such as acre-years. Factors to be considered in quantifying the level of services provided include, but are not limited to: the productivity of the replacement resource relative to the productivity of the injured resource but for the discharge; the amount of time required for the replacement resource to reach its maximum productivity level; and the life-span of the replacement resource. If the value of additional units of services provided by the restoration project is not comparable to the value of lost services, then an adjustment factor reflecting the relative value should be included in the calculation of equivalency.

In the third step, the trustee(s) calculates the appropriate scale of the replacement project(s), such that the total discounted value of services provided by the replacement project is equivalent to the total discounted value of interim lost services due to the injury. The final step consists of the determination of replacement costs. Total replacement costs are obtained by multiplying the scale of the project (e.g., number of acres of wetlands to be created) by the unit cost of restoration or replacement, including acquisition, construction, maintenance, and monitoring costs. These unit costs can be obtained either from existing literature values or from experts in the field.

IV. Implementation Guidance on Calculating Compensable Values

A. Committed Use

As stated in the proposed rule, damages are recoverable for all committed uses of injured natural resources and/or services. For the purposes of this proposed rule, committed uses include: (1) Any direct or passive use of the injured natural resource and/or service available to the public but for the discharge; and (2) any documented planned future use. The concept of committed use is intended to avoid recovery for purely speculative uses of injured resources and/or services. Any future use is considered a committed use if it is adequately documented through such things as permit application, purchase or investment agreement, engineering or architectural plans, etc. Because there are no behavioral records comparable to those that exist for direct uses, documentation of committed use is not required for valuing passive use losses and option values claimed under OPA as well.

B. Willingness To Accept and Willingness To Pay

Humans derive both direct use and passive use values from the flow of services provided by natural resources. If the quantity or quality of a service is reduced or eliminated by a discharge of oil, the measure of damages to an individual is the change in the individual's utility or level of well-being, as measured in monetary terms. Economic analysis provides two exact monetary measures of any change in an individual's well-being: Willingness-to-pay (WTP) and willingness-to-accept (WTA). Given the occurrence of a discharge of oil, WTP would measure the individual's willingness-to-pay to have avoided the injury; WTA would measure the amount the individual would require in order to be as well off (i.e., to have the same level of utility), given the injury occurred, as before the injury. To calculate the monetized change in an individual's WTP or WTA resulting from a resource injury, net willingness to pay or willingness to accept is calculated. Net willingness to pay or willingness to accept is total WTP or WTA minus the costs an individual incurs to use the resource services, including travel and time costs.

An approximation for the exact measures of the change in utility or well-being is the Marshallian "consumer surplus," the value of which is between WTP and WTA. Marshallian consumer surplus is the difference

between the maximum sum of money an individual would be willing to pay for a good or service, as calculated from a Marshallian demand function, and the amount the individual is actually required to pay. The Marshallian consumer surplus is calculated directly from observed behavior in market or market-like transactions. This measure of value of a good or service incorporates the income effects of changes in its price or quality; for example, a reduction in price or an increase in quality would have the effect of increasing real buying power. As a result, Marshallian consumer surplus does not measure value from a fixed baseline level of utility. In contrast, the exact measures of WTP and WTA are so labeled because they calculate the monetized change in utility or well-being from a fixed baseline level of utility.

The choice as to which criterion is more appropriate in a given context depends upon the allocation of the property rights. Because the government is holding natural resources in trust for the public, the WTA criterion is more appropriate as the measure of damages. The conventional wisdom in the academic literature regarding changes in the price of a commodity indicates that WTP and WTA are likely to be fairly close in value, with the difference depending directly on the size of the income elasticity of demand for the commodity whose price changes. However, it has recently been shown that in this context where the quality of public goods or services is reduced due to injuries caused by a discharge, the difference between WTP and WTA may be substantial if the public goods have few substitutes.

In some circumstances it may be infeasible or impractical to provide reliable measures of WTA. In those circumstances, the more conservative measures of WTP or the Marshallian consumer surplus are appropriate for measuring damages. For example, WTA is very difficult to elicit from respondents in CV studies, and consequently may create greater empirical uncertainties than eliciting WTP. At present, recognizing that WTP provides a lower-bound estimate of WTA (for normal goods), NOAA recommends that the more conservative WTP criterion be elicited in CV studies at present. For the methodologies in which exact welfare measures, providing the monetized changes in individual utility, can be derived from the Marshallian models through analytical techniques, WTA and WTP measures are of equal reliability. In those circumstances, WTA should be used where feasible and practical.

C. Substitutability

In calculating the diminution of value, the availability of substitute resources and/or services should be taken into account. For example, substitutes may exist for individuals who have lost or diminished use of a resource and/or service, such as a recreational site. Generally, the fewer substitutes available for a particular resource and/or service or the poorer the match of attributes between the injured and substitute sites, the greater is the lost value to the public. However, though substitute sites may exist, congestion at these sites will increase as they absorb displaced participants from the injured site. Consequently, the quality of the recreational experience at the substitute sites may deteriorate due to the discharge. Potential effects of congestion on reducing quality at alternate sites should be taken into account in the damage calculation.

Incorporating the availability of substitute resources and/or services, for example in recreational demand models, may increase the cost and complexity of a damage assessment. Therefore, the additional cost and complexity should be undertaken only if the probable benefits from an increase in accuracy of the damage estimate are greater than the probable increase in damage assessment costs.

D. Uncertainty

Uncertainty regarding the predicted consequences of restoration options and predicted supply and demand of natural resources and/or the services they provide should be addressed in the economic analysis of restoration alternatives and determination of diminution in values and documented in the Report of Assessment.

E. Discounting

In calculating natural resource damages, the trustee(s) should discount the three components of a claim: (1) Interim lost value of injured resources pending full recovery, also referred to as compensable values; (2) restoration costs; and (3) damage assessment and restoration costs already incurred. Discounting is a widely used economic procedure that allows the trustee(s) to convert past and future damage sums to current dollars. (Discounting expenditures from the past to the present is also referred to as capitalizing or compounding forward past expenditures.) This conversion is necessary for the trustee(s) to be able to present a claim for a "sum certain." NOAA recommends that the trustee(s) use the U.S. Treasury borrowing rate on marketable securities of comparable maturity to the period of analysis to discount each of the components. The reference date for the discounting calculation is the date at which the claim is presented.

Note that discounting the components of the claim is separate from calculating the pre-judgment interest. Section 990.14 of the proposed rule, as required by section 1005(b) of OPA, provides for pre-judgment interest and post-judgment interest to be paid at a commercial paper rate, starting from 30 calendar days from the date a claim is presented until the date the claim is paid. (For a discussion of pre-judgment interest see the earlier preamble discussion of § 990.14 of this proposed rule.)

Logical consistency requires that the analysis be conducted either in terms of nominal values or in constant dollars. The nominal Treasury rate shall be used if the components of the claim are denominated in dollar values of the year a loss or expenditure is to occur (i.e., in nominal terms). Otherwise, if components of the claim are denominated in constant dollars (of the discounting reference year), then real Treasury rates are to be used. The real rates are calculated by removing expected inflation over the period of analysis from nominal Treasury interest rates. To characterize expected inflation, NOAA recommends the trustee(s) use the Administration's assumption about the rate of increase in the Gross Domestic Product deflator for the period of analysis (as reported in the Budget of the President). For projects or programs that extend beyond the six-year budget horizon, the inflation assumption can be extended by using the inflation rate for the sixth year of the budget forecast. The logic of the choice of the U.S. Treasury rate is discussed for each component of the claim in turn below.

1. Compensable values. The compensable values component of the damage claim reflects the lost consumer surplus, lost fees, and lost economic rent (that could have been charged by the government for use of a public resource) resulting from injuries caused by the discharge. The losses may occur from the time of the discharge over many years into the future. To value these losses, the trustee(s) must determine how much compensation consumers would require as of the date of the claim presentation to make them as well off as they would have been, but for the discharge. Because the purpose of the litigation is to make the public whole, the relevant discount rate is the

consumers' rate of time preference, which is the rate of interest at which an individual would be indifferent between consuming goods or services in the present and postponing consumption to a later date.

Market interest rates available to consumers provide an estimate of the consumer rate of time preference for lost services. To identify the discount rate that reflects the "pure" time preference, one looks to the yield on a "safe" investment with little or no default risk, such as the U.S. Treasury rate.

2. Estimated restoration costs. Most restoration projects will be carried out over a period of years. The effectiveness and ultimate success of a restoration strategy depends on the ability of the trustee(s) to conduct restoration activities until the resource recovery is complete, including post-construction maintenance and monitoring operations. If funds are insufficient to cover the full costs of restoration, natural resource recovery will be incomplete or will be further delayed, and the public will be deprived of full compensation for the injuries. The recommendation that trustee(s) use the U.S. Treasury rate for marketable securities of comparable maturity to the period of analysis is predicated on the assumption that this rate of return is available to the trustee(s) for investment of settlement monies.

If legal and/or institutional constraints prevent investment of settlement monies yielding the U.S. Treasury rate, then it is incumbent upon the trustee(s) to structure the damage claim to ensure that sufficient funds will be available to fund the entire set of restoration activities. One option is to calculate the discounted value of this component of the claim, using an alternative discount rate that represents the yield on settlement monies available to the trustees. An alternative option is to structure a multi-year schedule for claim payments to ensure it provides the cash flow for each year required for planned expenditures.

3. Past Costs Incurred. The third category of damages is damage assessment and emergency restoration costs, which may have been accruing from the time of the discharge. To calculate the present value of these costs at the time the claim is presented to the RP, the trustee(s) will discount forward (also referred to as capitalize or compound forward) the costs already incurred. Note that if the trustees are discounting damages denominated in the year the claim is presented (i.e., constant dollars) using a real Treasury rate, then expenditures from previous years must also be translated to dollars of the claim year using an appropriate inflation index, prior to discounting (or compounding forward). Because the rate of interest employed as the discount rate for past costs incurred should reflect the opportunity cost of the money spent, NOAA recommends the U.S. Treasury rate for discounting this component of the claim as well.

U.S. Treasury bond rates may be found in the Federal Reserve Bulletin, issued monthly, or the Treasury Bulletin, issued quarterly. The Gross Domestic Product fixed-weighted price index may be found in the Survey of Current Business, issued monthly, and the Economic Report of the President, issued annually. The Administration prediction for future Gross Domestic Product deflators (for translating the nominal Treasury rates to real terms for future years) is updated twice annually at the time the budget is published in January or February and at the time of the Mid-Session Review of the Budget in July. The current Treasury rates and inflation adjustment assumptions are reported in regular updates of Appendix C of Circular No. A–94, available from the OMB Publications Office (202–395–7332).

Response to Comments

"Value of a Claim"

Comment: Commenters were divided over interpretation of the meaning of "diminution of value" within the natural resource damage assessment context. Some suggested that there was no clear indication provided, either by the courts or the Congressional Conference Report, as to the intent within CERCLA and OPA concerning measurement of diminution of value. Others disagreed, finding specific guidance on this matter. Two commenters quoted the ruling by the court in *Ohio* v. *DOI* to mean that values should not be limited to strictly consumptive use values, but also should include non-consumptive use values.

Response: NOAA finds that there is ample evidence, from the Congressional Conference Report (H. Conf. Rep. No. 653, 101st Cong., 2d Sess. at 108), and the D.C. Circuit Court decision on *Ohio* v. *DOI*, to believe that "diminution of value" refers to the standard for measuring resource damages cited in the D.C. Circuit Court decision on *Ohio* v. *DOI*. This opinion defines "use values" broadly, to encompass both direct use and passive use values that can be reliably measured. Failure to include all relevant categories of damages in a claim would understate the true loss to the American public attributable to a discharge of oil. NOAA concurs with commenters that recoverable losses include direct consumptive use losses (for example, to hunting or fishing activities), direct non-consumptive use losses (for example, bird watching or swimming activities), and passive use losses (for example, existence values).

Comment: Some commenters argued that passive use values should be included in damage assessment, because exclusion would understate the true cost of exposing natural resources to environmentally risky activities and induce systematic reallocation of environmentally risky activities to those environments that generate greater passive use values relative to direct use values. Another commenter stated that if passive use values are not considered in the determination of total value of the resource, it is more likely that the cost of restoration will be inappropriately characterized by the RP(s) as "grossly disproportionate" to the value of the resource being restored.

Other commenters contended that in some cases the cost of trying to measure the passive use losses may well exceed the potential total value of passive use damages, and hence the effort would not be worthwhile and would violate the reasonable cost test.

Response: As previously stated, under OPA, and in accordance with the *Ohio* decision, passive use values are a component of compensable values that are necessary to compensate fully the public for its losses resulting from a discharge and to return the public, as nearly as possible, to the level of well-being it enjoyed before the discharge. By determining total compensable value, the natural resource trustee(s) avoids serious resource misallocation effects. When the true value of the loss is positive, but not known with certainty, the use of zero as a measure of that positive loss will be in error, creating downward bias in the damage estimate by understating the true social loss. The result of such a systematic bias will be: (1) Smaller than appropriate recovery for, and thus investments in, restoration, rehabilitation, replacement, or acquisition of equivalent resources; (2) smaller than appropriate investments in spill prevention, mitigation, and clean-up technology; and (3) more intensive use of the natural resources of the nation than appropriate. Thus, it is important that the total compensable value be determined to rebut an argument that the cost of restoration is grossly disproportionate to the value of the resource being restored. However, as discussed earlier in this preamble, NOAA is not adopting a strictly quantitative approach to the grossly disproportionate determination. Rather,

a number of qualitative factors must also be considered.

The decision to include passive use value estimates as part of total value in a damage assessment should be predicated upon the probable magnitude of passive use losses associated with a specific discharge, as well as on the specific attributes of the injured natural resources. If the expected value of the passive use loss is small relative to the cost of estimating it, then its inclusion in the damage assessment may not be justified.

Comment: A number of commenters asserted that passive use value damages should only be assessed for permanent or long-lasting injuries to unique natural resources—atypical conditions for discharges of oil. They argued there is no need for compensation for lost passive use values when the resource will fully recover and when compensation will be paid for direct use losses pending restoration. They further argued, even when significant lost use values are present, the potential for significant lost passive use values is not very great. One commenter stated that this criterion applies most obviously in the case of bequest value when resources will be restored in a reasonable time frame and so future generations will not be denied the bequest. One commenter stated that there is no credible evidence that inherent or existence values are likely to be significant even if the resource is unique and non-reproducible and the injury is irreversible.

Response: NOAA has found no empirical evidence to suggest that a natural resource must be unique (i.e., have few substitutes), non-reproducible and/or permanently injured in order to have significant passive use values. NOAA recognizes that in cases involving temporary injury, individuals may not experience a significant sense of loss because the resource's existence is not permanently threatened. Further, after restoration, rehabilitation, replacement, and/or acquisition of equivalent resource, the resource will be available for future use and may be left as a legacy to future generations. However, there are cases where the death of individual members of a species may cause a significant loss in passive use values even though species levels may return to baseline. While complete recovery of an injured resource or service may result in lower passive use losses than otherwise, there is no evidence to suggest that compensable passive use losses do not exist in the interim pending recovery. The extent and magnitude of the losses will depend on the restoration alternative chosen, biological and ecological factors, including availability of substitute resources, and the type and extent of the original injury.

Comment: Several commenters expressed concern as to whether "option values" and/or "existence values" could be affected by a discharge, if the injured natural resources were ultimately restored through natural recovery or restoration. One commenter suggested that option values arise because of uncertainty about future availability and future demand for the resources in question. Thus, the shorter the elapsed time between injury and restoration, the less such uncertainty will matter. Similarly, several commenters suggested that passive use losses may be small or insignificant in situations where the loss in services is only for a short period of time until restoration or natural recovery is completed. Therefore, there is no reason to include passive use losses in a natural resource damage assessment.

Response: Regardless of whether complete recovery occurs naturally or through human intervention (i.e., restoration), there may be a loss or diminution of passive use values during the time period from the injury through recovery. For example, in the case of "option" value, the precise timing of a decision to exercise the option to use the resource may be unspecified, therefore the potential for access must be continuously available to maintain the full value of the option. Absent the uninterrupted opportunity to exercise the option to access the resource, the "option" is diminished and a loss accrues. Likewise, even when complete restoration to baseline conditions is possible, during the time between injury and recovery, the resource, as defined prior to the discharge, effectively does not exist. Therefore, existence value may be diminished. In addition, individuals may experience a loss in well-being because animal deaths occurred through anthropogenic causes. The size of passive use value losses is an empirical question that can only be answered with further empirical studies in these cases.

Comment: One commenter noted the difficulty of disaggregating total values into direct use and passive use components.

Response: NOAA believes that a consensus is emerging in the economics community that the appropriate conceptual approach for valuing natural resources is to measure the total value of the resource, which includes both direct use and passive use values. Contingent valuation is the only methodology currently available to provide estimates of combined direct use and passive use value. When other valuation studies are included in a damage assessment along with a CV study, the total damages are to be calculated in such a way as to avoid possible double-counting for compensable values between estimates from the contingent valuation study and from the direct use valuation study(ies).

Comment: Several commenters noted that OPA prohibits double recovery in the damage assessment claim. They claimed that CV as currently applied results in double recovery.

Response: NOAA believes that direct use and passive use losses are additive and the inclusion of each in the damage assessment does not result in double recovery. However, the potential for double recovery does exist when a CV study and a direct use study both elicit direct use values in the same category in samples covering the same usergroups. For example, if the trustee(s) considers use of both CV-based and travel cost method-based estimates of the value of recreational fishing losses, double recovery could occur if the relevant CV study elicited total value of the resource and its sample included recreational anglers. Double recovery can be avoided through careful preparation of the damage claim.

Comment: One commenter suggested that CV cannot be justified on the grounds that it is necessary to provide incentives for deterrence of a discharge, without a careful analysis of the entire system of regulations and other incentives that a potential RP faces.

Response: As discussed earlier, OPA's incentives to avoid environmental injuries are dependent upon knowing what the potential liability from discharges is likely to be. Without the availability of CV as an assessment tool, that full potential liability cannot be estimated.

Comment: A number of commenters discussed passive use values—some questioning the inclusion of such values by suggesting that they are poorly defined while others felt that such valuation has no relevance because the environment is priceless. Other commenters supported inclusion of passive use values.

Response: NOAA notes that there is a general consensus in the economic community that passive use values exist; there is no basis in economic theory to suggest otherwise.

Comment: One commenter noted a continuing debate over defining passive use values. The commenter suggested that any judgment on the definition of passive use values in the rule is

premature. Rather, the rule should allow analysts to make use of emerging, state-of-the-art theories and techniques for defining and measuring passive use values.

Response: NOAA believes that passive use values are well-defined and are an appropriate component within a damage assessment determination of compensable values. To facilitate consistent usage, NOAA defines passive use values in the definition section of subpart A of the proposed rule. As stated in the preamble, the proposed rule allows the trustee(s) broad discretion in the selection of valuation methods specifically to allow for the use of new methods of valuation as they become recognized and accepted in the economics profession.

Comment: A number of commenters contended that the relevant law, the *Ohio* decision, and the precedents do not require that passive use value damages be calculated by CV or any other methodology and that nothing in OPA mandates use of CV to impose liability for potential impairment of passive use values.

Response: NOAA believes that the *Ohio* decision should be considered in this rulemaking because the natural resource provisions of OPA are patterned after those of CERCLA. In that decision, the circuit court upheld CV as an allowable method for calculating passive use damages. The trustee(s) has the discretion to use CV where appropriate.

Comment: One commenter stated that if NOAA does not recognize the practical limits on the ability of the marine industry to insure against speculative losses, the result will be awards that the industry cannot afford to pay. Similarly, other commenters noted that the financial resources of the insurance market and individual shipowners should govern the size of recoverable claims under OPA.

Response: NOAA disagrees. In the statutory language of OPA, the Congress of the United States established a standard of strict liability and the objective of full compensation for all attributable loss. NOAA does not have discretion to change these requirements and substitute others.

Further, NOAA believes that economic theory supports a comprehensive definition of the social cost of a discharge when identifying cost elements to be included in an assessment. Alternatively, if damage claims systematically understate the size of compensable losses resulting from discharges of oil, society will underinvest in preventing damages from future discharges.

Comment: Numerous commenters indicated that damages under OPA should be compensable, not punitive.

Response: NOAA concurs that natural resource damages under OPA are compensatory rather than punitive.

Comment: One commenter stated that the existence of substitute sites in an evaluation of lost resources becomes irrelevant if the damage was caused by negligence.

Response: NOAA believes that there is no theoretical reason to separate the estimation of damages caused by negligence from those which were not. (The discussion of how to treat substitutability among resources appears below.)

Comment: Several commenters suggested that a trustee(s) should be required to select the "minimum social cost" restoration alternative, including natural recovery, when selecting a restoration approach.

Response: NOAA disagrees that this will be true for all cases. These commenters are essentially recommending that NOAA adopt the "lesser-of" rule contained in the natural resource damage assessment regulations promulgated by DOI, and rejected by the court in *Ohio* v. *DOI*. This rule specified, in essence, that the trustee(s) should choose to do restoration projects only if restoration costs were less than the interim lost value avoided by the restoration project. Consequently, cost-effectiveness and benefit/cost comparisons are factors in restoration alternatives analysis, as outlined in subpart G of the draft regulations and in the Restoration Guidance Document, but are not the sole factors to be applied in choosing among competing restoration alternatives.

Comment: A few commenters suggested that the value of the claim should be the cost of the most cost-effective restoration alternative.

Response: NOAA disagrees. Section 1006 of the OPA Conference Report (H. Conf. Rep. No. 653, 101st Cong., 2d Sess. at 108 (Aug. 1, 1990)) provides a clear mandate to NOAA to "establish a system for assessing damages to natural resources, including a measure of damages equal to the costs of restoration, replacement or acquisition of equivalent resources, *and* the diminution in value of those resources pending restoration" (emphasis added). Moreover, the appropriate restoration approach to include in a damage claim may not be the one that is most cost-effective because the trustee(s) must consider a number of factors when selecting restoration options. It is important to note that cost-effectiveness only allows ranking of alternatives that accomplish the same increase in services at the same rate over time. Other criteria are necessary to compare alternatives that accomplish different outcomes.

Comment: Some commenters indicated that actions taken by the RP(s) in connection with a discharge may be beneficial to the environment and/or the local economy and thus should be considered as an offset to damages resulting from the discharge. For example, one commenter argued that passive use and/or nonmarket losses should not enter into damage assessments because for every category of persons suffering a loss as a result of a natural resource injury, there will be other individuals who gain. Other commenters said that such "offsetting" is not authorized by OPA and that the trustee(s) must not consider any such actions.

Response: NOAA agrees that offsetting public damages against private gains is not authorized by OPA. The scope of a natural resource damage assessment is limited to the losses to the public due to injury to public trust natural resources—losses that are not actionable under private actions. To the extent that some actions taken by the RP(s) may mitigate the injuries to the environment and speed restoration of the resources, the impacts will be lessened, as will the damages; consequently the size of the damage claim will be smaller than it would have been if the RP(s) had not taken the mitigative actions.

However, damage claims brought by public trustees do not include the positive or negative effects on private parties, such as reduced income accruing to local recreation-related businesses due to declining tourism or increased income to spill response firms. Further, to the extent that such expenditures are simply shifted from one location to another, the gain of businesses in one location is the loss of businesses in another and the net effect on the private parties throughout the whole country is essentially zero.

Comment: Several commenters were concerned about "double counting" or "double recovery" within the damage assessment process. Each observed that OPA does not allow double recovery of damages, and proposed that the NOAA rules explicitly disallow such claims.

Response: NOAA agrees that no double recovery is permitted under OPA.

Comment: One commenter raised the issue of "rents" within the compensable claim. One commenter recommended that the regulations state that the trustee(s) cannot collect forgone

resource rents accruing to a private party(ies), even if that rent is generated from the private party's use of public resources.

Response: NOAA does not concur. In the event of a discharge covered under OPA, the trustee(s) is entitled to recover from the RP(s) the total diminution in value of lost or diminished services from affected public trust resources that is not recoverable by a private party. One part of the diminution in value of affected resources is the resulting reduction in economic rent, which represents the fee or price the trustee(s) could charge for use of the public trust resource. The loss in value created by the public resource occurs whether or not the rent was collected from the private parties before the discharge. Unless such rents are recovered under a private action, the trustee(s) is entitled to recover them.

Comment: A number of commenters suggested the OPA rules should exclude recovery of damages for injury to privately owned natural resources, or that recovery should be limited to those natural resources in which the government has a dominant interest.

Response: NOAA agrees that recoveries for injuries to private resources shall not be included in any estimate of the public damage claim under OPA, and shall be accomplished through private causes of action. NOAA recognizes, however, that trust resources (e.g., birds) can use private resources (e.g. land). To the extent that an injury to a privately-owned natural resource causes injury to a trust resource, the trustee(s) can recover for the injuries to the trust resource.

Comment One commenter noted that aesthetic injury should be considered in addition to physical impacts. The long-term assessment should account for impacts, too.

Response: NOAA believes that, if the aesthetic injury affects the physical experience of users or affects passive use values, then by definition this is a compensable loss.

"Valuation Methodologies"

Comment: Several commenters reflected the position that, because each discharge and the injury it causes are unique, no single procedure or standard economic equation could or should apply to all situations. One of these commenters recommended that an analyst should have the flexibility to examine each valuation problem on a case-by-case basis, and determine which type of valuation technique is likely to generate the most valid and useful results.

Response: NOAA agrees that flexibility in the determination of assessment procedures is important. NOAA is therefore providing four alternative assessment procedures from which the trustee(s) may choose. In addition, parallel assessments, in which the valuation of damages for one incident employs different assessment procedures, are permitted under OPA provided there is no double recovery of damages. One example of parallel assessments would be supplementing Type A model calculations with expedited damage assessment calculations for service losses that are excluded or not fully estimated in the Type A model. In addition, within the comprehensive damage assessment procedures, allowable calculation procedures range from benefits transfer procedures to original studies conducted with site-specific data.

Comment: Some commenters expressed the opinion that monetary measures of value, in particular for natural resources and related services, must be empirically "stable" in order to be characterized as "well formed" value preferences. Others argued that no such "stability" criterion is required for such values to be theoretically consistent with consumer theory.

Response: NOAA notes that monetary measures of economic values for all goods and services, including natural resources and services from natural resources, are derived in theory from consumer preference orderings. From an individual's complete preference ordering, one can derive the trade-offs individuals are willing to make between alternative bundles of goods and services, holding all else constant. It is also possible to determine monetary measures of value. Where consumer preference orderings are stable, but an individual's circumstances change because the price, quality or availability of other goods changes, then the individual's monetary measures of value are expected to adjust as well.

Comment: One commenter noted that since Congress intended that full compensation for natural resource damages be awarded, NOAA's regulations should not limit available economic valuation methodologies and should allow the trustee(s) broad discretion in choosing between currently available standard methodologies and new methodologies that may become available and accepted. The commenter stated that, while minimum standards of quality might be useful, regulations should not "lock in" the current state-of-the-art as improvements in nonmarket valuation techniques continue to occur at a rapid pace.

Response: NOAA stresses that the trustee(s) should use all applicable, reliable economic value measurement techniques in order to adequately assess all compensable values to be incorporated in the damage claim. As stated earlier, NOAA is determined to take no action that would arbitrarily preclude the use of new methodologies, as they become recognized and accepted in the economics profession.

Comment: Other commenters warned that exclusion of nonmarket techniques may result in undervaluing the effect of oil pollution on a wide range of goods and services such as real estate values, recreational use and wildlife viewing. They argued that ignoring such values leads to distorted and incomplete damage assessments.

Response: NOAA concurs with the suggestion that the trustee(s) should have broad discretion in selecting the methodologies that will be employed in performing the damage assessment, because each discharge will be unique in some respects. The nonmarket valuation techniques, including Contingent Valuation (CV), Travel Cost Method (TCM) and Hedonic Price Model (HPM), would appropriately be among the range of methodological options available to the trustee(s). Each of the identified methodological approaches values injuries to different resource services. As a result, for the most part the methods are not substitutes for one another; the choice of which to use depends upon the injuries to be valued in the given application.

Comment: A few commenters argued that all nonmarket valuation techniques are inherently less reliable than market-based approaches. Other commenters supported CV, as well as TCM, and HPM. Many of the economic methodologies for estimating the diminution in value of resource services are nonmarket methodologies that do not have a long history of experience to indicate when and how they can be applied to produce reliable estimates in individual cases. They noted these valuation techniques have been shown to produce reliable estimates of WTP, when "appropriately" applied. Another commenter noted empirical market-based valuation techniques are subject to many of the same potential problems as nonmarket-based valuation techniques, such as conceptual difficulties, data limitations, and accuracy of statistical estimation techniques.

Response: NOAA does not support the conclusion that all nonmarket valuation techniques are inherently less

reliable than market-based approaches. In fact, it is widely recognized that market-based valuation techniques are potentially subject to many of the same criticisms and weaknesses attributed to nonmarket techniques. In addition, it is not possible to use market valuation techniques for natural resource services that are not traded in markets.

NOAA observes that CV, TCM, and HPM techniques have each been successfully employed in a wide range of nonmarket valuation applications, and have undergone extensive scrutiny. NOAA finds no justification for arbitrarily ranking, nor unilaterally precluding the use of, any valuation methodology that is regarded by the trustee(s) as useful and appropriate to the specific injuries of a given discharge of oil. The specific characteristics of the discharge event and the nature of the injuries to be valued should guide the choice of valuation method.

Comment: One commenter recommended that NOAA establish criteria or guidelines to ensure that estimates of the diminution in use value of injured resources are valid and reliable. Further, NOAA should provide criteria and guidance to the trustee(s) regarding the selection and use of such methodologies to ensure that the value estimates are valid, reliable, and accurate.

Response: NOAA, in the proposed rule, has stated that the trustee(s) should follow the best practices established in the literature. This recommendation is generally the best guidance NOAA could provide. However, where new information has been made available to NOAA as part of the rulemaking, that guidance has been provided, e.g., guidance concerning CV.

Comment: Two commenters questioned the validity of the hedonic price model (HPM) in discharge cases because "the environmental value of a site is difficult to isolate in comparison studies" due to the innumerable other variables that affect property values.

Another commenter noted that impacts are typically of short duration and unlikely to cause any measurable change in property values. Further, where property value changes are observed and are solely caused by a discharge of oil, they would represent otherwise compensable private losses, not natural resource damages. The commenter argues that any such private losses would be poor indicators of a public loss.

Response: NOAA agrees that the type of injuries HPM is designed to value may not be significant in most discharges. Most discharges will have only small effects on housing prices. Even where there are effects, it may be difficult to estimate them using standard econometric methods because so many factors influence housing prices, and many are correlated. However, the HPM technique is reasonably straightforward to apply and may be useful in certain situations. Therefore, NOAA supports the inclusion of the HPM in the list of available value measurement techniques.

One of these commenters misinterpreted the use of HPM in damage assessments. The technique is not used to estimate the private property loss to consumers; rather, the method takes into account the fact that the quality of local environmental resources (e.g., water, air, biological resources) is a factor in the value of property. Further, because local environmental quality is part of any purchase of private property, environmental quality is considered an attribute of the property. As a result, the value of the environmental quality is reflected in property values. Hedonic valuation analysis uses the reduction in property prices of local residents as a measure of a portion of the reduced value of public resources due to the discharge.

Comment: Another commenter argues that HPM is based upon questionable assumptions, such as the ideas that households continually reevaluate their location decisions, that decisions are based upon current environmental quality, and that a family can easily move its entire household in response to nearby natural resource damage.

Response: The HPM is predicated on the assumption that the preferences for nonmarket goods and services can be revealed through directly observable transactions in related markets. To the extent that the housing transaction costs are high, individuals may not respond to marginal changes in attributes of housing. As a result, the method is likely to understate the sensitivity of individual's values to the attributes.

Comment: One commenter strongly recommends that hedonic property damages can be determined by following normal tort (e.g., trespass) type damage procedures.

Response: Given the range in approaches by various jurisdictions to property and natural resource damages, it is difficult to determine what is meant by "normal" tort procedures. NOAA believes that its approach is consistent with that envisioned by OPA.

Comment: One commenter was concerned that an earlier Notice suggests that single-site travel cost models do not account for substitute sites, but multiple-site models do.

Response: NOAA did not mean to imply that single-site travel cost models are incapable of treating substitutes. In practice, however, the collinearity among travel cost (price) and environmental attributes of the set of substitute sites substantially limits the number of substitutes that can be incorporated in a single equation model.

Comment: One commenter stated that the rules should emphasize that the travel cost model, for the purpose of measuring lost use value, is only a technique for estimating interim lost value to supplement restoration/replacement value during the time period after the discharge and before restoration. The commenter noted that because restoration efforts in most cases will gradually reduce the natural resource injury from its peak within a short time after the discharge, TCM damage estimates should be adjusted for the improvement factor, and should be phased out entirely when restoration is complete.

Response: NOAA concurs that, as an injured resource (say a recreational fishery) recovers through time, the quality of the services will generally increase. As the quality of the recreational fishery improves toward baseline, the value per fishing trip will tend to increase and as a consequence, so will the demand for fishing. For versions of the TCM in which recreational demand is a function of both the travel cost and the environmental quality of the site (such as catch rate), the model may be used to predict these changes in value and participation so long as data on expected environmental quality improvements (such as the increase in catch rate) during the recovery period are available. When the relationship between quality and participation is not explicitly modeled, and the TCM only predicts total participation at the site, adjustments in the damage calculations will be necessary as participation returns to baseline. NOAA concurs that the interim lost values are calculated from the time of the discharge until restoration is deemed complete by the trustee(s).

Comment: Two commenters noted problems with TCM. One said TCM provides estimates of the value of a site as a whole and does not measure the impact of relatively slight changes in the availability of natural resources. Another indicated visitors may lack information or have a misconception about a particular site, which will skew the resulting data. Another noted it is also very difficult and ultimately ambiguous to attempt to measure lost opportunity costs, which depend on

each individual's wage rate as well as his/her ability and inclination to work during travel time. Also, the commenter notes there is an unsettled controversy over whether individual data on travel cost are better than zonal aggregation of travel costs.

Response: NOAA recognizes the limitations in applicability of the TCM. The greatest disadvantage of the TCM, and other indirect techniques as well, is that it cannot be employed unless there is some easily observable behavior that can be used to reveal values. Advances in the TCM incorporating multiple-site visits, improved models of the value of time, and the availability of substitutes continue to broaden the range of this measurement technique. In addition, the economics profession has developed procedures for valuing changes in environmental quality of a site, in addition to valuing access to a particular site. Random utility models, a multi-site extension of TCM, can value changes in quality at sites without requiring observed participation levels. This feature is useful, because for sites in which recovery is expected to occur over a long period, it will not be feasible to collect site-specific data through the full period of recovery within the time frame of the damage assessment.

In prevailing economic theory and practice, it is assumed that individuals' behavioral responses are derived from their personal perceptions of reality. These behavioral responses provide the basis for valuation. Therefore, if a discharge of oil produces an injury to a site, it is not necessary that a user know with scientific certainty what the specific extent of the injury has been. If the consumer perceives that the value of the site has been diminished as a result of the discharge, there has been a reduction in utility, and thus a potentially compensable loss. If additional information eventually reduces the perception and experience of loss, then the damages will be reduced accordingly. However, past losses derived from uncertainty regarding consequences of a discharge may still be a compensable loss. To the extent that individuals are unaware of injuries to resources, their responses may understate the values they might express with full information. Since these individuals will most likely eventually experience the service losses (though they be unaware of the cause), these future losses should be estimated and included as compensable values.

Comment: Two commenters stated TCM will be superior to HPM in most cases.

Response: NOAA contends that both the TCM and HPM have their advantages and disadvantages, and are suited to different circumstances. NOAA finds that both models should be considered for potential use in damage assessment.

"Contingent Valuation Methodology"

"General"

Comment: Several commenters stated that compensatory natural resource damage assessment is all that is included in OPA. They claimed that CV as currently applied has such an upward bias as to be punitive.

Response: Under OPA, the compensatory framework includes calculations of both direct use and passive use values. NOAA has found no empirical evidence to support the contention that CV measures of passive use values are so upwardly biased as to be punitive.

Comment: A number of commenters contended that authorizing the application of unreliable methodologies such as CV for measuring speculative elements of loss, such as theoretical passive use damages, even under limited circumstances, will result in increased litigation costs because the RP(s) will be more likely to go to trial on the grounds that CV will significantly overstate passive use damages.

Response: The use of CV, in and of itself, does not promote litigation. The potential for litigation depends upon the nature and quality of the damage assessment and the litigious nature of the trustee(s) and RP(s). A CV study that is carefully constructed, administered, and analyzed should not meet with the skepticism that many past CV estimates have received.

Comment: One commenter stated that the use of CV is inconsistent with the general law of damages. That commenter contended that a decision to employ CV measures of passive use losses would invite wider use of CV, with potentially serious repercussions for the legal system and could lead to speculative claims like a claim for harm due to the death of a friend.

Commenters further compared traditional tort law and the natural resource damages under OPA. These commenters noted that imposing liability for natural resource damages based upon CV studies for passive use values does not further the public's interest in preserving and restoring publicly owned natural resources. Additionally, these commenters stated that liability under OPA is limited to the costs to restore or replace injured resources, and that any passive use values assessed above those costs are punitive damages. These commenters also noted that even if OPA authorized such damages, tort law actions generally do not allow damages for losses that cannot be determined with sufficient evidentiary reliability and economy.

In contrast, other commenters stated that recovery for passive use values is not punitive since OPA specifically recognizes two components of the damage figure—costs to restore, replace, rehabilitate, or acquire the equivalent of the injured resources and diminution in value pending that restoration. Failure to include passive use values in a natural resource damage claim under OPA would, in fact, be a violation of law. Also, these commenters noted that there is no requirement in private tort law that the damages must be proven with mathematical precision and that difficulty in determining damages is not a bar to their recovery.

Response: Although NOAA observes that certain claims, such as those for emotional distress, etc., are recognized by the American judicial system, it also points out that it is not the role of this rulemaking to speculate whether CV will gain acceptance in areas of the law other than that dealing with natural resource injuries. Because OPA explicitly includes diminution in value as part of the damage claim for natural resource injuries, damages under OPA are not limited to the costs to restore, rehabilitate, replace, or acquire the equivalent. As stated elsewhere in this proposed rule, the OPA compensatory framework includes both direct use and passive use values. Thus, the inclusion of passive use values in a damage claim cannot be considered punitive. Rather determination of passive use values furthers the public interest by ensuring adequate compensation to restore, rehabilitate, replace, or acquire the equivalent of the injured resources.

As indicated in this rule, CV is a valid, proven technique when properly structured and professionally applied, and as such is an acceptable method for use by natural resource trustees. Further, use of CV to measure passive use values has been sanctioned in the *Ohio* decision. As stated earlier, NOAA believes that CV studies of passive use values can produce reliable estimates of damages. In cases where passive use values cannot be estimated at reasonable costs, they may be omitted from the damage claim.

Comment: One commenter stated that assessment of damages for impacts on existence or option values is inappropriate because no restoration effort will serve to avoid this claimed impact. Therefore, it is an irremediable

element of the event and constitutes a penalty.

Response: NOAA does not agree that impacts to existence or option values are an irremediable element of a discharge of oil unless restoration, replacement, or rehabilitation of the injured resources (and thus services) is impossible. Liability is for foregone direct use and passive use values during the interval from the discharge to complete recovery. Should recovery be impossible, these losses are, by definition, irremediable. Such losses are, nonetheless, compensable under OPA and do not constitute a penalty. Recovery for such losses can be used to acquire the equivalent of the injured resources.

Comment: One commenter recommended that the federal government produce standard damage assessments for a few specific reference discharges of oil, either hypothetical or actual, ranging from small to large. These standard valuations could be generated by any method, including through a jury of experts. These benchmarks could serve as reference points for later CV studies. That is, when a damage assessment is required, surveys could be used to elicit answers to questions like: "Would you pay [much more, more, about the same, less, much less] to prevent this spill than you would to prevent Standard Spill A?"

A few commenters suggested as an alternative to using CV to estimate interim lost values, that NOAA consider establishing a range of pre-set monetary values that reflect lost passive use values. For any specific discharge or incident, NOAA could establish a methodology for applying these values to calculate the precise amount of payment due to compensate the public for lost passive use values. The values and methodology should be established by an expert panel.

Response: NOAA will consider the feasibility and desirability of establishing reference studies. NOAA is proposing a compensation formula with values for relatively small discharges. Though the current version of the formula does not include passive use values, the intention is to include passive use values when reliable estimates are available for such discharges.

Comment: A number of commenters asserted that use of CV will reduce the credibility of the entire trustee framework and result in undesirable social consequences.

Response: NOAA believes the use of CV will not reduce the credibility of the damage assessment process if it is done correctly, with consideration of the guidance and guidelines set forth in the proposed rule. In addition, use of CV should produce some socially desirable consequences by enabling the trustee(s) to determine total compensable value and ensure that there is adequate compensation to restore the injured natural resources.

Comment: One commenter noted that any damage assessment rule authorizing CV to measure passive use damages could well cost the U.S. economy hundreds of millions of dollars annually by generating excessively high estimates of passive use damages. This could result in reduction of the number of competitors in the transportation industry, including bankruptcy of some responsible parties. Industry concentration could follow which, in turn, could lead to higher freight rates and unnecessary costs borne by U.S. oil consumers. Under E.O. 12291 (now E.O. 12866), a rule imposing such costs cannot be promulgated prior to completion of a regulatory impact analysis.

Response: NOAA has considered the possible impacts of the proposed rule. The proposed rule has been designated as a "major" rule because of the significant issues involved in the rulemaking. However, because of the difficulty of evaluating the effects of alternatives to this proposal, a Regulatory Impact Analysis under E.O. 12866 is not necessary and has been waived.

"Reliability"

Comment: A great deal of controversy surrounds the use of CV to estimate passive use values. Critics state that, as an approach to assessing these values, CV is: (1) Deeply and irretrievably flawed; (2) highly unreliable as a measurement tool for passive use values; and (3) unable to meet basic standards of accuracy such as tests of theoretical validity and convergent validity. These critics pointed out that studies frequently cited as providing support for the reliability of CV have never been replicated and do not provide clear scientific evidence in support of CV.

Another commenter stated that the empirical literature on CV estimates of passive use values is too thin at this time to establish or dismiss the credibility of reported estimates, while another suggested that no perfect instrument exists for measuring peoples' values for any commodity—marketed or nonmarketed—and that we will never know the exact nature of peoples' true value functions for any commodity.

Proponents stated that CV is the only viable means to meet OPA's mandate that both direct use and passive use values be considered in assessing natural resource damages. Thus, passive use values measured by CV need to be sanctioned. These individuals argued that the fact that it is difficult to quantify passive use values using CV does not justify ignoring such values. Further, CV should not be held to a higher standard of reliability than other types of analysis.

Response: NOAA includes CV as one of the measurement techniques available to the trustee(s) for the determination of the diminution in value of natural resources and/or their services as a result of a discharge. NOAA believes that CV studies can produce reliable estimates of damages. Further, NOAA agrees that CV should be held to the same, not a greater, standard of reliability as other types of analysis.

Comment: Several commenters argued that the use of CV to measure passive use values cannot be tested or validated by comparison to valuations derived by other methods. Thus, there is no standard against which CV answers can be compared to detect bias. Since no valid alternative method currently exists for assessing "true" passive use values, it is impossible to judge the extent of any overestimation produced by CV surveys. Several commenters acknowledged that there have been some attempts to investigate criterion validity, which provide some suggestive evidence establishing the validity of estimated passive use values.

Response: NOAA agrees that it is difficult to validate externally the results of CV studies measuring passive use values as there are no other methods currently available to provide external validation with an alternative estimate. This same disadvantage, however, will exist for any method used to estimate passive use values. To minimize any potential bias, CV studies should consider the guidance provided elsewhere in this proposed rule concerning survey design, development and administration. Furthermore, this rule proposes a test for determining the validity of the results.

"Survey Design Issues"

"Injured Substitute Commodities, Budget Constraints, and Alternative Expenditure Possibilities"

Comment: Several commenters expressed the view that CV-based estimates of willingness to pay would be overstated if respondents: (1) Were unaware of the availability of substitute natural resources that were not injured by the discharge under investigation, (2)

were not cognizant of their existing financial claims (i.e., their budget constraint), or (3) were unaware that they may be asked to pay for future public programs. These commenters suggested that respondents be reminded of uninjured substitute natural resources, budget constraints, and future expenditure possibilities prior to the CV willingness to pay elicitation question.

Response: NOAA agrees that it is important to inform respondents of related natural resources that have not been injured by a discharge if such resources exist and to remind respondents prior to the elicitation question that there may be things they would wish to spend their money on other than the program offered in the survey. However, NOAA does not agree that respondents should be told about speculative future programs that might be proposed as people are not reminded of future potential expenditures when they purchase a marketed good or make decisions concerning expenditures for public commodities. For example, voters are not reminded of issues that may appear on future ballots at the time they cast their votes in actual referenda. Further, if the trustee(s) selects the conservative lump-sum payment vehicle recommended by NOAA in the preamble to this proposed rule, this design component will greatly reduce the respondents' need to consider the future financial implications of their willingness-to-pay decisions.

"Sensitivity to the Scope of Injuries"

Comment: Many commenters expressed concern that estimates of willingness to pay (WTP) for the services of natural resources obtained through CV studies are not sufficiently sensitive to the magnitude of the services being offered, and therefore, those results are inconsistent with accepted economic theory and must be deemed unreliable estimates of lost passive use value.

Response: NOAA is sympathetic to this concern; however, NOAA is not convinced that phenomena such as insensitivity to scope are endemic to the CV approach. The concern of the commenters can be illustrated with a simple example. Consider two samples of respondents, identical in all respects. The first sample is confronted with a CV survey that elicits a WTP for a well-defined natural resource service. The second sample is confronted with the identical survey, with the exception that the quantity of the natural resource service offered is significantly larger than that in the first survey. If environmental services enter individuals' utility functions in a manner analogous to common consumer goods (e.g., household electronics, clothing etc.), one might expect WTP from the second sample to be larger than that from the first, although relevant economic theory states only that the WTP of the second sample should not be smaller than that of the first.

"Substitutes"

Comment: A number of commenters contended that CV responses for generic sites indicate that survey respondents have not considered substitute sites sufficiently because their responses are too close to the responses for irreplaceable sites. Lacking clear preferences, individuals are unlikely to recognize substitutes for the service in question, unless a description of these substitutes is specifically included in the survey instrument.

Response: Reminding respondents of undamaged substitutes has been outlined in the literature as a good CV practice. In order to obtain reliable estimates of WTP, NOAA recommends that the survey instrument places the commodity to be valued in the context of related natural resources, if such related resources exist or describes the future state of the same natural resources. This reminder should be introduced prior to the main valuation question to ensure that respondents have the alternatives in mind when revealing their willingness-to-pay.

"Hypothetical Questions"

Comment: One commenter claimed that CV surveys cannot provide reliable estimates of lost passive use since such surveys ask respondents about hypothetical programs to provide public goods and that respondents view the survey as a purely hypothetical exercise. Under these conditions the commenter claimed that the respondent undertakes no mental effort to answer the questions since there is no cost to being wrong.

Response: NOAA acknowledges that poorly designed and administered CV surveys may be subject to the criticism that individuals do not take the decisions posed by the survey seriously and do not undertake the effort necessary to make decisions consistent with their preferences and financial constraints. However, NOAA rejects this comment when applied to all CV surveys. CV surveys designed and conducted according to the guidance laid out in this proposed rule will lead to careful decisionmaking on the part of respondents. This is ensured by the proposed regulations which require: (1) An accurate and understandable injury description; (2) credible prevention or restoration programs that are offered to the respondent; (3) a realistic choice mechanism and payment vehicle and (4) followup questions that ask respondents to explain aspects of their decisions. Further, NOAA believes that its recommendation to use in person interviews will motivate respondents to complete the interview and will maintain the respondents' interest in the subject matter of the survey.

"Referendum"

Comment: Several commenters recommended the use of a referendum format to pose the valuation question. Critics, however, contended that the use of the currently popular dichotomous-choice payment question format can lead to even less credible results than those using open-ended formats. They argued that studies show means from dichotomous-choice data to be significantly larger than the means from the open-ended data and that results of dichotomous-choice models suffer from starting-point bias.

Response: NOAA believes that the more appropriate method of questioning for the estimation of reliable estimates of WTP is the dichotomous-choice or referendum format. Open-ended CV questions are less likely to provide the most reliable valuations because they lack realism. In our society, most goods are offered using posted prices. Asking an individual to reveal his or her maximum WTP for a good is both unfamiliar and unrealistic. On the other hand, a voting format for public goods is one with which people are familiar (i.e., school bond issues; special assessments for public infrastructure). Further, an open-ended request for WTP may invite strategic overstatement or failure to respond to the valuation question.

"Strategic Behavior"

Comment: One commenter claimed that respondents confronted with CV questions regarding public environmental programs will attempt to increase the amount of money spent on the proposed project by increasing their expressed willingness-to-pay beyond the level consistent with their preferences.

Response: Strategic behavior is less likely to occur if the trustee(s) uses the voting format recommended by NOAA. If this approach is used, the survey will specify that some public entity, such as a state or federal government, is considering a plan that would provide a public good and is conducting a survey to see how individuals would vote on this plan if it were offered on a ballot and the cost to the respondent's household was $X. The referendum

format does not permit the respondent to express an amount greater than that asked nor does it suggest that the level of the public good offered is being debated, thus the respondent cannot increase the amount of the public good provided by offering to pay a greater amount. Moreover, it has been shown that the referendum format is incentive compatible, implying that respondents' only incentive is to vote for the plan if his or her WTP equals or exceeds the required payment, or to vote no if his or her WTP is less than the required payment.

"Warm Glow"

Comment: Several comments suggested that expressed willingness-to-pay for the programs offered in CV surveys are not expressions of value for the services provided by the natural resources described in the programs, but rather are expressions of the simple pleasure one receives from giving to any good cause (sometimes referred to as the warm glow of giving).

Response: NOAA finds no evidence to suggest that the warm glow motivation is prevalent in properly designed and administered CV surveys that follow the guidance outlined in the proposed rule. If warm glow were a prevalent motivation, one would not expect to find large numbers of respondents refusing to pay anything at all for environmental programs offered in a CV survey.

A very common and effective payment vehicle employed in CV studies is a lump-sum tax payment. NOAA finds no evidence to support the notion that the warm glow hypothesis would imply that individuals get a similar warm glow from taxing themselves. Certainly, casual evidence suggests the opposite is true. Since a tax vehicle is one of the preferred methods of payment in CV surveys, NOAA believes that responses to such surveys are not amenable to explanation via the warm glow hypothesis.

"Sensitivity of Results to Various Factors"

Comment: Several commenters voiced concern that in the absence of clear preferences, respondents are subject to even unintentional influence by the framing of the survey instrument. These commenters stated that WTP values derived from CV are highly sensitive to variables that, according to economic theory, should be irrelevant to the valuation of a specific resource, including elicitation format, the sequence of questions, and the starting point value given in the questionnaire. Conversely, they assert that CV results are quite insensitive to changes that, according to economic theory, should matter, including variation in the quantity or quality of the resource. This evidence further demonstrates that CV results do not reflect valid economic measures of value.

Response: NOAA is not persuaded that CV results do not represent valid measures of lost value. NOAA recommends that CV surveys be designed to provide the highest degree of realism possible. Additional guidance is discussed in this preamble in the responses to comments on embedding, income constraints, and uninjured substitutes. In addition, NOAA proposes a test in its proposed regulations to demonstrate sensitivity to the scope of the environmental insult.

"Present Value Calculation of Interim Losses"

Comment: One commenter noted the distinction between interim and steady state passive use losses and claimed that respondents to a CV survey are unlikely to be able to discount appropriately the specific time path of interim losses. The commenter then presented an alternative procedure whereby respondents would value interim losses for a single year and technical experts would estimate how the services provided by the resource will vary from year to year as the restoration takes place. These experts would scale the respondents' valuation by the amount of the recovery that has taken place each year and compute the appropriate present value.

Response: There is no evidence to suggest that respondents' expressions of willingness to pay embody inappropriate discounting. Moreover, the alternative approach advocated in the comment is not only inconsistent with economic theory, but, at an implementation level, infuses the valuation with unnecessary economic and ecological uncertainty. Rates of time preference for the restoration of natural resources are specific to each individual. CV valuation of natural resource injuries is consistent with this fact and permits individuals to discount at their own rates. The alternative proposed by the comment would abandon individual-specific time preference rates, for a single rate chosen by some expert. This would clearly lead to discounting errors and is therefore an unacceptable approach. At the implementation stage, the alternative would require experts to estimate the actual time path of recovery and levels of recovery for each of the natural resources injured, and then to form a suitable index of the recovery that could be used to scale the respondents' willingness to pay amounts. Even if the experts could quantify the specific time path of recovery for each of the resources, they could not form the appropriate aggregate since this would rely on information about each respondent's preferences. Therefore, NOAA finds the proposed alternative unacceptable.

"Temporal Averaging"

Comment: One commenter stated that time dependent measurement noise should be reduced by averaging across independently drawn samples taken at different points in time. The commenter also suggested that a clear and substantial time trend in responses would cast doubt on the reliability of the finding.

Response: NOAA disagrees with this comment. Expressed willingness to pay can vary over time for valid economic reasons (e.g., increase certainty concerning expected recovery) and simple time averaging would mask these economic reasons. Moreover, even if such averaging were appropriate and warranted, it would require the trustee(s) to field several full-scale surveys that would greatly increase damage assessment costs and, at best, add nothing to the reliability of the CV results.

"Unfamiliarity With the Good"

Comment: A great deal of concern was voiced over the complexity of the policy issue and/or the level of familiarity of the good (environmental amenity) and changes in the level of the good with which the CV respondent is faced. Moreover, the benefits from environmental projects can be complicated, cumulative, and systemic, and knowledge about these things cannot be quickly absorbed and used by average survey respondents. As a result, the respondent has no experience or basis for valuing the good, leading them to construct values that are not related to the good itself. On the other hand, a number of commenters criticized the empirical research used to support claims of the unreliability of CV, due to the ambiguity of the valuation scenarios used in this research.

Response: If CV surveys are to elicit useful information about WTP, respondents must understand what it is they are being asked to value and must accept the scenario in formulating their responses. NOAA recognizes that some past CV surveys have provided only sketchy details about the program(s) being valued, calling into question the estimates derived from those surveys. NOAA posits that a conservative

approach should be taken regarding the knowledge of the respondent. A conservative CV study will provide sufficient information about the environmental program such as frequency and magnitude of discharges of oil, the peculiar features of the discharge in question, and similar relevant information.

"Embedding"

Comment: A number of commenters highlighted a form of embedding which is sometimes related to the inclusiveness of the resource. This form of embedding is suggested by the very different responses given by an individual when asked about a single resource as compared to surveys when the individual is asked to begin with an overall sum for environmental causes and is asked to then allocate this amount among various resources. The difference between a "bottom up" approach and a "top down" approach indicates that an individual is not observing his budget constraint in the bottom up approach. Because the respondent is unable to distinguish between what he is being asked to value and a more inclusive good, he may state an identical or similar WTP for a subset of a resource as for the entire resource.

Other commenters suggested that some of the phenomena associated with the embedding effect are simply standard propositions in utility theory (diminishing marginal utility of the asset in question). Further, a poorly designed survey instrument can contribute to embedding effects that can be largely avoided with an instrument that identifies more effectively the good(s) to be valued.

Another commenter suggested that the measurement issues raised by the embedding controversy involve a well recognized and potentially serious category of biases that are referred to as "amenity misspecification." Although these potential biases pose a methodological challenge to CV researchers and require careful attention in the design phase of the study, they are often avoidable if the scenario is plausible and the good is well described.

Response: NOAA rejects the "top down" approach advocated by the commenters because it suffers from two problems that invalidate its use in CV studies of lost passive use. First, the "top down" approach permits respondents to change the levels of vast aggregates of public goods as they move down a decision tree ordering of public goods toward the injuries to be valued. Thus, the value given for the injuries is predicated on the new levels of public goods chosen by the respondent as he moves down the decision tree. Since each respondent may choose his own levels for all public goods offered, and the levels of other public goods in part determine the value of the injuries, it is impossible to recover the value of the injuries associated with the level of public goods that actually prevailed at the time the injuries occurred from survey responses.

Second, at points in the decision tree lying above the injuries to be valued, the definitions of the public goods provided to respondents are necessarily broad and cover vast aggregates of public goods. The result of this broad definition of the goods offered is a lack of specificity regarding the components of any aggregate. It is left to the respondent to decide for himself what the precise components of the aggregate might be. The value finally given for the injuries in question is dependent on the definitions of the public goods made by the respondents at earlier levels and these definitions are unknown. Therefore, no consistent set of definitions may be inferred and thus no value for injuries, contingent upon those definitions, may be measured.

Finally, NOAA agrees with the commenters who believe that alleged biases in CV responses resulting from the embedding phenomenon can be avoided through careful questionnaire design and execution of the survey.

"Pristine Environment"

Comment: One commenter noted that proponents of CV have not addressed the issue of CV's capability of measuring passive use values for less than pristine environments. That commenter questioned whether CV can reliably measure passive use values in an already diminished area.

Response: NOAA notes that there is nothing in the empirical literature to suggest that respondents cannot formulate WTP estimates for less than pristine environments. A well-designed survey instrument that describes the baseline conditions before the discharge and the impacts of the discharge should provide respondents with adequate information upon which to base WTP.

"Temporal Measurement"

Comment: One commenter was concerned that CV has not been proven capable of measuring passive use damages when there is gradual restoration of the injured resources over time.

Response: In order to obtain reliable estimates of WTP, the CV survey should provide a description of possible restoration activities and their expected outcomes as well as the time period for natural recovery. This information allows the respondent to distinguish between interim and steady state losses and the timing of restoration. Given such information, there is nothing in the empirical literature to suggest that a respondent cannot submit a reliable WTP estimate.

Comment: One commenter asserted that in implementing a CV survey, it should be made apparent that respondents can distinguish interim from steady state losses. This assertion is based on the assumption that most passive use values of natural resources may be derived only or mostly from its steady state and not from its day-to-day state.

Response: NOAA rejects this comment as there is no empirical evidence to suggest that passive use values are derived solely from the steady state characteristics of the resource.

"Extent of the Market"

Comment: One commenter noted that the passive use values derived from an environmental good are likely to be concentrated locally, but may extend to a large distance. Deciding where to draw the line for valuation is crucial. Another commenter noted that there is currently no accepted theoretical or empirical structure for determining the appropriate geographic extent of the population across which to extrapolate the WTP values. Thus, damage figures derived from CV studies for passive use values have no reliable or predictable basis.

Response: NOAA agrees that there is no clear line for determining extent of the market, but it does not follow that passive use value estimates have no reliable basis. The extent of the market is an empirical question best left to the discretion of the trustee(s) in consultation with their survey research experts, based on the particular case in question and guided by the results of survey pretests and pilots.

Comment: A few commenters asserted that CV studies focus on controversial subjects and, as a result, exaggerated perceptions almost certainly undermine the objectivity of the study. If CV is to be used, it is imperative that surveys not be framed in terms of discharges of oil, but rather should describe reductions in resource services due to some noncontroversial source, such as natural mortality.

Response: The underlying concern of these commenters is whether the potential controversy surrounding a discharge can undermine the objectivity of a CV survey. NOAA believes that this

potential problem will not be a factor in well-designed CV surveys because they are generally conducted at times sufficiently distant from the discharge. This time lapse occurs because of the long lead-time necessary to determine the likely injuries from the discharge so that they can be accurately represented to the respondent and because of the time needed to prepare and implement the final CV survey. Further, media attention that may generate controversy will likely have focused on other events by the time the full survey can be conducted. The referendum approach also prevents potential controversy from tainting WTP. Because respondents are voting to increase their own taxes or the price of a consumer product such as oil rather than voting on how much the oil and gas company should pay to remedy the injury, respondents cannot vent their frustrations at the oil or gas company. Thus there is little or no possibility that potential controversy will undermine the objectivity of the CV study.

"Ex-ante v. Ex-post Questioning"

Comment: One commenter contended that CV surveys are biased and inaccurate because they do not really measure the value of the resource but are designed instead to determine WTP to prevent harm to a resource. This is because CV is always carried out in the aftermath of an accident and does not reflect pre-existing values independent of the accident and the valuation process.

A number of critics of CV claimed that CV questionnaires focus on total values (although passive use values dominated) in an ex-ante setting—that is, protecting waterfowl and preventing injury resulting from the discharge. They suggested that such ex-ante CV studies are better suited for damage assessment than are assessments that involve an ex-post valuation.

Response: In NOAA's judgment, the conceptually correct measure of damages is the ex-ante WTA. That is, ideally one would wish to place individuals at a point in time just prior to the injury and elicit from them an expression of WTA for the future injury. For reasons discussed earlier in the preamble, WTP, not WTA, is proposed as the basis for measuring passive use values. Thus, the obvious WTP analog is ex-ante prevention. It is true, though, that under certain circumstances, it may not be possible to develop an ex ante WTP CV commodity that is both plausible and reasonable to respondents. In these instances, the trustee(s) is free to use ex-post WTP programs. The trustee(s) should determine whether to use an ex-ante or an ex-post scenario on a case-by-case basis.

"Distribution of Responses"

Comment: A number of critics of CV contended that the mean WTP is estimated with low statistical precision, due to extreme responses. The distribution of WTP appears to be strongly skewed, so that trying to circumvent the problem by using medians or similar statistical devices is likely to introduce serious bias. These commenters assert that very large samples should be required to provide acceptable statistical accuracy.

Response: NOAA agrees with the commenters that extreme responses may skew results. However, standard practice in empirical research is to begin with a large sample size and treat outliers appropriately. NOAA believes that probability sampling is essential for a survey used for damage assessment and that the size of the sample must be large enough to ensure statistical precision. Due to the complexity of sample-specific design and size, the trustee(s) should consult with sampling statisticians in the design of a CV survey.

"Calibration/Scaling"

Comment: One commenter asked whether a CV study can generate useful information when respondents fail to answer truthfully. This commenter suggested that a "calibration approach" can be applied to environmental goods, for example, a CV response predicated on a hypothetical scenario could be statistically mapped into a response that would be obtained if the opportunity to purchase the good were actually provided. A number of commenters suggested that if systematic divergence existed between actual behavior and CV survey responses and this divergence could be quantified, then calibration of CV results could be undertaken.

Response: NOAA notes that there are some studies that suggest that stated intentions of WTP in CV surveys significantly exceed observed responses in simulated markets or in solicitations for charitable contributions (though none of the surveys meet the standards proposed in the rule, and there is debate as to whether the simulated markets or charitable contributions capture "actual" WTP). Because of the possible bias, a discount factor is included in the proposed rule to apply to estimated WTP. The proposed rule gives a default factor of 50 percent for the purposes of soliciting comment. However, the trustee(s) may adopt a different calibration factor if it can be shown that a different factor is appropriate for a specific application of CV.

"WTP vs. WTA"

Comment: A number of commenters addressed the subject of WTP versus WTA compensation measures within the damage assessment context. Some of these commenters noted that WTA is the correct measure because the public trust doctrine embodied in OPA implies that the property right for the resources rests with the government, in trust for the public. Consequently, the public has the right to be compensated when injuries occur. Another commenter stated that CV studies frequently find large differences between WTP and WTA and that this difference is another sign of the failure of CV to measure correctly any genuine underlying preferences for passive use values. Other commenters noted that the conventional wisdom applies only to changes in the price (of marketed goods). Recent research has shown that, for changes in the quality of either marketed or unmarketed goods, large differences between WTP and WTA may be consistent with economic theory, particularly for public goods.

Response: While NOAA agrees that the conceptually correct measure of lost passive use value for environmental damage is WTA, it is concerned that respondents to CV questionnaires would give unrealistically high answers to such questions. Therefore, NOAA contends that the WTP format should be used instead of the compensation required (WTA) because the former is the conservative choice unless future empirical evidence suggests otherwise. NOAA encourages the trustee(s) to remain current with the state-of-the-art in this area and to use the criterion that reflects the best available practice among natural resource economists. NOAA disagrees with the assertion that the large difference between WTA and WTP is an indication that CV fails to correctly measure underlying preferences, as experiments have shown that such differences also exist for market goods.

"Research"

Comment: Several commenters stated that the results of past CV studies are sufficiently interesting and demonstrate sufficient promise to warrant the commitment of substantial resources to further research. There is an urgent need for methodological research on CV.

Response: NOAA encourages further research in this area.

"Expressions of Punishment"

Comment: One commenter claimed that CV surveys of passive use permit the respondents in such surveys to express in their WTP amounts feelings that responsible parties should be fined or punished for the effects of discharges of oil.

Response: Such problems can be avoided in a properly designed survey if the trustee(s) selects a voting format as the choice vehicle coupled with a tax as the payment mechanism. By asking the respondent how he or she would vote on such a plan if the plan would cost the household $X, the respondent cannot express any anger directed at the RP in terms of the respondent's household's willingness to pay for the program offered, except possibly to refuse to answer the question or to answer the question based on a belief that taxpayers should not be required to pay for impacts resulting from the discharge.

"Survey Methods"

Comment: Several commenters argued that high nonresponse rates in CV surveys would bias survey results, producing unreliable estimates.

Response: While NOAA agrees that a high response rate is desirable, there is no bright line to determine at what level of response a survey's results become "unreliable." NOAA proposes that the trustee(s) shall obtain as high a response rate as possible that can be achieved at a reasonable cost while ensuring reliable inferences to the general population.

In addition, good survey technique generally involves a followup analysis of nonrespondents and/or respondents to determine whether the sample is representative of the target population for the survey.

"Self-Selection Bias"

Comment: One commenter claimed that respondents with strong environmental preferences have a higher survey response rate than those with weaker preferences and thus are overrepresented in the final sample employed in the passive use value calculations.

Response: NOAA disagrees with this comment. Under the survey administration guidelines laid out in the proposed rule, probability sampling is specified. Probability sampling ensures that the sample drawn does not over-sample those with strong environmental preferences.

The proposed regulations also direct the trustee(s) to minimize self-selection bias related to the contents of the survey instrument. NOAA's recommended use of in-person interviews will help to ensure that respondents do not know the true intent of the survey until the interviewing process has started. Only at this time can a self-selection bias enter, and previous evidence from in-person CV interviews suggests that interviews once started are completed.

"No-answer Option"

Comment: One commenter asserted that a "no-answer" option should be explicitly allowed in addition to the "yes" and "no" vote options on the main valuation question of a CV survey.

Response: It is not clear at this time that the inclusion of a "no-answer" option would substantially change the measure of passive use values for the injury. NOAA supports further research in the area.

"Survey Mode"

Comment: Several commenters criticized the use of mail and telephone interviews in CV surveys, especially in the context of complex goods. A few commenters argued in favor of mail surveys, asserting that telephone and face-to-face interviews typically provide the respondents with inadequate time to formulate a response or test it against their actual budget and expenditures.

Other commenters argued that in-person interviews are simply not required to elicit the "opinions and feelings" required from CV questionnaires and may lead to bias in results by giving the issue high apparent importance and exposing the respondent to undue influence from the interviewer.

Response: There are advantages and disadvantages of each mode of administration, and the selection of the appropriate method is dependent on a number of factors such as cost, turn-around time, desired response rate, type of information to be conveyed, use of visual aids, required population coverage and the ultimate use of the survey results.

After analyzing the advantages and disadvantages of each method, NOAA believes that while mail surveys can provide invaluable information for many academic studies and regulatory purposes (i.e., U.S. decennial census), mail surveys at this time lack certain features that are desirable for use in the natural resource damage assessment area. In deciding between the use of telephone and in-person surveys, NOAA suggests that the trustee(s) consider seriously the use of in-person interviews for the final survey because of the characteristics of a survey needed for damage assessment purposes. A CV survey designed for natural resource damage assessment purposes is likely to impart a large amount of information to respondents causing interviews to be lengthy and often complex. In-person interviews offer the opportunity to motivate the respondents and to hold their interest by providing important information in a graphical and pictorial format and asking interactive questions regarding the respondents' understanding and acceptance of key features of the instrument. It also permits interviewers to record verbatim responses to important open-ended questions. Such information may be critical in demonstrating that the trustee(s) has adhered to the regulatory guidance proposed by NOAA.

NOAA, however, encourages the trustee(s) to consider the use of the other modes of administration during the survey development stage. For example, a telephone survey may be an appropriate and cost effective method to test a design feature such as question ordering or the understanding of technical terms. Further, NOAA is interested in comparative empirical testing of other administration modes. If such testing demonstrates that other modes can produce the type of information and results comparable to in-person interviews, NOAA would encourage the trustee(s) to consider the use of those methods for the final survey.

"Standards for CV Studies"

Comment: Several commenters observed that if CV is to be included in the rule, it is critical that NOAA provide strict guidelines that minimize the problems associated with CV and identify cases where the problems are relevant, despite efforts to minimize them.

Response: In this proposed rule, NOAA has provided guidelines for the use of CV. The guidelines are discussed earlier in this preamble.

"Interviewer Effects"

Comment: One commenter suggested that CV surveys differ from actual referenda since an interviewer is present. The commenter argued that the presence of the interviewer can cause "social desirability" bias since many of the programs that would be valued in a CV survey would preserve or restore the environment, which may be considered "socially or politically" correct. The implication of this bias would be exaggerated expressions of willingness to pay. This comment recommended that CV studies should test for the presence of such effects.

Response: Evidence of interviewer effects is sometimes found in surveys

that ask respondents questions about illegal behavior, such as drug use, but there is no evidence to support the claim that the presence of interviewers would bias the willingness-to-pay amounts elicited in a CV survey used to assess natural resource damages. Nevertheless, until research on this issue has produced definitive conclusions, NOAA encourages the trustee(s) to be cognizant that such effects may be present.

"Prior Approval"

Comment: One commenter recommended that the trustee(s) seeks concurrence of the RP(s) prior to using a CV to measure passive use values.

Response: NOAA always encourages cooperation between the trustee(s) and RP(s) when appropriate. Due to the trustee's(s') fiduciary responsibilities, however, the trustee(s) cannot be placed in the posture of compromising his position in on-going or potential litigation. Thus, the decision to seek prior concurrence from the RP(s) is left to the discretion of the trustee(s). However, NOAA encourages the trustee(s) and other interested parties, such as industry or environmental groups, to consider cooperative development of CV surveys for natural resources that may be at risk of being impacted by discharges (i.e., resources of national marine sanctuaries). Such studies could then be used as a reference value should a discharge occur that injures such resources.

"Benefits Transfer Method"

Comment: One commenter stated that the concept of a "unit day" consisting of "average per day values for resource uses" is unsound because it unfairly undervalues the injured resource by treating unique resources as fungible. The commenter cited a statement in an earlier Notice that unit day values should be accepted as a measure of damages when there is a "small spill or a small impact," and stated that if such a measure is adopted, its use should only be allowed where there is a "small spill" and "small impact" and the resource ranks low in biodiversity.

Response: NOAA finds that the unit day value methodology is appropriate to damage assessment, when applied under standard and accepted procedures, and within the appropriate context. NOAA agrees with the commenter that most applications of unit values are regarded as relatively crude approximations of resource values. However, they have proven useful when more rigorous, detailed, and theoretically sound techniques are too costly or time consuming for the specific application.

Comment: One commenter noted the use of user-day values of an activity (i.e., recreation) or administratively-determined values have been common for a variety of policy purposes in the past. Another commenter noted that the absence of any accepted protocols for benefits transfer make it important for NOAA to provide reasonable guidelines for such transfers. Absence of such will assure lengthy and expensive litigation for many incidents. Such guidance must be specific and yet flexible. These guidelines should include the following criteria: (1) Studies must meet minimum standards for quality assurance in terms of data, theory, and analysis; (2) the activities from the transferred studies must accurately mirror those impacted by the incident; and (3) methodologies used for transfer should conform with standards for benefits transfer, as they are developed.

Response: For purposes of damage assessments under OPA, use of "benefits transfer" is a practical necessity, given the time and resources typically available to the trustee(s). While extensive research into these procedures is underway in the academic community, no formal benefits transfer protocol presently exists. The current state-of-the-art in benefits transfer does suggest that where feasible, it may be preferable to transfer a valuation function that characterizes the variation in use values with characteristics of the individuals and of the experience. However, NOAA agrees that the quality of the studies to be transferred and the applicability of the study context to the damage assessment context are important considerations.

"General Guidance"

Comment: Many comments were received concerning the appropriate discount rate. Several commenters stated that the rules should establish that present value of future year damages be discounted at the 10% discount rate as upheld in the *Ohio* vs. *DOI* ruling. Other commenters were critical of the 10% rate. Those commenters indicated that the 10% rate was too high, unrealistic, and inadequately represented future generations' interest. Instead of the 10% rate, some commenters recommended much lower rates, ranging from 0% to 3%. Others recommended that NOAA allow the rate to be determined on a case-by-case basis.

Response: NOAA finds that the appropriate rate of discount to be used by a trustee(s) is the U.S. Treasury note. For a detailed explanation of the rationale for this choice, see the earlier preamble discussion on discount rates.

Comment: Several commenters addressed the concept of "committed use," i.e., current or planned public uses at the time of the discharge, within OPA damage assessment regulations. Some expressed concern that restricting damage determination to "committed uses" would significantly understate the true value of the injured resource, and thus fail to provide adequate compensation to fully offset the public loss.

Response: NOAA feels that the concept of committed use adequately provides compensation for public losses resulting from resource injury due to a discharge of oil. As stated in the preamble, committed use implies that a resource is or has been directly utilized or employed or there exist attributable passive use values. In addition, a documented future use is considered a committed use, and thus would be included in compensable and recoverable damages, assuming incomplete recovery of the resource or delay in implementation of a future use due to a recovery timelag.

Comment: One commenter suggested that estimates of diminution of value must consider the availability of substitutes.

Response: NOAA agrees that in calculating the diminution in value, it is desirable to take into account the availability of substitute services. However, incorporating such information may increase the cost and complexity of a damage assessment. Therefore the additional cost and complexity should be undertaken only if the potential benefits from an increase in accuracy of the damage estimate outweighs the potential increase in damage assessment costs.

Comment: Some commenters observed that in assessing diminution in value the extra cost of obtaining substitute services may be regarded as the upper bound estimate of that loss.

Response: NOAA disagrees that the extra cost of obtaining substitute services is necessarily an upper bound of the loss. Unless the substitute source(s) is a perfect equivalent and has sufficient capacity to accommodate additional demand without congestion, the extra cost of obtaining those services will not reflect the true and complete attributable loss.

Comment: A number of commenters addressed the subject of WTP versus WTA compensation measures within the damage assessment context. Some of these commenters noted that WTA would be the correct measure.

Response: As noted above, NOAA concurs that WTA is the correct measure of compensation. At present, WTA is very difficult to elicit from respondents in a reliable manner. Consequently, NOAA recommends that CV studies elicit the more conservative WTP criterion at the present time. For methodologies such as the travel cost model in which exact (Hicksian) welfare measures, measuring monetized changes in utility, can be derived from the Marshallian models through analytical techniques, WTA and WTP measures are of equal reliability. In those circumstances, WTA should be used where feasible.

Subpart H—Post-Assessment Preamble Language

Introduction

At the completion of an assessment of any type described in this proposed rule, the trustee(s) shall prepare a Report of Assessment, present a demand for damages to the RP, set up an account to receive any payment of those sums, and develop a Final Restoration Plan. If a settlement agreement is reached at any point before the formal completion of the assessment, the same basic steps are required, except that the sum agreed upon as damages constitutes the demand for damages. Also, if there is a Regional Restoration Plan in place through prespill planning to which the damages may be appropriately applied, the trustee(s) need not develop a separate Final Restoration Plan.

Report of Assessment

At the conclusion of an assessment, the trustee(s) shall prepare a Report of Assessment as described in § 990.80 of the proposed rule. The Report of Assessment should be made available to the public, but the timing of publication may vary. In some cases, the trustee(s) may wish to issue the Report of Assessment in connection with entry of a consent decree resolving natural resource damage claims, in order to give the court and the public adequate information to evaluate the settlement.

The Report of Assessment consists of the DARP, as modified based upon any comments received on the DARP. The Report of Assessment describes the selected restoration approach and the estimated costs of implementing that approach. The Report of Assessment will also contain an index of the administrative record of the assessment as an attachment.

Demand

At the conclusion of the assessment, the trustee(s) should present to the RP(s) a demand in writing for the damages, as described in § 990.81 of the proposed rule. The demand should be delivered to the RP(s) in a manner that will establish the date of receipt.

The demand shall include an identification of the discharge of oil from which the claim arises, the natural resource trustee(s) asserting the claim, and a brief description of the natural resources and/or services for which the claim is being brought. The demand will include the Report of Assessment as an attachment. Finally, the demand shall state the amount of damages being sought.

The damages presented in the demand will include the estimated costs to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and/or their services, the diminution in value pending that recovery, costs already incurred in carrying out emergency restoration, and the reasonable costs of conducting the assessment and recovering the damages.

Review of Damage Figure

As explained earlier in this preamble, NOAA is proposing that the restoration component of the Report of Assessment be granted record review. Therefore, of the total damage figure, that part of damages representing the estimated costs of implementing the restoration component is that portion subject to record review. The other damages, including but not limited to assessment costs and compensable values, are to be reviewed with the trustee(s) receiving the benefit of the rebuttable presumption.

Account

This proposed rule allows the use of various types of accounts into which the trustee(s) may place sums recovered. If more than one trustee is involved in the recovery, the proposed rule, in § 990.82(a), allows trustees to establish a "joint trustee account" under the registry of the applicable federal court when there is a joint recovery involving both federal trustees and state or Indian tribe trustees. A federal court is listed since section 1017(b) of OPA states that actions for natural resource damages shall be filed in a United States district court. Such an account may be interest bearing, depending upon the rules of the court. The joint trustee account should be managed by all trustees through a mutually agreed upon trustee committee or council. Such an account and its management could be agreed to in a Memorandum of Understanding (MOU) such as the one suggested in § 990.16 and given as an example in Appendix A.

While the joint trustee account may be the preferred alternative, trustees also have the option of dividing the recoveries and depositing their respective amounts in their own separate accounts. These accounts should be interest-bearing, revolving trust accounts. These accounts may be new, separate accounts established for each incident or preexisting accounts to which additional deposits are allowed for specific purposes. In addition, trustees may establish escrow accounts or any other type of investment account(s) unless specifically prohibited by law.

Regardless of the placement of recoveries into joint or separate accounts, the sums shall be used as specified in § 990.83 of this proposed rule. Also, the trustee(s) must maintain appropriate accounting and reporting methods to ensure the proper use of sums recovered, including independent auditing.

Although OPA clearly intends that trustee accounts are to be interest bearing, there may be circumstances where this is not the case, e.g., the rules of the court on court registry accounts do not allow it. Therefore, it is essential that the trustee(s) determines the likely repository of any potential recovery when determining the appropriate damage amount to demand. The calculation of the expected present value of the damages amount should be adjusted to correct for the anticipated effects of inflation over the time estimated to complete the restoration alternative chosen. The damage amount should be adjusted by the rate payable on notes or bonds issued by the United States Treasury with a maturity date that approximates the length of time estimated to complete the chosen restoration alternative.

Because of the possibly long-term nature of the Regional Restoration Plan described in § 990.84(b) of this proposed rule, this adjustment for inflation applies only to the incident- specific restoration plans described in § 990.84(a) of the proposed rule.

Use of Sums Recovered

As mentioned earlier, section 1006 of OPA establishes damages for injury to natural resources to be the: (1) Costs of restoring, rehabilitating, replacing, or acquiring the equivalent of the injured natural resources and their services; (2) diminution in value of those natural resources and/or services pending the restoration; and (3) reasonable costs of assessing those damages. The damages recovered are to be placed, upon receipt, into one of the accounts described in § 990.82 of the proposed rule.

At the trustee's(s') option, prior to the deposit of a recovery in an account, the trustee(s) may request immediate receipt of those sums recovered that represent assessment costs already incurred, costs necessary to complete the assessment, emergency expenses, costs necessary to develop the final restoration plan and costs to implement a restoration plan or individual project that is part of that restoration plan. The remaining sums, those consisting of restoration or replacement costs and diminution of value, are damages representing compensation for the injuries to the natural resources.

The damages representing compensation are to be spent to develop and implement a final restoration plan. In order to refine this restoration plan, the trustee(s) should be allowed to immediately use that part of the damages representing compensation necessary to meet the expenses involved in developing the final restoration plan.

Final Restoration Plan

The proposed rule describes two types of Final Restoration Plans. First, the trustee(s) may develop an Incident-Specific Restoration Plan to address the effects of the discharge of concern. This plan shall be based upon the restoration component developed under subpart G of the proposed rule. This Final Restoration Plan is the post-assessment restoration planning document. This plan should serve to define the objectives and the approach for the particular discharge site, and establish the procedures for restoration, and where applicable, rehabilitation, replacement, and acquisition of the equivalent actions. The Final Restoration Plan incorporates all proposed restoration activities for the discharge site that have been selected by the trustee(s), taking into consideration public comments. Once damages are awarded or a settlement with the RP(s) reached, the trustee(s) shall review the restoration plan for possible modifications. The Final Restoration Plan shall take into account the available funds; priorities of natural resources and/or services of concern; direct and indirect (i.e., interdependency and feedback between restoration options) benefits to the natural resources and/or services of concern; and sequence of restoration steps. If there are significant modifications between the restoration component of the DARP made available to the public prior to the damage award, and the restoration plan that the trustee(s) intends to implement after receiving the award, the rule requires the trustee(s) to make the revised plan available to the public for a 30 calendar day comment period. The trustee(s) should make the plan publicly available, along with a response to public comments.

Under this proposed rule, the trustee(s) would also be allowed to pool recoveries to apply them to a Regional Restoration Plan, as described in § 990.16 of this proposed rule. Where such a plan already exists, whether developed through prespill planning efforts or under regular management efforts, that plan may be used subject to the conditions listed below. This option will likely be most useful in areas with long-term pollution effects where damages from a single discharge would be too small to "restore" the ecosystem or where the planning costs for the restoration after a single discharge would be quite high compared to the damage figure. This type of approach may allow meaningful restoration efforts to result from several recoveries received through the use of a compensation table or one of the Type A models developed by DOI. However, where a Regional Restoration Plan has not been developed, an Incident-Specific Restoration Plan must be developed for use of the damages recovered.

The proposed rule states that, to qualify as a Regional Restoration Plan under this rule, the plan must be developed through a process consistent with the prespill planning process described in § 990.16 of the proposed rule. The plan must also address the same or similar resource injuries as those identified in the assessment procedure. These requirements are completely consistent with the DOI rule at 43 CFR 11.93, which also allows for pooling damages assessed using a Type A procedure.

Post Assessment Response to Comments

"Account"

Comment: Some commenters suggested the OPA rule allow for the establishment of an account in the court registry, particularly where federal and state trustees are jointly seeking natural resource damages. One commenter suggested this joint account may ensure that monies will be spent on restoration without obtaining special appropriations from the legislature. It also provides a mechanism for state and federal trustees to decide on expenditure of funds. Other commenters, however, stated that the role of the court should be limited to ensuring that uses of sums recovered are consistent with the statutory directives, and noted that such accounts do not yield a high rate of interest.

Response: NOAA agrees with the commenters suggesting deposit of sums recovered into an account in the court registry and has allowed that as an option in § 990.82(a) of the proposed rule. NOAA also notes that there are concerns over expanding the role of the court to assume a greater role than the statute seems to allow. However, it is unlikely that a court would usurp the role of the trustee(s) over the management of the natural resources where the trustee(s) has developed a plan for the use of such sums.

Comment: A few commenters indicated that a joint fund system will only work if the trustees work well together and can agree on a process to manage and disburse the funds. These commenters suggested that there should be provisions for dispute mechanisms and for a working group dissolution. Otherwise, the commenters were concerned that funds for restoration would be stuck in the account pending resolution of disputes.

Response: NOAA agrees that the trustee(s) should establish a process for management and disbursement of the funds in a way to avoid deadlock.

Comment: Two commenters noted that funds awarded for natural resource damages under 43 CFR part 11 must go into non-interest bearing accounts in the Federal Treasury, but that supplemental appropriations language permitted DOI to place award monies into an interest-bearing account.

Response: NOAA notes that the 43 CFR part 11 rule may have a different provision for interest-bearing accounts. However, OPA does provide for such accounts.

Comment: One commenter, although agreeing with the joint trustee account, encouraged NOAA to develop alternatives that would eliminate a trustee's submissions to a legislative appropriations process before using the awarded monies. Another commenter suggested an alternative of an additional "Joint Trust Fund" to be applied to costs other than those paid by the RP(s). The single account would simplify administration of the monies, as opposed to the trustees dividing the funds into their various agency accounts.

Response: NOAA points out that the accounts provided for in § 990.82 of the proposed rule allow for use of funds without appropriations, as provided for in section 1006(c) of OPA. Also, it would be allowable for the trustee(s) to deposit monies other than those paid by the RP(s) into these accounts.

Comment: One commenter recommended that the RP(s) pay directly for services performed under its supervision in lieu of depositing funds in the Federal Treasury. One commenter noted that if the RP(s) is to underwrite a joint fund, or any fund, the RP(s) must legally have a primary role in the management of the funds.

Response: NOAA agrees that the RP(s) may pay directly for restoration actions (see discussion on "Participation of the Responsible Party" earlier in this preamble). However, NOAA cannot agree that the RP(s) who pays into an account would have a primary role in managing the account. Once the money is paid to the trustee(s), it is then the responsibility of the trustee(s) to manage the account according to statutory directions. Under the discretion of the trustee(s), the RP(s) may have the right to participate in the development of the restoration plan, which will be paid for by the monies in the account.

"Accounting for Expenditures"

Comment: One commenter also urged a final disclosure and accounting of the recovered funds to the RP(s) and to the public.

Response: NOAA agrees that the trustee(s) must provide an accounting of the way recovered sums are used. Therefore, § 990.82(d) of this proposed rule requires the trustee(s) to maintain appropriate accounting and reporting methods to document the use of the sums recovered.

"Use of Sums"

Comment: Several commenters noted that the only activities to which recovered sums can be dedicated are assessments and the implementation of restoration plans. Some commenters stated that the first priority of the funds should be restoration, and only if restoration is not possible, or when the cost of those restoration alternatives would be grossly disproportionate to the value of the resources involved, should other actions, such as acquisition of the equivalent be considered. Another commenter strongly urged that any sums recovered by the federal government for discharges occurring in a state should be spent in the same state.

Response: NOAA agrees that sums recovered as damages should be used to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources as required by OPA. OPA suggests that restoration, replacement, or rehabilitation be the first choices of action, with the trustee(s) acquiring equivalent natural resources only when restoration is not possible or the cost would be grossly disproportionate to the value of the resources. The proposed rule allows the trustee(s) to make those determinations. NOAA does not agree that the rule should require that sums recovered by the federal government always be spent in the state in which the incident occurred. The nature of the federal trust resources that are not "land" is such that those resources are likely either to cross state boundaries or to be of national interest. For example, if a large number of migratory birds is killed by a discharge of oil in a flyway, the most appropriate method of restoring those populations may be to enhance the birds' nesting grounds hundreds of miles away from the discharge site.

"Reimbursement of Assessment Costs"

Comment: Another commenter stated the rules should be clear about the use of recovered sums that represent the costs of the assessment and emergency restoration by ensuring the trustee(s) will have ready access to that portion.

Response: NOAA agrees with this commenter and points out that § 990.83(a) specifies that the trustee(s) is to have immediate reimbursement of assessment costs already incurred, costs necessary to complete the assessment, emergency restoration expenses, costs necessary to develop the final restoration plan and costs to implement a restoration plan or individual project that is part of that restoration plan.

Comment: Several commenters strongly rejected uses of "recoveries from previous spills" or current recoveries held in suspense until there is a sufficient amount of money to conduct restoration activities "on an ecosystem, bay or area approach." Commenters argued that pooling and usage of funds is contrary to the principles of compensatory damages and avoidance of double damages enunciated by Congress in passing OPA. Further, this usage contradicts section 1006(f) that "there be a nexus between monies recovered resulting from a particular spill and their use to restore or enhance the specific resources 'affected by a discharge.'" They cite section 1006(c), that requires the trustee(s) to "implement" the specific restoration plans that have provided the basis of the RP's(s') liability. Some commenters argue that, only when the RP(s) can refer to the site-specific restoration measures undertaken by the trustee(s) for a specific discharge of oil, can it defend itself against overlapping claims by other trustees.

One commenter noted that Congress defined "equivalence" as properly focused on "enhanc[ing] the recovery, productivity, and survival of the ecosystem affected by a discharge." As such, both the statute and legislative history reflect congressional intent for a strong connection between recovered monies in a case and their application.

Another commenter, however, supports a pooling of funds in order to fund a restoration plan for an entire region, provided a legally-approved regional restoration plan exists. The commenter supports this so long as NOAA maintains the definition of "acquisition of the equivalent" or "replacement" as it appeared in the ANPRM of March 13, 1992, so that sums are not spent on unlike resources.

Response: NOAA does not believe that pooling recoveries for use in a Regional Restoration Plan contradicts the requirement in OPA that recoveries be used to restore the resources affected by a discharge. A relatively small recovery, assessed by a compensation table or Type A model, is unlikely to be sufficient to restore a bay or estuary affected by a discharge where many forces are working to degrade that ecosystem. By pooling recoveries, the trustee(s) has a chance to carry out meaningful actions to help that system recover. The trustee(s), in the assessment, is to outline how the damage figure was derived, i.e., compensation table or Type A model. Those procedures are based on restoration costs when feasible. If restoration is not feasible for such a discharge, both the compensation table and Type A model base damages on compensable value. Therefore, recoveries are to go to restoring the services previously provided by the injured resources. In this way, a Regional Restoration Plan will help return those services. The RP(s) will be able to defend against an attempted double recovery by showing how the damage figure is to be applied within the regional restoration plan. As one commenter pointed out in the legislative history, the monies recovered are closely tied to the "ecosystem affected." The definitions of "replacement" and "acquisition of the equivalent" remain in the proposed rule and should help ensure that the pooled recoveries are, in fact, meaningfully used for the recovery of the system.

"'Excess' Recoveries"

Comment: Many commenters noted that any excess monies should be deposited in the Oil Pollution Trust Fund and not be used for unrelated environmental projects.

Response: The proposed rule allows for the recovery of damages required by OPA, namely: (1) the cost of restoring, rehabilitating, replacing or acquiring the

equivalent of, the damaged resources pending restoration; (2) the diminution in value of those natural resources pending restoration; plus (3) the reasonable cost of assessing those damages. The recovery of those three items is not excess recovery. The trustee(s) is to use the money to restore, rehabilitate, replace, or acquire the equivalent of the damaged resources and/or services provided by those resources and to reimburse the reasonable costs of conducting the assessment. Any recoveries that may be left over after implementing the restoration plan shall be deposited in the Oil Spill Liability Trust Fund.

National Environmental Policy Act, Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

The National Oceanic and Atmospheric Administration has determined that this rule does not constitute a major federal action significantly affecting the quality of the human environment. Therefore, no further analysis pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) has been prepared. The General Counsel, in accordance with the Regulatory Flexibility Act, certifies to the Chief Counsel for Advocacy, Small Business Administration, that this proposed rule will not have a significant economic effect on a substantial number of small entities.

The National Oceanic and Atmospheric Administration has determined that this document is not a major rule under Executive Order 12866. The rule provides optional procedures for the assessment of damages to natural resources. It does not directly impose any additional cost. In addition, estimates of the potential economic effects of this rule are well below $100 million annually. As the rule applies to federal, state, and tribal entities acting as trustees for natural resources, it is not expected to have a significant effect on a substantial number of small entities.

It has been determined that this rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 15 CFR Part 990

Coastal zone, Endangered and threatened species, Energy, Environmental protection, Estuaries, Fish, Fisheries, Fishing, Gasoline, Historic preservation (archeology), Hunting, Incorporation by reference, Indian lands, Marine pollution, Migratory birds, National forests, National parks, National Wild and Scenic Rivers System, Natural resources, Navigable waters, Oil, Oil pollution, Petroleum, Plants, Public lands, Recreation and recreation areas, Rivers, Seashores, Shipping, Waterways, Water pollution control, Water resources, Water supply, Water transportation, Wetlands, Wildlife.

Dated: December 30, 1993.

Katharine W. Kimball,

Deputy Assistant Secretary for Oceans and Atmosphere.

Under the authority of the Oil Pollution Act of 1990, and for the reasons set out in this preamble, title 15 of the Code of Federal Regulations, chapter IX is proposed to be amended to add a new Subchapter E—Oil Pollution Act Regulations and a new part 990 as set forth below.

SUBCHAPTER E—OIL POLLUTION ACT REGULATIONS

PART 990—NATURAL RESOURCE DAMAGE ASSESSMENTS

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Appendix D to Part 990—List of Acronyms

Authority: 33 U.S.C. 2706(e).

Subpart A—General

§ 990.10 Scope and applicability.

The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides for the prevention of, liability for, removal of, and compensation for the discharge of oil into or upon navigable waters, adjoining shorelines, or the Exclusive Economic Zone. OPA also provides for the designation of federal, state, tribal, and foreign officials to act on behalf of the public as trustee(s) for natural resources. In the event that natural resources are injured, lost, destroyed, or the loss of use of natural resources occurs as a result of a discharge of oil covered by OPA, these officials are authorized to assess natural resource damages, present a claim for those damages, and develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources under their trusteeship. Because the assessment procedures provided in this part are not mandatory, a trustee(s) may use other assessment procedures. However, this proposed rule must be used by the natural resource trustee(s) in order to obtain the rebuttable presumption provided by section 1006(e)(2) of OPA. This part applies to discharges covered by OPA. This part supplements the procedures established under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR Part 300, for the identification, investigation, study, and response to a discharge of oil, and provides procedures by which the natural resource trustee(s) can determine compensation for injuries to natural resources that are not addressed by response actions conducted pursuant to the NCP.

§ 990.11 Purpose.

This part provides a range of standardized and cost- effective procedures for assessing natural resource damages. These procedures will allow expeditious actions on the part of the trustee(s) to return natural resources and/or services to the public as compensation for injuries resulting from a discharge of oil. The results of an assessment performed by the federal, state, or tribal natural resource trustee(s) according to these procedures shall be accorded the evidentiary status of a rebuttable presumption as provided in section 1006(e)(2) of OPA.

§ 990.12 Overview.

(a) General. This part provides guidance on three basic phases that may be a part of a natural resource damage assessment under OPA. These three phases are: Preassessment Phase, Assessment Phase, and Post-Assessment Phase.

(b) Organization. Each of the three basic phases described above has various components. Phase I includes the Preassessment Phase—subpart B of this part. Phase II includes the Assessment Phase—subparts C, D, E, F and G of this part. Finally, Phase III includes the Post-Assessment Phase—subpart H of this part.

§ 990.13 Definitions.

Acquisition of the equivalent means obtaining natural resources and/or services that the trustee(s) determines are comparable to those injured.

Assessment area means the area in which natural resources and/or services are affected by the discharge of oil.

Baseline means the condition(s) of the natural resources and/or services, taking into account natural or other (human-induced) variability, that would have existed had the discharge of oil under investigation not occurred. In the absence of reliable data on variability, the baseline is the condition of the resources and/or services of interest immediately prior to the discharge.

Baseline data means those data that are systematically collected for natural resources and/or services environmental parameters of interest over a period of time and on a regular basis.

CERCLA means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, frequently referred to as the "Superfund Act."

Commercial services or "resources of commercial importance" means those natural resources and/or services that are oriented toward the provision of income or profit for a private party. Examples include: agriculture, shipping, commercial fishing, charter boat operations, water intake for plant operations, mining, and log harvesting.

Compensable values means the total diminution in value of the injured natural resources and/or services as a result of the discharge, from the onset of the discharge until recovery to baseline or comparable conditions is deemed complete by the trustee(s).

Comprehensive damage assessment (CDA) means a range of procedures to assess damages to natural resources and/or services based on complex, prolonged studies.

Contributing factor means where multiple factors may have contributed to an indivisible injury to a natural resource and/or service, the discharge of oil may be considered a contributing factor to the injury.

Control means conditions where all variables, except the presence of the discharged oil, are the same, and which can be manipulated, measured, and monitored.

Cost-effective means that when two or more activities provide the same or comparable level of benefits to the natural resources and/or services, the least costly activity providing that level of benefits will be selected.

Damages means the amount of money calculated to compensate for injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs of assessing or determining the damage, which shall be recoverable by the United States, a state, Indian tribe, or foreign trustee.

Destruction means the total loss of a natural resource and/or service.

Direct use value means the value individuals derive from direct use of a natural resource, including consumptive and nonconsumptive uses.

Discharge means any emission of oil (other than natural seepage), intentional or unintentional and includes, but is not limited to, spilling, leaking, pumping, pouring, emptying, or dumping.

Ecological services or "resources of ecological importance" means the physical, chemical, and biological functions that one natural resource provides for another. Examples include the provision of food, protection from predation, nesting habitat, biodiversity, erosion control, and waste assimilation.

Effect means the impact on or result of a natural resource and/or service exposed to the discharge of oil.

Equivalent resources mean those natural resources that provide the same or comparable services as the injured resources.

Exclusive Economic Zone means the zone established by Presidential Proclamation Number 5030, dated March 10, 1983, including the ocean waters of the areas referred to as "eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990.

Expedited damage assessment (EDA) means a range of procedures to assess damages to natural resources and/or services based on limited, focused studies.

Exposed to means all or part of a natural resource that may be in contact with oil or with any medium containing the oil.

Exposure means that the natural resource was exposed and there is a pathway between the discharge and exposed natural resource.

Fund means the Oil Spill Liability Trust Fund, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509).

Historical data means those data that are collected for natural resources and/or services but that may be temporally or spatially discontinuous.

Incident means an occurrence having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.

Injury means any adverse change in a natural resource or impairment of a service provided by a resource relative to baseline, reference, or control conditions. Injury incorporates the definitions of "destruction," "loss," and "loss of use."

Injury resulting from a discharge of oil (or injury caused by the discharge of oil) has been determined when the trustee(s) has demonstrated that:

(1) With direct exposure,

(i) The natural resource was exposed;

(ii) There is a pathway between the discharge and exposed natural resource; and

(iii) The exposure of oil, its components, or by-products has been shown by rigorous and appropriate scientific methodology to have an adverse effect on the natural resource in laboratory experiments or the field; or

(2) In the absence of direct exposure,

(i) The adverse effect on or impaired/diminished use of a natural resource has been shown by rigorous and appropriate scientific methodology; and

(ii) The adverse effect on or impaired/diminished use of the natural resource would not have occurred but for the fact of the discharge or threat of a discharge.

Lead administrative trustee (LAT) means a natural resource trustee who is designated on an incident-by-incident basis for the purpose of preassessment and damage assessment, and chosen by the other trustees whose natural resources are affected by the incident. The LAT facilitates effective and efficient communication between the OSC and other natural resource trustees regarding their activities during the Response Phase. An LAT may also be chosen to coordinate prespill planning for damage assessment.

Loss means a reduction in a natural resource.

Loss of use of means a reduction in a service provided by the natural resource.

Natural resource(s) or *resource(s)* means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States (including the resources of the Exclusive Economic Zone), any state or local government, Indian tribe or foreign government.

Natural resource damage assessment or *assessment* means the process of collecting and analyzing information to determine damages for injuries to natural resources and/or services as set forth in this part.

Navigable waters means waters of the United States, including the territorial sea.

Oil means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 U.S.C. 9601) and which is subject to the provisions of that Act.

OPA means Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*

Passive use value means the value individuals place on natural resources that are not linked to direct use of a natural resource by the individual, including, but not limited to, the value of knowing the natural resource is available for use by family, friends, or the general public; the value derived from protecting the natural resource for its own sake; and the value of knowing that future generations will be able to use the natural resources.

Pathway means the course the oil takes from the point of discharge to, between, and among natural resources.

Person means an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body.

Protocol means scientific, economic, legal, or regulatory accepted procedures used as guidance to implement an activity.

Reasonable cost of assessment means those costs incurred in performing a natural resource damage assessment, or any part thereof, in accordance with this rule.

Recovery means the return of the injured natural resource and/or service to its baseline or comparable condition within the constraints of natural or other (human-induced) variability.

Recovery period means the length of time required for the injured natural resources and/or services to return to their baseline or comparable condition.

Recreational services or *resource of recreational importance* means the direct use of natural resources by individuals for purposes of enjoyment or relaxation. Examples include consumptive uses (those uses that involve harvesting of the resource) such as fishing and hunting, as well as nonconsumptive uses such as swimming, picnicking, boating, bird watching, nature photography, hiking, and camping.

Reference means a natural resource and/or service that is physically, chemically, and/or biologically similar to that affected by the discharge.

Rehabilitation means actions that bring injured natural resources and/or services to a state different from baseline conditions, but still beneficial to the environment and public.

Replacement means actions that substitute natural resources and/or services for those injured. The natural resources and/or services that are substituted provide the same or comparable resources and/or services as those injured.

Resources of special significance means a category of natural resources that is afforded statutory or regulatory protection (e.g., threatened or endangered species), or is of cultural or archaeological significance (e.g., religious or native American artifacts).

Responsible party (RP) means a person described in or potentially described in one or more of the categories set forth in section 1001(32) of OPA.

Restoration means actions that return injured natural resources and/or services to their baseline condition.

Services or *natural resource services* means the physical, chemical, biological, aesthetic, and cultural functions performed by the natural resources, including the human uses of those functions.

State means the several states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

Technical feasibility or *technically feasible* means that the technology necessary to implement an element of the damage assessment plan or a restoration methodology has a reasonable chance of successful completion in an acceptable period of time.

Trustee(s) means those officials of the federal and state governments, of Indian tribes, and of foreign governments designated according to section 1006(b)

of OPA who may present a claim for and recover damages for injury to natural resources.

Type A procedure means one of the simplified natural resource damage assessment procedures requiring minimal field observation, found in subpart D of 43 CFR part 11.

Type B procedure means an alternative procedure for comprehensive natural resource damage assessments, currently found in subpart E of 43 CFR part 11.

§ 990.14 Recovery of damages.

(a) *General.* In an action filed pursuant to section 1006 of OPA, the natural resource trustee(s) may recover:

(1) Damages based on injuries occurring from the onset of the discharge through the recovery period (including monitoring costs), less any mitigation of those injuries by response actions taken or anticipated, plus any increase in injuries as a result of response actions taken or anticipated;

(2) The costs of emergency restoration under § 990.20(g) of this part; and

(3) The reasonable costs of the assessment, including:

(i) The cost of performing the preassessment, assessment, and post-assessment phases and procedures provided in this part; and

(ii) Any administrative or legal costs, including base and incremental costs, incidental to assessment and restoration; and

(4) Interest on the amounts recoverable as provided in section 1005 of OPA.

(b) *Statutory limitations on liability.* The determination of the damage amount shall consider any applicable limitations on liability provided for in section 1004 of OPA.

(c) *Double recovery.* There shall be no double recovery for damages as a result of the same discharge, as set forth in section 1006(d)(3) of OPA.

(d) *Parallel assessments.* Nothing in this part precludes the determination of damages for injuries to separate natural resources and/or services resulting from a single discharge, so long as such determination does not result in the double recovery of damages. Therefore, the trustee(s) may conduct parallel assessments, combining assessment procedures for separate resources and/or services.

(e) *Statute of limitations.* Actions for damages and assessment costs shall consider the statute of limitations set forth in section 1017(f) of OPA.

(f) *Settlements.* The trustee(s) and responsible party(ies) may settle a claim for natural resource damages at any time following a discharge of oil. Federal trustees shall seek the approval of the Department of Justice in the compromise of any claim of the United States. Subject to prespill restoration plans, the trustee(s) shall provide for public review of such agreed upon settlements and the related restoration plans.

(g) *Oil Spill Liability Trust Fund.* Any excess damages shall be deposited in the Oil Spill Liability Trust Fund in accordance with section 1006(f) of OPA.

§ 990.15 Administrative record for development of draft assessment/restoration plans

(a) *Purpose.* The administrative record has four basic purposes:

(1) Facilitate selection of restoration alternatives by providing a central repository for scientific data;

(2) Document the trustee's(s') consideration of the relevant factors in selecting restoration actions;

(3) Facilitate public participation; and

(4) Provide the basis for judicial review.

(b) *General.* The trustee(s) shall establish an administrative record upon which the trustee(s) shall base the selection of restoration alternatives. The restoration plan shall include the rationale for selection of the alternatives and an estimate of the cost of implementing the plan.

(c) *Content.* An administrative record should consider the documents that form the basis of the selection of the trustee's(s') plan to restore, rehabilitate, replace, or acquire equivalent resources.

(1) Documents that form the basis of the trustee's(s') selection of this plan will generally include:

(i) Documents containing factual information, data, or analysis of the factual information or data, that may form a basis for the selection of a plan;

(ii) Guidance documents, technical literature, and site-specific policy memoranda that may form a basis for the selection of a plan;

(iii) Relevant documents that are timely submitted by the RP(s) or other members of the public; and

(iv) Decision documents such as the Report of Assessment.

(2) Documents that do not form the basis for the selection of a plan, such as draft documents, internal memoranda, and day-to-day notes of staff, should not be included in the administrative record, unless such documents contain information that forms the basis of selection of the plan and the information is not included in any other document in the administrative record. Documents relating exclusively to liability or calculation of compensable values will ordinarily not be included in the administrative record.

(d) *Level of detail.* The contents and level of detail of the record will vary according to the type of procedure selected. Certain types of information will be common to all assessments, regardless of the type of procedure selected. However, the volume of material compiled for the administrative record should be consistent with the scope of the assessment and restoration.

(e) *Supplementing the record.* (1) Supplements to the record may be allowed if the:

(i) Interested party did not receive actual or constructive notice of the Draft Assessment/Restoration Plan and the opportunity to comment on the plan;

(ii) Information submitted does not duplicate information already contained in the administrative record; and

(iii) Information raises sufficiently significant issues regarding the scope, effectiveness, or cost of the plan as to warrant having the trustee(s) reconsider the plan.

(2) Where the Draft Assessment/Restoration Plan provides for the development of certain components at a later date, the information or documents used to develop these components should be added to the administrative record as they become available.

(3) Where the Draft Assessment/Restoration Plan is modified, the public will have the right to review and comment upon modifications that are, in the opinion of the trustee(s), significant.

(4) Where the Final Restoration Plan of § 990.84 is a result of significant modifications of the restoration component in the Report of Assessment, the administrative record should be supplemented with any additional material or data considered in developing that modification.

(f) *Availability of the administrative record.* (1) To the extent practicable, the administrative record should be compiled and made available for review and comment as documents are generated or received by the trustee(s). However, the degree of public notice and involvement in the administrative record should be determined by the trustee(s) on a case-by-case basis.

(2) The administrative record should be made available for public review and comment concurrently with the Draft Assessment/Restoration Plan.

(g) *Judicial review.* The administrative record shall form the basis of review of the Report of Assessment in any judicial or administrative proceeding.

§ 990.16 Prespill planning.

(a) *Prespill planning.* To the extent practicable and in conjunction with other willing participants where

appropriate, the trustee(s) should conduct the following prespill activities:

(1) Develop a natural resource damage assessment management and technical team. The size of the team should be a function of the scope and complexity of the assessment.

(2) Identify outside experts to assist in the design and conduct of studies, and serve in independent peer review;

(3) Identify support services;

(4) Collect information on natural resources and/or services potentially affected by discharge of oil along high risk areas;

(5) Identify the potential trustee(s) and a process to designate a lead administrative trustee (LAT), using guidance in paragraph (b) of this section at sites that may be affected by discharges of oil;

(6) Identify sources of information for background data;

(7) Design a general approach and develop protocols for an early sampling program; and

(8) Establish a centralized data management system for natural resource damage assessment baseline data.

(b) *Lead Administrative Trustee.* (1) Trustees are encouraged to cooperate and coordinate any assessment that involves coexisting or contiguous natural resources or concurrent jurisdiction. They may arrange to divide responsibility for implementing the assessment in any manner that is agreed to by all of the affected natural resource trustees with the following conditions:

(i) A lead administrative trustee should be designated to administer the assessment. The lead administrative trustee should act as coordinator and contact regarding all aspects of the assessment. The lead administrative trustee should be designated by mutual agreement of all the natural resource trustees.

(ii) If there is a reasonable basis for dividing the assessment, the natural resource trustees may act independently and pursue separate assessments, actions, or claims so long as the claims do not overlap. In these instances, the natural resource trustees should coordinate their efforts, particularly those concerning the sharing of data and the development of the Draft Assessment/Restoration Plan (DARP).

(iii) If a natural resource trustee(s) takes action as a result of a discharge of oil prior to the designation of a lead administrative trustee, all damage assessment actions performed by that trustee(s) shall be documented and transmitted to the lead administrative trustee to avoid duplication of efforts and double counting.

(2) If the discharge affects trust resources of the other natural resource trustee(s) as a result of coexisting or contiguous natural resources or concurrent jurisdiction, the trustee(s) may conduct an assessment pursuant to this rule without designating a lead administrative trustee. However, if appointed the lead administrative trustee, conducting an assessment pursuant to this rule, shall ensure that all other known affected natural resource trustees are notified that a DARP is being developed. This notification shall include the results of the Preassessment Phase.

(c) *Regional restoration plan.* The trustee(s) is encouraged in prespill planning to develop Regional Restoration Plans. These plans should be developed, or existing plans modified, through a public review and comment process consistent with the restoration planning process described in subpart G of this part.

(d) *Trustee memorandum of understanding (MOU).* It is strongly recommended that, to the extent practicable, natural resource trustees, on some logical geographic or political basis, enter into a Memorandum of Understanding (MOU) to ensure the coordination and cooperation of the trustees in the initiation of assessment and assessment of damage determination for injuries to natural resources and/or services resulting from a discharge of oil and the application of any natural resource damages recovered toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

The MOU is recommended because of the importance of integrating and coordinating the assessment of natural resource damages for injuries to natural resources affected by a discharge, seeking compensation for those injuries to natural resources and/or services, and restoration of those affected resources and/or services. This MOU should be prepared either in anticipation of a discharge of oil or as soon as possible after an actual discharge of oil. A sample MOU is given in Appendix A of this part.

§ 990.17 Participation of the responsible party(ies) RP(s).

(a) *General.* When practicable, the trustee(s) should seek the participation of the responsible party(ies) in the natural resource damage assessment process. Such participation is not mandatory and is at the discretion of the trustee(s).

(b) *Prespill activities.* The trustee(s) is encouraged to invite the participation of the potential responsible party(ies) in prespill planning activities authorized in § 990.16 of this part. Where practicable, such prespill planning shall be in connection or coordination with the development of Area Contingency Plans authorized under section 4202 of OPA. In their prespill plans, the trustee(s) and potential responsible party(ies) may consider, but not be limited to, the following: identification of likely natural resources at risk, possible protective measures taken in the event of a discharge, and identification of personnel and agencies likely involved in the event of a discharge.

(c) *Preassessment activities.* If deemed practicable by the trustee(s), the trustee(s) should invite the responsible party(ies) to participate in the conduct of the Preassessment Phase in accordance with § 990.20 of this part.

(d) *Assessment activities*—(1) Offer to participate. Upon completion of the preassessment and determination by the trustee(s) under § 990.23 of this part to continue assessment procedures under subpart F (EDA) or subpart G (CDA) of this part, the trustee(s) should invite the participation of the identified RP(s) in such assessment actions. Such offer shall be in writing and will serve as the notification under § 990.23(c) of this part. The RP(s) shall have ten calendar days to respond to the trustee's(s') invitation. Sampling or data collection and emergency restoration that are appropriate and necessary during the ten-day waiting period may continue. If the RP(s) has not responded to the trustee(s) in that time, the trustee(s) may continue activities geared towards the conduct of a solo assessment/restoration process.

(2) Development of agreement. If the responsible party(ies) indicates a willingness to participate in further assessment activities, the trustee(s) and RP(s) shall, in good faith, initiate negotiations to develop an enforceable agreement considering the guidance in subsection (f) of this section. However, such negotiations should not prevent the trustee(s) from conducting assessment activities during this time period. Such agreement may address all or any part of the damage assessment and may be conditioned upon the RP(s) agreement to pay trustee costs. If the trustee(s) and RP(s) cannot reach any agreement within 45 calendar days from the first day of negotiations, the trustee(s) may continue activities geared towards a solo assessment/restoration process.

(3) Draft Assessment/Restoration Plan. The participation of the responsible party(ies) must be specifically noted in the Draft Assessment/Restoration Plan

developed under subpart C of this part in order to provide an adequate opportunity for public review.

(e) Restoration activities. The trustee(s) and responsible party(ies) may agree to participate jointly in restoration activities identified in the Restoration Plan developed through any of the assessment procedures identified in this part. In determining whether to invite the responsible party(ies), the trustee(s) may consider, but not be limited to, the following factors:

(1) The willingness of the responsible party(ies) to participate in restoration activities (If the responsible party(ies) has not participated in earlier phases of the assessment, the trustee(s) may also consider the reasons for the responsible party(ies) not participating in those earlier activities.);

(2) The ability (knowledge, expertise, personnel) of the responsible party(ies) to participate in restoration activities; and

(3) The willingness of the responsible party(ies) to pay for restoration activities and for trustee costs.

(f) Jointly-conducted phased assessments.

(1) To encourage cooperative assessments, the trustee(s) and responsible party(ies) are authorized to enter into enforceable agreements to jointly conduct any assessment activities in steps or phases. These enforceable agreements should contain, but are not limited to, the following provisions:

(i) Identification of the step or phase jointly conducted and end product of enforceable agreement (data collection, data analysis, etc.);

(ii) Identification of the activities and responsibilities of the respective parties;

(iii) Conditions for terminating the enforceable agreement;

(iv) Provisions for nonperformance;

(v) Provision that the end product of the enforceable agreement (data, studies, and other information) will be included in the administrative record;

(vi) Provisions for funding for the various activities; and

(vii) An agreement that end products of the joint effort cannot be challenged by either party with collateral data, studies, and other information, collected outside the joint assessment process.

(2) The trustee(s) and responsible party(ies) should stipulate that all data, studies, and other information, jointly collected shall be included in the administrative record at the completion of each enforceable agreement. The trustee(s) and RP(s) should also stipulate that each party to the agreement will be barred from introducing new or different data, studies, or other information collected outside the joint process to challenge the jointly collected data in either a judicial or administrative proceeding under OPA.

(3) A sample enforceable agreement is given in appendix B of this part.

§ 990.18 Compliance with other applicable laws and statutes.

(a) *Worker human health and safety.* All worker human health and safety considerations specified in the NCP for response actions shall also apply to the assessment/restoration process.

(b) *Resource protection.* Before taking any actions under this part, particularly before taking samples or making determinations of restoration or replacement, compliance is required with any applicable statutory consultation or review requirements, including, but not limited to, the Endangered Species Act; the Migratory Bird Treaty Act; the Marine Protection, Research, and Sanctuaries Act; and the Marine Mammal Protection Act, that may govern the taking of samples or in other ways affect alternative management actions.

(c) *State laws.* Nothing in this part shall affect, or be construed or interpreted as preempting, any state or political subdivision thereof from promulgating natural resource damage assessment regulations under applicable state or common law. Nothing in this part shall affect or be construed or interpreted as preempting any state or political subdivision thereof from the use of their applicable natural resource damage assessment regulations under applicable state or common law.

§ 990.19 Review of regulations.

NOAA plans to review and revise as appropriate these regulations as often as necessary, but no less than once every five years.

Subpart B—Preassessment Phase

§ 990.20 Preassessment phase—General.

(a) *Purpose/Scope.* The Preassessment Phase provides for early action in the case of a discharge of oil through a two-step process consisting of: Preassessment Determination, to decide whether to continue with preassessment; and Damage Assessment Determination, to decide which damage assessment procedure to conduct, if any. This process is based on limited data collection and analysis. This part also provides for notification, coordination, estimation of assessment costs, reporting, and emergency restoration.

(b) *Notification.* (1) Notification should be consistent with the NCP. According to the NCP, the OSC or lead response agency generally provides notification to the natural resource trustee(s) when natural resources and/or services may be injured by a discharge of oil. If the trustee(s) learns of an unidentified or unreported discharge of oil, the trustee(s) shall report that discharge to the appropriate authority as designated in the NCP.

(2) After learning of a discharge of oil, the trustee(s) should attempt to notify all other known potential trustees of the possibility of a natural resource damage assessment. Actions taken by the trustee(s) shall be consistent with the NCP and this subpart.

(3) In addition, in accordance with section 1011 of OPA, the OSC or lead response agency shall consult with the affected trustee(s) concerning removal actions.

(c) *Coordination.* The trustee(s) should coordinate the Preassessment Phase with the response agency(ies), as appropriate, consistent with the NCP and prespill plans developed pursuant to OPA. To the extent practicable, the Preassessment Phase should also be coordinated with the trustee(s) whose natural resources and/or services are affected by the discharge of oil. The trustee(s) may invite the RP(s) to participate in the Preassessment Phase.

(d) *Preassessment Phase costs.* (1) Preassessment Phase costs include and are recoverable only for trustee-approved activities that deal directly with preassessment. Examples of preassessment costs include, but are not limited to, costs necessary for: Notification; coordination; Preassessment Determination; Damage Assessment Determination; data collection and analysis; report preparation, and emergency restoration.

(2) Preassessment Phase costs shall not reflect response-related actions and non-incident specific activities performed by the trustee(s) in the management of natural resources and/or services.

(3) The costs stipulated in § 990.20 (d)(1) shall be supported with appropriate and sufficient documentation.

(e) Preassessment Phase Report. At the conclusion of the Preassessment Phase, the trustee(s) shall prepare a Preassessment Phase Report documenting all preassessment actions taken, estimated costs related to those actions, and decisions to proceed with preassessment and damage assessment/restoration actions. If no additional actions are undertaken, the Preassessment Report becomes the Report of Assessment. If the trustee(s) conducts further actions, the

Preassessment Phase Report becomes a part of the Report of Assessment.

§ 990.21 Preassessment phase—preassessment determination.

(a) *Purpose.* Following notification of a discharge of oil, the trustee(s) shall conduct a Preassessment Determination to decide whether to continue with the Preassessment Phase.

(b) *Scope.* The trustee(s) shall gather readily available information on the nature of the discharge and environmental setting, i.e., circumstances of the discharge incident, oil characteristics, nature of the receiving environment, and natural resources and/or services characteristics.

(c) *Conditions.* Using such information, the trustee(s) will decide if the following conditions are met:

(1) The discharge does not qualify for an exclusion under section 1002(c) of OPA;

(2) Trust natural resources, as defined by OPA, and/or services may be adversely affected by the discharge; and

(3) There is a reasonable probability that the trustee(s) can make a successful damage claim based on the scientific, economic, and legal merits of the case, i.e., potential for injury resulting from the discharge and successful and meaningful restoration and/or compensation.

(d) *Continuing with preassessment.* If these conditions are met, the trustee(s) may continue with the Preassessment Phase. If all conditions are not met, further preassessment activities should not be conducted.

§ 990.22 Preassessment phase—damage assessment determination.

(a) *Purpose.* Following the decision to proceed with the Preassessment Phase, the trustee(s) collects data sufficient to decide which damage assessment procedures to conduct, if any.

(b) *Scope.* Damage Assessment Determination requires that the trustee(s):

(1) Characterize the discharge and environmental setting based on similar but more detailed data collection and analysis efforts conducted in Preassessment Determination, encompassing circumstances of the discharge incident, oil characteristics, nature of the receiving environment, and natural resources and/or services characteristics;

(2) Determine potential exposure based on direct and indirect exposure or the threat of exposure;

(3) Determine potential injury based on physical, chemical, biological, or other attributes of the natural resource and/or service;

(4) Characterize the potential risk (probable cause-effect associations) to natural resources and/or services based on the weight of evidence and best professional judgment of the information developed above;

(5) Estimate extent of injury to natural resources and/or services based on spatial and temporal boundaries; and

(6) Estimate damages based on possible environmental and/or economic values, likely cost of restoration actions, and all assessment-related costs.

(c) Additional injury determination studies. If the trustee(s) determines that no further assessment activities are to be conducted, but that additional information regarding the discharge may be beneficial, the trustee(s) with or without the RP(s) may decide to conduct limited injury determination studies to collect additional information verifying that no significant injury to natural resources and/or services has resulted from the discharge. Where no injury is identified, the costs of such studies are not recoverable under this subpart and shall be borne by the trustee(s). Should such additional studies indicate that significant and quantifiable injury has occurred to natural resources and/or services, the trustee(s) may reinitiate the Preassessment Phase and the costs are then part of the assessment costs.

§ 990.23 Preassessment phase—damage assessment selection.

(a) *Decision on type of assessment.* The trustee(s), at his discretion, may select any of the following assessment procedures at the completion of the Preassessment Phase:

(1) Compensation Formula;

(2) Type A model;

(3) Expedited Damage Assessment (EDA); or

(4) Comprehensive Damage Assessment (CDA).

(b) *Parallel assessments.* The trustee(s) may use more than one procedure for a discharge of oil, provided there is no double counting.

(c) *Responsible Party option.* The RP(s) may request the trustee(s) to conduct an EDA or CDA procedure, so long as the costs of that study are provided by the RP(s) in advance of conducting the procedure.

(d) *Estimates.* Using the estimates developed in § 990.22(b)(6), the trustee(s) should select the assessment procedure(s) that is reasonable. These estimates will necessarily be of a preliminary nature, subject to change as more information is obtained. The trustee(s) may select from the procedures identified in subparts D, E, F, and G of this part.

(e) *General considerations.* The trustee(s) should examine the following general considerations for the most appropriate damage assessment procedure:

(1) The size and nature of the discharge and environmental setting;

(2) The extent to which the discharge of oil is expected to cause injury to natural resources and/or services;

(3) The expected environmental and/or economic values provided by those affected natural resources and/or services;

(4) The extent to which response actions carried out or planned will avoid further injury to natural resources and/or services without further action;

(5) The extent to which the discharge meets the conditions for using the selected damage assessment procedures;

(6) The extent to which injury to natural resources and/or services can be determined with available information and quantification methods;

(7) The extent to which restoration alternatives can return injured natural resources and/or services to their baseline or comparable conditions;

(8) The extent to which damages based upon injury to natural resources and/or services can be determined with available information and quantification methods; and

(9) Whether the anticipated damage assessment procedure(s) is cost effective.

(f) *Specific factors.* The trustee(s) should consider the following specific factors in selecting a particular damage assessment procedure.

(1) *Compensation formulas.* The Compensation Formulas require the least amount of information concerning the discharge. All information necessary for the use of the procedures is likely gathered during the Preassessment Phase. Procedures for conducting the compensation formulas are found in subpart D of this part. The trustee(s) shall consider, but not be limited to, the following factors when determining whether use of the compensation formulas is appropriate:

(i) The amount of the discharge is between 10 gallons and 50,000 gallons, 24 hours after the discharge begins;

(ii) The likely injury and damages resulting from the discharge are appropriate for calculation using the compensation formulas as described in either: "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Estuarine and Marine Environments, Volumes I–IV" or "Compensation Formula for Natural Resource Damage Assessments

under OPA: Oil Spills into Inland (Freshwater) Waters, Volumes I–III"; and

(iii) The discharge is of the nature where the accurate quantification of injury and damages would not be cost-effective in the determination of the trustee(s).

(2) *Type A models.* Any one of the Type A models found at 43 CFR part 11 subpart D may be used to determine the damages resulting from a discharge. Procedures for conducting the Type A models are found in subpart E of this part. The trustee(s) shall consider, but not be limited to, the following factors when determining whether use of a Type A model is appropriate:

(i) The conditions of the discharge are sufficiently similar to the conditions of 43 CFR 11.33(b);

(ii) The compensation formulas of subpart D of this part are not sufficient alone to estimate the injury and damages resulting from the discharge; and

(iii) There is no other cost-effective procedure available to estimate the injury and damages resulting from the discharge.

(3) *Expedited Damage Assessment (EDA).* This procedure focuses the trustee(s) on determining and quantifying injuries to selected natural resources and/or services. Procedures for conducting an EDA are found in subpart F of this part. The trustee(s) may determine that the use of an expedited damage assessment procedure is appropriate after considering, but not limited to, the following factors:

(i) The use of the compensation formula or Type A model alone may not sufficiently account for the injury and damages resulting from the discharge;

(ii) There is readily available information on the nature of the discharge and its effect on natural resources and/or services;

(iii) The injury and damages resulting from the discharge can be adequately calculated by conducting limited, focused injury determination/quantification and compensable values studies as outlined in subpart F of this part; or

(iv) Potential restoration actions can be implemented without complex, prolonged injury determination/quantification and compensable values studies.

(4) *Comprehensive Damage Assessment (CDA).* The trustee(s) may determine that the circumstances of the particular discharge will require a more lengthy and detailed damage assessment. Procedures for conducting a CDA are found in subpart G of this part. The trustee(s) shall consider, but not be limited to, the following factors in selecting a CDA:

(i) The injury and damages resulting from the discharge can best be determined through a complex, prolonged process, involving a broad scope of injury determination/quantification and compensable values studies;

(ii) Information concerning the nature of the discharge and its effects on the natural resources and/or services at risk is not readily available; and

(iii) Potential restoration actions cannot be determined or implemented without substantive injury determination/quantification and compensable values studies.

§ 990.24 Preassessment phase—data collection and analysis.

(a) *Purpose.* The purpose of data collection and analysis (data collection) in the Preassessment Phase is to ensure that there is sufficient information to evaluate the risk to natural resources and/or services resulting from the discharge of oil.

(b) *Scope.* (1) The trustee(s) may conduct limited data collection throughout the Preassessment Phase.

(2) Only information on natural resources and/or services that is related to the discharge, and considered relevant to the assessment process, restoration alternatives likely to be implemented, and/or compensable values, should be collected. Such information serves as the basis for the Assessment Phase.

(3) When practicable, data collection protocols and Quality Assurance (QA) procedures should follow the guidance provided in subpart C of this part.

(4) When reasonably practicable, the trustee(s) should collect the following types of information during the Preassessment Phase:

(i) Data necessary to make a determination to proceed with the Preassessment Phase;

(ii) Ephemeral or perishable data that may be lost if not collected immediately; and

(iii) Necessary data that serves as the basis for the selected damage assessment procedure, the absence of which data would prevent the trustee(s) from proceeding with damage assessment determination of § 990.23, i.e., input into the compensation formulas or Type A models, or the study design for the EDA or CDA.

(5) The trustee(s) is encouraged to collect baseline, reference, control, or other necessary information to determine the appropriate assessment procedures to the extent that such information is available or can be readily determined.

§ 990.25 Preassessment phase—emergency restoration.

(a) *Purpose.* After notification and during response, the trustee(s), with the approval of the OSC, may undertake emergency restoration such that it does not interfere with response actions. Emergency restoration is deemed necessary to restore natural resources and/or services in those limited situations where the imminent loss of that resource and/or service may occur before any assessment of injury and restoration plan could be developed and implemented.

(b) *Costs.* Any costs associated with emergency restoration may be claimed as part of the damage claim or as uncompensated claims under section 1012(a)(4) of OPA.

Subpart C—Draft Assessment/Restoration Plan

§ 990.30 Draft assessment/restoration plan—general.

(a) *Purpose.* The purpose of the Draft Assessment/Restoration Plan (DARP) is to ensure that the assessment/restoration is performed in a planned, cost-effective, and systematic manner, and provide for public review and comment of the restoration plans as required under section 1006 of OPA.

(b) *DARP requirement.* The trustee(s) shall develop plans for the assessment of damages and restoration of natural resources and/or services affected by the discharge. These plans shall be developed in accordance with the requirements and procedures provided in this subpart and in subparts D, E, F, and G of this part.

(c) *Prespill plans.* To the maximum extent practicable, a DARP developed by the trustee(s) under this subpart shall be consistent with any applicable prespill plans completed under § 990.16, unless the trustee(s) justifies and documents the departure from such plans.

(d) *Administrative Record, Report of Assessment.* The DARP, along with any significant modifications and associated comments and responses, shall be placed in the administrative record. The DARP, as modified after public review, as appropriate, is the basis of the Report of Assessment.

(e) *Plan approval.* The trustee(s) shall have final approval as to the content and development of the DARP.

(f) *NEPA compliance.* The DARP shall be developed in order to fulfill applicable NEPA requirements.

§ 990.31 Draft assessment/restoration plan—content.

(a) *General.* (1) The DARP shall address the four major components of the Assessment Phase, the:

(i) Injury determination component, i.e., results of injury determination studies, to the extent they are known, with documentation of those results;

(ii) Injury quantification component, i.e., the results of quantification studies, to the extent they can be calculated, with documentation of those results;

(iii) Restoration planning component, i.e., the evaluation, selection, and estimated cost of planned restoration actions; and

(iv) Compensable values component, i.e., valuation studies planned, subject to § 990.32(c)(4) of this part, with the results of those studies if deemed appropriate by the trustee(s).

(2) For CDAs, where there are prolonged (multi-year) plans, the trustee(s) need not develop all components of the DARP simultaneously, but may develop annual reports to update the DARP as the assessment progresses.

(b) *DARP information requirements.* The DARP should include:

(1) A brief identification of the discharge of concern based upon information from the Preassessment Phase;

(2) Descriptions of the natural resources and/or services involved;

(3) A statement of authority for asserting trusteeship, or co-trusteeship, for those natural resources and/or services considered in the DARP;

(4) The Preassessment Phase Report; and

(5) Those requirements of each of the assessment procedures, described in subparts D, E, F, and G of this part, used by the trustee(s).

(c) *Level of detail.* The level of detail for each component of the DARP shall be consistent with what is appropriate for the type of assessment procedures being conducted.

§ 990.32 Draft assessment/restoration plan—development.

(a) *Timing of DARP development.* (1) Following the development and trustee approval of the injury determination and quantification components of the DARP, the trustee(s) should implement those components of the DARP to the extent practicable.

(2) As data are produced in the injury determination and quantification components, the trustee(s) should complete the restoration component and the design of the compensable values component for the injured natural resources and/or services.

(b) *Development requirements for multiple trustees.* The trustee(s) should fulfill the following requirements in developing a DARP for assessments in which there are multiple trustees:

(1) A lead administrative trustee should be designated to administer the DARP. The lead administrative trustee should act as coordinator and contact regarding all aspects of the DARP.

(2) The trustees are encouraged to cooperate and coordinate any DARP that involves coexisting or contiguous natural resources or concurrent jurisdiction. They may arrange to divide responsibility for implementing the components of the assessment in any manner that is agreed upon by all of the affected natural resource trustees.

(c) *Public involvement.* (1) Injury determination and quantification components of the DARP. The trustee(s) shall provide notification of the selection of the methodologies used to determine and quantify injury to natural resources and/or services pursuant to the compensation formula, Type A model, and the EDA. The trustee(s) shall provide formal public review and comment for the injury determination and quantification components of the CDA.

(2) Restoration planning component of the DARP. The trustee(s) must provide for public notice and comment of the restoration planning component of the DARP. Where there is no Regional Restoration Plan developed and adopted following public review and comment pursuant to prespill planning, as described in § 990.16 of this part, the trustee(s) must provide for public review and comment of the restoration component of DARPs developed pursuant to the compensation formula, Type A model, EDA, and CDA. Where a Regional Restoration Plan has been developed and adopted following public review and comment pursuant to prespill planning as described in § 990.16 of this part, the trustee(s) must provide for public notice, review and comment of the intent to apply one or more recoveries from a compensation formula or Type A assessment to the Regional Restoration Plan. The trustee(s) must provide for public review and comment of the restoration components of DARPs developed pursuant to an EDA or CDA.

(3) The trustee(s) may provide for public notification or review of the compensable values component of the DARP, subject to § 990.32(c)(5) of this part.

(4) Public review period. Where the trustee(s) is required to provide a minimum for public review and comment, the trustee(s) must provide a minimum of 30 calendar days for public review and comment. The trustee(s) may grant reasonable extensions for that review.

(5) Exception to public notification, review, and comment. It is at the discretion of the trustee(s) to provide for notification, review, and comment of those portions of the DARP concerning the calculation of compensable values. The trustee(s) may further withhold the description of studies and methodologies for determining the damages for the compensable values from public review and comment. Such damages are still afforded the rebuttable presumption, but may not be eligible for judicial review on the record.

(6) Method of publication. Notification or publication of a DARP may be provided in a publication of local, state, regional, or national circulation, as deemed appropriate to the scope of the assessment/restoration by the trustee(s).

(d) *Modification.* (1) The DARP may be modified at any stage of the assessment/restoration process as new information becomes available.

(2) Any modification to that portion of the DARP that has been the subject of review and comment that, in the judgment of the trustee(s), is significant shall be made available for review and comment for a period of at least 30 calendar days, with reasonable extensions granted as appropriate, before tasks subject to modification are begun.

(3) Any modification to the DARP that in the judgment of the trustee(s) is not significant may be made available for review at the discretion of the trustee(s), but the implementation of such modification need not be delayed as a result of such review.

(e) *DARP implementation by RP(s).* At the option of the trustee(s) and if agreed to by any RP(s) acting jointly, the RP(s) or any other party under the direction, guidance, and monitoring of the trustee(s) may implement all or any part of the DARP as approved by the trustee(s). Any decision to involve the RP(s) shall be documented in the DARP.

§ 990.33 Draft assessment/restoration plan—other elements.

(a) *Protocols.* Selection of specific data collection protocols in damage assessment is left to the discretion of the trustee(s). In general, protocols should be applicable to the discharge and environmental setting, cost-effective, and provide information consistent with data quality requirements.

(b) *Quality Assurance (QA).* The trustee(s) may implement or modify existing, or develop new quality

assurance (QA) program and project plans relative to the requirements and constraints of incident.

(c) *Data Management.* Where appropriate, the trustee(s) should develop a data management plan to accommodate the input, uses, needs, and access for the data.

Subpart D—Compensation Formulas

§ 990.40 Compensation formulas—general.

(a) *General.* Based upon best professional judgment, the trustee(s) may determine damages as compensation for injury to natural resources and/or services using the compensation formulas authorized by this subpart for all or part of the assessment. The formulas may be used by the trustee(s) for discharges of oil ranging from ten gallons to 50,000 gallons and where the trustee(s) determines that there has not been a significant loss in passive use values.

(b) *Seasons.* For the purposes of this subpart, the seasons of the year are defined as follows:

(1) Winter=January 1 through March 31;

(2) Spring=April 1 through June 30;

(3) Summer=July 1 through September 30; and

(4) Fall=October 1 through December 31.

(c) *Incorporation by reference.* The following publications are incorporated by reference:

(1) "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Estuarine and Marine Environments," Volumes I–IV. Available from DART, Suite 604, 1825 Connecticut Avenue, N.W., Washington, DC 20235.

(2) "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters," Volumes I–III. Available from DART, Suite 604, 1825 Connecticut Avenue, N.W., Washington, DC 20235.

(d) *Damage claim.* (1) The damages include the compensation formula result plus any damages computed by the trustee(s) due to beach and/or shoreline closure, plus for inland (freshwater) waters damages due to lost boating days, plus the reasonable costs of conducting the assessment. Additional damages determined through other assessment methods may also be included so long as there has been no double counting. This damage figure is included in the Report of Assessment and the Demand under §§ 990.80 and 990.81 of this part, and is documented in the administrative record.

(2) Damages calculated using one of the compensation formulas provided in subpart D of this part are conclusive for the injuries included in that formula. Judicial review of the demand shall be limited to the applicability of the formula and the accuracy of any site-specific input data.

(e) *Final Restoration Plan.* Based upon the final damages recovered, the trustee(s) shall develop a restoration component plan, either implementing restoration actions identified in a prespill Regional Restoration Plan or as an incident-specific plan as provided by subpart H of this part.

§ 990.41 Compensation formulas—estuarine and marine formula.

(a) *Use of estuarine and marine formula.* To use the Estuarine and Marine formula, the trustee(s) must identify:

(1) Whether the discharge occurred in a marine, estuarine, subtidal, or intertidal area using the definitions given in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA; Oil Spills in Estuarine and Marine Environments;"

(2) Location of discharge, using the boundaries and definitions of the provinces provided in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA; Oil Spills in Estuarine and Marine Environments," to determine in which province the discharge occurred;

(3) Habitat type that typifies the habitat affected by the discharge using definitions provided in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA; Oil Spills in Estuarine and Marine Environments;"

(4) Type of oil discharged as determined by the definitions provided in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills in Estuarine and Marine Environments;"

(5) Amount discharged. The trustee(s) shall subtract from the total amount discharged the trustee's(s') estimate of the volume of oil that is cleaned up within 24 hours from the beginning of the discharge, if the cleanup is from the water. Cleanup from shorelines shall not be subtracted;

(6) Season of discharge, as defined in § 990.40 of this subpart; and

(7) Amount of beach and/or shoreline closed, if any, determined by linear measure and days closed.

(b) *Determining damage figure.* The trustee(s) should:

(1) Determine the damages using the estuarine and marine compensation formula based upon the requirements of this subsection and "Volumes I through IV—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA; Oil Spills in Estuarine and Marine Environments;"

(2) Determine the appropriate habitat/province scenario using "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills in Estuarine and Marine Environments." Locate the table in Appendix A corresponding to the season discharge and the type of oil discharged using the scenario and volume discharged, identify the applicable formula. Compute the damage figure as instructed in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA; Oil Spills in Estuarine and Marine Environments;" and

(3) Determine damages for beach and/or shoreline closure by identifying the linear measure of beach and/or shoreline closed, in accordance with Volume III of the "Compensation Formula for Natural Resource Damage Assessments under OPA; Oil Spills in Estuarine and Marine Environments," and multiplying the length by the time period for which the beach and/or shoreline was closed.

§ 990.42 Compensation formulas—inland (freshwater) waters formula.

(a) *Use of Inland (Freshwater) formula.* To use the Inland (Freshwater) Waters formula, the trustee(s) must identify:

(1) The appropriate freshwater habitat in which the discharge occurred, as defined in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters;"

(2) Location of the discharge, using the boundaries and definitions of the provinces provided in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters;" to determine in which province the discharge occurred;

(3) Habitat type that typifies the habitat affected by the discharge using definitions provided in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under

OPA: Oil Spills into Inland (Freshwater) Waters;"

(4) The type of oil discharged as determined by the definitions provided in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters;"

(5) Amount discharged. For those large water bodies identified in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters;" the trustee(s) may subtract from the total amount discharged the trustee's(s') estimate of the volume of oil that is cleaned up within 24 hours from the beginning of the discharge, if the cleanup is from the water. Cleanup from all other inland (freshwater) waters and from shorelines shall not be subtracted;

(6) Season of discharge, as defined in § 990.40 of this subpart;

(7) Amount of shoreline and/or beach closed, if any, determined by linear measure; and

(8) Amount of recreational boating area closed, if any, determined by square kilometer.

(b) *Determining damage figure.* The trustee(s) should:

(1) Determine the damages using the Inland (Freshwater) Waters compensation formula based upon the requirements of this subsection and "Volumes I through III—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA; Oil Spills in Inland (Freshwater) Waters;"

(2) Determine the appropriate habitat/province scenario using "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills in Inland (Freshwater) Waters." Locate the table in Appendix A corresponding to the season discharge and the type of oil discharged using the scenario and volume discharged, identify the applicable formula. Compute the dollar figure as instructed in "Volume I—Technical Documentation" of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters;"

(3) Determine damages for beach and/or shoreline closure by identifying the linear measure of beach and/or shoreline closed in accordance with Volume III of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters," and multiplying the length by the time period for which the beach and/or shoreline was closed; and

(4) Determine damages for lost recreational boating closure by identifying the square kilometers closed and multiplying by the density of use and value per day as found in Volume III of "Compensation Formula for Natural Resource Damage Assessments under OPA: Oil Spills into Inland (Freshwater) Waters," and the number of days the area was closed.

Subpart E—Type A Models

§ 990.50 Type A models—general.

(a) The trustee(s) may use a computer model for natural resource damage assessments under OPA.

(b) The trustee(s) shall document the use of a computer model through the development of the DARP under subpart C of this part.

§ 990.51 Type A models—natural resource damage assessment model for coastal and marine environments, version 1.2.

(a) The trustee(s) may use the Natural Resource Damage Assessment Model for Coastal and Marine Environments (NRDAM/CME), Version 1.2, incorporated by reference in 43 CFR 11.18 and 11.41. The trustee(s) must show that the conditions of the discharge are sufficiently similar to the conditions of 43 CFR 11.33(b).

(b) The assessment component for application of the NRDAM/CME will contain the items required in 43 CFR 11.41(c), which are the inputs required to apply the NRDAM/CME.

(c) *Damage claim.* The total damage figure includes the result of the application of the NRDAM/CME plus the reasonable costs of conducting the assessment. This damage figure is included in the Report of Assessment and the Demand under §§ 990.80 and 990.81 of this part and documented in the administrative record.

(d) *Restoration.* Based upon the final damages recovered, the trustee(s) shall develop a restoration component plan, either implementing restoration actions identified in the prespill plan developed under § 990.16(a) or as an incident-specific plan under subpart G of this part.

Subpart F—Expedited Damage Assessment

§ 990.60 Expedited damage assessment—general.

(a) *Purpose/Scope.* The purpose of an EDA is to determine and quantify injury based on limited, focused studies in order to facilitate restoration as soon as possible. This subpart provides the trustee(s) with guidance and procedures for selecting and undertaking an EDA.

(b) *Scope of natural resources and services.* The trustee(s) should focus injury determination and quantification on those resources that are of commercial, recreational, or ecological importance or of special significance as deemed by the trustee(s).

(c) *Time frame.* Where possible, the trustee(s) should complete the Assessment Phase, including, but not limited to, the development of a restoration component within two years from the date of the discharge. This time frame, however, is not mandatory. The trustee(s) need not complete the Assessment Phase before beginning to prepare the damage claim, undertake settlement negotiations, if appropriate, provide public review of the restoration component and finalize the restoration plan.

(d) *EDA costs.* EDA costs cover the same categories as those defined in a CDA, including costs associated with injury determination and quantification, restoration planning, and compensable values determination. However, costs associated with injury determination and quantification should be limited to the focused studies undertaken.

(e) *Administrative Record.* The trustee(s) should document all pertinent activities and decisions within the Administrative Record, as with a CDA.

§ 990.61 Expedited damage assessment—selection.

(a) *Guidelines.* The trustee(s) should examine the various guidelines in evaluating whether an EDA is appropriate for a given discharge and exercise best professional judgment in making the final determination. Factors to be considered by the trustee(s) include, but are not limited to:

(1) The use of the compensation formulas or Type A models alone would not sufficiently account for the injury and damages resulting from the discharge.

(2) There is readily available information on the nature of the discharge and its effect on natural resources and/or services.

(3) The injury and damages resulting from the discharge can be adequately calculated by conducting limited, focused injury determination/quantification and compensable values studies.

(4) Potential restoration actions can be implemented without complex, prolonged injury determination/quantification and compensable values studies.

(b) [Reserved].

§ 990.62 Expedited damage assessment—objectives and approach.

(a) The objectives of an EDA are to:

(1) expeditiously determine and quantify injuries to selected natural resources and/or services resulting from a discharge using limited, focused studies and baseline or reference/control information, and

(2) Provide the basis for restoration and recovery of natural resources and/or services.

(b) To achieve these objectives, the EDA procedure consists of: (1) Injury determination; (2) Injury quantification; (3) Restoration; and (4) Compensable values.

§ 990.63 Expedited damage assessment—injury determination.

(a) *General.* Injury resulting from (or caused by) a discharge of oil has been determined when the trustee(s) has demonstrated that:

(1) With direct exposure,

(i) The natural resource was exposed;

(ii) There is a pathway between the discharge and exposed natural resource; and

(iii) The exposure of oil, its components, or by-products has been shown by rigorous and appropriate scientific methodology to have an adverse effect on the natural resource in laboratory experiments or the field; or

(2) In the absence of direct exposure,

(i) The adverse effect on or impaired/diminished use of a natural resource has been shown by rigorous and appropriate scientific methodology; and

(ii) The adverse effect on or impaired/diminished use of the natural resource would not have occurred but for the fact of the discharge or threat of a discharge. The trustee(s) should establish baseline or reference/control conditions from which changes in environmental and biological parameters may be measured.

(b) *Contributing factor.* Where multiple factors may have contributed to an indivisible injury to a natural resource and/or service, the discharge of oil may be considered a contributing factor to the injury.

(c) *Exposure.* The trustee(s) shall confirm that at least one of the natural resources and/or services identified as potentially injured in the Preassessment Phase has been exposed or threatened to be exposed to the oil. To confirm exposure, the trustee(s) should determine that:

(1) The natural resource was exposed to the discharge; and

(2) There is a pathway between the discharge and the exposed natural resource.

(d) *Identify natural resources and services.* The trustee(s) should identify those natural resources and services for which injury determination and quantification will be conducted. Eligible natural resources will include those that are of recreational, commercial, or ecological importance, or of special significance.

(e) *Initiate early restoration planning.* The trustee(s) should begin the restoration planning process by developing a restoration Scoping Statement to identify potential restoration alternatives to remedy the effects of the discharge of oil. In undertaking restoration planning for an EDA, the trustee(s) should refer to §§ 990.73, 990.74, 990.75 and subpart G to supplement the guidance provided in this section.

(f) *Scope of injuries.* Injuries to natural resources and/or services for which the trustee(s) may claim damages will, by definition, be limited relative to a CDA, and may include, but not limited to, mortality, sublethal effects, and lost or diminished services. Categories of injury which meet the acceptance criteria specified in § 990.71(e) and which are appropriate to the EDA are currently being developed.

(1) Mortality. (i) The trustee(s) may derive estimates of acute mortality to fish and wildlife resources from body counts in the affected area in accordance with acceptable procedures such as the American Fisheries Society Fish-Kill Investigations (See PART II of "Monetary Values of Freshwater Fish and Fish-Kill Counting Guidelines," American fisheries Society Special Publication Number 13, 1992). In addition, the trustee(s) may determine acute mortality using standard, laboratory toxicity testing or acceptable models.

(ii) Where appropriate, the trustee(s) shall identify direct mortality of the flora resulting from the oil. Surveys may be employed to estimate both initial and delayed mortality.

(iii) The trustee(s) may estimate indirect mortality such as starvation, failure to nest, and hatching failure, loss of critical habitat from the existing literature or from limited, focused studies.

(2) Sublethal effects. The trustee(s) should identify sublethal effects that the trustee(s) deems significant and that can be documented with limited, focused studies. Sublethal effects may include, but are not limited to, reproductive impairment, reduction in growth rates of the flora and/or fauna, and changes in species diversity and abundance utilizing the habitat.

(3) Services. The trustee(s) should determine injury to services.

(i) The trustee(s) should inventory all services provided by the resource prior to the discharge and identify those lost or diminished, or expected to be lost or diminished. Services that may be considered for an EDA include, but are not limited to, recreational, commercial, ecological, and those of special significance.

(ii) The trustee(s) should determine whether there are adequate baseline data to support the calculation of lost or diminished services.

§ 990.64 Expedited damage assessment injury quantification.

(a) *General.* The trustee(s) should quantify injuries to natural resources and/or services identified through injury determination. The trustee(s) should also establish the extent of the lost or diminished services. Quantification of natural resources and/or services can be accomplished through before-after (using baseline data) or reference/control-impact study designs, using combined (at the community/population level) and/or individual (at the organism/biomarker effects level) injuries.

By definition, EDA quantification will be scaled down relative to the CDA.

(b) *Develop Restoration Component.* The trustee(s) shall develop the restoration component pursuant to the guidance in §§ 990.73–990.76 of this part.

(c) *Compensable Values Component.*

(1) The trustee(s) should develop the compensable value component by:

(i) Determining the lost services associated with the restoration components;

(ii) Identifying the appropriate measurement methods to estimate the compensable values of those services; and

(iii) Implementing these methods.

(2) Estimating compensable values may be based on site-specific analysis, provided such analysis falls within the trustee's(s') general time parameters prescribed by the EDA. Assignment of compensable values may also be based on estimates, equations, models, or data from existing valuation studies through the use of benefits transfer.

(3) The trustee(s) should follow the guidance in §§ 990.77–990.79 of subpart G in developing the compensable values component of an EDA.

Subpart G—Comprehensive Damage Assessment (CDA)

§ 990.70 Comprehensive damage assessment—general.

(a) *Purpose/Scope.* The purposes of the CDA are to:

(1) Comprehensively determine the nature and extent of injury to natural resources and/or services;

(2) Develop a restoration plan to remedy that injury; and

(3) Determine the total compensable values for discharges requiring a complex, prolonged assessment/restoration process as deemed necessary by the trustee(s). The CDA consists of Injury Determination, Injury Quantification, Restoration, and Compensable Values.

(b) *CDA costs.* CDA costs include those costs associated with injury determination and quantification, restoration planning, and compensable values determination. Costs incurred should be limited to those the trustee(s) considers necessary.

(c) *Administrative Record.* The trustee(s) should document all pertinent activities and decisions within the Administrative Record. The Administrative Record should provide the rationale for conclusions regarding each component of the CDA process.

§ 990.71 Comprehensive damage assessment—Injury determination.

(a) *Purpose/Scope.* (1) The purpose of injury determination in a CDA is to verify or modify the nature of the injury to natural resources and/or services resulting from the discharge of oil.

(2) Injury determination in a CDA should be made for natural resources and/or services that can be restored or for which the public can be compensated.

(3) Should the trustee(s) be able to document the nature of the injury to the natural resources and/or services resulting from the discharge of oil, he should then proceed to Injury Quantification. If the trustee(s) is unable to determine the nature of the injury to the natural resources and/or services resulting from the discharge, further assessment efforts should be terminated and the results of the Injury Determination documented in the Report of Assessment.

(b) *Objectives and study designs.* The trustee(s) should develop objectives governing the overall CDA and for the individual component studies. The trustee(s) should also develop individual study designs to serve as the framework for the CDA.

(c) *Injury determination.* Once the individual study designs are complete, the trustee(s) should then document the nature of the injury resulting from the discharge of oil. Injury resulting from (or caused by) a discharge of oil has been determined when the trustee(s) has demonstrated that:

(1) With direct exposure,

(i) The natural resource was exposed;

(ii) There is a pathway between the discharge and exposed natural resource; and

(iii) The exposure of oil, its components, or by-products has been shown by rigorous and appropriate scientific methodology to have an adverse effect on the natural resource in laboratory experiments or the field; or

(2) In the absence of direct exposure,

(i) The adverse effect on or impaired/diminished use of a natural resource has been shown by rigorous and appropriate scientific methodology; and

(ii) The adverse effect on or impaired/diminished use of the natural resource would not have occurred but for the fact of the discharge or threat of a discharge.

(d) *Contributing factor.* Where multiple factors may have contributed to an indivisible injury to a natural resource and/or service, the discharge of oil may be considered a contributing factor to the injury.

(e) *Injury criteria.* The method for determining injury should be chosen based on the capability of the method to demonstrate an effect on or impaired/diminished use of a natural resource. For any injury to be considered such under this proposed rule, the trustee(s) must satisfy the following acceptance criteria:

(1) For natural resources,

(i) The exposure to oil, its components, or by-products has been demonstrated to cause an adverse effect on the natural resource in laboratory experiments or the field; and

(ii) The measurement for a natural resource adverse effect is cost-effective and can be obtained through the application of a scientifically rigorous and appropriate methodology.

(2) For resource services,

(i) The use of a natural resource has been demonstrated to be impaired/diminished; and

(ii) The measurement for impaired/diminished use is cost-effective and can be obtained through the application of a scientifically rigorous and appropriate methodology.

(f) *Categories of injury.* Categories of natural resource and/or service injury for the CDA (as well as the EDA) that meet the acceptance criteria specified in (e) for discharges of oil are currently being developed.

§ 990.72 Comprehensive damage assessment—Injury quantification.

(a) *Purpose/Scope.* (1) The purpose of injury quantification is to determine the extent of effects on natural resources and/or services resulting from the discharge as defined in the proposed rule.

(2) The trustee(s) has the option to measure the change in the natural resource itself, or directly in the services. The trustee(s) is encouraged to use whichever approach proves to be most appropriate for the natural resources and/or services being considered.

(3) Should the trustee(s) be able to quantify injury to natural resources and/or services resulting from the discharge of oil, the trustee(s) should then proceed to the restoration component. If the trustee(s) is unable to quantify injury, further assessment efforts should be terminated and the results of the injury quantification documented in the Report of Assessment.

(b) *Quantification of injury.* (1) For quantifying injury to natural resources, the trustee(s) may quantify the injury to the natural resources themselves and translate that injury to the reduction in services provided by the resources prior to the discharge.

(2) For quantifying injury to services where there are insufficient data to quantify a natural resource injury or where there is no associated injured natural resource, the trustee(s) may directly quantify the reduction in the services resulting from the discharge.

(3) If the trustee(s) chooses to quantify the natural resource injury, the trustee(s) should determine the:

(i) Extent to which the natural resource injuries have occurred;

(ii) Extent to which the injured natural resources differ from baseline or reference/control conditions;

(iii) Services normally provided by the injured natural resources; and

(iv) Reduction of services resulting from the discharge of oil.

(4) To quantify the injury to services, the trustee(s) should determine the:

(i) Extent of impaired/diminished services; and

(ii) Extent to which the level of impaired/diminished services differs from baseline and/or reference/control conditions.

(c) *Quantification methods.* (1) Specific natural resources and/or services to quantify should be selected based upon the: extent to which a particular natural resource and/or service is affected; extent to which a given natural resource and/or service can be used to represent a broad range of related resources and/or services; consistency of the quantification method with the requirements of the compensable values determination component to be used; ability to quantify changes in a given natural resource and/or service at reasonable cost; and preliminary estimates of services.

(2) The trustee(s) should consider before-after (using baseline data) or reference/control-impact study designs, using combined (at the community/population level) and/or individual (at the organism/biomarker effects level) injuries. Quantification methods appropriate to a CDA are currently being developed.

(d) *Recovery.* The trustee(s) should estimate the time necessary for natural recovery without restoration efforts and beyond response activities. Recovery is defined as a return of natural resources and/or services to baseline or comparable conditions within the limits of natural or other (human-induced) variability.

§ 990.73 Comprehensive damage assessment—restoration/general.

(a) *Purpose.* The purposes of the restoration planning process are to:

(1) Determine the most appropriate restoration alternatives for the recovery of natural resources and/or services resulting from a discharge of oil; and

(2) Estimate the costs of implementing restoration.

(b) *Restoration component.* The restoration component outlines the most appropriate approach to bring about the recovery of the natural resources and/or services to baseline or comparable conditions based upon a consideration of available alternatives.

(c) *Coordination.* Where multiple trustees are involved, coordination and responsibilities may be facilitated through a Memorandum of Understanding (Appendix A). Participation of the RP(s) in the restoration process is encouraged, as described in § 990.17 of this part, and should be identified in the restoration component. The trustee(s), however, has the ultimate responsibility for all restoration activities. A joint enforceable agreement or Memorandum of Agreement (Appendix B) should be considered between the trustee(s) and RP(s) where the RP(s) is involved.

(d) *Emergency restoration.* Consistent with § 990.25, emergency restoration prior to the development of an incident-specific restoration plan is permitted where immediate action is necessary to avoid irreversible loss, or to prevent or reduce continuing danger to natural resources and/or services.

(e) *Restoration costs.* Costs of restoration will include direct and indirect costs. These costs will be one component of the total damage figure.

§ 990.74 Comprehensive damage assessment—restoration component development.

(a) *Requirements.* In developing the restoration component for a CDA, the trustee(s) should:

(1) Develop a restoration Scoping Statement;

(2) Develop the restoration component of the DARP; and

(3) Estimate the costs of implementing the restoration component.

(b) *Restoration scoping statement.* (1) The trustee(s) should develop a restoration Scoping Statement to identify those restoration alternatives that the trustee(s) may consider as potential actions to remedy the effects of the discharge of oil.

(2) The Scoping Statement should:

(i) Include a summary of the natural resources and/or services of concern, an evaluation of the circumstances of the discharge, and the expected injured natural resources and/or services;

(ii) Identify the range of restoration alternatives available to the trustee(s); and

(iii) Identify the opportunity to pool the recovery with other similar recoveries in a given region for a more encompassing restoration plan.

(3) The Scoping Statement should be included in the administrative record.

(4) If prespill plans have been developed that encompass the injured natural resources and/or services, the trustee(s) may decide that a Scoping Statement is not needed.

(c) Restoration component of the DARP.

(1) The restoration component of the DARP should be based on the Scoping Statement and injury determination/quantification studies, and will serve as the basis of the Post-assessment Restoration Plan.

(2) The restoration component of the DARP should:

(i) Include an analysis of the restoration alternatives considered for each natural resource and/or service, and provide the basis for estimating the restoration costs associated with each alternative;

(ii) Identify the preferred restoration approach for each injured natural resource and/or service; and

(iii) Include the results of any feasibility or pilot studies.

(3) The restoration component of the DARP should analyze opportunities for pooling recoveries from multiple cases and identify other statutory review and consultation requirements.

(4) The restoration component of the DARP, including any significant changes, will be made available pursuant to § 990.32(c) of this part.

(d) *Estimate restoration costs.* (1) Once the restoration component is chosen, the trustee(s) must estimate the costs of planning, developing, and implementing that component. These costs shall include both direct and indirect costs.

(2) Direct costs are those that are identified by the trustee(s) as charged directly to the conduct of the selected restoration alternative. Direct costs would include trustee agency expenses for a specific action(s).

(3) Indirect costs are costs associated with a particular action for restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources and/or services where there is no direct way to calculate or attribute them to a particular action(s).

(4) Compensation for indirect costs can be included in the damage claim in one of two ways. The trustee(s) could either identify indirect costs or claim a certain indirect cost rate for expenses.

(5) Restoration component of the damage claim. The estimated restoration costs make up that component of the damage claim representing the costs to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and/or services. These estimates are to be documented in the administrative record.

(e) *Phased Restoration Planning.* NOAA recommends that the trustee(s) should consider undertaking restoration planning in phases. Phased planning and implementation is proposed through an Adaptive Management Approach (AMA). AMA involves a process whereby alternatives can be suggested and tested (i.e., pilot projects) often in small scale before undertaking full scale restoration. Results of initial experiments are then evaluated to select the approach for later projects.

§ 990.75 Comprehensive damage assessment—analysis and selection of restoration alternatives.

(a) *Restoration alternatives.* In developing the restoration component, the trustee(s) should consider the following alternatives. Each alternative may be implemented through one or more options or methods selected by the trustee(s). When mentioned, alternatives imply associated options.

(1) The natural recovery (no-action) alternative should always be considered. Natural recovery may be selected when:

(i) There is evidence that the natural recovery process will be more effective than other available restoration alternatives;

(ii) The resulting natural resources and/or services are predicted to

resemble the original, within the constraints of natural or other (i.e., human-induced) variability, in a time frame not significantly different from that resulting from human intervention;

(iii) Other natural resources and/or services will not be adversely affected prior to the recovery of those originally injured resources and/or services; and

(iv) There are no threats to human health and safety from the length of time for natural recovery.

(2) The restoration alternative, i.e., direct restoration, includes actions undertaken to return injured natural resources and/or services to their baseline conditions.

(3) The rehabilitation alternative includes actions to bring resources and/or services to a state different from baseline conditions but still beneficial to the environment and public.

(4) The replacement alternative includes actions that substitute a natural resource and/or service that provides the same or comparable resources and/or services as those injured.

(5) The acquisition of equivalent natural resources alternative includes obtaining natural resources and/or services that the trustee(s) determines are comparable to those injured. Equivalent natural resources should be acquired to hasten recovery, and protect and maintain the natural resources affected by the discharge.

(6) Each alternative discussed above may be considered individually or combined in various ways, depending upon the factors outlined in § 990.75(b).

(b) *Analysis of restoration alternatives.* As the results of the injury and quantification studies become available, the trustee(s) should revise the list of restoration alternatives developed. The trustee(s) should analyze each alternative taking into account the feasibility, environmental effectiveness, and relative cost described below. If an alternative is unacceptable, it will be eliminated from further consideration. The rationale for this determination must be documented in the administrative record.

(1) Feasibility is determined upon, but not limited to, the following factors: availability of services, materials and equipment; expertise; construction and operational limitations; need or capability of future restoration; and administrative, legal, or regulatory requirements. The trustee(s) should consider technically feasible methods, i.e., those methods that are currently available.

(2) Once the trustee(s) determines that a restoration alternative is feasible, the trustee(s) should then evaluate the environmental effectiveness of the alternative. Effectiveness addresses whether an action accomplishes the goals and objectives of restoration. Effectiveness is dependent upon the:

(i) Extent to which the proposed alternative can return natural resources and/or services to acceptable conditions;

(ii) Extent to which the proposed alternative causes additional injury;

(iii) Extent to which the proposed alternative improves the rate of recovery and success; and

(iv) Level of risk and uncertainty in the success of the proposed alternative.

(3) Simultaneous with environmental effectiveness determination, the trustee(s) should evaluate the expected cost of implementing the alternative relative to other alternatives and its expected benefits. The trustee(s) should consider, among other things:

(i) Significance of the natural resource and/or service to the environment and public;

(ii) Extent to which the alternative benefits more than one resource and/or service;

(iii) Cost of the alternative;

(iv) Relationship of the expected costs to the expected benefits; and

(v) Level of risk and uncertainty in the cost-benefit analysis.

For alternatives that achieve similar benefits and meet the goals and objectives of restoration, the most cost-effective alternative should be chosen. In the event that value estimates are not available, the alternative will be judged on the basis of the increase in the rate of recovery time relative to the costs of the alternative.

(c) *Selection of restoration alternatives.* Based upon the analysis of the restoration alternatives for each category of injured natural resource and/or service, the trustee(s) should select the alternative or some combination thereof that best meets the needs of each injured natural resource and/or service. The trustee(s) should then develop the restoration component of the DARP based upon this selection for each natural resource and/or service.

(d) *Feasibility (pilot) studies.* (1) If restoration alternatives for certain natural resources and/or services are limited or poorly developed, the trustee(s) may implement small-scale feasibility or pilot studies. The costs associated with these actions are recoverable under this proposed rule.

(2) The trustee(s) should coordinate with the OSC prior to proceeding with any feasibility or pilot studies during the Preassessment Phase to ensure that such studies are not incompatible with response activities. The RP(s) may be given the opportunity to participate in such studies, if appropriate.

§ 990.76 Comprehensive damage assessment—evaluation of restoration.

(a) *Recovery and success.* The trustee(s) should define restoration goals, select appropriate criteria for monitoring goal achievement, identify performance standards (endpoints), and measure levels of achievement of those standards in determining recovery and success in restoration.

(b) *Monitoring.* The trustee(s) should evaluate recovery through effective monitoring until recovery is attained without human intervention. To enable the trustee(s) to accomplish this goal:

(1) Monitoring should be sufficiently long to ensure recovery to a stable condition;

(2) All relevant components of the affected environment should be monitored (as it relates to the restoration alternative);

(3) The progress of recovery should be compared with natural changes occurring in similar unaffected reference or control areas;

(4) Sampling should be designed to provide statistically significant and defensible results; and

(5) The monitoring plan should be sufficiently flexible to permit mid-course corrections if the need arises.

(c) Mid-course corrections. Restoration components should incorporate provisions allowing for necessary mid-course corrections. Mid-course corrections should be based upon, but limited to, the:

(1) Nature and extent of the injured natural resources and/or services;

(2) Actual effectiveness of the restoration alternatives; and

(3) Results of monitoring.

§ 990.77 Comprehensive damage assessment—compensable values.

(a) *Purpose.* Section 1006(f) of OPA authorizes the trustee(s) to recover: The cost of restoring, rehabilitating, replacing or acquiring the equivalent of the injured or lost natural resources and/or services; the diminution in value of the injured or lost natural resources pending restoration; plus the reasonable cost of assessing those damages. The purpose of this subpart is to provide guidance to the trustee(s) for estimating the total diminution in value of resources and/or services affected by the discharge, hereinafter referred to as compensable values.

(b) *Requirement.* The trustee(s) shall determine the compensable values resulting from the discharge of oil based upon the information collected during the assessment/restoration process and the guidance provided in this subpart.

(c) *Services.* Before estimating compensable values under this subpart, the trustee(s) should determine the uses of the resources identified in the Injury Quantification component.

(d) *Time period of losses.* Compensable values include, for each affected resource and/or service, the diminution in value of the resource and/or service from the onset of the discharge through the estimated time of full recovery to baseline or comparable conditions, as determined by the trustee(s). As identified in subpart G of this part, to the extent possible, restoration actions will be designed to yield full recovery of the resources and/or services; however, in some cases, only partial recovery may occur. If the resources and/or services will not fully recover with the implementation of the Restoration Plan, the calculation of compensable values will include the value of a perpetual stream of lost services.

(e) *Completion of the Compensable Values Component.* Upon completion of the valuation component, the results shall be briefly described in the Report of Assessment. Those results, combined with the restoration costs and costs of conducting the assessment, shall comprise the trustee(s) damage claim.

(f) Compensable values are the total diminution in value of the injured natural resource(s) and/or services as a result of a discharge, from the onset of the discharge until recovery to baseline or comparable conditions is deemed complete by the trustee(s).

(g) *Compensable values include:*

(1) Direct use value, i.e., the value individuals derive from direct use of a natural resource, including consumptive and nonconsumptive uses, and

(2) Passive use value, i.e., the value individuals place on natural resources that is not linked to direct use of a natural resource by the individual, including the value of knowing the natural resource is available for use of family, friends, or the general public; the value derived from protecting the natural resource for its own sake; and the value of knowing that future generations will be able to use the natural resource.

(h) *Compensable values include, but are not limited to:*

(1) The value of losses to all public uses of natural resources as measured by changes in:

(i) Monetized measures in utility, or consumer surplus,

(ii) Fees or other payments collectable by the government or an Indian tribe for use of the natural resource by a private party, and

(iii) Any economic rent accruing to a private party because the government or Indian tribe does not charge a fee or price for the use of the resource, provided such economic rent is not recovered under a private cause of action; and

(2) In instances where the natural resource trustee(s) is the majority operator or controller of a for-profit or not-for-profit enterprise, and the injury to the natural resource results in a reduction of net income to such an enterprise, that portion of the lost net income due the trustee(s) from this enterprise resulting directly or indirectly from the injury to the natural resource.

(i) Compensable values do not include:

(1) Taxes forgone, because these are transfer payments from individuals to the government;

(2) Wages and other income lost by private individuals, except for that portion of income that represents uncollected economic rent, because these values do not accrue to the trustee(s) and may be the subject of lawsuits brought by the individuals suffering the loss; or

(3) Any speculative losses.

§ 990.78 Comprehensive damage assessment—compensable values, measurement techniques.

(a) *General.* (1) The methodologies listed in this subpart, or other appropriate methodologies selected by the trustee(s), shall be used to estimate compensable values. The trustee(s) should select only those methods that can provide valid and reliable resource values and that are appropriate for valuing the injuries associated with a particular discharge.

(2) Nothing in this part precludes the use of different methodologies to produce separate damage estimates for different resource services, so long as there is no double counting.

(b) *Site-specific valuation techniques.* (1) Travel cost method. The travel cost method may be used to estimate the value of recreational services provided by a specific site based on information on the number and costs of recreational visits to that site. The value of recreational losses resulting from injury to an area (which may include multiple sites) is measured as the difference between the values of recreational services provided by the area with and without the discharge of oil.

(2) Factor income method. If a lost or injured resource and/or service is an input to a production process, the factor income methodology may be used. This methodology may be used to estimate the change in economic rent attributable to the injured natural resource as a result of the discharge. When the price of the good being produced is not affected by the injuries, the change in economic rent is simply the sum of the changes in factor costs for each affected input.

(3) Hedonic price model. The hedonic price model relates the price of a marketed commodity, such as property, to its attributes, such as the quality of the surrounding environment or access to environmental amenities. Where nonmarket services provided by public trust resources, such as local water or air quality, function as attributes of private property or other market goods, the hedonic price model may be used to determine the value of the change in services for property owners.

(4) Market models of supply and demand. (i) For natural resources that are traded in markets, the trustee(s) may estimate models of market supply and demand for the natural resource. The measure of damages to consumers of the marketed natural resource or of its marketed services is the difference between the total consumer surplus for the marketed natural resource/service with and without injury.

(ii) When the supply of the natural resource is fixed (or quasi-fixed), then the observed or appraised change in market price may be used as a proxy for damages per unit of affected natural resource or of affected service. The measure of damages to consumers of the marketed services is the sum of difference between the without- and with-injury market or appraisal prices for each affected unit. When the appraisal method is employed, damages should be measured, to the extent possible, in accordance with the applicable sections of the "Uniform Appraisal Standards for Federal Land Acquisition," Uniform Appraisal Standards, Interagency Land Acquisition Conference, Washington, DC, 1973.

(5) Contingent valuation method. The trustee(s) may use the contingent valuation method to determine individuals' valuation of natural resources or of the services provided by natural resources in order to estimate compensable values. When using contingent valuation pursuant to this part, the trustee(s) shall adhere to the following:

(i) Survey instrument design and development—(A) Willingness to pay for Prevention or Restoration.

(*1*) The survey instrument shall elicit from respondents their willingness-to-pay (WTP) either to prevent described injuries to natural resources or to restore

injured resources as described to their baseline or comparable condition.

(2) The trustee(s) shall document the rationale for selecting a prevention program or restoration program as the commodity to be valued.

(B) Commodity definition. (1) During development of the survey, the trustee(s) shall determine whether respondents understood and found credible the description of the injuries (including whether they are permanent or interim losses) and the program (including the timing of the process) for preventing injuries or restoring the natural resource.

(2) Prior to the value elicitation, the trustee(s) shall identify the natural resource context of the injured resources, if related resources exist, including commodities that might serve as substitutes.

(C) Budget constraints. Prior to the value elicitation, respondents shall be reminded of their budget constraints and their alternative expenditure possibilities. Respondents shall be reminded that their WTP for the environmental program in question would reduce their expenditures on other goods. This reminder should be more than perfunctory but less than overwhelming. The goal is to induce respondents to keep in mind other likely expenditures, including those on other environmental goods, when evaluating the main scenario. After the value elicitation, respondents shall be reminded again of their alternative expenditure possibilities. Respondents shall be given an opportunity to reconsider and change their votes (bid) after this second reminder of alternative expenditure possibilities.

(D) Comparability with real transactions. (1) The survey instrument shall use a credible choice mechanism and payment vehicle.

(2) The trustee(s) shall select a choice mechanism that is incentive compatible and shall document the rationale for the selected choice mechanism.

(3) The trustee(s) shall ask follow-up questions to determine whether the respondents accepted the choice mechanism and payment vehicle as credible.

(4) The survey instrument or analysis method shall provide a mechanism for calibrating hypothetical WTP to actual WTP. The trustee(s) shall document the rationale for the selected calibration mechanism. If the survey instrument or analysis method fails to provide such a mechanism or the trustee(s) fails to document the rationale for the selected calibration mechanism, actual WTP shall be presumed to be one-half of stated WTP.

(E) Pretesting. (1) Survey development shall include adequate field testing to ensure that the above design criteria are met.

(ii) Survey administration—(A) Sampling procedures. (1) The trustee(s) shall determine the relevant population(s) to be sampled and document the rationale for that determination.

(2) The trustee(s) shall draw a probability sample(s) from the target population for the administration of the final survey. Less rigorous sampling is suitable for pretesting and pilot surveys so long as the heterogeneity of the target population is considered.

(3) The sample size(s) shall be sufficient to draw statistically significant population inferences and to estimate WTP valuation functions or to test relevant statistical hypotheses.

(4) The trustee(s) shall minimize nonresponse bias to the extent practicable by striving for as high a response rate in the final survey as possible, consistent with the requirements of reasonable cost. In no case shall the response rate be less than seventy percent.

(5) The trustee(s) shall document the rationale for the selected response rate.

(B) Mode of administration. (1) The trustee(s) shall document the rationale for the selected mode of survey administration.

(2) If interviewers are used, the survey administration shall be conducted by trained interviewers who are supervised by experienced interviewer field managers.

(3) Regardless of the mode of administration, the trustee(s) shall use an experienced survey research organization to administer the survey.

(C) Confidentiality. The trustee(s) should ensure respondent confidentiality.

(iii) Nature of results—(A) Scope test. Controlling for attitudinal, demographic, perceptual, and other differences across respondents, the trustee(s) shall demonstrate statistically that the aggregate WTP across all respondents for the prevention or restoration program increases (decreases) as the scope of the environmental insult is expanded (contracted). The scope of the environmental insult is characterized by the severity of the natural resource injuries and the level of effectiveness and timing of the restoration or prevention program. The demonstration shall be conducted through the use of split samples.

(B) Number of scenarios. The trustee(s) shall administer to split samples different survey instruments containing three variations of the scope of the environmental insult that respondents perceive as different unless the trustee(s) can provide a reasonable showing that the three-scenario test is infeasible due to considerations of cost or lack of plausibility of scenarios. Where three scenarios are feasible, the statistical test shall involve pairwise comparisons. In either case, the scenarios may vary along any of the margins of intensity, geography, and duration of damage and, for prevention scenarios, the probability of an event occurring. The trustee(s) shall document the rationale for the selected variations of the scope of the environmental insult. In determining the descriptions to be used with the split samples, the trustee(s) shall use realistic injury scenarios and prevention or restoration programs that the respondents accept as credible.

(C) Maximum amount of difference between scenarios. The trustee(s) shall develop scenarios for the total value test. Prior to the performance of the test, the trustee(s) shall demonstrate that not more than ninety-five percent of respondents in a pre-test or in focus groups indicate that there are meaningful value differences between the scenarios to be tested in any pairwise comparison. The demonstration shall be based on a minimum of sixty valid responses. The trustee(s) shall exclude from this demonstration any individuals who indicate in screening questions that they are not willing to pay anything for any size environmental cleanup or who would be willing to pay unrealistically large and invariant amounts for any size environmental cleanup.

(iv) Reporting. The trustee(s) shall ensure that reports of contingent valuation studies discuss the relevant factors identified in the standards pertaining to survey instrument design and development, survey administration, and nature of results in this section. A copy of the survey instrument shall be included.

(c) *Alternative techniques.* (1) Benefits transfer approach. Benefits (or valuation) transfer involves the application of existing valuation point estimates or valuation function estimates and data that were developed in one context to value a similar resource and/or service affected by the discharge of concern. When using benefits transfer, the trustee(s) should consider:

(i) The comparability of the users and of the resource and/or services being valued in the initial study(ies) and the changes resulting from the discharge of concern;

(ii) The comparability of the change in quality or quantity of resources and/or services in the initial study(ies) and the ones affected by the discharge of concern; and

(iii) The quality of the study(ies) being used for the transfer(s).

(2) Habitat or species replacement cost method. The habitat or species replacement cost method involves estimating damages in terms of the cost of obtaining from alternative sources the equivalent of the quality and quantity of services diminished by the injury from the onset of the discharge through full recovery. As appropriate, damages may be calculated as the cost of replacing entire habitats that support multiple species and provide a variety of resource services. In applying this method, the trustee(s) should:

(i) Quantify a total discounted measure of the value of lost services over the full duration of the injury, taking into account the extent to which the resource and/or service will recover over time;

(ii) Determine the total discounted measure of the value of services provided by the restoration or replacement project over the full life of the relevant species or habitat;

(iii) Calculate the appropriate scale of the restoration or replacement project, such that the total discounted value of services provided is equivalent to the total discounted value of interim lost services; and

(iv) Estimate the cost of implementing the restoration or replacement project.

§ 990.79 Comprehensive damage assessment—compensable values, implementation guidance.

(a) *Committed use.* Only losses in committed uses of injured natural resources and/or services shall be recoverable. Damages for losses of purely speculative uses are not recoverable. For the purposes of this subpart, a committed use is:

(1) Any direct or passive use of the injured natural resource and/or service available to the public, but for the discharge; or

(2) Any documented, planned future use.

(b) *Willingness to accept and willingness to pay.* For purposes of this part, the trustee(s) may use willingness to accept, willingness to pay, or Marshallian consumer surplus (the value of which is between willingness to accept and willingness to pay) as the criterion to measure damages. However, only willingness to pay shall be elicited in contingent valuation survey instruments.

(c) *Substitutability.* When calculating compensable values, the trustee(s) should take into account, to the extent practicable, the ability to substitute alternative resources and/or services for the injured resources.

(d) *Uncertainty.* Uncertainty regarding the predicted consequences of restoration options and predicted supply and demand of natural resources and/or services should be addressed in the economic analysis of restoration alternatives and determination of compensable values and documented in the administrative record.

(e) *Discounting.* (1) The trustees should discount the three components of the damage claim: Compensable values; future restoration costs; and assessment and restoration costs already incurred. NOAA recommends that the trustee(s) use the U.S. Treasury borrowing rate on marketable securities of comparable maturity to the period of analysis for discounting the value of each of the components. The reference date for the discounting calculation is the date at which the claim is presented. Section 9.14 of the proposed rule, as required by section 1005(b) of OPA, provides for pre-judgment interest and post-judgment interest to be paid at a commercial paper rate, starting from 30 calendar days from the date a claim is presented until the date the claim is paid.

(2) Trustees are referred to Appendix C of OMB Circular A–94 for information about nominal and real U.S. Treasury rates of various maturities and for further guidance in calculation procedures. Copies of the Appendix, which is regularly updated, and of the Circular are available from the OMB Publications Office (202–395–7332).

(f) *Economic definitions.* (1) "Commodity" as used in contingent valuation, refers to the item respondents are asked to value. In damage assessment, the item to be valued will generally be a plan or program to protect against future oil spills or a plan or program to restore an already injured set of resources.

(2) "Payment vehicle" is the method by which contingent valuation survey respondents will pay for the commodity being valued. Common payment vehicles used in contingent valuation include increases in local, state or federal taxes, or increases in process of consumer goods or services.

(3) "Choice mechanism" is the institutional format in which contingent valuation survey respondents are asked to express their value for the commodity offered in the survey. A frequently used choice mechanism is the voting format (referendum) where respondents express their value for the commodity offered by choosing to vote for or against a ballot proposal that would provide the commodity by raising respondents' taxes.

(4) "Probability sampling" refers to the use of sampling techniques that assign each sampling unit in the target population a known non-zero probability of being included in the sample. Sampling units for survey research are usually individuals or households.

Subpart H—Post Assessment Phase

§ 990.80 Post-assessment phase—report of assessment.

(a) *Requirement.* At the conclusion of any of the assessment procedures provided in this part or upon reaching settlement with the RP(s) under § 990.14(f) of this part, the trustee(s) shall prepare a Report of Assessment.

(b) *Contents.* The Report of Assessment shall contain:

(1) The selected restoration approach;

(2) The estimated costs of implementing that approach; and

(3) An index to the administrative record.

§ 990.81 Post-assessment phase—demand.

(a) *Requirement.* Where the trustee(s) and RP(s) have not reached settlement by the conclusion of the Assessment Phase, the trustee(s) shall present to the RP(s), jointly or individually, a demand in writing for a sum certain representing the damages as determined by the trustee(s). The demand should be delivered in such a manner as will establish the date of receipt.

(b) *Contents.* The demand shall include the following items:

(1) Identification of the discharge of oil from which the claim arises;

(2) The natural resource trustee(s) asserting the claim;

(3) A brief description of the natural resources and/or services for which the claim is being brought;

(4) The Report of Assessment, as an attachment; and

(5) The amount of damages being sought.

(c) *Damages. (1) The damages presented in the demand include:*

(i) Costs of restoration, replacement, rehabilitation, or acquisition of equivalent natural resources and/or services;

(ii) Compensable values; and

(iii) Reasonable costs of the assessment.

(2) The damage figure should be adjusted, if necessary, by the guidance in § 990.82(e) of this part.

(d) *Review of damage figure.* The total damage figure may be divided into two

components: costs (both assessment costs and estimated costs of restoration) and compensable values. Judicial review of that portion of the demand representing costs shall be conducted on the administrative record. Judicial review of that portion of the demand representing compensable values shall be conducted with the trustee(s) receiving the benefit of the rebuttable presumption.

§ 990.82 Post-assessment phase—accounts.

(a) *Joint account.* For joint recoveries involving both federal trustees and state or Indian tribe trustees, trustees may establish an interest-bearing joint trustee account under the registry of the applicable federal court. The account should be jointly managed by all the trustees through a mutually agreed upon trustee committee or council. Such funds shall be used only as specified in § 990.83 of this part.

(b) *Separate accounts.* The trustees have the option of dividing the recoveries and depositing their respective shares in separate interest-bearing accounts. Such funds should be retained by each trustee in a revolving trust account, without further appropriation, for use only as specified in § 990.83 of this part.

(c) *Other accounts.* The trustees may establish escrow accounts or any other investment account(s) unless specifically prohibited by law. Such funds shall be used only as specified in § 990.83 of this part.

(d) *Records.* Regardless of the type of account used, the trustee(s) must maintain appropriate accounting and reporting methods to document the use of those sums, including independent auditing.

(e) *Adjustments.* (1) If, for any reason, a recovery cannot be placed in an interest-bearing account, prior to the presentation of a demand for the damage amount, the calculation of the expected present value of the damage amount should be adjusted to correct for the anticipated effects of inflation over the time estimated to complete the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources and/or services.

(2) In order to make the adjustment in paragraph (e)(1) of this section, the trustee(s) should adjust the damage amount by the rate payable on notes or bonds issued by the United States Treasury with a maturity date that approximates the length of time estimated to complete the restoration, rehabilitation, replacement, or acquisition of the equivalent.

(3) The adjustment outlined in this paragraph applies only to those sums to be expended through an Incident-Specific Restoration Plan described in § 990.84 of this part.

§ 990.83 Post-assessment phase—use of sums recovered.

(a) *Reimbursable costs.* Prior to deposit of the sums recovered, as provided in § 990.82 of this part, the trustee(s) may immediately request receipt of those sums recovered that represent the:

(1) Costs of the assessment already incurred and costs necessary to complete the damage assessment;

(2) Costs already incurred for emergency restoration as described in § 990.25;

(3) Costs necessary to develop the final restoration plan; and

(4) Costs necessary to implement a restoration plan or individual project that is part of that restoration plan.

(b) *Damages representing compensation.* Damages recovered as compensation for injuries to natural resources and/or services, as specified in § 990.81 of this part, shall be paid out of the account established under § 990.82 of this part only for those actions described in a restoration plan developed pursuant to the guidance in § 990.84 of this part.

§ 990.84 Post-assessment phase—final restoration plan.

(a) *Incident-specific Restoration Plan.* The Final Restoration Plan is that plan implemented after damages have been received. The Final Restoration Plan can be either one of two types: Incident-specific or regional.

(1) Upon determination of the amount of the award of a natural resource damage claim, as authorized by section 1006(a)(2) of OPA, the trustee(s) shall prepare a Final Restoration Plan as provided in section 1006(c) of OPA.

(2) This post-assessment restoration plan should be based upon the restoration component developed pursuant to subpart G of this part.

(3) If there are significant modifications between the restoration component developed under subpart G of this part, which was made available to the public, and the Final Restoration Plan, the Final Restoration Plan shall be made available for a 30 calendar day public review and comment period.

(4) Before implementing the significantly modified plan discussed in paragraph (a)(3) of this section, the plan and a response to any public comments received, should be made available to the public.

(5) This Final Restoration Plan shall be implemented using the sums in one or more of the accounts described in § 990.82 of this subpart.

(b) *Regional Restoration Plan.* (1) Where the trustee(s) has developed a Regional Restoration Plan, as described in § 990.16 of this part, through a public review and comment process, for a specific area, e.g., bay or estuary, monies placed in an account established under § 990.82 of this part may be pooled with other recoveries to implement that Regional Restoration Plan, in whole or in part.

(2) Where a Regional Restoration Plan has not been or is not in the process of being developed, an incident-specific plan must be developed for use of the damages recovered.

(3) To qualify as a Regional Restoration Plan for use of sums recovered pursuant to this part, the plan must:

(i) Be developed through a process consistent with the prespill planning process described in § 990.16 of this part, including public review and comment; and

(ii) Address the same or similar resource injuries as those identified in the assessment.

Appendix A to Part 990—Draft Memorandum of Understanding (MOU)

I. Introduction

This Memorandum of Understanding (MOU) by and between the state of _____ (state), the National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA), the United States Department of the Interior (DOI) and the United States Department of Agriculture (USDA) (collectively referred to as the Trustees) is entered into to ensure the coordination and cooperation of the trustees in the initiation of assessment and assessment of damages for injuries to natural resources and/or services resulting from _____, and the application of any natural resource damages recovered toward the restoration, rehabilitation, replacement and/or acquisition of equivalent natural resources.

[Note: Obviously, in any given incident there may be more or fewer trustees than those indicated above.]

II. Parties

The following officials, or their designees, are parties to this MOU and act on behalf of the public as Trustees for natural resources under this MOU:

1. The _____ of the state of _____,

2. The Under Secretary for Oceans and Atmosphere, Administrator of the National Oceanic and Atmospheric Administration, acting on behalf of the Secretary of Commerce,

3. The Secretary of the Department of the Interior,

4. The Secretary of the Department of Agriculture,

5. [The Secretary of Department of Defense, Department of Energy, and/or the designated

trustee of a Tribe and any foreign [international] trustee.]

III. Location

This MOU is intended to address natural resources injured [damaged] * * *

[Identify as precisely as possible geographic location and incident(s) involved] * * * (the Incident).

IV. Purpose

The trustees recognize the importance of integrating and coordinating the assessment of natural resource damages for injuries to natural resources affected by the Incident, seeking compensation for those injuries to natural resources and/or services and restoration of those affected resources and/or services. The purpose of this MOU is to provide a framework for such coordination and cooperation between the trustees, and for the implementation of the activities of the trustees in furtherance of their natural resource trustee responsibilities. The trustees' activities will primarily involve assessing damages for injuries to natural resources, seeking compensation for those injuries to natural resources and/or services and restoring the injured natural resources and/or services affected by the incident. Nothing in this MOU is to imply that any signatory trustee is in any way abrogating or ceding any responsibility or authority inherent in its control or trusteeship over natural resources.

V. Authority

The trustees enter into this MOU in accordance with the natural resource trustee authorities provided for each trustee by the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, the Oil Pollution Act of 1990, Public Law 101–380, the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. 9601 *et seq.*, and, if utilized, the Natural Resource Damage Assessment Regulations, 43 CFR part 11, or the OPA regulations, when promulgated.

VI. Organization

The trustees recognize the importance of coordinating their efforts in order to effectively and efficiently meet their respective natural resource trustee responsibilities under applicable federal and state law. Accordingly, there is hereby created a Trustee Council (Council) to implement the MOU to which each trustee will designate a representative and an alternate. The Council may create subcommittees when they are deemed necessary to effect the purposes of this MOU. A representative designated by unanimous consent of the Trustee Council members will serve as Lead Administrative Trustee for administrative purposes. This representative shall fully coordinate his activities with and act under the direction of the Council. The Trustee Council will also seek advisory participation from the United States Department of Justice, the United States Department of Transportation (Coast Guard), the State Attorney General or other legal advisor and the United States Environmental Protection Agency, when appropriate.

VII. Duties and Responsibilities

On behalf of the trustees, the Trustee Council shall coordinate and authorize all trustee activities and matters under this MOU in accordance with the decisionmaking requirements contained in Section VIII. The Trustee Council may take whatever actions the Council, in its discretion, determines are necessary to fulfill the trust responsibilities of each trustee under and to effectuate the purposes of applicable federal and state law. It is expected that the Trustee Council, in accordance with applicable laws and policies, may take the following actions, among others, to address the trustees' natural resource trustee responsibilities:

A. Conduct scientific and technical studies, sampling and other matters related to the assessment of natural resource damages for injury to natural resources with respect to trust resources which may be lost, injured or destroyed.

B. Seek compensation from responsible parties for the damages assessed by the trustees and for the costs of planning and implementing the assessment.

C. Acting in concert with its attorneys, participate in negotiations with responsible parties.

D. In accordance with applicable law, supervise, manage and obligate any money paid to the trustees by or on behalf of responsible parties for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources.

E. Oversee the development and implementation of a plan for the restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those trust resources, and/or services, that may be injured, destroyed or lost.

F. In accordance with applicable law, make all necessary decisions for the management and administration of funds pursuant to Section IX of this MOU.

G. In accordance with applicable law, arrange for one or more contracts with professional consultants, technical or otherwise, that the Trustee Council determines are necessary and best qualified to provide services to the Council.

H. Identify a contact for coordination with the U.S. Coast Guard regarding access to the Oil Spill Liability Trust Fund.

The duties of the Lead Administrative Trustee shall include, but are not limited to: coordination and monitoring of the progress of the natural resource damage assessment process; scheduling of meetings of the Trustee Council, and preparation of agendas for those meetings; acting as a central contact point for the Trustee Council; establishment and maintenance of the administrative record and other records and relevant documents; and such other duties as directed by the Trustee Council. The Lead Administrative Trustee will be responsible for informing the other trustees of all pertinent developments on a timely basis.

VIII. Decisionmaking

The trustees agree that all decisions implementing this MOU shall require unanimous approval. In the event that unanimous agreement cannot be reached among the members of the Trustee Council, the matter in dispute will be elevated to the Trustees for resolution. If necessary, the trustees may establish further mechanisms by which disputes may be resolved. The trustees further agree that decisionmaking deliberations will focus upon the trustees' mutual purpose of assessing, restoring, rehabilitating, replacing and/or acquiring the equivalent of the affected natural resources, rather than upon control or respective trusteeship over those resources.

IX. Funds

The trustees agree to cooperate in good faith to attempt to establish, to the extent consistent with applicable law, a joint trust account for purposes of receiving, depositing, holding, disbursing, managing and expending all natural resource damage recoveries obtained or received by the trustees relating to the natural resource injuries arising out of the Incident and interest earned thereon. This joint trust account will be established under the registry of the applicable Federal district court. Such recovered damages shall be used for restoration activities conducted under this MOU to address those injuries to natural resources and/or services. Any recoveries for injury to natural resources obtained or received by or on behalf of any trustee shall be deposited in this joint trust account.

The Trustee Council, in accordance with its decisionmaking process in section VIII of this MOU, shall establish standards and procedures governing the joint use of all natural resource damages received by the Trustees for the purposes of restoring, replacing, rehabilitating and/or acquiring the equivalent of natural resources injured as a result of the Incident and the reduced or lost services provided by such resources pursuant to the final Restoration Plan.

The trustees further agree that the following damage assessment costs shall be advanced or reimbursed to each trustee out of any damage assessment cost recoveries or payments thereon, including funds received from the Oil Spill Liability Trust Fund: reasonable unreimbursed costs jointly agreed upon for the planning, conduct, evaluation and coordination of all natural resource damage assessment activities pursued by the Trustee Council with respect to injuries incurred resulting from the Incident.

X. Confidentiality

The trustees agree that it is in the public interest that all scientific data arising out of their review of the injury to natural resources as a result of the Incident be made public. Therefore, such data shall be made public as soon as publication will not prejudice the on-going assessment. Public sharing of scientific data will be the general policy of the trustees.

However, all parties to this MOU recognize that all written or oral communications related to the assessment and recovery of damages for injury to natural resources and/or services may be undertaken in anticipation of litigation. Accordingly, all oral and written communications and work product will be treated as privileged attorney-client communications, attorney work product or protected by other applicable privilege (or a

combination thereof), as appropriate, and will be protected from disclosure to the maximum extent possible under applicable federal or state law. They further agree that when a request for production of such a record is received pursuant to any applicable federal or state law, the request will be forwarded for response to the trustee or trustees to which the privilege applies or whose representatives originally generated or contributed the record requested. Nothing contained herein shall be construed as prohibiting or restraining the trustees or the Trustee Council from agreeing to release any record.

XI. Reservation of Rights

Except for the confidentiality agreement contained in Section X, all parties understand that this document is not intended to create any further legal rights or obligations between the parties, the trustees or any other persons not a party to this MOU.

XII. Modification of Agreement

It is acknowledged that additional agreements may be executed by the trustees with regard to natural resource damage claims that arise and to planning for the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed or lost. Therefore, modification of this MOU must be in writing and upon approval of all Trustees currently parties to the MOU.

XIII. Termination

This MOU shall be in effect from the date of execution until termination by agreement of the trustees. At any time the trustees determine that the purposes underlying this MOU have been addressed, the MOU will terminate upon such a finding. In the event any trustee withdraws from the MOU, such withdrawal must be in writing at least thirty calendar days in advance of the withdrawal. In the event of such withdrawal, this MOU remains in full force and effect for the remaining parties.

In the event of the withdrawal of any trustee, or at the termination of this MOU, there shall be a full and complete accounting of all funds received, deposited, held, disbursed, managed, expended pursuant to Section IX of this MOU, or otherwise controlled in any joint account by the trustees as a result of the incident.

XIV. Limitation

Nothing in this MOU shall be construed as obligating the United States, a state or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XV. Third Party Challenges or Appeals

The rights and responsibilities contained in this MOU are subject to the availability of funding and are intended to be guidance for the respective trustees. They may not be the basis of any third party challenges or appeals.

XVI. Execution: Effective Date

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOU. The date of execution shall be the date of the final trustee's signature.

Appendix B to Part 990—Memorandum of Agreement (MOA)

This memorandum of agreement (MOA) is between the [trustee(s)], referred to as _____, and [responsible party(ies)], referred to as _____. The [trustee(s)] and [RP(s)] are hereafter collectively referred to as "the parties." This MOA shall become effective as of the last date of its execution by the authorized representatives of the parties.

The parties, in order to pursue a [negotiated settlement of possible claims or phased joint assessment (PJA)] arising from [description of discharge], have executed this MOA, which addresses the nature and scope of [settlement negotiations in this case or the PJA].

The parties agree that, by entering into this MOA, neither party is making any admission of fact or law. This MOA shall not be admissible as evidence of proof of liability or nonliability or the validity or nonvalidity of any claim or defense in the above-referenced or other discharge. This MOA shall not prejudice the position of either party in the above-referenced or other discharge, nor shall it be used for any purpose other than the attempted [settlement of this case or PJA].

Recitals

Whereas, the parties to this MOA seek to resolve without further litigation all issues in the [case or PJA];

Whereas, the parties are entering into the negotiations in good faith and agree to consider and discuss all issues that either party deems necessary or appropriate to a final resolution;

Whereas, the parties intend to negotiate in good faith through their expressly designated representatives and do not intend to undermine negotiations through other means or methods;

Now, therefore, based upon the above premises and the mutual covenants and considerations set forth below, the parties agree as follows:

PJA Process and Schedule

The [settlement or PJA] process shall take the (five)-phase approach, described below. The parties will use their best efforts to adhere to the schedule set forth in Attachment A, hereto. This (five)-phase approach and schedule may be modified upon written agreement of the parties.

Phase I—Agreeing to the Settlement Process

During Phase I the parties discussed and formulated a process to engage in substantive settlement negotiations. The agreements of the parties as a result of those discussions are contained in this MOA. If this MOA is negotiated as part of a claim, this MOA will be submitted to the Court in the litigation in conjunction with a joint petition of the parties for a stay of the litigation. Phase II of the settlement process shall proceed upon the Court's approval of such joint petition.

[The following section outlines the maximum extent of agreement between the possible parties. This section is designed to be modular in nature, i.e., one may pick appropriate phases or components to revise and include in a particular MOA.]

Phase II—Preassessment Phase

During Phase II the parties will discuss the technical, scientific, and other issues pertaining to preassessment, particularly as to the type of assessment procedure to conduct for [the expected area of impacts]. The discussions will proceed on the basis of natural resource units. The natural resource units were chosen because they logically lend themselves to segregated discussion. The natural resource units will be:

[Natural resource units may consist of resource categories, e.g., surface waters, geologic units; aquatic resources, including surface water, sediments, fish, etc.; terrestrial resources; acres of particular wetland or other habitat type; certain populations of fish and/or wildlife species; recreational areas.]

The substantive discussions on a particular natural resource unit will proceed according to the Settlement Process Schedule provided in Attachment A as follows:

A. The basis for the [trustee's(s')] trusteeship of the resources and the precise geographical location and extent of the same; and

B. The [trustee's(s')] initial recommendation of the type of assessment procedure to implement for this incident.

Phase III—Assessment/Restoration Phase

During Phase III, the parties will discuss the nature and extent of the injuries, along with the appropriate restoration approach, the cost of implementing that approach, and compensation for resources or services that are not restored. Phase III may be broken down into as many as three components as described below:

A. Injury determination/quantification component:

—Baseline/reference/control conditions
—Change from above conditions
—Quantification of injured natural resources and/or services

B. Restoration Component:

—Development of an approach
—Estimating rate of recovery
—Estimating interim lost uses

C. Economic Valuation Component:

—Estimate lost compensable values

Phase IV—Post-Assessment Phase

During Phase IV, the parties will discuss the actions to be carried out in the Post-Assessment Phase, including the components listed below:

A. Development of Final Restoration Plan.
B. Compensatory Restoration.
C. Accounts and Disbursements.
D. Monitoring.

Phase V—Final Settlement Negotiations

During Phase V, the parties will discuss and attempt to resolve the outstanding issues necessary for a final settlement. If not previously resolved, these will include: (1) The amount of any natural resource damages and assessment costs to be paid to the [trustee(s)] by [RP(s)]; and (2) the contents and details of the final settlement agreement and consent decree.

By the conclusion of Phase V, the parties should have agreed to a settlement agreement and consent decree resolving all issues that will be made available for public review and comment and submitted for court approval. The parties will submit to each other written statements of their positions as necessary during the Phase V discussions. Phase V should conclude no later than _____.

Joint Data

The [trustee(s)] and the [RP(s)] stipulate that each party to the agreement shall be barred from introducing new or different data (information, analysis, etc.) collected outside the joint process to challenge the jointly collected data in either a judicial or administrative proceeding under OPA.

Public Review

During the settlement process, appropriate public review shall be provided as follows:

1. Following the complete execution of this MOA, the MOA shall be submitted to the Court and released to the public. Any subsequent modifications of this MOA shall also be submitted to the Court and released to the public.

2. During Phases II, III, IV, and V of the [settlement or assessment] process, the [trustee(s)] at its discretion may make available for public review copies of any information that it has submitted to the [RP(s)], provided that such information does not contain information submitted by the [RP(s)] to the [trustee(s)] in the [settlement or assessment] process. Ten (10) days prior to any submission of such information, the [trustee(s)] shall deliver to the [RP(s)] a general written description of such information that is sufficient to assure the [RP(s)] that such information will not contain any confidential information submitted by the [RP(s)] to the [trustee(s)] in the [settlement or assessment] process.

3. During Phases II, III, IV, and V, of the [settlement or assessment] process, the [trustee(s)], following the express written agreement of the [RP(s)], may make available for public review any information that the [RP(s)] has submitted to the [trustee(s)].

4. During Phases II, III, IV, and V, of the [settlement or assessment] process, the [trustee(s)] shall make available for public review and comment any final agreements reduced to writing by the parties.

5. The [trustee(s)] negotiators, at their discretion, may meet with the general public or with individual members of the public regarding the status of the settlement process, provided that the [trustee(s)] does not discuss at such meetings information submitted by the [RP(s)] to the [trustee(s)] in the settlement process. The [RP(s)] may have a representative present at the meetings that are open to the general public.

6. At the completion of each phase, the [trustee(s)] shall enter all documentation developed for that phase into the Administrative Record of the [settlement or assessment] process to be made available to the public during the review of the settlement agreement or consent decree.

7. Following the complete execution of any final settlement agreement(s) and consent decree(s) that will be submitted for court approval, the [trustee(s)] shall make such agreement(s) and decree(s) available for public review and comment for a period of ____ days. The [trustee(s)] may hold a public meeting to receive comments during the comment period. The parties agree that any such consent decree(s) shall not be approved as an order of the court until the comment period expires and all comments received have been duly considered by the parties and jointly submitted to the court together with responses and/or mutually agreed amendments to the consent decree(s).

Stay of Litigation

[For Litigation-Driven Assessments]

Upon complete execution of this MOA, the parties shall file the MOA with a joint petition to the Court to stay the litigation in its entirety, including all discovery and motions practice, except as hereinafter provided dealing with matters or issues covered by this MOA. It is agreed that the parties will use their best efforts (provided that such efforts are reciprocal as between the parties) to respond to all Rule 34 F.R. Civ. P. requests for production of documents which were served prior to [some date prior to this MOA] . It is agreed that should any disputes over production of documents arise, no motions to compel shall be filed during the pendency of this stay and each party shall reserve its right to file any such motion after the stay is lifted.

In addition, either party at any time may request, in writing, that the other party make available to it, for review and/or copying, documents not previously requested or produced in the litigation that are reasonably required in the negotiation process. Such requests shall be limited in nature and reasonably precise in their description of the documents requested; such requests shall not be burdensome or overly-broad. Further, the parties reserve their right to withhold any such documents that, under applicable law, are irrelevant or qualify as attorney-client or litigation work product materials. It is agreed that should any disputes over document production under this paragraph arise, such disputes shall not affect the [settlement or assessment] process schedule and no motions to compel may be filed during the pendency of this stay; and each party shall reserve its right to file any appropriate discovery requests or motions to compel production of such documents after the stay is lifted.

The parties in their joint petition shall request that the court vacate all deadlines dealing with matters or issues covered by this MOA. The parties agree that the stay of litigation should remain in effect so long as the parties are engaged in the [settlement or assessment] process pursuant to this MOA. If this MOA should terminate prior to a final settlement and court approval of a final consent decree, all litigation shall continue as before, all pending motions shall be recalendered, and all court deadlines shall be reimposed, except all such deadlines shall be extended as set forth in Attachment ____, hereto.

The parties may jointly request the court to designate a mediator or special master, with expertise in natural resource damage actions, for assistance in resolving disputes over legal or other issues upon which the parties cannot agree. Such involvement by the court's designee shall not result in any final or binding decision on any such issue, but rather shall be in the form of mediation assistance to help the parties reach mutual agreement on such disputed issues. The costs for any such mediator or special master shall be shared equally between the [trustee(s)] and the [RP(s)].

Confidentiality

To encourage full and frank discussions, the parties further agree to jointly petition the court to order that the substance of all settlement negotiations are confidential and that all documents and information related thereto, except the parties' joint petition, the court's Order, and the matters described in Section ____ above, shall not be released to anyone outside of the attorneys, consultants, and administrative personnel involved in this action or the negotiations and their principals.

Modification

This MOA may be modified by agreement of the parties. All modifications shall be in writing and signed by authorized representatives of the parties. All modifications shall be submitted to and filed with the court.

Termination

At any time either party may terminate this MOA and the [settlement or assessment] process upon thirty (30) days' written notice to the other party. The stay of litigation shall be lifted thirty (30) days after receipt by the non-terminating party of the notice of termination; and the date upon which the stay is lifted shall be the "MOA Termination Date."

Non-Waiver of Claims, Defenses, and Privilege

Neither party waives any privilege, defenses, or claims that could otherwise be asserted with respect to any claims made or information or data communicated or acquired by virtue of these settlement discussions or related proceedings. Statements made in the negotiation process shall not constitute a waiver of any claims or defenses nor serve any party as a substitute for the need to develop evidence to be used in any litigation now pending or which may subsequently be filed for or against the parties. Neither party will oppose discovery, including the depositions of witnesses, relating to the natural resource damage action on the grounds that the discussions as contemplated herein serve as a substitute for discovery or that discovery shall be repetitive of information obtained during the negotiations. These negotiations shall be conducted pursuant to Rule 408, Federal Rules of Evidence, which shall be binding upon all participants in the [settlement or assessment] process discussions. These negotiations do not protect from discovery any information otherwise discoverable merely because it is presented in these or subsequent negotiations.

Attachment A—Schedule for Performance

[**Note:** Parties should devise reasonable time tables for each phase and component.

Parties should also provide for an expedited process for modifications that may become necessary in the schedule.]

Appendix C to Part 990—Expedited Damage Assessment: Oil Characteristics

Very light refined products, such as gasoline and jet fuel, are extremely volatile and usually evaporate within hours to days after being discharged. They usually contain high concentrations of toxic compounds that can result in high but localized mortality to water-column and intertidal resources. Yet, because of their volatility, they are generally non-persistent and cause little or no residual contamination of sediments and organisms. Where a discharge of these products results in minimal residual contamination of sediments and organisms, the trustee(s) may determine an EDA is appropriate.

Light oil includes diesel, No. 2 fuel oil, and certain light crudes. These oils are considered to be moderately volatile. Up to 50 percent can evaporate within the first 24 hours depending upon the air and water temperatures. Like very light, refined products, light oils contain high concentrations of the most toxic water-soluble compounds and therefore may be acutely toxic to water-column organisms. These oils are moderately persistent and likely to leave residual oil in the environment with the attendant risk of long-term contamination of sediments and chronic toxicity to benthic organisms. Because of these characteristics, the trustee(s) should evaluate discharges of light oil very carefully prior to selecting EDA procedures.

Medium crude oils comprise the third category of oil types. Up to one-third of these oils can evaporate within the first 24 hours leaving a significant amount of oil persistent in the environment. The water soluble fraction is acutely toxic immediately after the discharge. In addition, residual contamination of the sediment creates chronic toxicity problems. However, there are extensive databases regarding toxicity problems associated with the sediment and water column. There are also studies from previous discharges that have documented the effects of the contamination of certain habitats, fish and wildlife. The trustee(s) may adopt the EDA approach where existing data are sufficient to determine injury using limited, focused studies.

Finally, heavy oils, such as No. 6 fuel oil and Bunker C, result in little or no loss by evaporation and have very low water solubilities. These oils can sink in fresh-water habitats and may be highly persistent in both fresh and salt water systems. Acute effects may result from smothering rather than aquatic toxicities. While persistent, the bioavailability and resulting toxicity of the high molecular-weight polynuclear aromatic hydrocarbons (PAHs) is not well known. Where extensive contamination of intertidal or subtidal sediments is likely, it may be necessary to conduct extensive studies, more appropriate for a CDA, to determine the injury to resources and/or services.

Appendix D to Part 990—List of Acronyms

ANPRM—Advance Notice of Proposed Rulemaking.
BNA—Bureau of National Affairs.
CDA—Comprehensive Damage Assessment.
CERCLA—Comprehensive Environmental Response, Compensation, and Liability Act of 1980.
CEQ—Council on Environmental Quality.
CFR—Code of Federal Regulations.
COC—Citizen Oversight Committee.
CV—Contingent Valuation.
CWA—Clean Water Act, as Amended.
DARP—Draft Assessment/Restoration Plan.
DART—Damage Assessment Regulations Team.
DOI—U.S. Department of the Interior.
EDA—Expedited Damage Assessment.
EIS—Environmental Impact Statement.
E.O.—Executive Order.
Fund—Oil Spill Liability Trust Fund.
HVM—Hedonic Valuation Methodology.
LAT—Lead Administrative Trustee.
MOA—Memorandum of Agreement.
MOU—Memorandum of Understanding.
NCP—National Oil and Hazardous Substance Pollution Contingency Plan.
NEPA—National Environmental Policy Act of 1969.
NMFS—National Marine Fisheries Service.
NOAA—National Oceanic and Atmospheric Administration.
NRDAM/CME—Natural Resource Damage Assessment Model/Coastal and Marine Environments.
NRDAM/GLE—Natural Resource Damage Assessment Model/Great Lakes Model.
OMB—Office of Management and Budget.
OPA—Oil Pollution Act of 1990.
OSC—On-Scene Coordinator.
PAH—Polynuclear Aromatic Hydrocarbons.
PJA—Phased Joint Assessment.
QA—Quality Assurance.
RI/FS—Remedial Investigation/Feasibility Study
RP—Responsible Party.
RRT—Regional Response Team.
TCM—Travel Cost Methodology.
U.S. EPA—U.S. Environmental Protection Agency.
U.S.C.—United States Code.
USDA—United States Department of Agriculture.
WTA—Willingness to Accept.
WTP—Willingness to Pay.

[FR Doc. 94-225 Filed 1-4-94; 8:45 am]
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 990

Natural Resource Damage Assessments

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: Section 1006(e)(1) requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere, to promulgate regulations for the assessments of natural resource damages resulting from the discharge of oil. The National Oceanic and Atmospheric Administration (NOAA) is proposing those regulations in a separate Notice in this issue of the **Federal Register.** NOAA also wishes to announce a series of six regional meetings to receive additional comments and permit more detailed discussion of issues presented in today's proposed rule. The meetings will be held during the months of January and February, 1994. The locations of the meetings are New Orleans, LA; Chicago, IL; Atlanta, GA; Boston, MA; San Francisco, CA; and Seattle, WA. Those persons wishing further information should contact NOAA at the address below.

ADDRESSES: Written inquiries are to be submitted to: Damage Assessment Regulations Team (DART), c/o NOAA/DAC, 1305 East-West Highway, SSMC #4, 10th Floor, Workstation #10218, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Linda Burlington or Eli Reinharz, Office of General Counsel, DART, telephone (202) 606-8000, FAX (202) 606-4900.

SUPPLEMENTARY INFORMATION: The Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides for the prevention of, liability for, removal of, and compensation for the discharge, or substantial threat of discharge, of oil into or upon the navigable waters of the United States, adjoining shorelines, or the Exclusive Economic Zone. Section 1006(e) requires the President, acting through the Under Secretary of Commerce for Oceans and Atmosphere, to develop regulations establishing procedures for natural resource trustees to use in the assessment of damages for injury to, destruction of, loss of, or loss of use of natural resources covered by OPA. Section 1006(b) provides for the designation of federal, state, Indian tribe and foreign natural resource trustees to determine resource injuries, assess natural resource damages (including the reasonable costs of assessing damages), present a claim, recover damages, and develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship.

NOAA has published eight **Federal Register** Notices, 55 FR 53478 (December 28, 1990), 56 FR 8307 (February 28, 1991), 57 FR 8964 (March 13, 1992), 57 FR 14524 (April 21, 1992), 57 FR 23067 (June 1, 1992), 57 FR 44347 (September 25, 1992), 57 FR 56292 (November 27, 1992), and 58 FR 4601

(January 15, 1993), requesting information and comments on approaches to developing damage assessment procedures. Prior to developing the proposed regulations published in this issue of the **Federal Register** NOAA conducted a public meeting on March 20, 1991, for additional public participation into the process and held four regional workshops during 1991 in Rockville, Maryland; Houston, Texas; San Francisco, California; and Chicago, Illinois, to learn of regional concerns in coastal and inland waters. One workshop held in Alexandria, Virginia, in November, 1991, provided a forum for early discussions of various economic issues likely to be raised during the damage assessment rulemaking process. In addition, on August 12, 1992, NOAA held a public hearing on the issue of whether constructed market methodologies, including Contingent Valuation (CV), can be used to calculate reliably passive use values for natural resources, and if so, under what circumstances and under what guidance. On January 15, 1993, at 58 FR 4601, NOAA published in full the report of the panel commissioned by NOAA to evaluate the reliability of CV in calculating passive use values for natural resources.

The proposed rule published elsewhere in this issue of the **Federal Register** summarizes the written comments received by the agency and issues raised during the public meetings and workshops, responds to those comments, and contains proposed regulatory language.

In order to gather general information and specific comments on the proposed rule, NOAA will hold a series of six regional meetings in 1994, similar to the series held during the development of the proposed rule during 1991. These meetings will be open to the public, however representatives of organizations that have a direct interest in the assessment process are encouraged to attend. Such interested organizations can include, but are not limited to: Federal response and trustee agencies; states; foreign trustees; Indian tribes; industries, or industry organizations; environmental organizations; natural scientists; and economists.

The locations and schedules for these meetings are as follows:

New Orleans, LA, January 10–11
Chicago, IL, January 12–13
Atlanta, GA, January 24–25
Boston, MA, January 26–27
San Francisco, CA, February 7–8
Seattle, WA, February 9–10

Due to the necessary time constraints of the meetings, it is suggested that attendees focus their remarks to the following broad issues: (1) Prespill planning; (2) preassessment phase; (3) assessment planning; (4) simplified assessment procedures; (5) site-specific, detailed assessment procedures; (6) quantification of injuries; (7) valuation of resources; (8) post-assessment actions; and (8) certain legal principles involved in the assessment process.

Dated: December 30, 1993.

Katharine W. Kimball,

Deputy Assistant Secretary for Oceans and Atmosphere.

[FR Doc. 94–226 Filed 1–4–94; 8:45 am]

BILLING CODE 3510–12–P

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15 CFR Part 990

Natural Resource Damage Assessments

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of cooperative prespill planning.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA) wishes to announce that, in conjunction with the American Petroleum Institute and Coastal States Organization, six regional workshops are being co-sponsored to allow industry and trustees to begin planning for cooperative natural resource damage assessments. These planning sessions will be held immediately following the six regional public meetings being held by NOAA on the proposed natural resource damage assessment regulations, which are published in a separate notice in this issue of the **Federal Register**. Participation in the workshops will be limited to specific individuals to allow for meaningful discussions. However, these meetings will be open to others interested in observing the process. Those interested in more information should contact one of the organizations listed below.

ADDRESSES: Written inquiries are to be submitted to: Damage Assessment Regulations Team (DART), c/o NOAA/DAC, 1305 East-West Highway, SSMC #4, 10th Floor, Workstation #10218, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Doug Helton, NOAA, 301–713–3038, ext. 197; Grayson Cecil, American Petroleum Institute, 703–464–9664; Ray Perry, Coastal States Organization, 202–508–3860.

SUPPLEMENTARY INFORMATION: In the event of an oil spill, the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, provides that federal, state, Indian tribal and/or foreign natural resource trustees may determine natural resource injuries, assess natural resource damages, present a claim, recover damages, and develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources and their services under their trusteeship. NOAA was directed by Congress to promulgate regulations for the assessment of natural resource damages resulting from a discharge of oil.

In order to foster cooperation between trustees and industry in damage assessments, a series of six prespill planning workshops will be held in 1994, following each of the NOAA regional rulemaking meetings described in a separate notice in today's **Federal Register**. The locations and schedules for these workshops as well as the NOAA regulation review meetings are as follows:

Location	NOAA review meeting	Planning workshop
New Orleans, LA	Jan. 10–11	Jan. 11–12
Chicago, IL	Jan. 12–13	Jan. 13–14
Atlanta, GA	Jan. 24–25	Jan. 25–26
Boston, MA	Jan. 26–27	Jan. 27–28
San Francisco, CA.	Feb. 7–8	Feb. 8–9
Seattle, WA	Feb. 9–10	Feb. 10–11

These sessions will be limited to people from the trustee and industry communities who are familiar with natural resource damage assessment issues and are prepared to represent the views of their government or organization. However, these meetings will be open to others interested in observing the process. The co-sponsors believe that the workshops will be a positive first step toward producing agreed upon ground rules for cooperative natural resource damage assessments. By the same token, they recognize that much will remain to be done afterward. To make cooperative natural resource damage assessment a reality, follow-up efforts will be required.

The central premise of these workshops is that a cooperative approach to damage assessment, as opposed to an adversarial one, will benefit both trustees and industry and will lead to earlier restoration of the injured resources. However, because there is no statutory mandate to plan for cooperative damage assessments in

OPA, development of such a process will have to proceed from a realization by both industry and trustees that the alternative of costly litigation is both inefficient and ineffective.

In the exigency of an oil spill, often the best intentions of trustees and responsible parties are waylaid by the need for hurried decisions. It is more productive to approach a spill with a vigorous plan for cooperation between trustees and responsible parties. If, in the event of a spill, the representatives of the parties have met beforehand and, even tentatively, considered the ground rules for working cooperatively in a scientific investigation aimed toward early recovery of the environment, there is a significantly better chance that litigation can be avoided. Such an approach must involve the planning and development of a model for cooperation before the time of an oil spill, a model that can be applied across the nation. The workshops will consider the draft documents necessary to develop such a model.

Dated: December 30, 1993.

Katharine W. Kimball,

Deputy Assistant Secretary for Oceans and Atmosphere.

[FR Doc. 94–227 Filed 1–4–94; 8:45 am]

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federal register

Friday
January 7, 1994

Part III

Corporation for National and Community Service

45 CFR Part 2510, et al.
Corporation Grant Programs and Support and Investment Activities; Proposed Rule

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 2510, 2513, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2530, 2531, 2532, 2533, and 2540

Corporation Grant Programs and Support and Investment Activities

AGENCY: Corporation for National and Community Service.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Corporation for National and Community Service (the Corporation) is issuing this rule concerning the Corporation's grantmaking programs and various support and investment activities as authorized by the National and Community Service Act of 1990, as amended by the National and Community Service Trust Act of 1993 (the Act). The activities and grants described in this rule are designed to help address the Nation's human, educational, environmental, and public safety needs through national and community service. This rulemaking describes the different types of national and community service programs the Corporation may support, funding available for those programs, processes by which grants will be awarded, training and technical support services available for program development and applications, and Corporation plans to invest in service infrastructure.

DATES: Comments on the proposed rule, as well as the draft applications, must be received no later than February 7, 1994.

ADDRESSES: Comments may be mailed to the Corporation for National and Community Service, P.O. Box 34680, Washington, DC 20043–4680. Comments received may also be inspected at the Corporation for National and Community Service, Office of the General Counsel, Room 9200, 1100 Vermont Avenue, Washington, DC 20525, between 9 a.m. and 5 p.m.

The Corporation also will make available copies of drafts of applications for programs described in these regulations. These applications may be obtained by writing to the above address.

FOR FURTHER INFORMATION CONTACT: Terry Russell, (202) 606–4949 (Voice) or (202) 606–5256 (TDD), between the hours of 9 a.m. and 6 p.m. Eastern Standard Time. For individuals with disabilities, information will be made available in alternative formats, upon request.

SUPPLEMENTARY INFORMATION: The Supplementary Information section explains the basis and purpose of the proposed regulations—providing a context for understanding the policy decisions that underly them—and provides information on the Corporation's plans for fiscal year 1994. This Supplementary Information section should not be viewed as comprehensive. Congress made numerous policy decisions that went into the writing of the Act. These decisions, along with minor decisions made by the Corporation in interpreting the Act, are not discussed.

Invitation to Comment

Regulations

The Corporation invites written comments on the text of the proposed regulations and requests that the comments identify the specific regulatory provisions to which they relate. However, comments on the Supplementary Information section should focus on policy issues rather than specific language or construction.

Applications

Interested parties may obtain copies of drafts of the various grant applications from the Corporation as they become available. These applications will be in draft form, however, and should not be used to apply for funds. The forms are being reviewed by the Office of Management and Budget. We estimate that, on average, it will take approximately ten hours to fill out each of the forms. Any comments on the forms should be sent as soon as possible to the Corporation at the above address, as well as to the U.S. Office of Management and Budget, Attention: Steve Semenuk, New Executive Office Building, room 3001, Washington, DC 20503.

The Corporation's Mission and the Purpose of This Rule

Overall Mission

The Corporation's mission is to engage Americans of all ages and backgrounds in community-based service. This service will address the Nation's educational, public safety, human, and environmental needs to achieve direct and demonstrable results. In doing so, the Corporation will foster civic responsibility, strengthen the ties that bind us together as a people, and provide educational opportunity for those who make a substantial commitment to service.

Purpose of this Rule

The purpose of this rule is to establish policies and procedures for the activities the Corporation will undertake to achieve the goals described above. This rule should serve as a guide to explain the eligibility requirements, application processes, selection criteria, program requirements, and other relevant information for individuals, programs, public and private nonprofits, institutions of higher education, States, Indian tribes, and other entities wishing to participate.

Impact of Programs

All programs under the National and Community Service Act have in common the goal of achieving three types of impact: "getting things done," improving the lives of participants, and strengthening the ties that bind communities together. All programs, whether they involve elementary school children or senior citizens, are equally able to achieve the last "community-building" impact—by involving people of different backgrounds together in a common effort, by promoting civic responsibility so that every member of a community feels responsibility for its stewardship, and by breaking down barriers of mistrust and misunderstanding. The other two impacts are weighted differently for different program types based on the age and experience of the participants.

At the one extreme, the service-learning programs for school-age youth may indeed help to solve the pressing problems of communities, but their primary impact will be and should be on the lives of the participants. They should improve their educational motivation and achievement, citizenship skills, teamwork, and problem solving abilities. At the other extreme, for a professional corps of adults who are highly educated and highly skilled, the primary impact must be on getting things done in communities, with the receipt of an educational award for loan repayment as the main participant impact. Given the higher costs of these programs and the advanced education level of the participants, it is imperative that the work they do be highly valued by communities and the Nation. Programs like youth corps, which lie somewhere in the middle in terms of age and education level of participants, should achieve a balance of impacts. By keeping this calculus in mind, potential applicants can appropriately gauge the amount of program resources that should be dedicated to participant

education, life skills training, and other types of participant support.

STATE PLAN ISSUES

(1) General Purpose

Section 178(e) of the Act requires every State Commission to prepare a national service plan (the "State Plan") for submission to the Corporation for approval. The law requires that the State Plan (a) be developed through an open and public process that ensures outreach to diverse community-based agencies that serve underrepresented populations, and (b) cover a three year period and be updated annually. With the exception of section 122(c) of the Act, which requires each State to establish State-based priorities through the State Plan, the law is silent as to the overall purpose and content of the plan itself.

In part 2513 of this rule, the Corporation has clarified the purpose of the State Plan, indicating the information it must contain and the criteria by which it will be evaluated. In general, the Corporation intends for the State Plan to be an essential component of a State's overall application; it should indicate a State's strategy for supporting national and community service activities—including proposed programs and other volunteer activities—within the State. The State Plan is intended to bring diverse constituencies within the State together for the purpose of promoting and supporting national and community service, and it will be a factor in the Corporation's evaluation of State applications.

(2) Development of the State Plan

The State Plan should be developed through an open, public and inclusive process (such as through regional forums, hearings, or other means) that provides for maximum participation and input from national and community service programs within the State and other interested individuals, including representatives of the private sector, organizations involved in meeting educational, public safety, human, and environmental needs, community-based organizations, and constituencies that might not otherwise be formally involved with national and community service programs. The State Plan should also be developed in a non-partisan, non-political manner.

(3) Required Components

Section 2513.30 of this rule details the required components of the State Plan. The following information is provided as supplemental information on three aspects of the Plan:

(a) *Overview of State experience and "historical context" for service programming.* The State Plan, especially in the first year, should provide a context for understanding the development of national and community service activities within the State, including the extent to which the State has been involved in the development or support of such activities. It should also provide an overview of the broad array of organized service activities within the State, including, to the extent practicable, activities not funded by the Corporation. The primary goal for this section is to gain a "snapshot" of service within the State, and to determine the extent to which States have an established infrastructure to support high quality national and community service programs, including the capacity to provide technical assistance to prospective applicants and funded programs. In this regard, the Plan will provide a baseline against which the Corporation may assess future progress and activities.

(b) *Establishment of goals and priorities.* This section of the plan should detail the goals and strategies identified by the State to achieve the purposes of the Plan set forth above. In addition, any State priorities that will govern the programs proposed for support with formula funding should be clearly identified and explained, including if appropriate a description of why the priorities were established and how they relate to the national priorities established by the Corporation.

(c) *Description of process.* The State Plan must specifically describe the manner in which the State has conducted an open and inclusive process to develop the State Plan and the priorities.

(4) Evaluation Criteria

The State Plan will be evaluated on two principal criteria: quality and sustainability. These criteria are described in part 2513.40. In addition, the quality of the State Plan itself will also be factored into the Corporations overall evaluation of a State Commission's application. Specifically, the submission of a State Plan that meets the quality criteria established by the Corporation is an eligibility requirement for States seeking formula funding under the national and community service grant program. The quality of the State Plan will also be factored into the Corporation's selection of programs for competitive State funding. Finally, the Corporation may consider the quality of the State Plan in determining whether to renew State Commission administrative support under part 2550 of this rule.

SERVICE-LEARNING ISSUES

The K–12 service-learning programs—i.e., the school- and community-based programs described in parts 2516 and 2517 of this rule—as well as the Higher Education service-learning programs described in part 2519 of this rule, aim to engage school-age youth and students of all ages in activities to help meet the educational, public safety, human, and environmental needs of America's communities. Service-learning programs provide participants with structured, sometimes curriculum-based opportunities to reflect on and learn from their service experiences, often enhancing their academic skills, their sense of civic responsibility, their ability to solve community problems, and their understanding of important concepts such as community, diversity, and citizenship.

In similar ways, the higher education programs strive to develop the academic and civic skills of students by supporting efforts of colleges and universities to help meet community needs.

(A) K–12 SERVICE-LEARNING ISSUES

(1) Coordination With State Plans

Any State or grantmaking entity that applies for school-or community-based K–12 service-learning support must coordinate its service-learning activities with the development of the comprehensive State Plan described in part 2513 of this rule. This requirement is designed to facilitate the integration of K–12 service-learning programs into the overall national service efforts of each State.

The Corporation will consider the extent and quality of coordination with the development of the State Plan in assessing the merits of applications submitted by States or grantmaking entities. However, because State Plans will be in different stages of development, any applicant that makes a good faith effort at coordination will not be disadvantaged in the selection process.

(2) Terms of Grants

The Corporation has set the maximum term of most grants at three years, subject to satisfactory performance and annual appropriations. In addition to facilitating coordination with the State Plan, the three year term (a) allows programs to evolve and improve over time, learning from mistakes and making adjustments to ensure quality, and (b) allows the Corporation to track

and learn from the development of programs over time.

A one-year term will be set for planning grants made to school-based program applicants, as well as grants to local partnerships States not participating. This policy reflects the purpose of a planning grant: to move programs from a sound program concept to the brink of implementing a fully operational program. These grants thus should be used for such activities as seeking community input, building partnerships, developing curricula and materials, recruiting staff, etc.

(3) Treatment of ACTION Student Community Service Program and Commission on National and Community Service Grantees

High quality programs that received ACTION Student Community or Commission funds are encouraged to seek Corporation grants.

(4) Stipends

The Act prohibits using school-based service-learning funds to provide stipends to participants. With this rule, the Corporation extends this restriction to Corporation funds awarded to community-based service-learning programs in order to conserve and focus the relatively small amount of funds available for community-based programs.

(B) HIGHER EDUCATION SERVICE-LEARNING ISSUES

(1) Coordination With State Commissions

The Act is silent on the extent to which Higher Education service-learning programs should be coordinated with State Commissions. In considering this issue, the Corporation sought to balance (1) a desire to promote coordination among national and community service programs within each State, with (2) the concerns that programs not be unduly burdened with bureaucratic procedures and that the Corporation, as the direct funder of Higher Education service-learning programs, retain control of selection, monitoring, and evaluation.

As a result, in fiscal year 1994 the Corporation is requiring an assurance that, prior to submitting a Higher Education service-learning application, applicants will send one copy of the final proposal to the State Commission in each State where the program will operate. The State will have no part in selecting programs to be funded. However, as stated in the selection criteria of the application, evidence of support from a State Commission or consistency with a State comprehensive plan may improve the competitiveness of a program in the review process.

(2) Educational Awards

Section 119(f) of the Act states that "a participant in a program funded under this part shall be eligible for the national service educational award if the participant served in an approved national service position." However, the Act provides no guidance on what kinds of Higher Education service-learning programs involve participants in positions eligible to be approved AmeriCorps positions.

Since institutions of higher education are eligible to apply for AmeriCorps program support, campus-based programs fitting one or more of the AmeriCorps program types described in § 2522.110 should apply as AmeriCorps programs rather than as Higher Education service-learning programs. This reflects the idea that Higher Education service-learning programs should have a distinctive service-learning emphasis; it was not intended to be a grant program that merely supplements the AmeriCorps funds.

The Corporation examined whether certain other types of positions in a Higher Education service-learning programs should be provided AmeriCorps educational awards. In § 2519.320 of this rule, the Corporation retains flexibility on this issue. In the fiscal year 1994 application, the Corporation expects to provide AmeriCorps educational awards only to programs with positions designed to increase participation in community service on campus, to develop projects and partnerships in the community, or to facilitate service-learning in campus-based programs. They are similar to other AmeriCorps positions such as service-learning coordinators for school-based service-learning programs or crew leaders in youth corps. Positions of this type are essential for the longevity and progress of the service movement.

Any Higher Education service-learning program whose participants receive educational awards must meet the minimum AmeriCorps program requirements described in Section 2522.100 of this rule. As Higher Education service-learning programs, however, they will be reviewed according to selection criteria and priorities that apply to all Higher Education service-learning applicants.

(3) Treatment of Existing Grantees of the ACTION Student Community Service Program and the Commission on National and Community Service

ACTION and Commission grantees may seek funds to continue and build on activities carried out under their current grants. In the fiscal year 1994 application, the Corporation requires these grantees to submit an application that will be reviewed on a competitive basis according to the selection criteria applicable to all Higher Education service-learning applicants. However, the Corporation will give preference to applicants that offer evidence of positive performance relative to stated objectives under their existing grants. This policy is consistent with the Corporation's intent to select among all Higher Education service-learning applicants on the basis of quality, while giving existing grantees in good standing sufficient opportunity to develop and become self-sustaining.

Applicants for renewal funding are expected to reduce their dependence on Federal funds and to demonstrate clearly their potential for sustainability, in accordance with the guidelines in the application.

(4) Priorities

This rule gives priority to proposals that (among other characteristics) demonstrate the commitment of the higher education institution as a whole and specify how grant funds will be used to strengthen the capacity of institutions of higher education to support service.

The Corporation aims to fund programs supported not only by students but also by the college or university presidents, faculty members, and even trustees. An institutional commitment, beginning with the institution's top leadership, enhances program quality and sustainability by making resources from diverse areas of the institution available to the program, by ensuring continuity of the program as students come and go, and by signaling to the community that the institution views the program as an integral part of—not an "add-on" to—its core functions.

Moreover, as colleges and universities across the Nation develop more model programs, the Corporation aims to fund efforts to link individual initiatives within a campus or across several campuses in supportive networks that facilitate replication of effective models, delivery of training and technical assistance, access to information and resources, development and dissemination of materials, and evaluation of impacts. These activities, which build the capacity of higher education institutions to improve the quality of community service and service-learning programs, require strong infrastructures within and across institutions.

AMERICORPS PROGRAM ISSUES

Section I: Programmatic Issues

(A) Overview and Purpose of Grant Program: "Getting Things Done"

AmeriCorps is about getting things done. It will engage the energy and idealism of the American people, especially young people, in addressing the most critical educational, public safety, human, and environmental needs of our communities. It will strengthen communities and the civic character of our people through service, and reward those who answer the call to service with enhanced educational opportunity. The purpose of the AmeriCorps grant program, therefore, is to support locally driven programs that meet rigorous national standards. This strategy will enable communities across the Nation to channel the unique talents and creativity of America toward effectively addressing these most important needs. For these efforts to be successful, however, it is essential to ensure that they provide direct and demonstrable benefits that are valued by communities.

To achieve this outcome, the Corporation has attempted through these regulations to provide clear guidance to programs seeking assistance under the grant program. First, the regulations clarify the nature of service activities eligible for support under the Act. Second, to enhance the collective impact that all programs will have within the four broad issue areas specified by law, the Corporation has also exercised its authority to establish national priorities. Third, to ensure that each of the diverse programs supported through the grant program is of the highest possible quality, the Corporation has also specified minimum program requirements that all programs must address. And finally, the Corporation has clarified issues pertaining to participant eligibility and benefits.

(B) Eligible Service Activities

(1) Description of Eligible Service Activities

There are numerous pressing needs throughout our communities that may be appropriately addressed by AmeriCorps programs. But given the realities of limited resources and the extent to which other public, private and non-profit responses to many of these needs already exist, it is important that an AmeriCorps program undertake activities that are appropriate to the program's overall mission and capacity and that achieve the greatest positive impact possible. To this end, the Corporation has provided a framework for eligible service activities that builds on the parameters specified in the law.

The Corporation's proposed regulation (as set forth in part 2520) limits service to activities that provide a direct benefit to the community where they are performed or that involve the supervision of participants or volunteers whose service provides a direct benefit to the community where it is performed. The Corporation determined, based upon the inclusion in the Act of several program types involving such supervision, such as service-learning coordinator programs, that Congress intended for supervision of participants or others performing service to be included as an eligible service activity, provided that the service of those supervised would itself qualify.

In determining whether service "provides a direct benefit to the community where it is performed," the Corporation will take into consideration several factors, including whether the service must be performed physically in the community to be effective and whether the service brings participants face-to-face with residents of the community served or in contact with the physical environment that is the "beneficiary" of the service. Direct service includes physical projects like renovating low-income housing or creating a playground in a vacant lot, as well as less tangible projects like tutoring, mentoring and conflict resolution.

To further define what constitutes a "direct benefit," the Corporation's proposed regulation offers several examples of activities that would not meet this test: fundraising, clerical work, and research. This list is not intended to be limiting; other activities may also fail the "direct benefit" test. However, if an activity does not provide a direct benefit, it is not necessarily altogether prohibited. Rather, unless it falls into one of the "prohibited" categories discussed below, the activity may be performed if it is incidental to the direct service. For example, a team whose project involves providing meals, transportation, and health services to the homebound might conduct a door to door survey of community residents to help locate those in need of services; if they then went on to provide those services, this kind of research would be an appropriate activity for the team.

(2) Prohibited Activities

Prohibited activities (specified in § 2520.30) may not be performed by participants in the course of their duties, at the request of program staff, or in a manner that would associate the activities with the AmeriCorps program or the Corporation. These activities include: influencing legislation, as defined in the section of the IRS code relating to non-profit organizations; organizing protests, petitions, boycotts, or strikes; assisting, promoting or deterring union organizing; participating in partisan political activities; and performing religious activities, such as conducting worship services or engaging in religious proselytization. Of course, participants may engage in any of these activities at their own initiative, on their own time, and in a manner that is not associated with their participation in the program.

(3) General Guidance

In all cases, service activities must result in a specific identifiable service or improvement that otherwise would not be provided with existing funds or volunteers and that does not duplicate the routine functions of workers or displace paid employees. Further, service opportunities should be appropriate to the skill levels of participants, and they should provide a long-lasting, identifiable, and demonstrable benefit that is valued by the community.

While the Corporation reserves the right to further restrict eligible service, it has not done so because it recognizes that the character of service often depends on its content and context. For example, distributing leaflets may provide a "direct benefit" if the leaflets inform readers about the availability of free immunizations or how to conserve energy in the home. Conversely, distributing leaflets supporting a political candidate, or urge individuals to write their legislators about an issue, would be prohibited. Given the great educational, public safety, human, and environmental needs of our communities, it should not be difficult for programs to identify projects that clearly provide a direct benefit.

(C) Establishment of State and National Priorities

(1) State Priorities

As discussed earlier, States must establish and, through the State planning process, periodically alter priorities in the areas of educational, public safety, human, and environmental needs. These priorities apply to programs that receive assistance (funding or AmeriCorps educational awards) provided on a formula basis as described in § 2521.30(a)(1). The State priorities will be subject to Corporation review as part of the AmeriCorps application process

under Subpart C of part 2522 of this rule.

(2) National Priorities

In order to concentrate national efforts on addressing certain educational, public safety, human, and environmental needs, the Corporation will establish and, after review of the strategic plan approved by the Corporation's Board of Directors, periodically alter priorities regarding the AmeriCorps programs that will receive assistance (funding or AmeriCorps educational awards) and the purposes for which such assistance may be used. These priorities apply to assistance provided on a competitive basis as described in § 2521.30(a)(2) and (b)(3), and to any assistance provided through a subgrant of such funds.

(a) *National Priorities for Fiscal Year 1994.* For fiscal year 1994, the Corporation has established the following national priorities within each of the four broad issue areas:

(i) Education. (A) School Readiness: Furthering early childhood development; and

(B) School Success: Improving the educational achievement of school-age children.

(ii) Public safety. (A) Crime Prevention: Reducing the incidence of violence; and

(B) Crime Control: Improving criminal justice services, law enforcement, and victim services.

(iii) Human needs. (A) Health: Providing independent living assistance and home-and community-based health care; and

(B) Home: Rebuilding neighborhoods and helping people who are homeless.

(iv) Environment. (A) Neighborhood Environment: Reducing community environmental hazards; and

(B) Natural Environment: Conserving, restoring, and sustaining natural habitats.

(b) *Application of Priorities to Programs.* The National priorities established by the Corporation apply to programs seeking State competitive and national direct grants from the Corporation, as specified in § 2521.30 of this rule. Programs included in the State formula application are not governed by these priorities, but rather by priorities established by the State consistent with part 2513 of this rule. A more thorough description of how these National priorities will affect program selection in each of the major grant areas is described in Section II, Subsection B, Number 3 of this Supplementary Information section, below.

(D) Minimum Program Requirements To Ensure Quality

In an effort to ensure that all programs supported by the Corporation are high quality, the Corporation has specified a number of minimum requirements (in addition to those already provided in the law) that all programs must satisfy. These provisions, specified in § 2522.100 of this rule, seek not only to enhance the quality of individual programs, but to further the ability of each program to contribute to the achievement of the overall goals and purposes of AmeriCorps as set forth by the Corporation.

Because the minimum program requirements represent elements essential to the success of any AmeriCorps program, every program receiving assistance from the Corporation through part 2522 of this rule is required to address each requirement. The following sections discuss the most salient of these requirements:

(1) Getting Things Done

First and foremost, every AmeriCorps program that receives funding or AmeriCorps educational awards from the Corporation must address educational, public safety, human, and environmental needs, and provide a direct and demonstrable benefit that is valued by the community. This requirement reflects the Corporation's intent to make efficient use of limited funds—to have every grant made to an AmeriCorps program in some way help to address our Nation's most pressing needs.

(2) Strengthening Communities

In addition to addressing the Nation's most pressing community needs, the Corporation also seeks to strengthen the communities in which we live through AmeriCorps programs. As social and economic forces continually drive people apart, the need arises to promote opportunities for diverse Americans to enjoy common experiences and share common values that, in the words of the President, "strengthen the cords that bind us together as a people." Thus, the Corporation has established the requirement that each program must seek "to strengthen communities and encourage mutual respect and cooperation among citizens of different races, ethnicities, socioeconomic backgrounds, educational levels, among both men and women and individuals with disabilities."

This requirement reinforces several of the Corporation's goals for AmeriCorps. First, it affirms that a necessary ingredient of active, productive citizenship is the ability of diverse citizens to live and work together, notwithstanding differences in race, class, gender, physical or mental ability, etc. Second, the requirement supports the objective of strengthening not just individual relationships among people, but the collective relationships among all Americans as expressed in the spirit of community and in citizens' sense of personal responsibility to that community. Third, it acknowledges that diversity within programs can be an effective resource for community problem-solving. Finally, the requirement supports a number of legislative objectives and requirements found within the Act.

For example, an initial finding of the statute is that "Americans desire to affirm common responsibilities and shared values, and join together in positive experiences, that transcend race, religion, gender, age, disability, region, income, and education." Furthermore, section 179 of the Act instructs the Corporation to evaluate programs based on their effectiveness in "recruiting and enrolling diverse participants * * * based on economic background, race, ethnicity, age, marital status, education levels, and disability." These legislative provisions thus reinforce the Corporation's objective.

One way in which this important objective may be accomplished is to involve diverse participants in programs. Therefore, the Corporation requires each program to seek actively to engage participants from diverse backgrounds in AmeriCorps, including individuals from the community served. It also recognizes that in practice, it is not always possible (or in some cases desirable) for this objective to be realized in every case. Specifically, the Corporation recognizes two instances in which programs may lack diversity in one or more ways:

First, despite its best efforts, a program simply may be unable to recruit the participants necessary to achieve diversity in some respect. In recognition of this the Corporation requires that programs "seek to achieve" rather than "ensure" diversity. However, programs will be required to specify the specific strategy or activities to be undertaken to recruit participants in accordance with this provision.

Second, some programs may have legitimate, substantive or philosophical reasons to involve individuals who share a particular characteristic. Examples of such programs include, but are not limited to the following: (1) A youth corps or other program might be designed to impart specific job skills

and provide basic education through service-learning and thus might lack educational or economic diversity by design; (2) a professional corps that requires participants to possess specific post-secondary training necessarily would lack educational diversity.

Although such programs would thus lack diversity in one or more of the required aspects, they nevertheless must strive for diversity in other areas. For instance, a professional corps enlisting participants of a common educational background would still be required to seek to include a racially and ethnically diverse group of individuals, individuals with disabilities, and both men and women. Equally important, all programs should undertake activities that will provide opportunities for citizens who might not otherwise serve, work or learn together to do so, regardless of what the overall composition of the program might be.

While the Corporation is committed to making AmeriCorps opportunities available to Americans of all backgrounds, it will also ensure, consistent with the Act, that at least 50 percent of Corporation funds provided to States will go to programs that operate in areas of greatest need and that place a priority on recruiting participants who are residents in these high need areas (as specified in § 2521.30(a)(3)(iii) of this rule), or on Federal or other public lands. The Corporation does not consider this requirement, which affects the overall national composition of programs and participants, at odds with its goals of encouraging the participation of citizens of all backgrounds.

The Corporation recognizes that recruiting and retaining diverse participants requires special efforts. This is particularly true for qualified individuals with disabilities, including people with mental disabilities . Because the Corporation intends to assist programs in achieving the goal of diversity, the Corporation anticipates making technical and other assistance available to programs to assist in the attainment of recruitment goals. In addition to program development assistance for strengthening recruitment or outreach components of individual programs, the Corporation will make other resources available to programs, including financial support for programs seeking to involve qualified individuals with disabilities (as described in § 2524.50 of this rule), as well as referral information on participants identified through the national recruiting system described in § 2522.210 of this rule and in section (E)(3), below.

(3) Participant Selection Requirements

Through this rule, the Corporation offers guidance to programs regarding participant selection. First, the proposed regulation encourages programs to select participants who possess leadership potential and a commitment to the goals of the AmeriCorps program. This guidance is not intended to discourage the enrollment of individuals who have not attained educational or job success; rather, it acknowledges that within every social strata, there are people who possess leadership ability that has not been tapped or directed at productive activities. Second, the regulation calls for programs to select participants in a non-political, non-partisan, and non-discriminatory manner. The third participant selection rule is found in the Act itself—the requirement that programs establish minimum qualifications for participants. Among other things, this provision prohibits AmeriCorps participants from performing service that (1) is or was recently performed by paid employees (2) would infringe upon the promotional opportunities of paid employees (3) would supplant the hiring of employees or (4) would reduce the hours, wages, or benefits of paid employees.

Finally, although the Corporation expects that most programs will involve young adults or recent college graduates as participants, the regulations encourage programs to consider intergenerational approaches because of the natural mentoring relationships that arise in these programs. For example, a youth corps might involve seniors on each crew or a corps of young attorneys might include retired lawyers volunteering on a part-time basis.

In addition, the Corporation may require programs to establish pre-service orientation and training periods for participants. The goal of such periods would be to establish a common orientation process for all programs and participants that would be tied to the efforts to create a national identity. The Corporation might specify, for example, that the official AmeriCorps logo may not be worn until participants have satisfactorily completed the orientation period and have been officially enrolled in the program through the administration of a national oath. These efforts, among other things, may reduce prospective attrition rates and contribute to a positive *esprit de corps* across programs.

The statute also directs the Corporation to establish a national leadership pool and a national system for the recruitment of participants; States also must establish recruitment systems. National and State recruitment will contribute to the diversity of the overall participant pool by supplementing local recruitment with participants from across the Nation and with participants who possess specialized skills or training. The national and State recruitment efforts will also facilitate the participation of individuals who desire to serve but live in areas where there are few or no AmeriCorps programs available. The Corporation may therefore require programs to select a small percentage of participants from the national recruitment pool. In addition, as specified in the application materials, the Corporation may provide for the coverage of certain relocation expenses for a limited number of participants who are recruited through the national referral system. While the Corporation will not require programs to select any participants through the national system in fiscal year 1994, programs are strongly encouraged to do so.

(4) AmeriCorps Identification

In addition to those activities noted in paragraph (3) above, the Corporation will also require programs to agree to identify themselves as part of a larger national effort and to participate in such AmeriCorps activities as the Corporation may specify. Examples might include the use of a national logo or common application and informational materials as well as participation in special activities such as a national service day, a conference or common training, or the use of a common orientation component. This provision would not preclude an AmeriCorps program from developing its own training or materials, or from using its own name as the primary identification for the program. These efforts not only will enhance the visibility of the AmeriCorps programs but will contribute to a national recognition of the value and importance of the work being undertaken by the programs.

(5) Promoting Active, Productive Citizenship

In addition to "Getting Things Done" in communities throughout the Nation, another central goal for all AmeriCorps programs is to promote active, productive citizenship on the part of all participants, which may include fostering a sense of personal responsibility and a life-long ethic of service. To this end, programs are encouraged to design projects that employ service-learning methods to enhance participants understanding of the relationship between the activities

undertaken to address needs and the larger social context in which the efforts are made. In addition, programs must provide participants with appropriate training and support to carry out assignments, including background information on the community in which the service will be performed and on why the particular project is needed. Finally, because AmeriCorps programs seek to promote active citizenship, and because voting is a critical component of citizenship in any democracy, every program must encourage, in a non-partisan manner, each participant eligible to do so to register to vote.

(6) Start of Operations

To further the goal of creating a national identity for programs, this rule requires all programs to agree to begin operations at such times as the Corporation may reasonably require. Creating "classes" of participants who all begin and "graduate" from their terms of service during the same time period will foster a greater sense of national identity. The Corporation's current policy requires participants to begin service in June, September, or January. The Corporation may waive this requirement for programs that can demonstrate compelling reasons for alternative starting dates.

This requirement should also contribute toward the achievement of other programmatic goals. For example, common schedules and operating timelines will enable the Corporation to support, where appropriate, staff and participant training. In addition, this provision will enable many programs' term of service to track the traditional school year, making the recruitment of college and college-bound participants easier. For example, a program that begins in January and ends in October would require participants to miss two years of school, whereas a program that begins in September and ends in June would only require participants to miss one year of school.

In addition, this rule states that programs must agree to comply with any policy the Corporation may implement regarding filling approved AmeriCorps positions left vacant by attrition. The Corporation is currently considering a policy which would allow programs to fill such vacant positions only within the first month of the enrollment of a given class of participants. The Corporation encourages interested parties to comment on this proposed policy. This provision is aimed at providing a sense of cohesion within each AmeriCorps program. Experience shows, especially in team- or crew-based programs, that the process of continually filling positions left vacant by attrition tends to erode the sense of teamwork and identity among participants and can interrupt an efficient flow of operations, thereby affecting the quality of service provided in the community. Through this provision, the Corporation would require programs to wait until the next approved intake period before enrolling additional participants.

(7) Allocation of Educational Awards Within Programs

Because of the limited amount of funding available for program assistance, the Corporation anticipates that in some cases programs (especially existing programs) may not apply for or receive adequate support for all participants enrolled in the program, and the potential may thus arise for some participants (who are serving in approved AmeriCorps positions) to receive AmeriCorps educational awards while others do not. The Corporation is therefore requiring every applicant to describe the rationale for its distribution of educational awards to program participants in those cases where distinctions among participants are necessary. In general, this distribution should treat equally all participants doing the same or essentially similar work. This reflects a matter of principle as well as a pragmatic concern for the equal treatment of participants within a single program.

The Corporation recognizes that equal treatment may not be feasible or desirable in some instances. For example, an intergenerational program or a program with a specialized component or division assigned special projects may make distinctions among participants that justify the provision of educational awards to some but not to others. Similarly, a program may choose to offer alternative post-service benefits to participants in lieu of the AmeriCorps educational awards provided by the Corporation. AmeriCorps programs are strongly encouraged to offer alternative post-service benefits to participants who will not receive AmeriCorps educational awards. The Corporation will evaluate on a case-by-case basis the rationales of programs that do not plan to provide all participants with educational awards. However, the Corporation anticipates that it will not approve rationales based solely on a determination of economic need of participants.

(8) Evaluation Requirements

In order to ensure that only high quality programs continue to receive Corporation support, AmeriCorps programs must perform continuous monitoring and evaluation. The provisions of this rule emphasize the importance of monitoring and evaluation at all levels—by individual programs, States or grantmaking entities, and the Corporation.

This rule allows programs to conduct internal rather than independent evaluations. The Corporation will conduct independent evaluations at the national level because, due to economies of scale, that is where they will be most cost-effective. Each program, State, and grantmaking entity must collect data and cooperate fully in all of the Corporation's monitoring and evaluation activities.

A key provision of the Corporation's evaluation strategy requires all programs to set annual objectives in concert with the Corporation and applicable grant-making entity. Programs will be required to track, and report to the Corporation, progress towards these objectives. Programs will be evaluated annually, in part, based on their success at achieving their objectives.

Finally, this rule promotes continuous quality improvement and provides examples of techniques available to programs.

(E) Program Types and Size

(1) Program Types

Section 2522.110 of this rule lists fourteen discrete types of service programs that may qualify for AmeriCorps program funding. These types, while sharing the goal of meeting our Nation's pressing needs, differ in terms of which need is addressed, how the participants are organized, the age and background of the participants, and the nature of the sponsoring organization.

After careful and thorough consideration, the Corporation decided not to include in the regulations any program types not listed in the Act. This decision is not an attempt to restrict the types of eligible AmeriCorps programs. On the contrary, it was specifically intended to leave open-ended the types of programs that may be eligible.

The Act states that the Corporation may designate other AmeriCorps types aside from those listed to qualify for AmeriCorps grants. The Corporation decided that instead of attempting to list additional types of programs, it would interpret this provision broadly, allowing for the eligibility of any program type that meets the criteria applicable to all programs.

The fourteen program types listed are clearly eligible for support, and they may serve as guidelines for developing programs. However, programs that meet

the Corporation's eligibility and quality criteria but that do not fit one of these types will not be disadvantaged in the selection process. Conversely, because the Corporation wishes to fund the highest quality programs that meet the Nation's most pressing needs, the Corporation will not give priority to a program simply because it fits the description of one of the listed program types.

Finally, any organization considering applying should determine whether they are more appropriately a project sponsor than a program. A program is responsible for recruiting, selecting, and training participants, providing them benefits and support services, engaging them in regular group activities, and placing them in projects. While the program may also serve as the project sponsor by supervising the day-to-day service of participants, the program may instead place participants in projects overseen by another organization.

For example, a local police department could apply for funds to run a community policing support program. It would recruit and select participants, train them, and supervise them in a variety of projects. In this case, the police department would be both the program and the project sponsor. Alternatively, an organization that runs a program may work in collaboration with one or more other organizations that will serve as project sponsors. For example, a community-based organization (CBO) may apply for funds to operate an early childhood development corps. The CBO, as the program, would recruit and select participants, provide them with specialized training in child development, and bring them back together regularly for additional training and other activities. The participants would be assigned individually or in small groups to child care, Head Start, and preschool programs in the community, which would serve as project sponsors.

In general, organizations who can engage productively no more than four participants or that lack the capacity to perform the duties, required of programs should consider becoming project sponsors. Such an organization may form a partnership with another organization in the community with a shared vision and mission that is interested in becoming a program sponsor. Together, the organizations in the partnership should be able to present a coherent program, including common training and ongoing group activities, rather than a loosely federated consortia with unrelated elements. Such an organization may also contact the State Commission for information about funded programs in the area that might place participants with the organization, or contact the State ACTION office about the possibility of a VISTA being assigned there.

(2) Minimum Program Size

It is extremely important for all programs, regardless of type, to be large enough to achieve a demonstrable impact on the community served. Thus, while the actual size of each program may vary depending on the size of the community in which it operates, the design of the program, and other factors, in general the Corporation encourages programs to enroll at least twenty full-time equivalent participants, regardless of whether participants are placed individually or in teams. And while the Corporation will likely fund programs that exceed this preferred minimum size, any applicant seeking support for a program that does not intend to enroll at least twenty participants should demonstrate why a smaller program is necessary or appropriate to a specific circumstance.

This guideline should not only enhance the impact that programs will have on a particular issue or within specific communities, but it should also increase the ability of the Corporation and State Commissions to ensure the delivery of high quality programming and compliance with legislative and regulatory requirements. Accomplishing these outcomes would be significantly more difficult with many small groups of participants dispersed throughout a State or region.

It is important to note that this requirement relates to programs, not to project sponsors. Thus, while programs should enroll at least twenty participants, there is no minimum requirement for the number of AmeriCorps participants which may be placed in an approved service site or organization.

(F) Participant Eligibility and Benefits

(1) Terms of Service

Section 2522.220 specifies appropriate definitions and guidance pertaining to terms of service. This rule clarifies that participants shall receive benefits, including AmeriCorps educational awards, only for their first two terms of service, regardless of whether those terms of service are full-time, part-time, or a combination of both. It also establishes that admission to a second or further term of service is contingent upon successful completion and a positive performance review of the first term. (§ 2522.220(c)(i) of this rule explains the performance review.)

Participants and programs have substantial latitude in mixing different types of terms of service. For example, a high school graduate could participate full-time in a youth corps for one year, use his or her educational award to pay for two years of community college, participate in a part-time AmeriCorps program during college, and earn another award to help pay the costs of attending a four-year university. Alternatively, a participant could serve two consecutive 1½ year part-time terms of service while attending college; such a participant would thus, in total, serve 1800 hours and earn two part-time educational awards. A good example of this type of mixing of terms of service would be a during-college program analogous to the Reserve Officer Training Corps program, which engages participants in part-time service during college, followed by a full-time placement after graduation.

(2) Release from Terms of Service

Generally, participants can be released for two reasons: (i) they want to be released due to compelling personal circumstances; or (ii) they are released from the program for cause. In both cases, this rule puts primary responsibility for determining when to release a participant in the hands of the programs. Programs should be aware that participants released due to compelling personal circumstances may receive prorated educational awards whereas those released for cause may not.

In addition, this rule requires programs to establish in writing clear guidelines that establish the circumstances under which participants will be released for cause. These documents must be signed by the participant and by a representative of the program. The Corporation encourages programs to establish attainable but high standards for participant conduct. The Corporation requires programs to release participants for cause if they are convicted of a felony. If participants are charged with a violent felony or the sale or distribution of a controlled substance, or if they are convicted of the possession of a controlled substance, programs must suspend their service without a living allowance and without receiving credit for hours missed.

A participant who is wrongly released or suspended for cause will receive credit for any service missed and reimbursement for missed stipends. This rule further describes the conditions under which participants

whose service has been suspended may be reinstated, the impact of release for cause, and the grievance procedure available to participants. (See § 2522.230)

(3) Living Allowances

In general, the Act requires that all programs receiving Corporation assistance provide living allowances to full-time participants. The amount of the living allowance must be at least the average annual amount provided to VISTA volunteers (approximately $7,440 for FY 1994 or about $4.40 per hour assuming a total of 1700 hours served) but not more than twice that amount. Of this, the Corporation's share may not exceed 85% of the basic VISTA allowance (or approximately $6,375). Programs must therefore provide a cash match for their share of the stipend.

There are a number of exceptions to these requirements: a program that was in existence prior to September 21, 1993, is by law exempt from meeting the minimum stipend requirement; programs may, but are not required to, provide living allowances to part-time participants; and the Corporation may waive or reduce the minimum requirement at its discretion (see § 2522.240(b)(4) of this rule).

With this rule the Corporation also clarifies that the Corporation's share will not exceed 85% of the living allowance, regardless of whether the allowance has been reduced or prorated from the minimum full-time allowance. Thus, if a program provides part-time participants who serve 900 hours per year with an annualized stipend of $3,960, the Corporations share would not exceed $3,366 (85% of the part-time allowance).

Finally, the Corporation will pay no share of participant stipends for a professional corps described in § 2522.110(b)(3) that provides stipends to participants in excess of the maximum allowance. However, a program involving professionals that wishes to seek Corporation support for participant stipends or benefits while not technically a "professional corps" may do so by applying under the general provision (§ 2522.110(g)). Such a program would be subject to the same restrictions on stipends as other AmeriCorps programs.

(4) Child Care

The Act requires that programs provide child care or a child care allowance to any full-time participant who needs such assistance in order to participate. The regulations define need based on three factors: total family income of the participant must be less than 75 percent of the State median income; the participant must reside with and be a parent or guardian of a child under the age of 13; and the participant must not be receiving child care assistance from another source at the time of acceptance into the program, unless the participant would become ineligible for child care by virtue of enrollment in the program. These requirements were selected to be consistent with the Child Care and Development Block Grant Act of 1990, the major program through which the Federal government provides child care to low- and middle-income families. To ensure that funded care meets minimum health and safety standards, the regulations also tie eligible providers and the amount of the child care allowance to the Child Care and Development Block Grant of 1990. In implementing this provision, the Corporation expects to reserve program funds for child care benefits. Programs are asked in their applications to indicate how many participants they expect to require such benefits. This will help the Corporation determine the amount of funds that should be reserved.

(5) Health Insurance

The legislation requires the provision of health care benefits to full-time AmeriCorps participants who are not otherwise insured. The regulations provide for the Corporation to establish a minimum benefits package and to tie the amount of funding for health care policies to an affordable policy that provides these minimum benefits. The Corporation welcomes comments on the contents of the minimum benefits package. Any program wishing to provide alternative benefits may do so with approval from the Corporation, provided that the policy has a fair market value equal to or greater than the minimum benefits package.

Section II: Available Grants and Distribution of Funds

(A) Types of Grants Available

Eligible applicants may apply for planning, operating, or replication grants. Applicants seeking operating or replication grants also may apply for AmeriCorps educational awards. In addition, an applicant may seek AmeriCorps educational awards only.

(1) Planning Grants

The purpose of a planning grant is to bring a program to the verge of implementation so that it may compete successfully for operating assistance in the following grant cycle. The Corporation will make planning grants available to eligible applicants that already have identified a sound concept for an AmeriCorps program, but that require resources in order to plan, develop, and prepare the program for implementation. (In this sense, planning grants more accurately may be called "development grants.")

For example, a planning grant might be appropriate for an applicant that has already identified the type of program to be developed, including key design elements such as the specific need(s) to be addressed, types of projects to be conducted, and kinds of participants to be recruited. The program might lack, however, a specific training or education curriculum, or it might need to build additional community partnerships to identify specific service projects and activities to be conducted. It might also lack a specific staffing or recruitment plan and materials, or it might need to raise additional matching funds. Thus, while the specific elements of the program might require developmental assistance, the program design is nevertheless clear enough to enable the Corporation to evaluate fully the nature of the program and the prospective activities that it will undertake (including the expected impact it will have on a particular issue or problem). While the average size of grants awarded for planning and development will vary by circumstance and need, in general, grants will range from $50,000 to $250,000, depending on the size of the prospective full-time program, and may cover a period of between six months and one year, depending on the expected timing of the next grant cycle.

(2) Operating Grants

The purpose of an operating grant is to support an applicant that is ready to implement a fully developed new or expanded program. Operating grants may include a short planning phase to complete the final stages of program development before implementation. The Corporation may award operating grants for a term of up to three years, with annual renewal funding subject to periodic assessment of program quality, successful performance against stated objectives, and availability of appropriations. In general, the size of an operating grant will reflect the size and costs of the proposed program. However, the Corporation anticipates making few operating grants in excess of $4 million. While there are no absolute limitations on the number of AmeriCorps educational awards an applicant may seek, the Corporation will apportion these positions in a

manner consistent with the reasonable needs of programs. Moreover, programs are encouraged to take a cost-effective approach based on per-participant costs. The Corporation also encourages new or start-up programs to start relatively small (generally between 20 and 50 participants, depending on the needs of the program) in order to ensure high quality operations in the first year. For new programs proposing multi-State or multi-site operations, the Corporation also encourages piloting efforts in a limited number of communities or locations to ensure quality before undertaking significant expansion.

(3) Replication Grants

The purpose of a replication grant is to support the replication to other sites or programs of a program model or component that has a track record of success, identifiable core elements that account for its effectiveness, and sufficient adaptability to local circumstances. In its first year, the Corporation will evaluate proposals for replication against criteria similar to those that apply to operating grants. In future years, the Corporation may establish criteria that are specific to replication grants, including a requirement for independent evaluation results demonstrating the quality and effectiveness of the program seeking replication.

The terms and size of replication grants, as well as the allotment of AmeriCorps educational awards, are the same as for operating grants as described in paragraph 2 above.

(4) Educational Awards Only

For programs that have adequate resources to cover program costs and that meet all the requirements for an AmeriCorps program set forth in part 2522 of this rule, the Corporation may make grants consisting only of AmeriCorps educational awards. This rule clarifies that these grants may be made either to programs that do not apply for program assistance or to programs that apply for but do not receive program assistance (see § 2521.30(c)).

These types of grants are integral to the overall success of AmeriCorps: they are an efficient use of limited resources; and they allow for the inclusion of high-quality programs that might otherwise be excluded due to the supplantation rule (which states that Corporation assistance cannot supplant State, local or private funds). However, programs that receive this type of grant must be of at least as high-quality as programs that receive program assistance.

(5) Other Assistance

(a) *Program development, training and technical assistance.* The Corporation will make grants to provide program development, training, and technical assistance to improve the quality of service projects, assist in the recruitment of diverse participants, improve educational or other materials, and for other purposes (see § 2524.40 of this rule; also see part 2532, which describes other grants available for training and technical assistance).

(b) *Challenge grants.* Section 2524.40 of this rule allows the Corporation to make challenge grants to programs already receiving Corporation assistance. With these challenge grants the Corporation may provide up to $1 in assistance for every dollar raised by a program in excess of the matching funds required for its existing Corporation grant. More details concerning the specifics of this program are provided in § 2524.40 of this rule.

The Corporation views the challenge grant program as an important component of its efforts to support AmeriCorps. It allows the Corporation to leverage funds and expand the scope and reach of the highest-quality AmeriCorps programs. However, because programs generally will not receive AmeriCorps program grants until three-quarters of the way through the fiscal year, the Corporation anticipates making only a limited number of challenge grants in fiscal year 1994.

(c) *Grants for outreach to qualified individuals with disabilities.* The Act authorizes the Corporation to make grants:

(i) To assist AmeriCorps grantees in placing applicants who require reasonable accommodation (as defined in § 101(9) of the Americans with Disabilities Act of 1990) (42 U.S.C. 12111(9)) or auxiliary aids and services (as defined in section 3(1) of such Act) (42 U.S.C. 12102(1)) in an AmeriCorps program; and

(ii) To conduct outreach activities to qualified individuals with mental or physical disabilities to recruit them for participation in AmeriCorps programs.

(d) *Disaster relief.* With this rule, the Corporation has determined that in light of limited resources for this grant program, disaster relief grants will only be made available to enable national and community service programs to respond quickly and effectively to a Presidentially-declared disaster.

The Corporation has also clarified eligibility requirements by specifying that any AmeriCorps program (including youth corps, the National Civilian Community Corps, VISTA, and other programs authorized under the Domestic Volunteer Services Act) or grant making entity (such as a State or Federal agency) that is supported by the Corporation may apply to the Corporation for disaster relief grants.

Finally, the Corporation has specified that due to the limited duration of disaster relief activities, it may waive certain matching or program requirements if appropriate.

(B) Distribution of AmeriCorps Funds and Educational Awards

(1) State Formula Allotment and Corresponding Educational Awards

The Act specifies that of amounts available for allocation under the grant program, the Corporation will make one-third available to eligible State applicants through a population-based formula. For fiscal year 1994, the Corporation expects that $51,833,333 will be available for award by formula allotment. Because the Corporation is committed to supporting only high quality AmeriCorps programs, this formula distribution is not and will not be treated as an entitlement for states. These regulations specify that only those applicants that submit high quality applications consistent with the requirements contained in part 2522 of this rule and have an approved State Plan under part 2513 will receive their formula allotment. The Corporation is committed to working with States to ensure that the programs funded through their formula allotment will meet the quality standards established in this rule. For fiscal year 1994, all States must submit to the Corporation a notice of intent to apply for formula funds by March 31, 1994. The formula allotment for States not intending to apply (or that do not submit a notice of intent to apply by the required date) will be made available to eligible local applicants within the State consistent with § 2521.30(d) of this rule.

In addition, the Act instructs the Corporation to distribute to States receiving their formula allotment a "corresponding allotment" of AmeriCorps educational awards; however, the statute does not clarify what "corresponding allotment" means. The Corporation has therefore determined that the appropriate interpretation of the legal meaning of the expression "corresponding allotment" is the number of educational awards that directly corresponds with the expected number of approved AmeriCorps positions to be supported with program assistance.

Because a direct correlation does not exist between program dollars and educational awards, the Corporation determined that it needed to establish a plausible monetary relationship between the total value of a State's formula award and the number of educational awards it would receive. This relationship was determined by dividing each State's formula award by the anticipated average Federal share of the cost of an AmeriCorps position, calculated at $13,800 per participant (Program Money+$13,800=Educational Awards).[1] Basing the definition of "corresponding allotment" on a relationship between program dollars and educational awards reflects the Corporation's intent to ensure that any State receiving program assistance for the support of AmeriCorps participants would be ensured of receiving the requisite number of educational awards for those participants. Thus, according to the above calculus, Ohio, for example, will receive $2,228,498 through its formula allotment and will also receive 161 AmeriCorps educational awards. The overall expected distribution of formula grants and educational awards is provided by State in the table below.

FORMULA ALLOCATION OF PROGRAM FUNDS AND AMERICORPS EDUCATIONAL AWARDS TO STATES[1]

State	Program funds	Educational awards
Alabama	$831,565	60
Alaska	112,977	8
Arkansas	483,521	35
Arizona	752,837	55
California	6,107,718	443
Colorado	677,088	49
Connecticut	674,582	49
Delaware	136,874	10
District of Columbia	124,841	9
Florida	2,661,624	193
Georgia	1,332,191	97
Hawaii	228,283	17
Idaho	207,141	15
Illinois	2,347,085	170
Indiana	1,138,927	83

[1] This amount is exclusive of the national service educational award, which is provided separately through the National Service Trust Fund. This award represents an average estimated cost per participant for start-up programs based on the experience of the national service model programs funded by the Commission on National and Community Service. Average costs for established programs, including youth corps programs, are generally significantly lower. Because the Corporation anticipates funding start-up programs as well as programs that build on the infrastructure of existing programs and organizations, and because the Corporation will strongly encourage programs to exceed the minimum matching requirements, it is expected that many programs will achieve significantly lower average costs per position.

FORMULA ALLOCATION OF PROGRAM FUNDS AND AMERICORPS EDUCATIONAL AWARDS TO STATES[1]—Continued

State	Program funds	Educational awards
Iowa	570,551	41
Kansas	508,771	37
Kentucky	757,132	55
Louisiana	867,509	63
Maine	252,425	18
Maryland	982,217	71
Massachusetts	1,234,071	89
Michigan	1,909,484	138
Minnesota	897,970	65
Mississippi	529,412	38
Missouri	1,051,644	76
Montana	164,498	12
Nebraska	324,351	24
Nevada	246,884	18
New Hampshire	228,004	17
New Jersey	1,586,048	115
New Mexico	311,489	23
New York	3,693,483	268
North Carolina	1,362,733	99
North Dakota	131,279	10
Ohio	2,228,498	161
Oklahoma	646,322	47
Oregon	584,123	42
Pennsylvania	2,440,838	177
Puerto Rico	736,670	53
Rhode Island	205,912	15
South Carolina	717,574	52
South Dakota	143,281	10
Tennessee	1,002,281	73
Texas	3,491,927	253
Utah	353,656	26
Vermont	115,641	8
Virginia	1,272,453	92
Washington	1,000,500	72
West Virginia	368,770	27
Wisconsin	1,004,349	73
Wyoming	93,332	7
Totals	51,833,333	3,756

[1] The actual amount of each State's grant will be proportionally reduced if the Corporation chooses to set aside money for participant health and/or child care costs. In addition, numbers are based on the 1990 census but will be updated to incorporate the latest census estimates from the Census Bureau.

The Corporation will consider the number of educational awards that corresponds to a State's formula allotment as a minimum, and not as a maximum, number of educational awards potentially provided to a State. Thus, a State's "minimum" formula and award allotments should not necessarily drive the design or size of programs applying for assistance through State applications. Indeed, insofar as the formula application includes high quality, cost-effective programs that request more educational awards than would otherwise be provided through the minimum allotment, those programs would be eligible to receive additional awards from the Corporation on a competitive basis.

This mechanism for distributing educational awards not only satisfies the legislative requirement but also makes sense for policy and programmatic reasons. In making this determination, the Corporation did, however, consider other alternatives. For example, the Corporation considered the possibility of distributing the awards on a basis proportional to the distribution of formula grants. Thus a State receiving 12% of the total amount of funding available by formula allocation would also receive the same percentage of educational awards. The Corporation did not choose this option for several reasons.

First, from a legal standpoint, if the Congress had intended for there to be a direct, proportional correlation between the overall distribution of program funds and the overall distribution of AmeriCorps educational awards, it would not have created educational award set-asides for VISTA and CCC volunteers; nor would it have allowed for the distribution of educational awards to programs the Corporation does not fund or programs, such as professional corps, that necessitate different levels of Federal support than other programs.

Second, from a programmatic standpoint, the distribution of educational awards on a strict proportional basis would have resulted, in some cases, in the unfortunate consequence of leaving some States with insufficient programmatic funds to support the number of participants for whom they would have received educational awards. Finally, this approach also would have resulted in a lack of flexibility on the part of the Corporation to provide support to programs on the basis of quality and need, rather than on the basis of an arbitrary proportional rule that, as noted above, bears no relationship to anticipated or real program costs.

In short, the Corporation's need to support quality programs, to ensure adequate financial support for all approved AmeriCorps positions and educational awards within those programs, and the need to retain flexibility to respond to individual State and program needs are addressed through this distributive scheme.

(2) State Competition

In order to receive consideration for competitive funds, a State must receive its formula allotment. In addition to the grants made available to States by formula allocation, the Corporation will make at least one-third of program funds, as well as an appropriate number

of educational awards as determined by the Corporation, available to States on a competitive basis. For fiscal year 1994, the Corporation expects that $51,833,333 will be available for this competition. The following priorities will govern the competitive distribution of AmeriCorps funds and educational awards to States:

(a) *Priority for small states.* The Corporation is committed to ensuring that every State is able to participate in a meaningful way in the AmeriCorps grant program. Specifically, the Corporation seeks to enable every State that so desires to support at least one high quality AmeriCorps program that meets the preferred minimum size guidelines of 20 full-time equivalent participants as stipulated in section I(D)(2), above. Thus, for fiscal year 1994 the Corporation has established a priority for small States, whereby any State that: (i) Does not otherwise receive through the legislatively required formula allocation adequate funding to support at least 20 full-time AmeriCorps positions, and the same number of educational awards, and (ii) which can demonstrate the existence of a high quality program(s), will receive priority consideration for assistance through competitive State funding.

In essence, this priority effectively establishes a small State floor in the amounts of $276,100[2] and 20 AmeriCorps educational awards for those affected States (indicated in the table in section II(B)(1)) that meet the quality and need criteria indicated above. This priority does not, however, constitute a guarantee of assistance to any State. Although the priority for small States will result in programs otherwise supported through a State's formula allotment receiving limited competitive funding, these programs will not be required to address the national priorities established by the Corporation, notwithstanding the provision specified in § 2522.410(b)(1)(ii) of this rule. Thus, every State meeting the guidelines will be able to support at least one program of the minimum preferred size that addresses State-based priorities.

(b) *National issue priorities.* All programs, except those affected by paragraph (a) above, that are submitted through State applications for competitive funding should address the national issue priorities explained in section I(C)(2) of this supplementary section. In general, most activities conducted by programs should substantially address one or more of the national priorities. However, the Corporation may grant waivers if a program demonstrates that its proposed activities are (i) more essential for their communities and (ii) not being met in any other way.

(c) *Priority for existing grantees.* In fiscal year 1994, the Corporation will give priority to National Service Demonstration Programs and American Conservation and Youth Service Corps Programs that received funding from the Commission on National and Community Service. While this one-year priority does not constitute a guarantee for renewal funding, the Corporation expects that those programs that meet the minimum requirements and quality standards stipulated in this rule will receive support. In addition, States should give priority to these programs as well.

(3) Direct National Competition

(a) *Allocation.* After funds have been allotted to the States and set aside for Indian tribes and U.S. territories, any remaining AmeriCorps program funds will be distributed directly by the Corporation on a competitive basis. In fiscal year 1994, the Corporation anticipates making $48.8 million available for award in this category. In general, subdivisions of States, Indian tribes, public or private nonprofit organizations (including labor organizations), institutions of higher education, and Federal agencies may apply for these funds, although no more than one-third may go to Federal agencies. Unless a program has a clear and compelling reason not to do so, programs funded through this competition should address any national priorities established pursuant to § 2522.410(b)(1)(ii) of this rule.

(b) *Limitations for fiscal year 1994.* The Corporation will limit this category of funding in fiscal year 1994 to the following:

(i) Programs operated or funded by Federal agencies.

(ii) Programs operated or funded by national nonprofit organizations.

(iii) Professional corps programs.

(iv) Programs operated in more than one State.

The Corporation intends to use this category of funding primarily to support programs that are national or regional in scope.

In general, programs that are operated locally by nonprofits, subdivisions of States or institutions of higher education can and should apply through their respective States; doing so will increase the chances that the programs are part of a comprehensive State plan, which will enable the Corporation to ensure that all local programs are appropriately monitored and receive technical assistance necessary to support high-quality programs.

To clarify the eligibility of applicants in fiscal year 1994, the Corporation will consider a national nonprofit organization to be one whose membership, activities, constituencies, or mission is national in scope. In addition, although programs operated or funded by States are not otherwise eligible to receive direct national competitive funds, those National Service Demonstration Programs supported by the Commission on National and Community Service that operate in more than one State may compete for support in fiscal year 1994.

(c) *Agreements with Federal agencies.* Technically, when a Federal agency competes for and receives program funds under this category, the Corporation will not give that agency a grant but rather will enter into a contract or cooperative agreement that includes the transfer of funds. Federal agencies may either subgrant to other nonprofits or other eligible entities, or operate programs directly. Through this rule the Corporation has clarified the scope and purposes of the prospective awards to Federal Agencies as follows:

(i) AmeriCorps grants should serve as "seed money" to leverage agencies' existing resources and grant-making capacity toward the goal of integrating service more fully into agencies' programs and activities. Agencies should plan, ultimately, to support independently service initiatives developed or expanded with Corporation assistance.

(ii) Only Cabinet level departments and independent agencies may apply. Bureaus, division, and local and regional offices of such departments and agencies can only apply through the central department or agency. An application may, however, include proposals for more than one program. The primary purpose of this restriction is to ensure that all national and community service efforts within a department or agency are centrally coordinated and are part of a coherent strategy.

The Corporation also expects that many programs supported by Federal agencies with Corporation assistance will be sub-granted or operated in partnership with community-based organizations.

[2] This figure was calculated by multiplying the preferred minimum number of national service participants per state (20) by the average Federal cost per participant ($13,800)

(C) Application Requirements/Issues

(1) Content and Degree of Specificity

In §§ 2522.300–320 of this rule, the Corporation specifies the application requirements for all applicants seeking AmeriCorps program assistance, including national service educational awards. While the Corporation will provide applicants with additional guidance through approved application materials, the Corporation will require every applicant—regardless of whether the applicant is a State or other eligible entity applying directly to the Corporation—to include a complete, detailed description of the proposed program(s) to be funded.

In essence, applicants will not be able to apply to the Corporation for assistance for the purpose of subgranting awards to programs or organizations that are not yet known at the time of application. Especially in the case of States or other subgranting entities, applicants will therefore need to know the specific programs to be proposed and will need to provide required information on such programs at the time of application. This requirement will ensure that the Corporation will have complete information with which to select the highest quality programs.

In general, this requirement will apply to States for both formula and competitive applications, although the degree of specificity about programs may vary slightly. In fiscal year 1994, the Corporation—through the application materials—will require States to summarize in the narrative of the proposal information on programs proposed under the formula allotment (although States will be required to provide a complete application for each program in the appendix to the State's application). Specific, detailed information will be required for each individual program included in any application for competitive funding.

In addition, the statute requires that the Corporation obtain certain information on all programs prior to making any award. This information includes:

(a) *A description of service placements.* The Act requires that an application for AmeriCorps program funds and/or educational awards include a description of the positions into which participants will be placed, as well as a description of the minimum qualifications that individuals must meet to be placed in those positions.

With this rule, the Corporation requires that such descriptions describe the nature of specific tasks to be performed by participants. Although individual "job descriptions" are not required for every participant, applicants should clearly identify the specific nature of assignments to be performed by participants within service projects. This provision not only addresses a legislative requirement but also provides additional information that will enable the Corporation to assess the expected impact the program will achieve.

(b) *Coordination with State Plan.* The Corporation proposes to require all applicants that are not States coordinate their activities with the application of the State, including the State Plan, so as to build upon existing programs and not duplicate efforts. Applicants applying directly to the Corporation in fiscal year 1994 will be required to coordinate their planned efforts with the State in which the program(s) will operate, notwithstanding the fact that the application of the State will be due to the Commission after the applications of applicants other than States. The application should identify efforts undertaken to this effect, including documentation of meetings or correspondence.

(2) Special Requirements for State Applicants

(a) *Number of programs in the competitive portion of a State application.* To ensure that States submit only the highest quality programs for funding, the Corporation has limited the number of programs a State may include in its application for competitive funding as indicated in the table below. Every State may include at least three programs, and each State may include an additional program for each full percentage point of the population that State contains. New York, for example, will receive the initial three, plus an additional seven corresponding to the 7% of the total population New York contains, for a total of ten.

MAXIMUM NUMBER OF PROGRAMS THAT MAY BE INCLUDED IN STATES' APPLICATIONS FOR COMPETITIVE FUNDING

State	Maximum number of programs
Alabama	5
Alaska	3
Arkansas	4
Arizona	4
California	15
Colorado	4
Connecticut	4
Delaware	3
District of Columbia	3

MAXIMUM NUMBER OF PROGRAMS THAT MAY BE INCLUDED IN STATES' APPLICATIONS FOR COMPETITIVE FUNDING—Continued

State	Maximum number of programs
Florida	8
Georgia	6
Hawaii	3
Idaho	3
Illinois	8
Indiana	5
Iowa	4
Kansas	4
Kentucky	4
Louisiana	5
Maine	3
Maryland	5
Massachusetts	5
Michigan	7
Minnesota	5
Mississippi	4
Missouri	5
Montana	3
Nebraska	4
Nevada	3
New Hampshire	3
New Jersey	6
New Mexico	4
New York	10
North Carolina	6
North Dakota	3
Ohio	7
Oklahoma	4
Oregon	4
Pennsylvania	8
Puerto Rico	4
Rhode Island	3
South Carolina	4
South Dakota	3
Tennessee	5
Texas	10
Utah	4
Vermont	3
Virginia	5
Washington	5
West Virginia	4
Wisconsin	5
Wyoming	3
Totals	256

Because of the limited amount of funding available, the selection process will be very competitive, with only about one in five proposed programs likely to receive support. Furthermore, the Corporation does not anticipate that any one State will receive more than a third of the available funds, and most States will receive considerably less. States are advised to submit applications proposing only coherent, high quality programs that: address the program and size requirements explained in part 2522 of this rule; are consistent with the State plan; and are cost-effective. States will not increase the chances of their programs receiving funding by increasing the total number of programs they submit.

(b) *Use of competitive funds to support programs included in the formula portion of a State application.* The cost of programs included in the formula application may not exceed a State's formula allotment. However, from the competitive State funds, States may request additional funds and educational awards for programs listed in the formula section of the applications if either (i) the State receives small State priority consideration (as explained in § II(B)(2), above), or (ii) programs listed in the formula portion of the application meet the national priorities explained in § I(C)(2), above. Nevertheless, States should clearly indicate which programs will be supported with formula assistance if competitive funding is not received.

(c) *Limitation on State-run programs.* The Act requires an assurance that at least sixty percent of Corporation assistance provided to a State will be used to support programs that are not operated by the State or State agency. However, the Corporation may waive this requirement if a State demonstrates that it did not receive an adequate number of acceptable applications from applicants other than States during the competitive selection process.

The Corporation recognizes that this provision may be problematic for some States with large existing AmeriCorps programs previously supported by the Commission on National and Community Service, especially if the programs are operated by the State (through a department or agency). Such States should not attempt to comply with the 60% requirement if doing so would necessitate submission of more than five program proposals for competitive funding, proposals with inflated budgets, or proposals for programs that are not of high quality. In order to ensure that States with large existing grantees may participate, the Corporation will consider such States unable to comply.

(D) Selection Criteria Issues

In order to preserve maximum flexibility from year to year to respond to changing priorities, the proposed regulations do not substantively add to or modify the selection criteria listed in the statute, except that, for State applicants, the quality of the State plan will be a criterion in the selection of programs. As explained in the "State Plan" section of this Supplementary Section above, the quality of the State plan will be one factor in determining whether a State's application for its formula allotment is accepted or rejected, and insofar as a State has a high-quality State plan it will benefit those programs in the competitive selection process as well. Other changes or additions to the selection criteria will be provided annually in the Corporation's application materials.

Investment for Quality and Innovation Issues

(1) Purpose

The Investment for Quality and Innovation activities are a relatively small but nevertheless critical component of the Corporation's overall national and community service efforts. Activities funded under this part aim to build service infrastructure, and include training, technical assistance, fellowships, service awards, clearinghouses, research, recruitment, and innovative and demonstration programs.

The Investment for Quality and Innovation activities apply to a broad spectrum of service areas, including, but not limited to, the service-learning and AmeriCorps programs described in parts 2515–2524 of this rule. (Conversely, the training and technical assistance activities described in part 2524 of this rule target strictly the AmeriCorps programs described in parts 2520–2523.) All of these activities, however, are aimed at improving the quality of the service field and, ultimately, at finding the best ways to meet the Nation's needs through service.

(2) Priorities

This rule divides these activities into three groups: Innovative and Special Demonstration Programs; Technical Assistance, Training, and Other Service Infrastructure-building Activities; and Special Activities. The precise activities that are allowable under each area are specified in parts 2531–2533. Given the limited resources that will be allotted to these activities (the Corporation anticipates the availability of $15 million in fiscal year 1994), the Corporation may exercise its statutory authority to set priorities that will limit the categories of activities that will be eligible for funding. If the Corporation chooses to establish such priorities for fiscal year 1994, it will seek to concentrate funds on those activities that will be most effective and efficient in building service infrastructure.

Miscellaneous Requirements

Interested parties should be advised that because the assistance provided under the authority of this rule constitutes Federal financial assistance for the purposes of title VI of the Civil Rights Act of 1964 (which bars discrimination based on race, color, or national origin), title IX of the Education Amendments of 1972 (which bars discrimination on the basis of gender), the Rehabilitation Act of 1973 (which bars discrimination on the basis of disability), and the Age Discrimination Act of 1975 (which bars discrimination on the basis of age), grantees will be required to comply with the aforementioned provisions of Federal law.

Grant recipients will be expected to expend Corporation grants in a judicious and reasonable manner, consistent with pertinent provisions of Federal law and regulations. Grantees must keep records according to Corporation guidelines, including records that fully disclose the amount and disposition of the proceeds of a Corporation grant. The Inspector General of the Corporation (or other authorized official) shall have access, for the purpose of audit and examination, to the books and records of grantees that may be related or pertinent to the Corporation grant.

Grantees should further be advised that Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, and Administrative Requirements for Grants and Cooperative Agreements to other than State and Local Governments, as well as regulations for the Privacy Act, Freedom of Information Act, Sunshine Act, Government-wide Debarment and Suspension, and Government-wide Requirements for Drug-Free Workplace will also be published prior to awarding grants.

As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

The Corporation has separately submitted to the Office of Management and Budget, under the terms of the Paperwork Reduction Act, application packages to be used by applicants when applying for Corporation grants. To request copies of the applications, please contact the Corporation for National and Community Service at the address listed above.

As required by the Paperwork Reduction Act of 1980, the Corporation will submit the information collection requirements contained in this rule to the Office of Management and Budget for its review (44 U.S.C. 3504(h)). The information collection requirements are needed in order to provide assistance to parties affected by these regulations, in accordance with statutory mandates.

(Catalog of Federal Domestic Assistance Numbers: 94.003 for State Commissions,

Alternative Administrative Entities, and Transitional Entities; 94.004 for K–12 Service-Learning Programs; 94.005 for Higher Education Service-Learning Programs; 94.006 for AmeriCorps Programs; 94.007 for Investment for Quality and Innovation Programs)

List of Subjects

45 CFR Part 2510

Grant programs—social programs, Volunteers.

45 CFR Part 2513

Grant programs—social programs, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2515

Grant programs—social programs, Nonprofit organizations, Volunteers.

45 CFR Part 2516

Elementary and secondary education, Grant programs—social programs, Indians, Nonprofit organizations, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2517

Community development, Grant programs—social programs, Nonprofit organizations, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2518

Grant programs—social programs, Nonprofit organizations, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2519

Colleges and universities, Grant programs—social programs, Nonprofit organizations, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2520

AmeriCorps, Grant programs—social programs, Volunteers.

45 CFR Part 2521

AmeriCorps, Grant programs—social programs, Volunteers.

45 CFR Part 2522

AmeriCorps, Grant programs—social programs, Reporting and recordkeeping requirements, Volunteers.

45 CFR Part 2523

AmeriCorps, Grant programs—social programs, Volunteers.

45 CFR Part 2524

AmeriCorps, Grant programs—social programs, Technical assistance, Volunteers.

45 CFR Part 2530

Grant programs—social programs, Volunteers.

45 CFR Part 2531

Grant programs—social programs, Volunteers.

45 CFR Part 2532

Grant programs—social programs, Volunteers, Technical assistance.

45 CFR Part 2533

Decorations, Medals, Awards, Scholarships and fellowships, Volunteers.

45 CFR Part 2540

Administrative practice and procedure, Grant programs—social programs, Reporting and recordkeeping requirements, Volunteers.

Dated: January 3, 1994.

Catherine Milton,

Vice President and Director of National and Community Service Programs.

Accordingly, the Corporation amends title 45, chapter XXV of the Code of Federal Regulations by adding parts 2510, 2513, 2515 through 2524, 2530 through 2533, and 2540 to read as follows:

PART 2510—OVERALL PURPOSES AND DEFINITIONS

Sec.

2510.10 What are the purposes of the programs and activities of the Corporation for National and Community Service?

2510.20 Definitions.

Authority: 42 U.S.C. 12501 *et seq.*

§ 2510.10 What are the purposes of the programs and activities of the Corporation for National and Community Service?

The National and Community Service Trust Act of 1993 established the Corporation for National and Community Service (the Corporation). The Corporation's mission is to engage Americans of all ages and backgrounds in community-based service. This service will address the Nation's educational, public safety, human, and environmental needs to achieve direct and demonstrable results. In doing so, the Corporation will foster civic responsibility, strengthen the ties that bind us together as a people, and provide educational opportunity for those who make a substantial commitment to service. The Corporation will undertake activities and provide assistance to States and other eligible entities to support national and community service programs and to achieve other purposes consistent with its mission.

§ 2510.20 Definitions.

The following definitions apply to terms used in 45 CFR parts 2510 through 2550:

Act. The term *Act* means the National and Community Service Act of 1990, as amended (42 U.S.C. 12501 *et seq.*).

Administrative costs. The term *administrative costs* means costs associated with the overall administration of a Corporation program.

(1) Administrative costs include such costs as the following:

(i) Indirect costs (i.e., costs identified with two or more cost objectives but not identified with a particular cost objective) as described in applicable provisions of Office of Management and Budget Circulars that relate to indirect costs.

(ii) Costs for financial, accounting, or contracting functions.

(iii) Costs for insurance that protects the entity that operates the program.

(iv) Costs for salaries and benefits of the director and any other administrative staff of the program.

(2) Administrative costs do not include allowable costs directly related to program operations. These program costs include such costs as the following:

(i) Costs for living allowances and training of participants.

(ii) Costs for staff training.

(iii) Costs for travel.

(iv) Costs related to the evaluation of the program.

(v) Costs for salaries and benefits of staff who recruit, train, place, or supervise participants.

(3) Particular costs such as those associated with staff who perform both administrative and program functions may be prorated between administrative costs and costs directly related to program operations.

Adult volunteer. The term *adult volunteer* means an individual, such as an older adult, an individual with a disability, a parent, or an employee of a business or public or private nonprofit organization, who—

(1) Works without financial remuneration in an educational institution to assist students or out-of-school youth; and

(2) Is beyond the age of compulsory school attendance in the State in which the educational institution is located.

AmeriCorps. The term *AmeriCorps* means the combination of all AmeriCorps programs and participants.

AmeriCorps educational award. The term *AmeriCorps educational award* means a national service educational award described in section 147 of the Act.

AmeriCorps participant. The term *AmeriCorps participant* means any individual who is serving in—

(1) An AmeriCorps program;

(2) An approved AmeriCorps position; or

(3) Both.

AmeriCorps program. The term *AmeriCorps program* means—

(1) Any program that receives approved AmeriCorps positions;

(2) Any program that receives Corporation funds under section 121 of the Act; or

(3) Both.

Approved AmeriCorps position. The term *approved AmeriCorps position* means an AmeriCorps position for which the Corporation has approved the provision of an AmeriCorps educational award as one of the benefits to be provided for successful service in the position.

Carry out. The term *carry out,* when used in connection with an AmeriCorps program described in section 122 of the Act, means the planning, establishment, operation, expansion, or replication of the program.

Chief Executive Officer. The term *Chief Executive Officer,* except when used to refer to the chief executive officer of a State, means the Chief Executive Officer of the Corporation appointed under section 193 of the Act.

Community-based agency. The term *community-based agency* means a private nonprofit organization (including a church or other religious entity) that—

(1) Is representative of a community or a significant segment of a community; and

(2) Is engaged in meeting educational, public safety, human, or environmental community needs.

Corporation. The term *Corporation* means the Corporation for National and Community Service established under section 191 of the Act.

Economically disadvantaged. The term *economically disadvantaged* means, with respect to an individual, an individual who is determined by the Chief Executive Officer to be low-income according to the latest available data from the Department of Commerce.

Elementary school. The term *elementary school* has the same meaning given the term in section 1471(8) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(8)).

Indian. The term *Indian* means a person who is a member of an Indian tribe, or is a 'Native', as defined in section 3(b) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(b)).

Indian lands. The term *Indian lands* means any real property owned by an Indian tribe, any real property held in trust by the United States for an Indian or Indian tribe, and any real property held by an Indian or Indian tribe that is subject to restrictions on alienation imposed by the United States.

Indian tribe. The term *Indian tribe* means—

(1) An Indian tribe, band, nation, or other organized group or community, including—

(i) Any Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(c)), whether organized traditionally or pursuant to the Act of June 18, 1934 (commonly known as the 'Indian Reorganization Act', 25 U.S. C. 461 *et seq.*); and

(ii) Any Regional Corporation or Village Corporation, as defined in subsection (g) or (j), respectively, of section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602 (g) or (j)), that is recognized as eligible for the special programs and services provided by the United States under Federal law to Indians because of their status as Indians; and

(2) Any tribal organization controlled, sanctioned, or chartered by an entity described in paragraph (1) of this definition.

Individual with a disability. Except as provided in section 175(a) of the Act, the term *individual with a disability* has the meaning given the term in section 7(8)(B) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8)(B)), and includes an individual with a physical or mental impairment.

Infrastructure-building activities. The term *infrastructure-building activities* refers to activities that increase the capacity of organizations, programs and individuals to provide high quality service to communities.

Institution of higher education. The term *institution of higher education* has the same meaning given the term in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)).

Local educational agency (LEA). The term *local educational agency* has the same meaning given the term in section 1471(12) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(12)).

National nonprofit. The term *national nonprofit* means any nonprofit organization whose mission, membership, activities, or constituencies are national in scope.

National service laws. The term *national service laws* means the Act and the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4950 *et seq.*).

Objective. The term *objective* means a desired accomplishment of a program.

Out-of-school youth. The term *out-of-school youth* means an individual who—

(1) Has not attained the age of 27;

(2) Has not completed college or its equivalent; and

(3) Is not enrolled in an elementary or secondary school or institution of higher education.

Participant. (1) The term *participant* means an individual enrolled in a program that receives assistance under the Act.

(2) A participant may not be considered to be an employee of the program in which the participant is enrolled.

Partnership program. The term *partnership program* means a program through which an adult volunteer, a public or private nonprofit organization, an institution of higher education, or a business assists a local educational agency.

Program. The term *program,* unless the context otherwise requires, and except when used as part of the term academic program, means a program described in section 111(a) (other than a program referred to in paragraph (3)(B) of that section), 117A(a), 119(b)(1), or 122(a) of the Act, or in paragraph (1) or (2) of section 152(b) of the Act, or an activity that could be funded under sections 198, 198C, or 198D of the Act.

Program sponsor. The term *program sponsor* means an entity responsible for recruiting, selecting, and training participants, providing them benefits and support services, engaging them in regular group activities, and placing them in projects.

Project. The term *project* means an activity, carried out through a program that receives assistance under the Act, that results in a specific identifiable service or improvement that otherwise would not be done with existing funds, and that does not duplicate the routine services or functions of the employer to whom participants are assigned.

Project sponsor. The term *project sponsor* means an organization, or other entity, that has been selected to provide a placement for a participant.

Qualified individual with a disability. The term *qualified individual with a disability* has the meaning given the term in section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)).

School-age youth. The term *school-age youth* means—

(1) Individuals between the ages of 5 and 17, inclusive; and

(2) Children with disabilities, as defined in section 602(a)(1) of the Individuals with Disabilities Education

Act (20 U.S.C. 1401(a)(1)), who receive services under part B of that Act.

Secondary school. The term *secondary school* has the same meaning given the term in section 1471(21) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(21)).

Service-learning. The term *service-learning* means a method under which students or participants learn and develop through active participation in thoughtfully organized service that—

(1) Is conducted in and meets the needs of a community and is coordinated with an elementary school, secondary school, institution of higher education, or community service program, and with the community;

(2) Helps foster civic responsibility;

(3) Is integrated into and enhances the academic curriculum of the students or the educational components of the community service program in which the participants are enrolled; and

(4) Includes structured time for the students and participants to reflect on the service experience.

Service-learning coordinator. The term *service-learning coordinator* means an individual trained in service-learning who identifies community partners for LEAs; assists in designing and implementing local partnerships service-learning programs; provides technical assistance and information to, and facilitates the training of, teachers; and provides other services for an LEA.

State. The term *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. The term also includes Palau, until the Compact of Free Association is ratified.

State Commission. The term *State Commission* means a State Commission on National and Community Service maintained by a State pursuant to section 178 of the Act. Except when used in section 178, the term includes an alternative administrative entity for a State approved by the Corporation under that section to act in lieu of a State Commission.

State educational agency (SEA). The term *State educational agency* has the same meaning given that term in section 1471(23) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2891(23)).

Student. The term *student* means an individual who is enrolled in an elementary or secondary school or institution of higher education on a full-time or part-time basis.

Subdivision of a State. The term *subdivision of a State* means a governmental unit within a State other than a unit with Statewide responsibilities.

PART 2513—STATE PLAN: PURPOSE, APPLICATION REQUIREMENTS AND SELECTION CRITERIA

Sec.
2513.10 Who must submit a State Plan?
2513.20 What are the purposes of a State Plan?
2513.30 What information must a State Plan contain?
2513.40 How will the State Plans be evaluated?

Authority: 42 U.S.C. 12501 *et seq.*

§ 2513.10 Who must submit a State Plan?

The fifty States, the District of Columbia and Puerto Rico, through a Corporation-approved State Commission, Alternative Administrative Entity, or Transitional Entity must submit a comprehensive national and community service plan ("State Plan") in order to apply to the Corporation for support under parts 2515 through 2524 of this chapter.

§ 2513.20 What are the purposes of a State Plan?

The purposes of the State Plan are:

(a) To set forth the State's plan for promoting national and community service and strengthening its service infrastructure, including how Corporation-funded programs fit into the plan;

(b) To establish specific priorities and goals that advance the State's plan for strengthening its service program infrastructure and to specify strategies for achieving the stated goals;

(c) To inform the Corporation of the relevant historical background of the State's infrastructure for supporting national and community service and other volunteer opportunities, as well as the current status of such infrastructure;

(d) To assist the Corporation in making decisions on applications to receive formula and competitive funding under § 2521.30 of this chapter and to assist the Corporation in assessing a State's application for renewal funding for State administrative funds as provided in part 2550 of this chapter; and

(e) To serve as a working document that forms the basis of on-going dialogue between the State and the Corporation and which is subject to modifications as circumstances require.

§ 2513.30 What information must a State Plan contain?

The State Plan must include the following information:

(a) An overview of a State's experience in coordinating and supporting the network of service programs within the State that address educational, public safety, human, and environmental needs, including, where appropriate, a description of specific service programs. This overview should encompass programs that have operated independently of and/or without financial support from the State;

(b) A description of the State's priorities and vision for strengthening the service program infrastructure, including how programs proposed for Corporation funding fit into this vision. The plan should also describe how State priorities relate to any national priorities established by the Corporation;

(c) A description of the goals established to advance the State's plan, including the strategies for achieving such goals. With respect to technical assistance activities (if any) and programs proposed to be funded by the Corporation, the plan should describe how such activities and programs will be coordinated with other service programs within the State. The plan should also describe the manner and extent to which the proposed programs will build on existing programs, including Corporation programs such as Serve-America, Higher Education, and programs funded under the Domestic Volunteer Service Act and other programs;

(d) A description of the extent to which the State entity has coordinated its efforts with the State educational agency (SEA) in the SEA's application for school-based service learning funds;

(e) A description of how the State reached out to a broad cross-section of individuals and organizations to obtain their participation in the development of the State plan, including a discussion of the types of organizations and individuals who were actually involved in the process and the manner and extent of their involvement; and

(f) Such other information as the Corporation may reasonably require.

§ 2513.40 How will the State Plans be evaluated?

State plans will be evaluated on the basis of the following criteria:

(a) The quality of the plan as evidenced by:

(1) The development and quality of realistic goals and objectives for moving service ahead in the State;

(2) The extent to which proposed strategies can reasonably be expected to accomplish stated goals;

(3) The extent of input in the development of the State plan from a broad cross-section of individuals and organizations including community-

based agencies; organizations with a demonstrated record of providing educational, public safety, human, or environmental services; residents of the State, including youth and other prospective participants, State Education Agencies; traditional service organizations; and labor unions;

(b) The sustainability of the national service efforts outlined in the plan, as evidenced by the extent to which they are supported by:

(1) The State, through financial, in-kind and bi-partisan political support, including the existence of supportive legislation; and

(2) Other support, including the financial, in-kind and other support of the private sector, foundations, and other entities and individuals; and

(c) Such other criteria as the Corporation deems necessary.

PART 2515—SERVICE-LEARNING PROGRAM PURPOSES AND DEFINITIONS

Sec.
2515.10 What are the service-learning programs of the Corporation for National and Community Service?
2515.20 What definitions apply to service-learning programs?

Authority: 42 U.S.C. 12501 *et seq.*

§ 2515.10 What are the service-learning programs of the Corporation for National and Community Service?

(a) There are three service-learning programs:

(1) School-based programs, described in part 2516 of this chapter.

(2) Community-based programs, described in part 2517 of this chapter.

(3) Higher education programs, described in part 2519 of this chapter.

(b) Each program gives participants the opportunity to learn and develop their own capabilities through service-learning, while addressing needs in the community.

§ 2515.20 What definitions apply to service-learning programs?

In addition to the definitions in § 2510.20 of this chapter, the following definitions apply to terms used in parts 2515 through 2519 of this chapter.

Grantmaking entity. (1) For school-based programs, the term *grantmaking entity* means a public or private nonprofit organization experienced in service-learning that—

(i) Submits an application to make grants for school-based service-learning programs; and

(ii) Was in existence at least one year before the date on which the organization submitted the application.

(2) For community-based programs, the term *grantmaking entity* means a qualified organization that—

(i) Submits an application to make grants to qualified organizations to implement, operate, expand, or replicate community-based service programs that provide for educational, public safety, human, or environmental service by school-age youth in two or more States; and

(ii) Was in existence at least one year before the date on which the organization submitted the application.

Partnership. The term *partnership* means an organization comprised of two or more entities that have entered into a written agreement specifying the responsibilities of each partner with respect to a service-learning program.

Qualified organization. The term *qualified organization* means a public or private nonprofit organization, other than a grantmaking entity, that—

(1) Has experience in working with school-age youth; and

(2) Was in existence at least one year before the date on which the organization submitted an application for a service-learning program.

U.S. Territory. The term *U.S. Territory* means the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Palua, until the Compact of Free Association with Palau is ratified.

PART 2516—SCHOOL-BASED SERVICE-LEARNING PROGRAMS

Subpart A—Eligibility to Apply

Sec.
2516.100 Who may apply for a direct grant from the Corporation?
2516.110 Who may apply for a subgrant from a Corporation grantee?

Subpart B—Use of Grant Funds

2516.200 How may grant funds be used?

Subpart C—Eligibility to Participate

2516.300 Who may participate in a school-based service-learning program?
2516.310 May private school students participate?

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2516.410 What must a grantmaking entity, local partnership, or LEA include in an application for a grant?
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2516.710 Are there limits on the use of funds?
2516.720 What is the length of each type of grant?
2516.730 May an applicant submit multiple applications for the same project?

Subpart H—Monitoring and Evaluation Requirements

2516.800 What are the purposes of monitoring and evaluation?
2516.810 By what standards will service-learning programs be evaluated?
2516.820 What must grantees and subgrantees do to monitor and evaluate the effectiveness of their programs?
2516.830 What must a Corporation grantee do to monitor and evaluate the effectiveness of the programs of its subgrantees?
2516.840 Must grantees or subgrantees perform independent evaluations?
2516.850 What will the Corporation do to evaluate the overall success of the service-learning program?
2516.860 Will information on individual participants be kept confidential?

Authority: 42 U.S.C. 12501 *et seq.*

Subpart A—Eligibility to Apply

§ 2516.100 Who may apply for a direct grant from the Corporation?

(a) The following entities may apply for a direct grant from the Corporation:

(1) A State, through a State educational agency (SEA) as defined in § 2510.20 of this chapter. For the purpose of this part, "State" means one of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and, except for the purpose of § 2516.600 (b), U.S. Territories.

(2) An Indian tribe.

(3) A U.S. Territory as defined in § 2515.20 of this chapter.

(4) A grantmaking entity as defined in § 2515.20 of this chapter.

(5) For activities in a nonparticipating State, a local educational agency (LEA) as defined in § 2510.20 of this chapter or a local partnership as described in § 2516.110.

(b) The types of grants for which each entity is eligible are described in § 2516.200.

§ 2516.110 Who may apply for a subgrant from a Corporation grantee?

Entities that may apply for a subgrant from a State, Indian tribe, or grantmaking entity are:

(a) An LEA, for a grant from a State for planning school-based service-learning programs.

(b) A local partnership, for a grant from a State or a grantmaking entity to implement, operate, or expand a school-based service learning program.

(1) The partnership must include an LEA and one or more community partners. The partnership may include a private for-profit business or private elementary or secondary school.

(2) The community partners must include a public or private nonprofit organization that has demonstrated expertise in the provision of services to meet educational, public safety, human, or environmental needs; was in existence at least one year before the date on which the organization submitted an application under this part; and will make projects available for participants, who must be students.

(c) A local partnership, for a grant from a State or a grantmaking entity to implement, operate, or expand an adult volunteer program. The partnership must include an LEA and one or more public or private nonprofit organizations, other educational agencies, or private for-profit businesses.

(d) A qualified organization as defined in § 2515.20 of this chapter, for a grant from a State or Indian tribe for planning or building the capacity of the State or Indian tribe.

Subpart B—Use of Grant Funds

§ 2516.200 How may grant funds be used?

Funds under a school-based service-learning grant may be used for the purposes described in this section.

(a) Planning and capacity-building for States and Indian tribes. (1) A State or Indian tribe may use funds to pay for planning and building its capacity to implement school-based service-learning programs. These entities may use funds either directly or through subgrants or contracts with qualified organizations.

(2) Authorized activities include the following:

(i) Providing training for teachers, supervisors, personnel from community-based agencies (particularly with regard to the utilization of participants) and trainers, conducted by qualified individuals or organizations experienced in service-learning.

(ii) Developing service-learning curricula to be integrated into academic programs, including the age-appropriate learning components for students to analyze and apply their service experiences.

(iii) Forming local partnerships described in § 2516.110 to develop school-based service-learning programs in accordance with this part.

(iv) Devising appropriate methods for research and evaluation of the educational value of service-learning and the effect of service-learning activities on communities.

(v) Establishing effective outreach and dissemination of information to ensure the broadest possible involvement of community-based agencies with demonstrated effectiveness in working with school-age youth in their communities.

(b) *Implementing, operating, and expanding programs.* (1) A State or grantmaking entity may use funds to make subgrants to local partnerships described in § 2516.110(b) to implement, operate, or expand school-based service-learning programs.

(2) If a State does not submit an application that meets the requirements for an allotment grant under § 2516.400, the Corporation may use the allotment to fund applications from those local partnerships for programs in that State.

(3) A grantmaking entity may use funds to provide technical assistance and training to appropriate persons relating to its subgrants.

(c) *Planning programs.* (1) A State may use funds to make subgrants to LEAs for planning school-based service-learning programs.

(2) If a State does not submit an application that meets the requirements for an allotment grant under § 2516.400, the Corporation may use the allotment to fund applications from LEAs for planning programs in that State.

(3) Authorized activities include paying the costs of—

(i) The salaries and benefits of service-learning coordinators as defined in § 2510.20 of this chapter; and

(ii) The recruitment, training, supervision, and placement of service-learning coordinators who are participants in an AmeriCorps program described in parts 2520 through 2524 of this chapter or who receive AmeriCorps educational awards.

(d) *Adult volunteer programs.* (1) A State, Indian tribe, U.S. territory, or grantmaking entity may use funds to make subgrants to local partnerships described in § 2516.110(c) to implement, operate, or expand school-based programs involving adult volunteers to utilize service-learning to improve the education of students.

(2) If a State does not submit an application that meets the requirements for an allotment grant under § 2516.400, the Corporation may use the allotment to fund applications from those local partnerships for adult volunteer programs in that State.

(e) *Planning by Indian tribes and U.S. Territories.* If the Corporation makes a grant to an Indian tribe or a U.S. Territory to plan school-based service-learning programs, the grantee may use the funds for that purpose.

(f) *Allowable expenses.* An LEA, local partnership, or qualified organization may use funds under this part for the Corporation share of reasonable costs related to the supervision of participants, program administration, transportation, insurance, evaluations, and other reasonable expenses related to the funded activities.

Subpart C—Eligibility To Participate

§ 2516.300 Who may participate in a school-based service-learning program?

Students who are enrolled in elementary or secondary schools on a full-time or part-time basis may participate in school-based programs.

§ 2516.310 May private school students participate?

(a) Yes. To the extent consistent with the number of students in the State or Indian tribe or in the school district of the LEA involved who are enrolled in private nonprofit elementary or secondary schools, the State, Indian tribe, or LEA must (after consultation with appropriate private school representatives) make provision—

(1) For the inclusion of services and arrangements for the benefit of those students so as to allow for the equitable participation of the students in the programs under this part; and

(2) For the training of the teachers of those students so as to allow for the equitable participation of those teachers in the programs under this part.

(b)(1) If a State, Indian tribe, or LEA is prohibited by law from providing for the participation of students or teachers from private nonprofit schools as required by paragraph (a) of this section, or if the Corporation determines that a State, Indian tribe, or LEA substantially fails or is unwilling to provide for their participation on an equitable basis, the Corporation will waive those requirements and arrange for the provision of services to the students and teachers.

(2) Waivers will be subject to the consultation, withholding, notice, and judicial review requirements of section 1017(b) (3) and (4) of the Elementary

and Secondary Education Act of 1965 (20 U.S.C. 2727(b)).

Subpart D—Application Contents

§ 2516.400 What must a State or Indian tribe include in an application for a grant?

In order to apply for a grant from the Corporation under this part, a State (SEA) or Indian tribe must submit the following:

(a) A three-year strategic plan, or a revision of a previously approved three-year strategic plan, for promoting service-learning through programs under this part. The application of a SEA must include a description of how the SEA will coordinate its service-learning plan with the State Plan under part 2513 of this chapter and with other federally-assisted activities.

(b) A proposal containing the specific program, budget, and other information specified by the Corporation in the grant application package.

(c) Assurances that the applicant will—

(1) Keep such records and provide such information to the Corporation with respect to the programs as may be required for fiscal audits and program evaluation; and

(2) Comply with the nonduplication, nondisplacement, and grievance procedure requirements of part 2540 of this chapter.

§ 2516.410 What must a grantmaking entity, local partnership, or LEA include in an application for a grant?

In order to apply to the Corporation for a grant, a grantmaking entity, local partnership, or LEA must submit the following:

(a) A detailed description of the proposed program goals and activities. The application of a grantmaking entity must include—

(1) A description of how the applicant will coordinate its activities with the State Plan under part 2513 of this chapter and with other federally-assisted activities; and

(2) A description of how the program will be carried out in more than one State.

(b) The specific program, budget, and other information specified by the Corporation in the grant application package.

(c) Assurances that the applicant will—

(1) Keep such records and provide such information to the Corporation with respect to the program as may be required for fiscal audits and program evaluation;

(2) Prior to the placement of a participant, consult with the appropriate local labor organization, if any, representing employees in the area who are engaged in the same or similar work as that proposed to be carried out by the program, to prevent the displacement and protect the rights of those employees;

(3) Develop an age-appropriate learning component for participants in the program that includes a chance for participants to analyze and apply their service experiences; and

(4) Comply with the nonduplication, nondisplacement, and grievance procedure requirements of part 2540 of this chapter.

(d) For a local partnership, an assurance that the LEA will serve as the partnerships fiscal agent.

§ 2516.420 What must an LEA, local partnership, or qualified organization include in an application for a subgrant?

In order to apply for a subgrant from an SEA, Indian tribe, or grantmaking entity under this part, an applicant must include the information required by the Corporation grantee.

Subpart E—Application Review

§ 2516.500 How does the Corporation review the merits of an application?

(a) In reviewing the merits of an application submitted to the Corporation under this part, the Corporation evaluates the quality, innovation, replicability, and sustainability of the proposal on the basis of the following criteria:

(1) Quality, as indicated by the extent to which—

(i) The program will provide productive meaningful, educational experiences that incorporate service-learning methods;

(ii) The program will meet community needs and involve individuals from diverse backgrounds (including economically disadvantaged youth) who will serve together to explore the root causes of community problems;

(iii) The principal leaders of the program will be well qualified for their responsibilities;

(iv) The program has sound plans and processes for training, technical assistance, supervision, quality control, evaluation, administration, and other key activities; and

(v) The program will advance knowledge about how to do effective and innovative community service and service-learning and enhance the broader elementary and secondary education field.

(2) Replicability, as indicated by the extent to which the program will assist others in learning from experience and replicating the approach of the program.

(3) Sustainability, as indicated by the extent to which—

(i) An SEA or grantmaking entity applicant demonstrates the ability and willingness to coordinate its activities with the State Plan under part 2513 of this chapter and with other federally assisted activities;

(ii) The program will foster collaborative efforts among local educational agencies, local government agencies, community based agencies, businesses, and State agencies;

(iii) The program will enjoy strong, broad-based community support; and

(iv) There is evidence that financial resources will be available to continue the program after the expiration of the grant.

(b) The Corporation also gives priority to proposals that—

(1) Involve participants in the design and operation of the program;

(2) Reflect the greatest need for assistance, such as programs targeting low-income areas;

(3) Involve students from public and private schools serving together;

(4) Involve students of different ages, races, genders, ethnicities, abilities and disabilities, or economic backgrounds, serving together;

(5) Are integrated into the academic program of the participants;

(6) Best represent the potential of service-learning as a vehicle for education reform and school-to-work transition;

(7) Develop civic responsibility and leadership skills and qualities in participants;

(8) Demonstrate the ability to achieve the goals of this part on the basis of the proposal's quality, innovation, replicability, and sustainability; or

(9) Address any other priority established by the Corporation for a particular period.

(c) In reviewing applications submitted by Indian tribes and U.S. Territories, the Corporation—

(1) May decide to approve only planning of school-based service-learning programs; and

(2) Will set the amounts of grants in accordance with the respective needs of applicants.

§ 2516.510 What happens if the Corporation rejects a State's application for an allotment grant?

If the Corporation rejects a State's application for an allotment grant under § 2516.600 (b)(2) the Corporation will—

(a) Promptly notify the State of the reasons for the rejection;

(b) Provide the State with a reasonable opportunity to revise and resubmit the application;

(c) Provide technical assistance, if necessary; and

(d) Promptly reconsider the resubmitted application and make a decision.

§ 2516.520 How does a State, Indian tribe, or grantmaking entity review the merits of an application?

In reviewing the merits of an application for a subgrant under this part, a Corporation grantee must use the criteria and priorities in § 2516.500.

Subpart F—Distribution of Funds

§ 2516.600 How are funds for school-based service-learning programs distributed?

(a) Of the amounts appropriated to carry out this part for any fiscal year, the Corporation will reserve not more than three percent for grants to Indian tribes and U.S. Territories to be allotted in accordance with their respective needs.

(b) The Corporation will use the remainder of the funds appropriated as follows:

(1) Competitive Grants. From 25 percent of the remainder, the Corporation may make grants on a competitive basis to States, Indian tribes, or grantmaking entities.

(2) Allotments to States. (i) From 37.5 percent of the remainder, the Corporation will allot to each State an amount that bears the same ratio to 37.5 percent of the remainder as the number of school-age youth in the State bears to the total number of school-age youth of all States.

(ii) From 37.5 percent of the remainder, the Corporation will allot to each State an amount that bears the same ratio to 37.5 percent of the remainder as the allocation to the State for the previous fiscal year under Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2711 *et seq.*) bears to the allocations to all States.

(iii) Notwithstanding other provisions of paragraph (b)(2) of this section, no State will receive an allotment that is less than the allotment the State received for fiscal year 1993 from the Commission on National and Community Service. If the amount of funds made available in a fiscal year is insufficient to make those allotments, the Corporation will make additional funds available from the 25 percent described in paragraph (b)(1) of this section for that fiscal year to make those allotments.

(3) For the purpose of paragraph (b) of this section, "State" means one of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) If a State or Indian tribe does not submit an application that meets the requirements for approval under this part, the Corporation (after making any grants to local partnerships or LEAs for activities in nonparticipating States) may use its allotment for States and Indian tribes with approved applications, as the Corporation determines appropriate.

(d) Notwithstanding other provisions of this section, if less than $20,000,000 is made available in any fiscal year to carry out this part, the Corporation will make all grants to States and Indian tribes on a competitive basis.

Subpart G—Funding Requirements

§ 2516.700 Are matching funds required?

(a) Yes. The Corporation share of the cost of carrying out a program funded under this part may not exceed—

(1) Ninety percent of the total cost for the first year for which the program receives assistance;

(2) Eighty percent of the total cost for the second year;

(3) Seventy percent of the total cost for the third year; and

(4) Fifty percent of the total cost for the fourth year and any subsequent year.

(b) In providing for the remaining share of the cost of carrying out a program, each recipient of assistance must provide for that share through a payment in cash or in kind, fairly evaluated, including facilities, equipment, or services, and may provide for that share through State sources, local sources, or Federal sources (other than funds made available under the national service laws).

(c) However, the Corporation may waive the requirements of paragraph (b) of this section in whole or in part with respect to any program in any fiscal year if the Corporation determines that the waiver would be equitable due to a lack of available financial resources at the local level.

§ 2516.710 Are there limits on the use of funds?

Yes. The following limits apply to funds made available under this part:

(a)(1) The recipient of a direct grant from the Corporation may spend no more than five percent of the grant funds on administrative costs for any fiscal year.

(2) If a Corporation grantee makes a subgrant to an entity to carry out a service-learning program, the Corporation grantee may determine how the allowable administrative costs will be distributed between itself and the subgrantee.

(b)(1) An SEA or Indian tribe must spend between ten and 15 percent of the grant to build capacity through training, technical assistance, curriculum development, and coordination activities.

(2) However, the Corporation may waive this requirement in order to permit an SEA or a tribe to use between ten percent and 20 percent of the grant funds to build capacity. To be eligible to receive the waiver, the SEA or tribe must submit an application to the Corporation.

(c) Funds made available under this part may not be used to pay any stipend, allowance, or other financial support to any participant in a service-learning program under this part or part 2517 or 2519 of this chapter except reimbursement for transportation, meals, and other reasonable out-of-pocket expenses directly related to participation in a program assisted under this part.

§ 2516.720 What is the length of each type of grant?

(a) One year is the maximum length of—

(1) A planning grant under § 2516.200 (a), (c) or (f); and

(2) A grant to a local partnership for activities in a nonparticipating State under § 2516.200 (b) and (d).

(b) All other grants are for a period of up to three years, subject to satisfactory performance and annual appropriations.

§ 2516.730 May an applicant submit multiple applications for the same project?

No. The Corporation will reject an application if the application describes a project proposed to be conducted using assistance requested by the applicant and the project is already described in another application pending before the Corporation.

Subpart H—Monitoring and Evaluation Requirements

§ 2516.800 What are the purposes of monitoring and evaluation?

(a) Monitoring is a continuous effort to assess performance and improve quality. Evaluation is an assessment of program effectiveness and outcomes at the end of a given period of time.

(b) Every monitoring and evaluation requirement serves one or more of the following purposes:

(1) Ensuring quality programs.

(2) Examining the benefits of national and community service.

(3) Fulfilling legislative requirements.

§ 2516.810 By what standards will service-learning programs be evaluated?

The Corporation will evaluate programs based on the following:

(a) The extent to which the program meets the objectives established and agreed to by the grantee and the Corporation before the grant award.

(b) The extent to which the program is cost-effective.

(c) Other criteria as determined and published by the Corporation.

§ 2516.820 What must grantees and subgrantees do to monitor and evaluate the effectiveness of their programs?

Grantees and subgrantees must undertake the following activities:

(a) Monitor management effectiveness, the quality of services provided, and the satisfaction of both participants and service recipients. Monitoring should be a continuous process, allowing for frequent feedback and quick correction of weaknesses. Monitoring approaches such as community advisory councils, participant advisory councils, peer reviews, quality control inspections, and service recipient and participant surveys are encouraged.

(b) Track progress toward pre-established objectives. Objectives must be established by programs and approved by the Corporation. Programs must submit to the Corporation (or the Corporation grantee as applicable) periodic performance reports and, as part of an annual report, an annual performance report.

(c) Collect and submit to the Corporation (through the Corporation grantee as applicable) the following data:

(1) The total number of participants in each program and basic demographic characteristics of the participants including sex, age, economic background, education level, ethnic group, disability classification, and geographic region.

(2) Other information as required by the Corporation.

§ 2516.830 What must a Corporation grantee do to monitor and evaluate the effectiveness of the programs of its subgrantees?

A Corporation grantee that makes subgrants must undertake the following activities:

(a) Ensure that subgrantees comply with the requirements of § 2516.820.

(b) Track program performance in terms of progress toward pre-established objectives; ensure that corrective action is taken when necessary; and submit to the Corporation periodic performance reports and, as part of an annual report, an annual performance report for each subgrantee.

(c) Collect from programs and submit to the Corporation the descriptive information required in § 2516.820(c)(1).

§ 2516.840 Must grantees or subgrantees perform independent evaluations?

No. An independent evaluation is not required but is permissible.

§ 2516.850 What will the Corporation do to evaluate the overall success of the service-learning program?

(a) The Corporation will conduct independent evaluations. These evaluations will consider the opinions of participants and members of the communities where services are delivered. If appropriate, these evaluations will compare participants with individuals who have not participated in service-learning programs. These evaluations will—

(1) Study the extent to which service-learning programs as a whole affect the involved communities;

(2) Determine the extent to which service-learning programs as a whole increase academic learning of participants, enhance civic education, and foster continued community involvement; and

(3) Determine the effectiveness of different program models.

(b) The Corporation will also determine by June 30, 1995, whether outcomes of service-learning programs are defined and measured appropriately, and the implications of the results from such a study for authorized funding levels.

§ 2516.860 Will information on individual participants be kept confidential?

(a) Yes. The Corporation will maintain the confidentiality of information regarding individual participants that is acquired for the purpose of the evaluations described in § 2516.850. The Corporation will disclose individual participant information only with the prior written consent of the participant. However, the Corporation may disclose aggregate participant information.

(b) Grantees and subgrantees under this part must comply with the provisions of paragraph (a) of this section.

PART 2517—COMMUNITY-BASED SERVICE-LEARNING PROGRAMS

Subpart A—Grant Applications

Sec.
2517.100 Who may apply for a direct grant from the Corporation?
2517.110 Who may apply for a subgrant from a Corporation grantee?

Subpart B—Use of Grant Funds

2517.200 How may grant funds be used?

Subpart C—Eligibility to Participate

2517.300 Who may participate in a community-based service-learning program?

Subpart D—Application Contents

2517.400 What must a State Commission or grantmaking entity include in an application for a grant?
2517.410 What must a qualified organization include in an application for a grant or a subgrant?

Subpart E—Application Review

2517.500 How is an application evaluated?

Subpart F—Distribution of Funds

2517.600 How are funds for community-based service-learning programs distributed?

Subpart G—Funding Requirements

2517.700 Are matching funds required?
2517.710 Are there limits on the use of funds?
2517.720 What is the length of a grant?
2517.730 May an applicant submit multiple applications for the same project?

Subpart H—Evaluation and Monitoring Requirements

2517.800 What are the evaluation and monitoring requirements for community-based programs?

Authority: 42 U.S.C. 12501 *et seq.*

Subpart A—Grant Applications

§ 2517.100 Who may apply for a direct grant from the Corporation?

(a) The following entities may apply for a direct grant from the Corporation:

(1) A State Commission established under part 2550 of this chapter.

(2) A grantmaking entity as defined in § 2515.20 of this chapter.

(3) A qualified organization as defined in § 2515.20 of this chapter.

(b) The types of grants for which each entity is eligible are described in § 2517.200 of this chapter.

§ 2517.110 Who may apply for a subgrant from a Corporation grantee?

Entities that may apply for a subgrant from a State Commission or grantmaking entity are qualified organizations that have entered into a partnership with one or more—

(a) Local educational agencies (LEAs);

(b) Other qualified organizations; or

(c) Both.

Subpart B—Use of Grant Funds

§ 2517.200 How may grant funds be used?

Funds under a community-based service-learning grant may be used for the purposes described in this section.

(a) A State Commission or grantmaking entity may use funds—

(1) To make subgrants to qualified organizations described in § 2517.110 to

implement, operate, expand, or replicate a community-based service program that provides direct and demonstrable educational, public safety, human, or environmental service by participants, who must be school-age youth; and

(2) To provide training and technical assistance to qualified organizations.

(b)(1) A qualified organization may use funds under a direct grant or a subgrant to implement, operate, expand, or replicate a community-based service program.

(2) If a qualified organization receives a direct grant, its program must be carried out at sites in two or more States or be particularly innovative.

Subpart C—Eligibility to Participate

§ 2517.300 Who may participate in a community-based service-learning program?

School-age youth as defined in § 2510.20 of this chapter may participate in a community-based program.

Subpart D—Application Contents

§ 2517.400 What must a State Commission or grantmaking entity include in an application for a grant?

(a) In order to apply for a grant from the Corporation under this part, a State Commission or a grantmaking entity must submit the following:

(1) A three-year strategic plan for promoting service-learning through programs under this part. The plan must identify and describe the community-based programs proposed to be carried out during the first year.

(2) A proposal containing the specific program, budget, and other information specified by the Corporation in the grant application package.

(3) A description of how activities under the grant will be coordinated with the State Plan under part 2513 of this chapter and with other federally-assisted activities.

(4) Assurances that the applicant will—

(i) Keep such records and provide such information to the Corporation with respect to the programs as may be required for fiscal audits and program evaluation;

(ii) Comply with the nonduplication, nondisplacement, and grievance procedure requirements of part 2540 of this chapter; and

(iii) Ensure that, prior to placing a participant in a program, the entity carrying out the program will consult with the appropriate local labor organization, if any, representing employees in the area in which the program will be carried out that are engaged in the same or similar work as the work proposed to be carried out by the program, to prevent the displacement of those employees.

(b) In addition, a grantmaking entity must submit information demonstrating that the entity will make grants for a program—

(1) To carry out activities in two or more States, under circumstances in which those activities can be carried out more efficiently through one program than through two or more programs; and

(2) To carry out the same activities, such as training activities or activities related to exchanging information on service experiences, through each of the projects assisted through the program.

§ 2517.410 What must a qualified organization include in an application for a grant or a subgrant?

(a) In order to apply to the Corporation for a direct grant, a qualified organization must submit the following:

(1) A three-year plan describing the goals and activities of the proposed program;

(2) The specific program, budget, and other information specified by the Corporation in the grant application package; and

(3) Assurances that the applicant will—

(i) Keep such records and provide such information to the Corporation with respect to the program as may be required for fiscal audits and program evaluation;

(ii) Comply with the nonduplication, nondisplacement, and grievance procedure requirements of part 2540 of this chapter; and

(iii) Prior to placing a participant in the program, consult with the appropriate local labor organization, if any, representing employees in the area in which the program will be carried out who are engaged in the same or similar work as the work proposed to be carried out by the program, to prevent the displacement of those employees.

(b) In order to apply to a State Commission or a grantmaking entity for a subgrant, a qualified organization must submit the following:

(1) A plan describing the goals and activities of the proposed program; and

(2) Such specific program, budget, and other information as the Commission or entity reasonably requires.

Subpart E—Application Review

§ 2517.500 How is an application evaluated?

In evaluating an application for a grant or a subgrant, the Corporation, a State Commission, or a grantmaking entity will apply the following criteria:

(a) The quality of the program proposed.

(b) The innovation of, and feasibility of replicating, the program.

(c) The sustainability of the program, based on—

(1) Strong and broad-based community support;

(2) Multiple funding sources or private funding; and

(3) Coordination with the State Plan under part 2513 of this chapter and other federally-assisted activities.

(d) The quality of the leadership of the program, past performance of the program, and the extent to which the program builds on existing programs.

(e) The applicant's efforts—

(1) To recruit participants from among residents of the communities in which projects would be conducted;

(2) To ensure that the projects are open to participants of different ages, races, genders, ethnicities, abilities and disabilities, and economic backgrounds; and

(3) To involve participants and community residents in the design, leadership, and operation of the program.

(f) The extent to which projects would be located in areas that are—

(1) Empowerment zones, redevelopment areas, or other areas with high concentrations of low-income people; or

(2) Environmentally distressed.

Subpart F—Distribution of Funds

§ 2517.600 How are funds for community-based service-learning programs distributed?

All funds are distributed by the Corporation through competitive grants.

Subpart G—Funding Requirements

§ 2517.700 Are matching funds required?

(a) Yes. The Corporation share of the cost of carrying out a program funded under this part may not exceed—

(1) Ninety percent of the total cost for the first year for which the program receives assistance;

(2) Eighty percent of the total cost for the second year;

(3) Seventy percent of the total cost for the third year; and

(4) Fifty percent of the total cost for the fourth year and any subsequent year.

(b) In providing for the remaining share of the cost of carrying out a program, each recipient of assistance must provide for that share through a payment in cash or in kind, fairly evaluated, including facilities, equipment, or services, and may

provide for that share through State sources, local sources, or Federal sources (other than funds made available under the national service laws).

(c) However, the Corporation may waive the requirements of paragraph (b) of this section in whole or in part with respect to any program in any fiscal year if the Corporation determines that the waiver would be equitable due to lack of available financial resources at the local level.

§2517.710 Are there limits on the use of funds?

Yes. The following limits apply to funds made available under this part:

(a)(1) The recipient of a direct grant from the Corporation may spend no more than five percent of the grant funds on administrative costs for any fiscal year.

(2) If a Corporation grantee makes a subgrant to an entity to carry out a service-learning program, the Corporation grantee may determine how the allowable administrative costs will be distributed between itself and the subgrantee.

(b) Funds made available under this part may not be used to pay any stipend, allowance, or other financial support to any participant in a service-learning program under this part or part 2516 or 2519 of this chapter except reimbursement for transportation, meals, and other reasonable out-of-pocket expenses directly related to participation in a program assisted under this part.

§2517.720 What is the length of a grant?

A grant under this part is for a period of up to three years, subject to satisfactory performance and annual appropriations.

§2517.730 May an applicant submit multiple applications for the same project?

No. The Corporation will reject an application if the application describes a project proposed to be conducted using assistance requested by the applicant and the project is already described in another application pending before the Corporation.

Subpart H—Evaluation and Monitoring Requirements

§2517.800 What are the evaluation and monitoring requirements for community-based programs?

The monitoring and evaluation requirements for recipients of grants and subgrants under part 2516 of this chapter, relating to school-based service-learning programs, apply to recipients under this part.

PART 2518—SERVICE-LEARNING CLEARINGHOUSE

Sec.
2518.100 What is the purpose of a Service-Learning Clearinghouse?
2518.110 What are the functions of a Service-Learning Clearinghouse?

Authority: 42 U.S.C. 12501 *et seq.*

§2518.100 What is the purpose of a Service-Learning Clearinghouse?

The Corporation will provide financial assistance, from funds appropriated to carry out the activities listed under parts 2530 through 2533 of this chapter, to public or private nonprofit organizations that have extensive experience with service-learning, including use of adult volunteers to foster service-learning, to establish a clearinghouse, which will carry out activities, either directly or by arrangement with another such organization, with respect to information about service-learning.

§2518.110 What are the functions of a Service-Learning Clearinghouse?

An organization that receives assistance from funds appropriated to carry out the activities listed under parts 2530 through 2533 of this chapter may—

(a) Assist entities carrying out State or local service-learning programs with needs assessments and planning;

(b) Conduct research and evaluations concerning service-learning;

(c)(1) Provide leadership development and training to State and local service-learning program administrators, supervisors, project sponsors, and participants; and

(2) Provide training to persons who can provide the leadership development and training described in paragraph (c)(1) of this section;

(d) Facilitate communication among entities carrying out service-learning programs and participants in such programs;

(e) Provide information, curriculum materials, and technical assistance relating to planning and operation of service-learning programs, to States and local entities eligible to receive financial assistance under this title;

(f) Provide information regarding methods to make service-learning programs accessible to individuals with disabilities;

(g)(1) Gather and disseminate information on successful service-learning programs, components of such successful programs, innovative youth skills curricula related to service-learning, and service-learning projects; and

(2) Coordinate the activities of the Clearinghouse with appropriate entities to avoid duplication of effort;

(h) Make recommendations to State and local entities on quality controls to improve the quality of service-learning programs;

(i) Assist organizations in recruiting, screening, and placing service-learning coordinators; and

(j) Carry out such other activities as the Chief Executive Officer determines to be appropriate.

PART 2519—HIGHER EDUCATION INNOVATIVE PROGRAMS FOR COMMUNITY SERVICE

Subpart A—Purpose and Eligibility to Apply

Sec.
2519.100 What is the purpose of the Higher Education programs?
2519.110 Who may apply for a grant?

Subpart B—Use of Grant Funds

2519.200 How may grant funds be used?

Subpart C—Participant Requirements and Benefits

2519.300 Who may participate in a Higher Education program?
2519.310 Is a participant eligible to receive an AmeriCorps educational award?
2519.320 May a program provide a stipend to a participant?

Subpart D—Application Contents

2519.400 What must an applicant include in an application for a grant?
2519.410 Are there any limitations on the use of funds?
2519.420 How many years of assistance may an eligible applicant seek?

Subpart E—Application Review

2519.500 How does the Corporation review the merits of an application?

Subpart F—Distribution of Funds

2519.600 How are funds for Higher Education programs distributed?

Subpart G—Funding Requirements

2519.700 Are matching funds required?
2519.710 Are there limits on the use of funds?
2519.720 What is the length of a grant?
2519.730 May an applicant submit multiple applications for the same project?

Subpart H—Monitoring and Evaluation Requirements

2519.800 What are the monitoring and evaluation requirements for Higher Education programs?

Authority: 42 U.S.C. 12501 *et seq.*

Subpart A—Purpose and Eligibility to Apply

§2519.100 What is the purpose of the Higher Education programs?

The purpose of the higher education innovative programs for community

service is to expand participation in community service by supporting high-quality, sustainable community service programs carried out through institutions of higher education, acting as civic institutions helping to meet the educational, public safety, human, and environmental needs of neighboring communities.

§ 2519.110 Who may apply for a grant?

The following entities may apply for a grant from the Corporation:

(a) An institution of higher education.

(b) A consortium of institutions of higher education.

(c) A partnership comprised of one or more public or private nonprofit organizations and one or more institutions of higher education.

Subpart B—Use of Grant Funds

§ 2519.200 How may grant funds be used?

Funds under a higher education program grant may be used for the following activities:

(a) Enabling an institution of higher education or partnership to create or expand an organized community service program that—

(1) Engenders a sense of social responsibility and commitment to the community in which the institution is located; and

(2) Provides projects for participants, as described in § 2519.300.

(b) Supporting student-initiated and student-designed community service projects.

(c) Strengthening the leadership and instructional capacity of teachers at the elementary, secondary, and postsecondary levels with respect to service-learning by—

(1) Including service-learning as a key component of the preservice teacher education of the institution; and

(2) Encouraging the faculty of the institution to use service-learning methods throughout the curriculum.

(d) Facilitating the integration of community service carried out under the grant into academic curricula, including integration of clinical programs into the curriculum for students in professional schools, so that students may obtain credit for their community service projects.

(e) Supplementing the funds available to carry out work-study programs under part C of title IV of the Higher Education Act of 1965 (42 U.S.C. 2751 *et seq.*) to support service-learning and community service.

(f) Strengthening the service infrastructure within institutions of higher education in the United States that supports service-learning and community service.

(g) Providing for the training of teachers, prospective teachers, related education personnel, and community leaders in the skills necessary to develop, supervise, and organize service-learning.

Subpart C—Participant Requirements and Benefits

§ 2519.300 Who may participate in a Higher Education program?

Students, faculty, administration and staff of an institution, as well as residents of the community may participate. For the purpose of this part, the term "student" means an individual who is enrolled in an institution of higher education on a full-time or part-time basis.

§ 2519.310 Is a participant eligible to receive an AmeriCorps educational award?

In general, no. However, certain positions in programs funded under this part may qualify as approved AmeriCorps positions. The Corporation will establish eligibility requirements for these positions as a part of the application package.

§ 2519.320 May a program provide a stipend to a participant?

(a) A program may provide a stipend for service activities for a participant who is a student if the provision of stipends is reasonable in the context of a program's design and objectives.

(1) A program may not provide a stipend to a student who is receiving academic credit for service activities unless the service activities require a substantial time commitment beyond that expected for the credit earned.

(2) A participant who is earning money for service activities under the work-study program described in § 2519.200(e) may not receive an additional stipend from funds under this part.

(b) Consistent with the AmeriCorps program requirements in § 2522.100 of this chapter, a program with participants serving in approved full-time AmeriCorps positions must ensure the provision of a living allowance and, if necessary, health care and child care to those participants.

Subpart D—Application Contents

§ 2519.400 What must an applicant include in an application for a grant?

In order to apply to the Corporation for a grant, an applicant must submit the following:

(a) A plan describing the goals and activities of the proposed program.

(b) The specific program, budget, and other information and assurances specified by the Corporation in the grant application package.

(c) Assurances that the applicant will—

(1) Keep such records and provide such information to the Corporation with respect to the program as may be required for fiscal audits and program evaluation;

(2) Comply with the nonduplication, nondisplacement, and grievance procedure requirements of part 2540 of this chapter;

(3) Prior to the placement of a participant in the program, consult with the appropriate local labor organization, if any, representing employees in the area who are engaged in the same or similar work as the work proposed to be carried out by the program, to prevent the displacement and protect the rights of those employees; and

(4) Comply with any other assurances that the Corporation deems necessary.

§ 2519.410 Are there any limitations on the use of funds?

Not more that five percent of funds awarded under this part in any fiscal year may be used for administrative costs.

§ 2519.420 How many years of assistance may an eligible applicant seek?

Grants may be for up to three years, subject to satisfactory performance and annual appropriations.

Subpart E—Application Review

§ 2519.500 How does the Corporation review the merits of an application?

(a) The Corporation will evaluate the merits of an application submitted under this part on the basis of the quality, innovation, replicability, and sustainability of the proposed program and such other criteria as the Corporation establishes in an application package.

(b) In addition, in reviewing an application submitted under this part, the Corporation will give a proposed program increased priority for each characteristic described in paragraphs (b)(1) through (7) of this section. Priority programs—

(1) Demonstrate the commitment of the institution of higher education, other than by demonstrating the commitment of its students, to supporting the community service projects carried out under the program;

(2) Specify how the institution will promote faculty, administration, and staff participation in the community service projects;

(3) Specify the manner in which the institution will provide service to the community through organized

programs, including, where appropriate, clinical programs for students in professional schools;

(4) Describe any partnership that will participate in the community service projects, such as a partnership comprised of the institution, a student organization, a community-based agency, a local government agency, or a nonprofit entity that serves or involves school-age youth or older adults;

(5) Demonstrate community involvement in the development of the proposal;

(6) Specify that the institution will use funds under this part to strengthen the infrastructure in institutions of higher education; or

(7) With respect to projects involving delivery of service, specify projects that involve leadership development of school-age youth.

(c) In addition, the Corporation may designate additional priorities in an application package that will be used in selecting programs.

Subpart F—Distribution of Funds

§2519.600 How are funds for Higher Education programs distributed?

All funds under this part are distributed by the Corporation through grants.

Subpart G—Funding Requirements

§2519.700 Are matching funds required?

(a) Yes. The Corporation share of the cost of carrying out a program funded under this part may not exceed 50 percent.

(b) In providing for the remaining share of the cost of carrying out a program, each recipient of assistance must provide for that share through a payment in cash or in kind, fairly evaluated, including facilities, equipment, or services, and may provide for that share through State sources, local sources, or Federal sources (other than funds made available under the national service laws).

(c) However, the Corporation may waive the requirements of paragraph (b) of this section in whole or in part with respect to any program in any fiscal year if the Corporation determines that the waiver would be equitable due to lack of available financial resources at the local level.

§2519.710 Are there limits on the use of funds?

Yes. The recipient of a grant under this part may spend no more than five percent of the grant funds for any fiscal year on administrative costs.

§2519.720 What is the length of a grant?

A grant under this part is for a period of up to three years, subject to satisfactory performance and annual appropriations.

§2519.730 May an applicant submit multiple applications for the same project?

No. The Corporation will reject an application if the application describes a project proposed to be conducted using assistance requested by the applicant and the project is already described in another application pending before the Corporation.

Subpart H—Monitoring and Evaluation Requirements

§2519.800 What are the monitoring and evaluation requirements for Higher Education programs?

The monitoring and evaluation requirements for recipients of grants and subgrants under part 2516 of this chapter, relating to school-based service-learning programs, apply to recipients under this part.

PART 2520—PURPOSES AND DEFINITIONS: AMERICORPS PROGRAMS

Sec.

2520.10 What is the purpose of this part?
2520.20 What types of service activities are allowable for programs supported under parts 2521 through 2524 of this chapter?
2520.30 Are there any activities that are prohibited?
2520.40 Definitions.

Authority: 42 U.S.C. 12501 *et seq.*

§2520.10 What is the purpose of this part?

The purpose of this part is to describe the AmeriCorps grant program, including the manner in which eligible applicants may apply for funding. AmeriCorps programs must address educational, public safety, human, or environmental needs and provide AmeriCorps educational awards to eligible participants.

§2520.20 What types of service activities are allowable for programs supported under parts 2521 through 2524 of this chapter?

(a) The service must either provide a direct benefit to the community where it is performed, or involve the supervision of participants or volunteers whose service provides a direct benefit to the community where it is performed. Moreover, the approved AmeriCorps activities must result in a specific identifiable service or improvement that otherwise would not be provided with existing funds or volunteers and that does not duplicate the routine functions of workers or displace paid employees. Programs must develop service opportunities that are appropriate to the skill levels of participants and that provide a demonstrable, identifiable benefit that is valued by the community.

(b) In certain circumstances, some activities may not provide a direct benefit to the communities in which service is performed. Such activities may include, but are not limited to, clerical work and research. However, a participant may engage in such activities on his or her own time or if the performance of the activity is incidental to the participant's provision of service that does provide a direct benefit to the community in which the service is performed.

§2520.30 Are there any activities that are prohibited?

Yes. Some activities are prohibited altogether. Prohibited activities may not be performed by participants in the course of their duties, at the request of program staff, or in a manner that would associate the activities with the AmeriCorps program or the Corporation. These activities include:

(a) Any effort to influence legislation, as prohibited under section 501(c) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c));

(b) Organizing protests, petitions, boycotts, or strikes;

(c) Assisting, promoting or deterring union organizing;

(d) Engaging in partisan political activities, or other activities designed to influence the outcome of an election to any public office;

(e) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious education or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;

(f) Providing a direct benefit to—

(1) A business organized for profit;

(2) A labor union;

(3) A partisan political organization;

(4) A nonprofit organization that fails to comply with the restrictions contained in section 501(c) of the Internal Revenue Code of 1986; and

(5) An organization engaged in the religious activities described in paragraph (e) of this section, unless Corporation assistance is not used to support those religious activities; and

(g) Such other activities as the Corporation may prohibit.

§2520.40 Definitions.

AmeriCorps Program. The term *AmeriCorps program* means any

program, including VISTA and the National Civilian Community Corps, that provides AmeriCorps educational awards in exchange for substantial full- or part-time service.

PART 2521—ELIGIBLE AMERICORPS PROGRAM APPLICANTS AND TYPES OF GRANTS AVAILABLE FOR AWARD

Sec.
2521.10 Who may apply to receive an AmeriCorps grant?
2521.20 What types of AmeriCorps program grants are available for award?
2521.30 How will AmeriCorps program grants be awarded?

Authority: 42 U.S.C. 12501 *et seq.*

§ 2521.10 Who may apply to receive an AmeriCorps grant?

(a) States (including Territories), subdivisions of States, Indian tribes, public or private nonprofit organizations (including labor organizations), and institutions of higher education are eligible to apply for AmeriCorps grants. The Corporation may also enter into agreements with other Federal agencies as described in part 2523 of this chapter.

(b) In addition, eligible applicants must meet the following specific requirements:

(1) The fifty States, the District of Columbia and Puerto Rico must first receive Corporation authorization for the use of a State Commission or alternative administrative or transitional entity pursuant to 45 CFR part 2550; and

(2) Only Federal agencies that are cabinet-level departments or independent agencies are eligible to receive an AmeriCorps grant; bureaus, divisions, and local and regional offices of such departments and agencies may only apply through the central department or agency.

§ 2521.20 What types of AmeriCorps program grants are available for award?

The Corporation may make the following types of grants to eligible applicants. The requirements of this section will also apply to any State or other applicant receiving assistance under this part that proposes to conduct a grant program using the assistance to support other national or community service programs.

(a) *Planning grants.*—(1) *Purpose.* The purpose of a planning grant is to assist an applicant in completing the planning necessary to implement a sound concept that has already been developed.

(2) *Eligibility.* (i) States, Territories, and Federal agencies may apply to the Corporation for planning grants.

(ii) Subdivisions of States, Indian Tribes, public or private nonprofit organizations (including labor organizations), and institutions of higher education may apply either to a State or directly to the Corporation for planning grants.

(3) *Duration.* A planning grant will be negotiated for a term not to exceed one year.

(b) *Operational grants.*—(1) *Purpose.* The purpose of an operational grant is to fund an organization that is ready to implement a fully developed plan for a new or expanded program. An operational grant may include a short planning period if necessary to implement a program.

(2) *Eligibility.* (i) States, Territories and Federal agencies may apply to the Corporation for operational grants, including AmeriCorps educational awards.

(ii) Subdivisions of States, Indian Tribes, public or private nonprofit organizations (including labor organizations), and institutions of higher education may apply either to a State or directly to the Corporation for operational grants including AmeriCorps educational awards. The Corporation may limit the categories of applicants eligible to apply directly to the Corporation for assistance under this subsection consistent with its National priorities.

(3) *Duration.* An operational grant will be negotiated for a term not to exceed three years. Within a three-year term, renewal funding will be contingent upon periodic assessment of program quality, progress to date, and availability of Congressional appropriations.

(c) *AmeriCorps educational awards only.*—(1) *Purpose.* The purpose of these awards is to provide AmeriCorps educational awards to programs that are not receiving or applying to the Corporation for program assistance but that meet the criteria for approved AmeriCorps positions, and desire to provide an AmeriCorps educational award to participants serving in approved positions.

(2) *Eligibility.* (i) States and Territories may apply to the Corporation for AmeriCorps educational awards only.

(ii) Subdivisions of States, Indian Tribes, public or private nonprofit organizations (including labor organizations), institutions of higher education, and Federal agencies may apply directly to the Corporation for AmeriCorps educational awards only.

(d) *Training, technical assistance and other special grants.*—(1) *Purpose.* The purpose of these grants is to ensure broad access to AmeriCorps programs for all Americans, including those with disabilities; support disaster relief efforts; assist efforts to secure private support for programs through challenge grants; and ensure program quality by supporting technical assistance and training programs.

(2) *Eligibility.* Eligibility varies and is detailed under "Technical Assistance and Other Special Grants."

(3) *Duration.* Grants will be negotiated for a renewable term of up to three years.

§ 2521.30 How will AmeriCorps program grants be awarded?

In any fiscal year, the Corporation will award AmeriCorps program grants as follows:

(a) *Grants to State applicants.* (1) One-third of the funds available under this part and a corresponding allotment of AmeriCorps educational awards, as specified by the Corporation, will be distributed according to a population-based formula to States (including Puerto Rico and the District of Columbia) that have applications approved by the Corporation.

(2) At least one-third of funds available under this part and an appropriate number of AmeriCorps awards, as determined by the Corporation, will be awarded to States on a competitive basis. In order to receive these funds, a State must receive funds under paragraph (a)(1) of this section in the same fiscal year.

(3) In making subgrants with funds awarded by formula or competition under paragraphs (a) (1) or (2) of this section, a State must:

(i) Provide a description of the process used to select programs for funding including a certification that the State or other entity used a competitive process and criteria that were consistent with the selection criteria in § 2522.410 of this chapter. In making such competitive selections, the State must ensure the equitable allocation within the State of assistance and approved AmeriCorps positions provided under this subtitle to the State taking into consideration such factors as the location of the programs applying to the State, population density, and economic distress;

(ii) Provide a written assurance that not less than 60 percent of the assistance provided to the State will be used to make grants in support of AmeriCorps programs other than AmeriCorps programs supported by the State or a State agency. The Corporation may permit a State to deviate from this percentage if the State demonstrates that it did not receive a sufficient number of acceptable applications; and

(iii) Ensure that a minimum of 50 percent of funds going to the State will

be used for programs that operate in the areas of need and that place a priority on recruiting participants who are residents in high need areas, or on Federal or other public lands. The Corporation may waive this requirement for an individual State if at least 50 percent of the total amount of assistance to all States will be used for such programs.

(b) *Grants to applicants other than States.* (1) One percent of available funds will be distributed to the U.S. Territories [1] that have applications approved by the Corporation according to a population-based formula.[2]

(2) One percent of available funds will be reserved for distribution to Indian tribes on a competitive basis.

(3) The Corporation will use any funds available under this part remaining after the award of the grants described in paragraphs (a) and (b) (1) and (2) of this section to make direct competitive grants to subdivisions of States, Indian tribes, public or private nonprofit organizations (including labor organizations), institutions of higher education, and Federal agencies. No more than one-third of these remaining funds may be awarded to Federal agencies.

(c) *Allocation of AmeriCorps educational awards only.* The Corporation will determine on an annual basis the appropriate number of educational awards to provide eligible applicants who have not applied for program assistance.

(d) *Effect States' or Territories' failure to apply.* If a State or U.S. Territory does not apply for or fails to give adequate notice of its intent to apply for a formula-based grant as announced by the Corporation and published in applications and the Notice of Funds Availability, the Corporation will use the amount of that State's allotment to make grants to eligible entities within that State or Territory to carry out AmeriCorps programs in that State or Territory. Any funds remaining from that State's allotment after making such grants will be reallocated to the States, Territories, and Indian tribes with approved AmeriCorps applications at the Corporation's discretion.

(e) *Effect of rejection of State application.* If a State's application for a formula-based grant is ultimately rejected by the Corporation pursuant to § 2522.320 of this chapter, the State's allotment will be available for redistribution by the Corporation to the States, Territories, and Indian Tribes with approved AmeriCorps applications as the Corporation deems appropriate.

(f) The Corporation will make grants for training, technical assistance and other special programs described in part 2524 of this chapter at the Corporation's discretion.

(g) *Matching funds.*—(1) *Requirements.* In addition the matching requirements for participant benefits specified in § 2522.240(b)(5) of this chapter, the Federal share of the cost of carrying out an AmeriCorps program that receives the assistance under parts 2521 through 2524 of this chapter, whether the assistance is provided directly or as a subgrant from the original recipient of the assistance, may not exceed 75 percent of such cost.

(2) *Calculation.* In providing for the remaining share of the cost of carrying out an AmeriCorps program, the program—

(i) Must provide for its share through a payment in cash or in kind, fairly evaluated, including facilities, equipment, or services; and

(ii) May provide for its share through State sources, local sources, or other Federal sources (other than funds made available by the Corporation).

(3) *Waiver.* The Corporation reserves the right to waive, in whole or in part, the requirements of paragraph (g)(1) of this section.

(h) *Administrative costs.* (1) Grants or transfers of funds made under this part are subject to the five percent limitation on administrative costs specified in § 2540.110 of this chapter.

(2) Rules on use. States or other grantmaking entities that make subgrants to programs may retain no more than one-half of the five percent maximum administrative costs allowed for each Corporation grant.

PART 2522—AMERICORPS PARTICIPANTS, PROGRAMS, AND APPLICANTS

Subpart A—Minimum Requirements and Program Types

Sec.

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Authority: 42 U.S.C. 12501 *et seq.*

Subpart A—Minimum Requirements and Program Types

§ 2522.100 What are the minimum requirements that every AmeriCorps program, regardless of type, must meet?

Although a wide range of programs may be eligible to apply for and receive

[1] The United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Palau (until such time as the Compact of Free Association with Palau is ratified).

[2] The amount allotted as a grant to each such territory or possession is equal to the ratio of each such Territory's population to the population of all such territories multiplied by the amount of the one percent set-aside.

support from the Corporation, all AmeriCorps programs must meet certain minimum program requirements. These requirements apply regardless of whether a program is supported directly by the Corporation or through a subgrant. All AmeriCorps programs must:

(a) Address educational, public safety, human, or environmental needs, and provide a direct and demonstrable benefit that is valued by the community in which the service is performed;

(b) Perform projects that are designed, implemented, and evaluated with extensive and broad-based local input, including consultation with representatives from the community served, participants (or potential participants) in the program, community-based agencies with a demonstrated record of experience in providing services, and local labor organizations representing employees of project sponsors (if such entities exist in the area to be served by the program);

(c) Obtain, in the case of a program that also proposes to serve as the sponsor, the written concurrence of any local labor organization representing employees of the project sponsors who are engaged in the same or substantially similar work as that proposed to be carried out by the AmeriCorps participant;

(d) Establish and provide outcome objectives, including a strategy for achieving these objectives, upon which self-assessment and Corporation-assessment of progress can rest. Such assessment will be used to help determine the extent to which the program has had a positive impact:

(1) On communities and persons served by the projects performed by the program;

(2) On participants who take part in the projects; and

(3) In such other areas as the program or Corporation may specify;

(e) Strengthen communities and encourage mutual respect and cooperation among citizens of different races, ethnicities, socioeconomic backgrounds, educational levels, both men and women and individuals with disabilities;

(f) Agree to seek actively to include participants from the communities in which projects are conducted, as well as individuals of different races and ethnicities, socioeconomic backgrounds, educational levels, both men and women as well as individuals with disabilities unless a program design requires emphasizing the recruitment of participants who share a specific characteristic or background. In no case may a program violate the nondiscrimination, nonduplication and nondisplacement rules governing participant selection described in part 2540 of this chapter. In addition, programs are encouraged to establish, if consistent with the purposes of the program, an intergenerational component that combines students, out-of-school youths, and older adults as participants;

(g)(1) Determine the projects in which participants will serve and establish minimum qualifications that individuals must meet to be eligible to participate in the program; these qualifications may vary based on the specific tasks to be performed by participants. Regardless of the educational level or background of participants sought, programs are encouraged to select individuals who posses leadership potential and a commitment to the goals of the AmeriCorps program. In any case, programs must select participants in a non-partisan, non-political, non-discriminatory manner, ensuring fair access to participation. In addition, programs are required to ensure that they do not displace any existing paid employees as provided in part 2540 of this chapter. To this end, programs may not select any prospective participant who is or was previously employed by a prospective project sponsors within six months of the time of enrollment in the program.

(2) In addition, all programs are required to comply with any pre-service orientation or training period requirements established by the Corporation to assist in the selection of motivated participants. Finally, all programs must agree to select a percentage (to be determined by the Corporation) of the participants for the program from among prospective participants recruited by the Corporation or State Commissions under part 2532 of this chapter. The Corporation may also specify a minimum percentage of participants to be selected from the national leadership pool established under § 2522.120. The Corporation may vary either percentage for different types of AmeriCorps programs;

(h) Provide reasonable accommodation, including auxiliary aids and services (as defined in section 3(1) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(1))) based on the individualized need of a participant who is a qualified individual with a disability (as defined in section 101(8) of such Act (42 U.S.C. 12111(8)). For the purpose of complying with this provision, AmeriCorps programs may apply for additional financial assistance from the Corporation pursuant to § 2524.50 of this chapter;

(i) Use service experiences to help participants achieve the skills and education needed for productive, active citizenship, including the provision, if appropriate, of structured opportunities for participants to reflect on their service experiences. In addition, all programs must encourage every participant who is eligible to vote to register prior to completing a term of service;

(j) Provide participants in the program with the training, skills, and knowledge necessary to perform the tasks required in their respective projects, including, if appropriate, specific training in a particular field and background information on the community, including why the service projects are needed;

(k) Provide support services—

(1) To participants who are completing a term of service and making the transition to other educational and career opportunities; and

(2) To those participants who are school dropouts in order to assist them in earning the equivalent of a high school diploma;

(l) Ensure that participants serving in approved AmeriCorps positions receive the living allowance and other benefits described in §§ 2521.240 through 2521.250 of this chapter, including a living allowance and other benefits;

(m) Describe the manner in which the AmeriCorps educational awards will be apportioned among individuals serving in the program. If a program proposes to provide such benefits to less than 100 percent of the participants in the program, the program must provide a compelling rationale for determining which participants will receive the benefits and which participants will not. AmeriCorps programs are strongly encouraged to offer alternative post-service benefits to participants who will not receive AmeriCorps educational awards;

(n) Agree to identify the program, through the use of logos, common application materials, and other means, as part of a larger national effort (to be specified by the Corporation) and to participate in other activities such as common opening ceremonies (including the administration of a national oath or affirmation), service days, and conferences designed to promote a national identity for all AmeriCorps programs and participants, including those participants not receiving AmeriCorps educational awards. This provision does not preclude an AmeriCorps program from continuing to use its own name as the primary

identification, or from using its name, logo, or other identifying materials on uniforms or other items;

(o) Agree to begin operations at such times as the Corporation may reasonably require and to comply with any restrictions the Corporation may establish as to the length of time (subsequent to the starting date(s) of a program) that the program may take to fill an approved AmeriCorps position left vacant due to attrition;

(p) Prior to receiving Corporation support, comply with all evaluation procedures specified by the Corporation, as explained in §§ 2522.500 through 2522.560;

(q) In the case of a program receiving funding directly from the Corporation, consult with and coordinate activities with the State Commission for the State in which the program operates; and

(r) Address any other requirements as specified by the Corporation.

§2522.110 What types of AmeriCorps programs are eligible to compete for AmeriCorps grants?

Types of AmeriCorps programs eligible to compete for AmeriCorps grants include the following:

(a) *Specialized skills programs.* (1) A service program that is targeted to address specific educational, public safety, human, or environmental needs and that—

(i) Recruits individuals with special skills or provides specialized pre-service training to enable participants to be placed individually or in teams in positions in which the participants can meet such needs; and

(ii) If consistent with the purposes of the program, brings participants together for additional training and other activities designed to foster civic responsibility, increase the skills of participants, and improve the quality of the service provided.

(2) A preprofessional training program in which students enrolled in an institution of higher education—

(i) Receive training in specified fields, which may include classes containing service-learning;

(ii) Perform service related to such training outside the classroom during the school term and during summer or other vacation periods; and

(iii) Agree to provide service upon graduation to meet educational, public safety, human, or environmental needs related to such training.

(3) A professional corps program that recruits and places qualified participants in positions—

(i) As teachers, nurses and other health care providers, police officers, early childhood development staff, engineers, or other professionals providing service to meet educational, public safety, human, or environmental needs in communities with an inadequate number of such professionals;

(ii) That may include a salary in excess of the maximum living allowance authorized in § 2522.240(b)(2); and

(iii) That are sponsored by public or private nonprofit employers who agree to pay 100 percent of the salaries and benefits (other than any AmeriCorps educational award from the National Service Trust) of the participants.

(b) *Specialized service programs.* (1) A community service program designed to meet the needs of rural communities, using teams or individual placements to address the development needs of rural communities and to combat rural poverty, including health care, education, and job training.

(2) A program that seeks to eliminate hunger in communities and rural areas through service in projects—

(i) Involving food banks, food pantries, and nonprofit organizations that provide food during emergencies;

(ii) Involving the gleaning of prepared and unprepared food that would otherwise be discarded as unusable so that the usable portion of such food may be donated to food banks, food pantries, and other nonprofit organizations;

(iii) Seeking to address the long-term causes of hunger through education and the delivery of appropriate services; or

(iv) Providing training in basic health, nutrition, and life skills necessary to alleviate hunger in communities and rural areas.

(3) A program in which economically disadvantaged individuals who are between the ages of 16 and 24 years of age, inclusive, are provided with opportunities to perform service that, while enabling such individuals to obtain the education and employment skills necessary to achieve economic self-sufficiency, will help their communities meet—

(i) The housing needs of low-income families and the homeless; and

(ii) The need for community facilities in low-income areas.

(c) *Community-development programs.* (1) A community corps program that meets educational, public safety, human, or environmental needs and promotes greater community unity through the use of organized teams of participants of varied social and economic backgrounds, skill levels, physical and developmental capabilities, ages, ethnic backgrounds, or genders.

(2) A program that is administered by a combination of nonprofit organizations located in a low-income area, provides a broad range of services to residents of such an area, is governed by a board composed in significant part of low-income individuals, and is intended to provide opportunities for individuals or teams of individuals to engage in community projects in such an area that meet unaddressed community and individual needs, including projects that would—

(i) Meet the needs of low-income children and youth aged 18 and younger, such as providing after-school "safe-places," including schools, with opportunities for learning and recreation; or

(ii) Be directed to other important unaddressed needs in such an area.

(d) *Programs that expand service program capacity.* (1) A program that provides specialized training to individuals in service-learning and places the individuals after such training in positions, including positions as service-learning coordinators, to facilitate service-learning in programs eligible for funding under Serve-America.

(2) An AmeriCorps entrepreneur program that identifies, recruits, and trains gifted young adults of all backgrounds and assists them in designing solutions to community problems.

(e) *Campus-based programs.* A campus-based program that is designed to provide substantial service in a community during the school term and during summer or other vacation periods through the use of—

(1) Students who are attending an institution of higher education, including students participating in a work-study program assisted under part C of title IV of the Higher Education Act of 1965 (42 U.S.C. 2751 *et seq.*);

(2) Teams composed of such students; or

(3) Teams composed of a combination of such students and community residents.

(f) *Intergenerational programs.* An intergenerational program that combines students, out-of-school youths, and older adults as participants to provide needed community services, including an intergenerational component for other AmeriCorps programs described in this subsection.

(g) *Youth development programs.* A full-time, year-round youth corps program or full-time summer youth corps program, such as a conservation corps or youth service corps (including youth corps programs under subtitle I, the Public Lands Corps established under the Public Lands Corps Act of 1993, the Urban Youth Corps

established under section 106 of the National and Community Service Trust Act of 1993, and other conservation corps or youth service corps that perform service on Federal or other public lands or on Indian lands or Hawaiian home lands), that:

(1) Undertakes meaningful service projects with visible public benefits, including natural resource, urban renovation, or human services projects;

(2) Includes as participants youths and young adults between the ages of 16 and 25, inclusive, including out-of-school youths and other disadvantaged youths (such as youths with limited basic skills, youths in foster care who are becoming too old for foster care, youths of limited English proficiency, homeless youths, and youths who are individuals with disabilities) who are between those ages; and

(3) Provides those participants who are youths and young adults with—

(i) Crew-based, highly structured, and adult-supervised work experience, life skills, education, career guidance and counseling, employment training, and support services; and

(ii) The opportunity to develop citizenship values and skills through service to their community and the United States.

(h) *Individualized placement programs.* An individualized placement program that includes regular group activities, such as leadership training and special service projects.

(i) *Other programs.* Such other AmeriCorps programs addressing educational, public safety, human, or environmental needs as the Corporation may designate.

Subpart B—Participant Eligibility, Requirements and Benefits

§ 2522.200 What are the eligibility requirements for AmeriCorps participants?

(a) An AmeriCorps participant must be 17 years of age or older at the commencement of service (unless the participant is in a youth corps described in § 2522.110(a)(1)(ii), in which case the participant must be between the ages of 16 and 25, inclusive).

(b) An AmeriCorps participant must either have a high school diploma or its equivalent (including an alternative diploma or certificate for those individuals with disabilities for whom such an alternative diploma or certificate is appropriate) or agree to obtain a high school diploma or its equivalent. However, if the program in which the individual seeks to become a participant conducts an independent evaluation demonstrating that an individual is incapable of obtaining a high school diploma or its equivalent, the Corporation may waive this requirement.

(c) Unless an individual is enrolled in an institution of higher education on an ability to benefit basis and is considered eligible for funds under section 484 of the Higher Education Act of 1965 (20 U.S.C. 1091), he or she may not have dropped out of elementary or secondary school in order to enroll as an AmeriCorps participant.

(d) An AmeriCorps participant must be a citizen or national of the United States or lawful permanent resident alien of the United States.

§ 2522.210 How are AmeriCorps participants recruited and selected?

(a) *Local recruitment and selection.* In general, AmeriCorps participants will be selected locally by an approved AmeriCorps program, and the selection criteria will vary widely among the different programs. Nevertheless, AmeriCorps programs must select their participants in a fair and non-discriminatory manner which complies with part 2542 of this chapter. In selecting participants, programs must also comply with the recruitment and selection requirements specified in this section.

(b)(1) *National and State recruitment and selection.* The Corporation and each State Commission will establish a system to recruit individuals who desire to perform national service and to assist the placement of these individuals in approved AmeriCorps positions, which may include positions available under titles I and II of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 et seq.). The national and State recruitment and placement system will be designed and operated according to Corporation guidelines.

(2) *Dissemination of information.* The Corporation and State Commissions will disseminate information regarding available approved AmeriCorps positions through cooperation with secondary schools, institutions of higher education, employment service offices, State vocational rehabilitation agencies within the meaning of the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) and other State agencies that primarily serve qualified individuals with disabilities, and other appropriate entities, particularly those organizations that provide outreach to disadvantaged youths and youths who are qualified individuals with disabilities.

(c) *National leadership pool.* (1) *Selection and training.* From among individuals recruited under paragraph (b) of this section, the Corporation may select individuals with significant leadership potential, as determined by the Corporation, to receive special training to enhance their leadership ability. The leadership training will be provided by the Corporation directly or through a grant or contract as the Corporation determines.

(2) *Emphasis on certain individuals.* In selecting individuals to receive leadership training under this provision, the Corporation will make special efforts to select individuals who have served—

(i) In the Peace Corps;

(ii) As VISTA volunteers;

(iii) As participants in AmeriCorps programs receiving assistance under parts 2520 through 2524 of this chapter;

(iv) As participants in National Service Demonstration programs that received assistance from the Commission on National and Community Service; or

(v) As members of the Armed Forces of the United States and who were honorably discharged from such service.

(3) *Assignment.* At the request of a program that receives assistance, the Corporation may assign an individual who receives leadership training under paragraph (c)(1) of this section to work with the program in a leadership position and carry out assignments not otherwise performed by regular participants. An individual assigned to a program will be considered to be a participant of the program.

§ 2522.220 What are the required terms of service for AmeriCorps participants, and may they serve for more than one term?

(a) *Term of service.* In order to be eligible for the educational award described in § 2522.240(a), participants serving in approved AmeriCorps positions must complete a term of service as defined in this section:

(1) *Full-time service.* 1,700 hours of service during a period of not less than nine months and not more than one year.

(2) *Part-time service.* 900 hours of service during a period of not more than two years, or, if the individual is enrolled in an institution of higher education while performing all or a portion of the service, not more than three years.

(3) *Reduced part-time term of service.* The Corporation may reduce the number of hours required to be served in order to receive an educational award for certain part-time participants serving in approved AmeriCorps positions. In such cases, the educational award will be reduced in direct proportion to the reduction in required hours of service. These reductions may be made for summer programs, for categories of

participants in certain approved AmeriCorps programs and on a case-by-case, individual basis as the Corporation deems prudent.

(b) *Restriction on multiple terms.* While there is no limit on the number of terms an individual may serve in one or more AmeriCorps program, an AmeriCorps participant may only receive the benefits described in §§ 2522.240 through 2522.250 for the first two successfully-completed terms of service, regardless of whether those terms were served on a full-, part-, or reduced part-time basis.

(c) *Eligibility for second term.* A participant will only be eligible to serve a second or additional term of service if that individual has received satisfactory performance review(s) for any previous term(s) of service. Mere eligibility for a second or further term of service in no way guarantees a participant selection or placement.

(d) *Participant performance review.* For the purposes of determining a participant's eligibility for a second or additional term of service and/or for an AmeriCorps educational award, each AmeriCorps program will evaluate the performance of a participant mid-term and upon completion of a participants term of service. The end-of-term performance evaluation will assess the following:

(1) Whether the participant has completed the required number of hours described in paragraph (a) of this section;

(2) Whether the participant has satisfactorily completed assignments, tasks or projects; and

(3) Whether the participant has met any other performance criteria which had been clearly communicated both orally and in writing at the beginning of the term of service.

(e) *Grievance procedure.* Any AmeriCorps participant wishing to contest a program's ruling of unsatisfactory performance may file a grievance according to the procedures set forth in part 2540 of this chapter. If that grievance procedure or subsequent binding arbitration procedure finds that the participant did in fact satisfactorily complete a term of service, then that individual will be eligible to receive an educational award and/or be eligible to serve a second term of service.

§ 2522.230 Under what circumstances may AmeriCorps participants be released from completing a term of service, and what are the consequences?

In general, AmeriCorps programs have the authority to release participants serving in approved AmeriCorps positions from completing a term of service for two reasons: for compelling personal circumstances as demonstrated by the participant or for cause.

(a) *Release for compelling personal circumstances.* In general, AmeriCorps programs have the authority to define the circumstances by which a participant may be released for compelling personal circumstances. Programs wishing to release participants serving in approved AmeriCorps positions may elect either—

(1) To grant the release and provide a portion of the educational award equal to the portion of the term served; or

(2) To permit the participant to temporarily suspend performance of the term of service for a period of up to two years (and such additional period as the Corporation may allow for extenuating circumstances) and, upon completion of such period, to allow the participant to return to the program with which he or she was serving or to a similar AmeriCorps program with the assistance of the Corporation, in order to complete the remainder of the term of service and obtain the entire AmeriCorps educational award.

(b) *Release for cause.* AmeriCorps programs have the authority to define the circumstances by which a participant may be released for cause, except as specified in paragraph (b)(1) of this section. AmeriCorps programs must establish a written policy to be signed both by the participant and the program directors that clearly states the circumstances under which participants may be released for cause. Examples of conduct which programs may decide constitutes grounds for release for cause include chronic truancy, consistent failure to follow directions, and failure to adhere to program rules and guidelines. Under no circumstances may a participant's disability constitute grounds for release for cause.

(1) *Circumstances requiring release for cause.* AmeriCorps programs are required to release for cause any participant who is convicted of a felony during a term of service. Any participant who is officially charged with a violent felony (e.g., rape or homicide), or sale or distribution of a controlled substance, or any participant convicted of the possession of a controlled substance, will have his or her service suspended without a living allowance and without receiving credit for hours missed. Any individual whose service was suspended because of being charged with a violent felony or sale or distribution of a controlled substance may resume service if he or she is found not guilty or if such charge is dismissed. Any individual whose service was suspended because of being convicted of a first offense of the possession of a controlled substance may resume service by demonstrating that he or she has enrolled in an approved drug rehabilitation program. A person convicted of a second or third possession of a controlled substance may resume service by demonstrating successful completion of a rehabilitation program.

(2) *Impact of release for cause.* A participant released for cause may not receive any portion of the AmeriCorps educational award. In addition, any individual released for cause who wishes to reapply to the program from which he or she was released or to any other AmeriCorps program is required to disclose the release to that program. Failure to disclose to an AmeriCorps program any history of having been released for cause from another AmeriCorps program will render an individual ineligible to receive the AmeriCorps educational award, notwithstanding whether or not that individual successfully completes the term of service.

(3) *Grievance procedure.* Any AmeriCorps participant wishing to contest a program decision to release that participant for cause may file a grievance according to the procedures set forth in part 2540 of this chapter. Pending the resolution of such grievance procedure, a program may suspend the service of that participant. If the initial grievance procedure or subsequent binding arbitration proceedings find that there was not cause for release, the AmeriCorps program must reinstate the participant; moreover, the program must credit the participant with any service hours missed and pay the participant the full amount of any living allowance the participant did not receive as a result of such suspension. The Corporation retains the discretion to determine whether Corporation funds may be used to pay the living allowance withheld during a participant's suspension.

§ 2522.240 What benefits do AmeriCorps participants serving in approved AmeriCorps positions receive?

(a) *AmeriCorps Educational Awards.* An individual serving in an approved AmeriCorps position will receive an educational award from the National Service Trust upon successful completion of each of up to two terms of service as defined in § 2522.220.

(b) *Living allowances*—(1) *Amount.* Subject to the provisions of this part, any individual who participates on a full-time basis in an AmeriCorps program carried out using assistance provided under § 2521.30 of this chapter

will receive a living allowance in an amount equal to or greater than the average annual subsistence allowance provided to VISTA volunteers under section 105 of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4955). This requirement will not apply to any program that was in existence prior to September 21, 1993 (the date of the enactment of the National and Community Service Trust Act of 1993) or to any program which receives only educational awards from the Corporation.

(2) *Maximum living allowance.* With the exception of a professional corps described in § 2521.110(b)(3) of this chapter, the AmeriCorps living allowances may not exceed 200 percent of the average annual subsistence allowance provided to VISTA volunteers under section 105 of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4955). A professional corps AmeriCorps program may provide a stipend in excess of the maximum, subject to the following conditions:

(i) Corporation assistance may not be used to pay for any portion of the allowance; and

(ii) The program must be operated directly by the applicant, selected on a competitive basis by submitting an application directly to the Corporation, and may not be included in a State's application for the AmeriCorps program funds distributed by formula, or competition described in § 2521.30 (a)(1) and (a)(2) of this chapter.

(3) *Living allowances for part-time participants.* Programs may, but are not required to, provide living allowances to individuals participating on a part-time basis (or a reduced term of part-time service authorized under § 2522.220(a)(3). Such living allowances should be prorated to the living allowance authorized in paragraph (b)(1) of this section and will comply with such restrictions therein.

(4) *Waiver or reduction of living allowance.* The Corporation may, at its discretion, waive or reduce the living allowance requirements if a program can demonstrate to the satisfaction of the Corporation that such requirements are inconsistent with the objectives of the program, and that participants will be able to meet the necessary and reasonable costs of living (including food, housing, and transportation) in the area in which the program is located.

(5) *Limitation on Federal share.* Excepting the provision concerning professional corps in paragraph (b)(2)(i) of this section, the Federal share, including Corporation and other Federal funds, may not exceed 85% of the total amount provided to an AmeriCorps participant for a living allowance and may not exceed 85% of the minimum required living allowance enumerated in paragraph (b)(1) of this section.

§ 2522.250 What other benefits do AmeriCorps participants serving in approved AmeriCorps positions receive?

(a) *Child care.* Grantees must provide child care through an eligible provider or a child care allowance in an amount determined by the Corporation to those full-time participants who need child care in order to participate.

(1) *Need.* A participant is considered to need child care in order to participate in the program if he or she:

(i) Is the parent or legal guardian of, or is acting in loco parentis for, a child under 13 who resides with the participant;

(ii) Has a family income that does not exceed 75 percent of the State's median income for a family of the same size;

(iii) At the time of acceptance into the program, is not currently receiving child care assistance from another source, including a parent or guardian, which would continue to be provided while the participant serves in the program; and

(iv) Certifies that he or she needs child care in order to participate in the program.

(2) *Provider eligibility.* Eligible child care providers are those who are eligible child care providers as defined in the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858n(5)).

(3) *Child care allowance.* The amount of the child care allowance will be determined by the Corporation based on payment rates for the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858c(4)(A)).

(4) *Federal share.* The Corporation will pay 100 percent of the child care allowance, or, if the program provides child care through an eligible provider, the actual cost of the care or the amount of the allowance, whichever is less.

(b) *Health care.* In general, grantees must provide a health care policy meeting the minimum or alternative benefits determined by the Corporation, to any full-time participant who is eligible for health care benefits.

(1) *Participant eligibility.* A full-time participant is eligible for health care benefits if he or she is not otherwise covered by a health care policy providing minimum benefits established by the Corporation at the time he or she is accepted into a program. If, as a result of participation, or if, during the term of service, a participant demonstrates loss of coverage through no deliberate act of his or her own, such as parental or spousal job loss or disqualification from Medicaid, the participant will be eligible for health care benefits.

(2) *Minimum benefits.* The Corporation will determine the minimum benefits that must be included in the policy provided to eligible participants.

(3) *Alternative benefits.* A grantee may provide a health care policy that does not include the minimum benefits if the fair market value, as determined by the Corporation, of the proposed plan is equal to or greater than a plan that includes the minimum benefits.

(4) *Federal share.* The Corporation will pay 85% of the cost of the most affordable policy for any policy that provides minimum benefits. The most affordable policy will be determined by the Corporation. The Corporation will not pay any share of the cost of a policy that does not include the minimum benefits.

Subpart C—Application Requirements

§ 2522.300 What are the application requirements for AmeriCorps program grants?

All eligible applicants seeking AmeriCorps program grants must—

(a) Provide a description of the specific program(s) being proposed, including the type of program and of how it meets the minimum program requirements described in § 2522.100; and

(b) Comply with any additional requirements as specified by the Corporation in the application package.

§ 2522.310 What are the application requirements for AmeriCorps educational awards only?

(a) Eligible applicants may apply for AmeriCorps educational awards only for one of the following eligible service positions:

(1) A position for a participant in an AmeriCorps program that:

(i) Is carried out by an entity eligible to receive support under part 2521 of this chapter;

(ii) Would be eligible to receive assistance under this rule, based on criteria established by the Corporation, but has not applied for such assistance;

(2) A position facilitating service-learning in a program described in parts 2515 through 2519 of this chapter;

(3) A position involving service as a crew leader in a youth corps program or a similar position supporting an AmeriCorps program; and

(4) Such other AmeriCorps positions as the Corporation considers to be appropriate.

(b) Because programs applying only for AmeriCorps educational awards must, by definition, meet the same basic

requirements as other approved AmeriCorps programs, applicants must comply with the same application requirements specified in § 2522.300.

§ 2522.320 May an applicant submit more than one application to the Corporation for the same program at the same time?

No. The Corporation will reject a second or subsequent application submitted if a project proposed to be conducted using assistance requested by the applicant is included in another application already pending before the Corporation.

Subpart D—Selection of AmeriCorps Programs

§ 2522.400 How will the basic selection criteria be applied?

From among the eligible programs that meet the minimum program requirements and that have submitted applications to the Corporation, the Corporation must select the best ones to receive funding. Although there is a wide range of factors that must be taken into account during the selection process, there are certain fundamental selection criteria that apply to all programs in each grant competition, regardless of whether they receive funding or educational awards directly or through subgrants. States and other subgranting applicants are required to use these criteria during the competitive selection of subgrantees. The Corporation may adjust the relative weight given to each criterion. (Additional and more specific criteria will be published in the applications.)

§ 2522.410 What are the basic selection criteria for AmeriCorps programs?

The Corporation will consider elements relating to the program design and the capacity of the organization to carry it out; factors relating to need; and whether the program contributes to meeting the Corporation's overall goals relating to geographic, program and participant mix. These criteria are discussed in this section. Additional detail relating to these criteria may be published in any notice of availability of funding.

(a) *Program criteria.* The Corporation will consider four factors relating to the program design: the quality of the program proposed to be carried out directly by the applicant or supported by a grant from the applicant; the innovative aspects of the AmeriCorps program; the feasibility of replicating the program; and the sustainability of the program, based on evidence such as the existence of strong and broad-based community support for the program and of multiple funding sources or private funding. The Corporation will also consider an organization's capacity to carry out the program based on—

(1) The quality of the leadership of the AmeriCorps program;

(2) The past performance of the organization or program; and

(3) The extent to which the program builds on existing programs.

(b) *Need criteria.* In selecting programs, the Corporation will take into consideration the extent to which projects address State-identified issue priorities (if the program will be funded out of formula funds) or national priorities (if the program will be funded out of competitive funds), and whether projects would be conducted in areas of need.

(1) *Issue priorities.* In order to concentrate national efforts on meeting certain educational, public safety, human, or environmental needs, and to achieve the other purposes of this Act, the Corporation will establish, and after review of the strategic plan approved by the Board, periodically alter priorities regarding the AmeriCorps programs that will receive assistance (funding or approved AmeriCorps positions) and the purposes for which such assistance may be used. These priorities will be applied to assistance provided on a competitive basis as described in § 2521.30 of this chapter, and to any assistance provided through a subgrant of such funds.

(i) States must establish, and through the national service plan process described in part 2513 of this chapter, periodically alter priorities regarding the programs that will receive assistance (funding or approved AmeriCorps positions) provided on a formula basis as described in § 2521.30(a)(1) of this chapter. The State priorities will be subject to Corporation review as part of the application process under part 2521 of this chapter.

(ii) The Corporation will provide advance notice to potential applicants of any AmeriCorps priorities to be in effect for a fiscal year. The notice will describe any alternation made in the priorities since the previous notice. If a program receives multi-year funding based on conformance to national or state priorities and such priorities are altered after the first year of funding, the program will not be adversely affected due to the change in priorities until the term of the grant is ended.

(2) *Areas of need.* Areas of need are:

(i) Communities designated by the Federal government or states as empowerment zones or redevelopment areas, targeted for special economic incentives, or otherwise identifiable as having high concentrations of low-income people;

(ii) Areas that are environmentally distressed;

(iii) Areas adversely affected by Federal actions related to the management of Federal lands that result in significant regional job losses and economic dislocation;

(iv) Areas adversely affected by reductions in defense spending or the closure or realignment of military installations; and

(v) Areas that have an unemployment rate greater than the national average unemployment rate for the most recent 12 months for which satisfactory data are available.

(c) *Program and participant mix criteria.* The Corporation will select programs that will help achieve participant, program type, and geographic diversity across programs.

(d) *Additional considerations.* The Corporation may publish in any notice of availability of funding additional factors that it may take into consideration in selecting programs, including any additional priorities applicable to any or all funds.

§ 2522.420 Can a State's application for formula funds be rejected?

Yes. Formula funds are not an entitlement.

(a) *Notification.* If the Corporation rejects an application submitted by a State Commission under part 2550 of this chapter for funds described in § 2521.30 of this chapter, the Corporation will promptly notify the State Commission of the reasons for the rejection of the application.

(b) *Revision.* The Corporation will provide a State Commission notified under paragraph (a) of this section with a reasonable opportunity to revise and resubmit the application. At the request of the State Commission, the Corporation will provide technical assistance to the State Commission as part of the resubmission process. The Corporation will promptly reconsider an application resubmitted under this paragraph.

(c) *Redistribution.* The amount of any State's allotment under § 2521.30(a) of this chapter for a fiscal year that the Corporation determines will not be provided for that fiscal year will be available for redistribution by the Corporation to the States, Territories and Indian Tribes with approved AmeriCorps applications as the Corporation deems appropriate.

Subpart E—Monitoring and Evaluation Requirements

§ 2522.500 What are the purposes of monitoring and evaluation?

Monitoring is a continuous effort to assess performance and improve quality. Evaluation is an assessment of program effectiveness and outcomes at the end of given period of time. Every monitoring and evaluation requirement serves one or more of the following purposes:

(a) Ensuring quality programs;

(b) Examining the benefits of national and community service; or

(c) Fulfilling legislative requirements.

§ 2522.510 How will individual AmeriCorps programs be evaluated?

The Corporation will evaluate programs based on the following:

(a) The extent to which the program meets the objectives established and agreed to by the grantee and the Corporation before the grant award;

(b) The extent to which the program is cost-effective; and

(c) The effectiveness of the program in meeting the following legislative objectives:

(1) Providing direct and demonstrable services and projects that benefit the community by addressing educational, public safety, human, or environmental needs;

(2) Recruiting and enrolling diverse participants consistent with the requirements of part 2540 of this chapter, based on economic background, race, ethnicity, age, gender, marital status, education levels, and disability;

(3) Promoting the educational achievement of each participant based on earning a high school diploma or its equivalent and future enrollment in and completion of increasingly higher levels of education;

(4) Encouraging each participant to engage in public and community service after completion of the program based on career choices and participation in other service programs;

(5) Promoting an ethic of active and productive citizenship among participants;

(6) Supplying additional volunteer assistance to community agencies without providing more volunteers than can be effectively utilized;

(7) Providing services and activities that could not otherwise be performed by employed workers and that will not supplant the hiring of, or result in the displacement of, employed workers; and

(8) Other criteria determined and published by the Corporation.

§ 2522.520 What types of activities will programs be required to undertake in order to monitor and evaluate their effectiveness?

Programs will be required to:

(a) Monitor management effectiveness, the quality of services provided, and the satisfaction of both participants and persons served. Monitoring should be a continuous process, allowing for frequent feedback and quick correction of weaknesses. Monitoring approaches such as community advisory councils, participant advisory councils, peer reviews, quality control inspections, and customer and participant surveys are encouraged;

(b) Track progress toward objectives. Objectives will be established by programs and approved by the Corporation. Programs must submit to the Corporation (or State or grantmaking entity as applicable) periodic performance reports and, as part of an annual report, an annual performance report; and

(c) Collect and submit to the Corporation (through the State or grantmaking entity as applicable) the following data:

(1) Information on participants including the total number of participants in the program, and the number of participants by race, ethnicity, age, gender, economic background, education level, ethnic group, disability classification, geographic region, and marital status;

(2) Information on services conducted in areas classified as empowerment zones (or redevelopment areas), in areas that are environmentally distressed, in areas that are adversely affected by Federal actions related to the management of Federal lands, in areas that are adversely affected by reductions in defense spending, or in areas that have an unemployment rate greater than the national average unemployment rate; and

(3) Other information as required by the Corporation.

§ 2522.530 What types of activities will States or grantmaking entities be required to undertake in order to monitor and evaluate the effectiveness of their subgrantees?

In cases where a State or grantmaking entity is the direct grantee they will be required to:

(a) Ensure that subgrantees comply with the requirements of this subpart;

(b) Track program performance in terms of progress towards pre-established objectives and ensure that corrective action is taken when necessary. Submit periodic performance reports and, as part of an annual report, an annual performance report to the Corporation for each subgrantee; and

(c) Collect from programs and submit to the Corporation the descriptive information required in this subpart.

§ 2522.540 Are programs or State/grantmaking entities required to perform independent evaluations?

No. An independent evaluation is not required but is permissible.

§ 2522.550 What types of activities will the Corporation be required to undertake in order to evaluate the overall success of the AmeriCorps programs?

(a) The Corporation will conduct independent evaluations of programs, including in-depth studies of selected programs. These evaluations will consider the opinions of participants and members of the community where services are delivered. Where appropriate these studies will compare participants with individuals who have not participated in service programs. These evaluations will:

(1) Study the extent to which the national service impacts involved communities;

(2) Study the extent to which national service increases positive attitudes among participants regarding the responsibilities of citizens and their role in solving community problems;

(3) Determine the costs and effectiveness of different program models in meeting program objectives including full- and part-time programs, programs involving different types of national service, programs using different recruitment methods, programs offering alternative non-federally funded vouchers or post-service benefits, and programs utilizing individual placements and teams;

(4) Determine the impact of programs in each State on the ability of VISTA and National Senior Volunteer Corps, each regular and reserve component of the Armed Forces, and the Peace Corps to recruit individuals residing in that State; and

(5) Determine the levels of living allowances paid in all AmeriCorps programs and American Conservation and Youth Corps, individually, by State, and by region and determine the effects that such living allowances have had on the ability of individuals to participate in such programs.

(b) The Corporation will also determine by June 30, 1995:

(1) Whether the State and national priorities designed to meet educational, public safety, human, or environmental needs are being addressed;

(2) Whether the outcomes of both stipended and nonstipended service

programs are defined and measured appropriately;

(3) Whether stipended service programs, and service programs providing educational benefits in return for service, should focus on economically disadvantaged individuals or at risk youth, or whether such programs should include a mix of individuals, including individuals from middle and upper income families;

(4) The role and importance of stipends and educational benefits in achieving desired outcomes in the service programs;

(5) The income distribution of AmeriCorps participants, to determine the level of participation of economically disadvantaged individuals. The total income of participants will be determined as of the date the participant was first selected to participate in a program and will include family total income unless the evaluating entity determines that the participant was independent at the time of selection. Definitions for "independent" and "total income" are those used in section 480(a) of the Higher Education Act of 1965;

(6) The amount of assistance provided under the AmeriCorps programs that has been expended for projects conducted in areas classified as empowerment zones (or redevelopment areas), in areas that are environmentally distresses or adversely affected by Federal actions related to the management of Federal lands, in areas that are adversely affected by reductions in defense spending, or in areas that have an unemployment rate greater than the national average unemployment rate for the most recent 12 months for which satisfactory data are available; and

(7) The implications of the results of these studies as appropriate for authorized funding levels.

§ 2522.560 Will information on individual participants be kept confidential?

(a) Yes. The Corporation will maintain the confidentiality of information regarding individual participants that is acquired for the purpose of the evaluations described in this § 2522.550. The Corporation will disclose individual participant information only with the prior written consent of the participant. However, the Corporation may disclose aggregate participant information.

(b) Grantees and subgrantees that receive assistance under this chapter must comply with the provisions of paragraph (a) of this section.

PART 2523—AGREEMENTS WITH OTHER FEDERAL AGENCIES FOR THE PROVISION OF AMERICORPS PROGRAM ASSISTANCE

Sec.

2523.10 Are Federal agencies eligible to apply for AmeriCorps program grants?
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2523.110 Can Federal agencies submit multiple applications?
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Authority: 42 U.S.C. 12501 *et seq.*

§ 2523.10 Are Federal agencies eligible to apply for AmeriCorps program grants?

Yes. Federal agencies may apply for and receive AmeriCorps grants under parts 2521 and 2522 of this chapter, and they are eligible to receive up to one-third of the funds available for competitive distribution under § 2521.30(b)(3) of this chapter. The Corporation may also enter into a contract or cooperative agreement with another Federal agency to support an AmeriCorps program carried out by the agency. The Corporation may transfer funds available to it to other Federal agencies.

§ 2523.20 Which Federal agencies may apply for such grants?

The Corporation will consider applications only from Cabinet level departments and independent agencies. Bureaus, divisions, and local and regional offices of such departments and agencies can only apply through the central department or agency; however, it is possible for the department or agency to submit an application proposing more than one program.

§ 2523.30 Must Federal agencies meet the requirements imposed on other grantees?

Yes. Federal agency programs must meet the same requirements and serve the same purposes as all other applicants seeking support under part 2522 of this chapter.

§ 2523.40 For what purposes should Federal agencies use AmeriCorps program grants?

AmeriCorps grants should enable Federal agencies to establish programs that leverage agencies' existing resources and grant-making powers toward the goal of integrating service more fully into agencies' programs and activities. Agencies should plan to ultimately support new service initiatives out of their own budgets and appropriations.

§ 2523.50 What types of grants are Federal agencies eligible to receive?

Federal agencies may apply for planning and operating grants subject to the terms established by the Corporation in § 2521.20 of this chapter, except that operating grants will be awarded with the expectation that the Federal agencies will support the proposed programs from their own budgets once the Corporation grant(s) expire.

§ 2523.60 May Federal agencies enter into partnerships or participate in consortia?

Yes. Such partnerships or consortia may consist of other Federal agencies, Indian Tribes, subdivisions of States, community based organizations, institutions of higher education, or other non-profit organizations.

§ 2523.70 Will the Corporation give special consideration to Federal agency applications that address certain needs?

Yes. The Corporation will give special consideration to those applications that address the national priorities established by the Corporation. The Corporation may also give special consideration to those applications that demonstrate the agency's intent to leverage its own funds through an approved partnership or consortium, by raising other funds from Federal or non-Federal sources, by giving grantees incentives to build service opportunities into their programs, by committing appropriate in-kind resources, or by other means.

§ 2523.80 Are there restrictions on the use of Corporation funds?

Yes. The supplantation and nondisplacement provisions specified in part 2540 of this chapter apply to the Federal AmeriCorps programs supported with such assistance.

§ 2523.90 Is there a matching requirement for Federal agencies?

No. In general, a Federal agency is not required to match funds in programs that receive support under this chapter.

§ 2523.100 Are participants in programs operated by Federal agencies Federal employees?

No. Participants in these programs follow the same employee status as participants in other approved AmeriCorps programs, and are not considered Federal employees, except for the purposes of the Family and Medical Leave Act as specified in § 2540.220(b) of this chapter.

§ 2523.110 Can Federal agencies submit multiple applications?

No. The Corporation will only consider one application per agency. The application may propose more than one program, however, and the Corporation may choose to fund any or all of those programs.

§ 2523.120 Must Federal agencies consult with State Commissions?

Yes. Federal agencies must provide a description of the manner in which the proposed AmeriCorps program(s) is coordinated with the application of the State in which the projects will be conducted. Agencies must also describe proposed efforts to coordinate AmeriCorps activities with State Commissions and other funded AmeriCorps programs within the State in order to build upon existing programs and not duplicate efforts.

PART 2524—AMERICORPS TECHNICAL ASSISTANCE AND OTHER SPECIAL GRANTS

Sec.

2524.10 For what purposes will technical assistance and training funds be made available?
2524.20 What are the guidelines for program development assistance and training grants?
2524.30 What are the guidelines for challenge grants?
2524.40 What are the guidelines for grants to involve persons with disabilities?
2524.50 What are the guidelines for assistance with disaster relief?

Authority: 42 U.S.C. 12501 *et seq.*

§ 2524.10 For what purposes will technical assistance and training funds be made available?

(a) To the extent appropriate and necessary, the Corporation may make technical assistance available to States, Indian tribes, labor organizations, organizations operated by young adults, organizations serving economically disadvantaged individuals, and other entities eligible to apply for assistance under parts 2521 and 2522 of this chapter that desire—

(1) To develop AmeriCorps programs; or

(2) To apply for assistance under parts 2521 and 2522 of this chapter or under a grant program conducted using such assistance.

(b) In addition, the Corporation may provide program development assistance and conduct, directly or by grant or contract, appropriate training programs regarding AmeriCorps in order to—

(1) Improve the ability of AmeriCorps programs assisted under parts 2521 and 2522 of this chapter to meet educational, public safety, human, or environmental needs in communities—

(i) Where services are needed most; and

(ii) Where programs do not exist, or are too limited to meet community needs, as of the date on which the Corporation makes the grant or enters into the contract;

(2) Promote leadership development in such programs;

(3) Improve the instructional and programmatic quality of such programs to build an ethic of civic responsibility;

(4) Develop the management and budgetary skills of program operators;

(5) Provide for or improve the training provided to the participants in such programs;

(6) Encourage AmeriCorps programs to adhere to risk management procedures, including the training of participants in appropriate risk management practices; and

(7) Assist in such other manner as the Corporation may specify.

§ 2524.20 What are the guidelines for program development assistance and training grants?

(a) *Eligibility.* States, Federal agencies, Indian tribes, public or private nonprofit agencies, institutions of higher education, for-profit businesses, and individuals may apply for assistance under this section.

(b) *Duration.* A grant made under this section will be for a term of up to one year and is renewable.

(c) *Application requirements.* Eligible applicants must comply with the requirements specified in the Corporation's application package.

§ 2524.30 What are the guidelines for challenge grants?

(a) *Purpose.* The purpose of these grants is to challenge high quality AmeriCorps programs to diversify their funding base by matching private dollars they have raised with Corporation support. The Corporation will provide not more than $1 for each $1 raised in cash by the program from private sources in excess of amounts otherwise required to be provided by the program to satisfy the matching funds requirements specified under § 2521.30(g) of this chapter.

(b) *Eligibility.* Only Corporation grantees that meet all of the following eligibility criteria may apply for challenge grants:

(1) They are funded under parts 2520 through 2523 of this chapter.

(2) They are high quality programs with demonstrated experience in establishing and implementing projects that provide benefits to participants and communities.

(3) They have operated with Corporation funds for at least six months.

(4) They have secured the matching funds required described in §§ 2521.30(g), 2522.240(b)(5), 2522.250(a)(4), and 2522.250(b)(4) of this chapter.

(c) *Allowable program activities.* Challenge grants are intended to provide special opportunities for national and community service programs to enroll additional participants or undertake other activities specified by the Corporation.

(d) *Application procedures.* Eligible applicants must comply with the requirements specified in the Corporation's application materials.

(e) *Limitation on use of the funds.* Each year the Corporation will establish a maximum award that a program may receive as a challenge grant.

(f) *Allocation of funds.* The Corporation will determine annually how much funding will be allocated to challenge grants from funds appropriated for AmeriCorps programs.

§ 2524.40 What are the guidelines for grants to involve persons with disabilities?

(a) *Purpose.* There are two general purposes for these grants:

(1) To assist AmeriCorps grantees in placing applicants who require reasonable accommodation (as defined in section 101(9) of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111(9)) or auxiliary aids and services (as defined in section 3(1) of such Act, 42 U.S.C. 12102(1)) in an AmeriCorps program; and

(2) To conduct outreach activities to individuals with disabilities to recruit them for participation in AmeriCorps programs.

(b) *Eligibility*—(1) *Placement, accommodation, and auxiliary services.* Eligibility for assistance under this part is limited to AmeriCorps programs that:

(i) Receive competitive funding from the Corporation under §§ 2521.30(a)(2) or 2521.30(b)(3) of this chapter; and

(ii) Demonstrate that the program has received a substantial number of applications for placement from persons who are individuals with a disability and who require a reasonable

accommodation (as defined in section 101(9) of the Americans with Disabilities Act of 1990, or auxiliary aids and services (as defined in section 3(1) of such Act) in order to perform national service; and

(iii) Demonstrate that additional funding would assist the program in placing a substantial number of such individuals with a disability as participants in projects carried out through the program.

(2) *Outreach.* Corporation grantees and any public or private nonprofit organization may apply for funds to conduct outreach to individuals with disabilities to recruit them for participation in AmeriCorps programs. Outreach funds can also be used by any organization to assist AmeriCorps programs in adapting their programs to encourage greater participation by individuals with disabilities.

(c) *Application procedures.* Eligible applicants must comply with the requirements specified in the Corporation's application materials.

§2524.50 What are the guidelines for assistance with disaster relief?

(a) *Purpose.* Disaster relief funds are intended to provide emergency assistance not otherwise available to enable national and community service programs to respond quickly and effectively to a Presidentially-declared disaster.

(b) *Eligibility.* Any AmeriCorps program (including youth corps, the National Civilian Community Corps, VISTA, and other programs authorized under the Domestic Volunteer Services Act) or grant making entity (such as a State or Federal agency) that is supported by the Corporation may apply for disaster relief grants.

(c) *Application process.* Eligible applicants must comply with the requirements specified in the Corporation's application materials.

(d) *Waivers.* In appropriate cases, due to the limited nature of disaster activities, the Corporation may waive specific program requirements such as matching requirements and the provision of AmeriCorps educational awards for participants supported with disaster relief funds.

PART 2530—PURPOSES, DEFINITIONS, AND AVAILABILITY OF GRANTS

Sec.

2530.10 What are the purposes of the Investment for Quality and Innovation activities?
2530.20 Funding priorities.

Authority: 42 U.S.C. 12501 *et seq.*

2530.10 What are the purposes of the Investment for Quality and Innovation activities?

Investment for Quality and Innovation activities are designed to develop service infrastructure and improve the overall quality of national and community service efforts. Specifically, the Corporation will support innovative and model programs that otherwise may not be eligible for funding; and support other activities, such as training and technical assistance, summer programs, leadership training, research, promotion and recruitment, and special fellowships and awards. The Corporation may conduct these activities either directly or through grants to or contracts with qualified organizations.

§2530.20 Funding priorities.

The Corporation may choose to set priorities (and to periodically revise such priorities) that limit the types of innovative and model programs and support activities it will undertake or fund in a given fiscal year. In setting these priorities, the Corporation will seek to concentrate funds on those activities that will be most effective and efficient in fulfilling the purposes of this part.

PART 2531—INNOVATIVE AND SPECIAL DEMONSTRATION PROGRAMS

Sec.

2531.10 Military Installation Conversion Demonstration programs.
2531.20 Special Demonstration Project for the Yukon-Kuskokwim Delta of Alaska.
2531.30 Other innovative and model programs.

Authority: 42 U.S.C. 12501 *et seq.*

§2531.10 Military Installation Conversion Demonstration programs.

(a) *Purposes.* The purposes of this section are to:

(1) Provide meaningful service opportunities for economically disadvantaged youth;

(2) Fully utilize military installations affected by closures or realignments;

(3) Encourage communities affected by such closures or realignments to convert the installations to community use; and

(4) Foster a sense of community pride in the youth in the community.

(b) *Definitions.* As used in this section:

(1) *Affected military installation.* The term *affected military installation* means a military installation described in section 325(e)(1) of the Job Training Partnership Act (29 U.S.C. 1662d(e)(1)).

(2) *Community.* The term *community* includes a county.

(3) *Convert to community use.* The term *convert to community use,* used with respect to an affected military installation, includes—

(i) Conversion of the installation or a part of the installation to—

(A) A park;

(B) A community center;

(C) A recreational facility; or

(D) A facility for a Head Start program under the Head Start Act (42 U.S.C. 9831 *et seq.*); and

(ii) Carrying out, at the installation, a construction or economic development project that is of substantial benefit, as determined by the Corporation, to—

(A) The community in which the installation is located; or

(B) A community located within such distance of the installation as the Chief Executive Officer may determine by regulation to be appropriate.

(4) *Demonstration program.* The term *demonstration program* means a program described in paragraph (c) of this section.

(c) *Demonstration programs*—(1) *Grants.*—The Corporation may make grants to communities and community-based agencies to pay for the Federal share of establishing and carrying out military installation conversion demonstration programs, to assist in converting to community use affected military installations located—

(i) Within the community; or

(ii) Within such distance from the community as the Chief Executive Officer may by regulation determine to be appropriate.

(2) *Duration.* In carrying out such a demonstration program, the community or community-based agency may carry out—

(i) A program of not less than 6 months in duration; or

(ii) A full-time summer program.

(d) *Use of Funds*—(1) *Stipend.*—A community or community-based agency that receives a grant under paragraph (c) of this section to establish and carry out a project through a demonstration program may use the funds made available through such grant to pay for a portion of a stipend for the participants in the project.

(2) *Limitation on amount of stipend.* The amount of the stipend provided to a participant under paragraph (d)(1) of this section that may be paid using assistance provided under this section and using any other Federal funds may not exceed the lesser of—

(i) 85 percent of the total average annual subsistence allowance provided to VISTA volunteers under section 105 of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4955); and

(ii) 85 percent of the stipend established by the demonstration program involved.

(e) *Participants*—(1) *Eligibility.* A person will be eligible to be selected as a participant in a project carried out through a demonstration program if the person is—

(i) Economically disadvantaged and between the ages of 16 and 24, inclusive;

(ii) In the case of a full-time summer program, economically disadvantaged and between the ages of 14 and 24; or

(iii) An eligible youth as described in section 423 of the Job Training Partnership Act (29 U.S.C. 1693).

(2) *Participation.* Persons desiring to participate in such a project must enter into an agreement with the sponsor of the project to participate—

(i) On a full-time or a part-time basis; and

(ii) For the duration referred to in paragraph (f)(2)(iii) of this section.

(f) *Application*—(1) *In general.*—To be eligible to receive a grant under paragraph (c) of this section, a community or community-based agency must submit an application to the Corporation at such time, in such manner, and containing such information as the Chief Executive Officer may require.

(2) *Contents.* At a minimum, such application must contain—

(i) A description of the demonstration program proposed to be conducted by the applicant;

(ii) A proposal for carrying out the program that describes the manner in which the applicant will—

(A) Provide preservice and inservice training, for supervisors and participants, that will be conducted by qualified individuals or qualified organizations;

(B) Conduct an appropriate evaluation of the program; and

(C) Provide for appropriate community involvement in the program;

(iii) Information indicating the duration of the program; and

(iv) An assurance that the applicant will comply with the nonduplication, nondisplacement and grievance procedure provisions of part 2540 of this chapter.

(g) *Limitation on grant.* In making a grant under paragraph (c) of this section with respect to a demonstration program to assist in converting an affected military installation, the Corporation will not make a grant for more than 25 percent of the total cost of the conversion.

§ 2531.20 Special Demonstration Project for the Yukon-Kuskokwim Delta of Alaska.

(a) *Special Demonstration Project for the Yukon-Kuskokwim Delta of Alaska.* The Corporation may award grants to, and enter into contracts with, organizations to carry out programs that address significant human needs in the Yukon-Kuskokwim delta region of Alaska.

(b) *Application*—(1) *General requirements.* To be eligible to receive a grant or enter into a contract under paragraph (a) of this section with respect to a program, an organization must submit an application to the Corporation at such time, in such manner, and containing such information as the President may require.

(2) *Contents.* The application submitted by the organization must, at a minimum—

(i) Include information describing the manner in which the program will utilize VISTA volunteers, individuals who have served in the Peace Corps, and other qualified persons, in partnership with the local nonprofit organizations known as the Yukon-Kuskokwim Health Corporation and the Alaska Village Council Presidents;

(ii) Take into consideration—

(A) The primarily noncash economy of the region; and

(B) The needs and desires of residents of the local communities in the region; and

(iii) Include specific strategies, developed in cooperation with the Yupi'k speaking population that resides in such communities, for comprehensive and intensive community development for communities in the Yukon-Kuskokwim delta region.

§ 2531.30 Other innovative and model programs.

(a) The Corporation may support other innovative and model programs such as the following:

(1) Programs, including programs for rural youth, described in parts 2515 through 2524 of this chapter;

(2) Employer-based retiree programs;

(3) Intergenerational programs;

(4) Programs involving individuals with disabilities providing service;

(5) Programs sponsored by Governors; and

(6) Summer programs carried out between May 1 and October 1 (which may also contain a year-round components).

(b) The Corporation will support innovative service-learning programs.

PART 2532—TECHNICAL ASSISTANCE, TRAINING, AND OTHER SERVICE INFRASTRUCTURE-BUILDING ACTIVITIES

Sec.
2532.10 Eligible activities.

Authority: 42 U.S.C. 12501 *et seq.*

§ 2532.20 Eligible activities.

The Corporation may support—either directly or through a grant, contract or agreement—any activity designed to meet the purposes described in part 2530 of this chapter. These activities include, but are not limited to, the following:

(a) *Community-based agencies.* The Corporation may provide training and technical assistance and other assistance to project sponsors and other community-based agencies that provide volunteer placements in order to improve the ability of such agencies to use participants and other volunteers in a manner that results in high-quality service and a positive service experience for the participants and volunteers.

(b) *Improve ability to apply for assistance.* The Corporation will provide training and technical assistance, where necessary, to individuals, programs, local labor organizations, State educational agencies, State Commissions, local educational agencies, local governments, community-based agencies, and other entities to enable them to apply for funding under one of the national service laws, to conduct high-quality programs, to evaluate such programs, and for other purposes.

(c) *Conferences and materials.* The Corporation may organize and hold conferences, and prepare and publish materials, to disseminate information and promote the sharing of information among programs for the purpose of improving the quality of programs and projects.

(d) *Peace Corps and VISTA training.* The Corporation may provide training assistance to selected individuals who volunteer to serve in the Peace Corps or a program authorized under title I of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 et seq.). The training will be provided as part of the course of study of the individual at an institution of higher education, involve service-learning, and cover appropriate skills that the individual will use in the Peace Corps or VISTA.

(e) *Promotion and recruitment.* The Corporation may conduct a campaign to solicit funds for the National Service Trust and other programs and activities authorized under the national service

laws and to promote and recruit participants for programs that receive assistance under the national service laws.

(f) *Training*. The Corporation may support national and regional participant and supervisor training, including leadership training and training in specific types of service and in building the ethic of civic responsibility.

(g) *Research*. The Corporation may support research on national service, including service-learning.

(h) *Intergenerational support*. The Corporation may assist programs in developing a service component that combines students, out-of-school youths, and older adults as participants to provide needed community services.

(i) *Planning coordination*. The Corporation may coordinate community-wide planning among programs and projects.

(j) *Youth leadership*. The Corporation may support activities to enhance the ability of youth and young adults to play leadership roles in national service.

(k) *National program identity*. The Corporation may support the development and dissemination of materials, including training materials, and arrange for uniforms and insignia, designed to promote unity and shared features among programs that receive assistance under the national service laws.

(l) *Service-learning*. The Corporation will support innovative programs and activities that promote service-learning.

(m) *National Youth Service Day*.—(1) *Designation*. April 19, 1994, and April 18, 1995 are each designated as "National Youth Service Day". The President is authorized and directed to issue a proclamation calling on the people of the United States to observe the day with appropriate ceremonies and activities.

(2) *Federal activities*. In order to observe National Youth Service Day at the Federal level, the Corporation may organize and carry out appropriate ceremonies and activities.

(3) *Activities*. The Corporation may make grants to public or private nonprofit organizations with demonstrated ability to carry out appropriate activities, in order to support such activities on National Youth Service Day.

(n) *Clearinghouses*.—(1) *Authority*. The Corporation may establish clearinghouses, either directly or through a grant or contract. The service-learning clearinghouse to be established pursuant to part 2518 of this chapter is eligible to apply for a grant under this section. In addition, public or private nonprofit organizations are eligible to apply for clearinghouse grants; however, such organizations must have extensive experience in training, technical assistance and service and/or volunteer program development, and management and evaluation.

(2) *Function*. A Clearinghouse may perform the following activities:

(i) Assist entities carrying out State or local community service programs with needs assessments and planning;

(ii) Conduct research and evaluations concerning community service;

(iii) Provide leadership development and training to State and local community service program administrators, supervisors, and participants; and provide training to persons who can provide such leadership development and training;

(iv) Facilitate communication among entities carrying out community service programs and participants;

(v) Provide information, curriculum materials, and technical assistance relating to planning and operation of community service programs, to States and local entities eligible to receive funds under this chapter;

(vi) Gather and disseminate information on successful community service programs, components of such successful programs, innovative youth skills curriculum, and community service projects;

(vii) Coordinate the activities of the clearinghouse with appropriate entities to avoid duplication of effort;

(viii) Make recommendations to State and local entities on quality controls to improve the delivery of community service programs and on changes in the programs under this chapter; and

(ix) Carry out such other activities as the Chief Executive Officer determines to be appropriate.

(o) *Assistance for Head Start*. The Corporation may make grants to, and enter into contracts and cooperative agreements with, public or nonprofit private agencies and organizations that receive grants or contracts under the Foster Grandparent Program (part B of title II of the Domestic Volunteer Service Act of 1973 (29 U.S.C. 5011 *et seq.*)), for projects of the type described in section 211(a) of such Act (29 U.S.C. 5011) operating under memoranda of agreement with the ACTION Agency, for the purpose of increasing the number of low-income individuals who provide services under such program to children who participate in Head Start programs under the Head Start Act (42 U.S.C 9831 *et seq*).

(p) *Other assistance*. The Corporation may support other activities that are consistent with the purposes described in part 2530 of this chapter.

PART 2533—SPECIAL ACTIVITIES

Sec.
2533.10 National service fellowships.
2533.20 Presidential awards for service.

Authority: 42 U.S.C. 12501 *et seq.*

§ 2533.10 National service fellowships.

The Corporation may award national service fellowships in such a manner, in such amounts, for such periods, and at such times as it deems appropriate. National service fellowships, however, will only be awarded on a competitive basis.

§ 2533.20 Presidential awards for service.

The President, acting through the Corporation, may make Presidential awards for service to individuals providing significant service, and to outstanding programs. Information about recipients of such awards will be widely disseminated. The President may provide such awards to any deserving individual or program, regardless of whether the individual is serving in a program authorized by this chapter or whether the program is itself authorized by this chapter. In no instance, however, may the award be a cash award.

PART 2540—GENERAL ADMINISTRATIVE PROVISIONS

Subpart A—Requirements Concerning the Distribution and Use of Corporation Assistance

Sec.
2540.100 What restrictions govern the use of Corporation assistance?
2540.110 Limitation on use of Corporation funds for administrative costs.

Subpart B—Requirements Directly Affecting the Selection and Treatment of Participants

2540.200 Under what circumstances may participants be engaged?
2540.210 What provisions exist to ensure that Corporation-supported programs do not discriminate in the selection of participants and staff?
2540.220 Under what circumstances and subject to what conditions are participants in Corporation-assisted projects eligible for family and medical leave?
2540.230 What grievance procedures must recipients of Corporation assistance establish?

Subpart C—Other Requirements for Recipients of Corporation Assistance

2540.300 What must be included in State reports to the Commission?
2540.310 Must programs that receive Corporation assistance establish standards of conduct?
2540.320 How are participant benefits treated?

Subpart D—Suspension and Termination of Corporation Assistance

2540.400 Under what circumstances will the Corporation suspend or terminate a grant or contract?

Authority: 42 U.S.C. 12501 *et seq.*

Subpart A—Requirements Concerning the Distribution and Use of Corporation Assistance

§ 2540.100 What restrictions govern the use of Corporation assistance?

(a) *Supplantation.* Corporation assistance may not be used to replace State and local funding streams that had been used to support programs of the type eligible to receive Corporation support. For any given program, this condition will be satisfied if the aggregate non-Federal expenditure for that program in the fiscal year that support is to be provided is not less than the previous fiscal year.

(b) *Religious use.* Corporation assistance may not be used to provide religious instruction, conduct worship services, or engage in any form of proslytization.

(c) *Political activity.* Corporation assistance may not be used by program participants or staff to assist, promote, or deter union organizing; or finance, directly or indirectly, any activity designed to influence the outcome of a Federal, State or local election to public office.

(d) *Contracts or collective bargaining agreements.* Corporation assistance may not be used to impair existing contracts for services or collective bargaining agreements.

(e) *Nonduplication.* Corporation assistance may not be used to duplicate an activity that is already available in the locality of a program. And, unless the requirements of paragraph (f) of this section are met, Corporation assistance will not be provided to a private nonprofit entity to conduct activities that are the same or substantially equivalent to activities provided by a State or local government agency that such entity resides in.

(f) *Nondisplacement.* (1) An employer may not displace an employee or position, including partial displacement such as reduction in hours, wages, or employment benefits, as a result of the use by such employer of a participant in a program receiving Corporation assistance.

(2) A service opportunity will not be created under this title that will infringe in any manner on the promotional opportunity of an employed individual.

(3) A participant in a program receiving Corporation assistance may not perform any services or duties or engage in activities that would otherwise be performed by an employee as part of the assigned duties of such employee.

(4) A participant in any program receiving assistance under this chapter may not perform any services or duties, or engage in activities, that—

(i) will supplant the hiring of employed workers; or

(ii) are services, duties, or activities with respect to which an individual has recall rights pursuant to a collective bargaining agreement or applicable personnel procedures.

(5) A participant in any program receiving assistance under this title may not perform services or duties that have been performed by or were assigned to any—

(i) presently employed worker;

(ii) employee who recently resigned or was discharged;

(iii) employee who is subject to a reduction in force or who has recall rights pursuant to a collective bargaining agreement or applicable personnel procedures;

(iv) employee who is on leave (terminal, temporary, vacation, emergency, or sick); or

(v) employee who is on strike or who is being locked out.

§ 2540.110 Limitation on use of Corporation funds for administrative costs.

Not more than five percent of the amount of assistance provided to the original recipient of any grant or any transfer of assistance from the Corporation in any fiscal year may be used to pay for administrative costs incurred by—

(a) The original recipient of assistance; and

(b) Any subgrantee of that recipient.

Subpart B—Requirements Directly Affecting the Selection and Treatment of Participants

§ 2540.200 Under what circumstances may participants be engaged?

A State may not engage a participant to serve in any program that receives Corporation assistance unless and until amounts have been appropriated under section 501 of the Act (42 U.S.C. 12681) for the provision of AmeriCorps educational awards and for the payment of other necessary expenses and costs associated with such participant.

§ 2540.210 What provisions exist to ensure that Corporation-supported programs do not discriminate in the selection of participants and staff?

(a) An individual with responsibility for the operation of a project that receives Corporation assistance may not discriminate against a participant in, or member of the staff of, such project on the basis of race, color, national origin, sex, age, or political affiliation of such participant or member, or on the basis of disability, if the participant or member is a qualified individual with a disability.

(b) Any Corporation assistance constitutes Federal financial assistance for purposes of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 *et seq.*), and constitutes Federal financial assistance to an education program or activity for purposes of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*).

(c) An individual with responsibility for the operation of a project that receives Corporation assistance may not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with Corporation funds. This provision does not apply to the employment (with Corporation assistance) of any staff member of a Corporation-supported project who was employed with the organization operating the project on the date the Corporation grant was awarded.

§ 2540.220 Under what circumstances and subject to what conditions are participants in Corporation-assisted programs eligible for family and medical leave?

(a) *Participants in State, local, or private nonprofits programs.* A participant in a State, local, or private nonprofit program receiving support from the Corporation is considered an eligible employee of the program's project sponsor under the Family and Medical Leave Act if—

(1) The participant has served for at least 12 months and 1,250 hours during the year preceding the start of the leave; and

(2) The program's project sponsors engages in commerce or any industry or activity affecting commerce, and employs at least 50 employees for each working day during 20 or more calendar workweeks in the current or preceding calendar year.

(b) *Participants in Federal programs.* Participants in Federal programs operated by the Corporation or by another Federal agency will be considered Federal employees for the purposes of the Family and Medical Leave Act if the participants have completed 12 months of service and the project sponsor is an employing agency as defined in 5 U.S.C. 6381 *et seq.*; such participants therefore will be eligible for the same family and medical leave benefits afforded to such Federal employees.

(c) *General terms and conditions.* Participants that qualify as eligible employees under paragraphs (a) or (b) of this section are entitled to take up to 12 weeks of unpaid leave during a 12 month period for any of the following reasons (in the cases of both paragraphs (c) (1) and (2) of this section. The entitlement to leave expires 12 months after the birth or placement of such child):

(1) The birth of a child to a participant;

(2) The placement of a child with a participant for adoption or foster care;

(3) The serious illness of a participant's spouse, child or parent; or

(4) A participant's serious health condition that makes that participant unable to perform his or her essential service duties (a serious health condition is an illness or condition that requires either inpatient care or continuing treatment by a health care provider).

(d) *Intermittent leave or reduced service.* The program, serving as the project sponsor, may allow a participant to take intermittent leave or reduce his or her service hours due to the birth of or placement of a child for adoption or foster care. The participant may also take leave to care for a seriously ill immediate family member or may take leave due to his or her own serious illness whenever it is medically necessary.

(e) *Alternate placement.* If a participant requests intermittent leave or a reduced service hours due to a serious illness or a family member's sickness, and the need for leave is foreseeable based on planned medical treatment, the program, or project sponsor may temporarily transfer the participant to an alternative service position if the participant:

(1) Is qualified for the position; and

(2) Receives the same benefits such as stipend or living allowance and the position better accommodates the participants recurring periods of leave.

(f) *Certification of cause.* A program, or project sponsor may require that the participant support a leave request with a certification from the health care provider of the participant or the participant's family member. If a program sponsor requests a certification, the participant must provide it in a timely manner.

(g) *Continuance of coverage.* (1) If a State, local or private program provides for health insurance for the full-time participant, the sponsor must continue to provide comparable health coverage at the same level and conditions that coverage would have been provided for the duration of the participant's leave.

(2) If the Federal program provides health insurance coverage for the full-time participant, the sponsor must also continue to provide the same health care coverage for the duration of the participant's leave.

(h) *Failure to return.* If the participant fails to return to the program at the end of leave for any reason other than continuation, recurrence or onset of a serious health condition or other circumstances beyond his or her control, the program may recover the premium that he or she paid during any period of unpaid leave.

(i) *Applicability to term of service.* Any absence, due to family and medical leave, will not be counted towards the participant's term of service.

§ 2540.230 What grievance procedures must recipients of Corporation assistance establish?

State and local applicants that receive assistance from the Corporation must establish and maintain a procedure for the filing and adjudication of grievances from participants, labor organizations, and other interested individuals concerning programs that receive assistance from the Corporation. A grievance procedure may include dispute resolution programs such as mediation, facilitation, assisted negotiation and neutral evaluation.

(a) *Alternative dispute resolution.* (1) The aggrieved party may seek resolution through alternative means of dispute resolution such as mediation or facilitation. Dispute resolution proceedings must be initiated within 45 calendar days from the date of the alleged occurrence. At the initial session of the dispute resolution proceedings, the party must be advised in writing of his or her right to file a grievance and right to arbitration. If the matter is resolved, and a written agreement is reached, the party will agree to forego filing a grievance in the matter under consideration.

(2) If mediation, facilitation, or other dispute resolution processes are selected, the process must be aided by a neutral party who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the matter through a mutually achieved and acceptable written agreement. The neutral party may not compel a resolution. Proceedings before the neutral party must be informal, and the rules of evidence will not apply. With the exception of a written and agreed upon dispute resolution agreement, the proceeding must be confidential.

(b) *Grievance procedure for unresolved complaints.* If the matter is not resolved within 30 calendar days from the date the informal dispute resolution process began, the neutral party must again inform the aggrieving party of his or her right to file a formal grievance. In the event an aggrieving party files a grievance, the neutral may not participate in the formal complaint process. In addition, no communication or proceedings of the informal dispute resolution process may be referred to or introduced into evidence at the grievance and arbitration hearing. The advisory decision may not be binding unless both parties agree. Grievances that allege fraud or criminal activity must immediately be brought to the attention of the Corporation's inspector general.

(c) *Time limitations.* Except for a grievance that alleges fraud or criminal activity, a grievance must be made no later than one year after the date of the alleged occurrence. If a hearing is held on a grievance, it must be conducted no later than 30 calendar days after the filing of such grievance. A decision on any such grievance must be made no later than 60 calendar days after the filing of the grievance.

(d) *Arbitration.* If there is an adverse decision against the party who filed the grievance, or 60 calendar days after the filing of a grievance no decision has been reached, the filing party may submit the grievance to binding arbitration before a qualified arbitrator who is jointly selected and independent of the interested parties. If the parties cannot agree on an arbitrator within 15 calendar days after receiving a request from one of the grievance parties, the Corporations Chief Executive Officer will appoint an arbitrator from a list of qualified arbitrators. An arbitration proceeding must be held no later than 45 calendar days after the request for arbitration. If the arbitrator is appointed by the Chief Executive Officer, the proceeding must occur no later than 30 calendar days after the arbitrators appointment. A decision must be made by the arbitrator no later than 30 calendar days after the date the arbitration proceeding begins. The cost

of the arbitration proceeding must be divided evenly between the parties to the arbitration. If, however, a participant, labor organization, or other interested individual prevails under a binding arbitration proceeding, the State or local applicant that is a party to the grievance must pay the total cost of the proceeding and the attorneys fees of the prevailing party.

(e) *Suspension of placement.* If a grievance is filed regarding a proposed placement of a participant in a program that receives assistance under this chapter, such placement must not be made unless the placement is consistent with the resolution of the grievance.

(f) *Remedies.* In general, remedies for a grievance filed include suspension or termination of payments for assistance under this chapter, and prohibition of a placement of a participant, and in grievance cases where there is a violation of nonduplication or nondisplacement requirements and the employer of the displaced employee is the recipient of Corporation assistance, the displaced employee must—

(1) Be reinstated to the position he or she held prior to the displacement;

(2) Be paid lost wages and benefits;

(3) Regain any other relevant terms, conditions and privileges of employment; and

(4) Obtain any equitable relief that is necessary to correct any violation of the nonduplication or nondisplacement requirements or to make the displaced employee whole.

(g) *Suspension or termination of assistance.* The Corporation may suspend or terminate payments for assistance under this chapter.

(h) *Effect of noncompliance with arbitration.* A suit to enforce arbitration awards may be brought in any Federal district court having jurisdiction over the parties without regard to the amount in controversy or the parties' citizenship.

Subpart C—Other Requirements for Recipients of Corporation Assistance

§ 2540.300 What must be included in State reports to the Commission?

(a) *In general.* Each State receiving assistance under this title must prepare and submit, to the Corporation, an annual report concerning the use of assistance provided under this title and the status of the national and community service programs that receive assistance under such title in such State.

(b) *Local grantees.* Each State may require local grantees that receive assistance under this title to supply such information to the State as is necessary to enable the State to complete the report required under paragraph (a) of this section, including a comparison of actual accomplishments with the goals established for the program, the number of participants in the program, the number of service hours generated, and the existence of any problems, delays or adverse conditions that have affected or will affect the attainment of program goals.

(c) *Report demonstrating compliance*—(1) *In general.* Each State receiving assistance under this title must include information in the report required under paragraph (a) of this section that demonstrates the compliance of the State with the provisions of this chapter.

(2) *Local grantees.* Each State may require local grantees to supply such information to the State as is necessary to enable the State to comply with the requirement of paragraph (a) of this section.

(d) *Availability of report.* Reports submitted under paragraph (a) of this section must be made available to the public on request.

§ 2540.310 Must programs that receive Corporation assistance establish standards of conduct?

Yes. Programs that receive assistance under this title must establish and stringently enforce standards of conduct at the program site to promote proper moral and disciplinary conditions.

§ 2540.320 How are participant benefits treated?

Section 142(b) of the Job Training Partnership Act (29 U.S.C. 1552(b)) shall apply to the programs conducted under this chapter as if such programs were conducted under the Job Training Partnership Act (29 U.S.C. 1501 *et seq.*).

Subpart D—Suspension and Termination of Corporation Assistance

§ 2540.400 Under what circumstances will the Corporation suspend or terminate a grant or contract?

(a) *Suspension of a grant or contract.* In emergency situations, the Corporation may suspend a grant or contract for not more than 30 calendar days. Examples of such situations may include, but are not limited to:

(1) Serious risk to persons or property;

(2) Violations of Federal, State or local criminal statutes; and

(3) Material violation(s) of the grant or contract that are sufficiently serious that they outweigh the general policy in favor of advance notice and opportunity to show cause.

(b) *Termination of a grant or contract.* The Corporation may terminate or revoke assistance for failure to comply with applicable terms and conditions of this chapter. However, the Corporation must provide the recipient reasonable notice and opportunity for a full and fair hearing, subject to the following conditions:

(1) The Corporation will notify a recipient of assistance by letter or telegram that the Corporation intends to terminate or revoke assistance, either in whole or in part, unless the recipient shows good cause why such assistance should not be terminated or revoked. In this communication, the grounds and the effective date for the proposed termination or revocation will be described. The recipient will be given at least 7 calendar days to submit written material in opposition to the proposed action.

(2) The recipient may request a hearing on a proposed termination or revocation. Providing five days notice to the recipient, the Corporation may authorize the conduct of a hearing or other meetings at a location convenient to the recipient to consider the proposed suspension or termination. A transcript or recording must be made of a hearing conducted under this section and be available for inspection by any individual.

[FR Doc. 94–322 Filed 1–6–94; 8:45 am]

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federal register

Friday
January 7, 1994

Part IV

Department of Justice

Bureau of Prisons

28 CFR Part 571, et al.

Control, Custody, Care, Treatment and Instruction of Inmates; Compassionate Release; Drug Abuse Treatment Programs; Rule and Proposed Rule

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Parts 571 and 572

RIN 1120–AA09

Control, Custody, Care, Treatment and Instruction of Inmates; Compassionate Release

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: This rule revises the procedures for early inmate release under extraordinary or compelling circumstances in order to include provisions applicable to inmates who were sentenced under the new law sentencing guidelines that eliminated parole. In addition, the rule provisions relating to inmate release in response to prison overcrowding have been eliminated in conformance with revised Parole Commission procedures, a section has been added to note the ineligibility of certain offenders, and various administrative procedures have been simplified. Releases have been most often applied in cases where the inmate is terminally ill. The application of the rule has not been modified. The practical effect should remain the release or parole of a limited number of inmates under extraordinary or compelling circumstances.

EFFECTIVE DATE: January 7, 1994.

ADDRESSES: Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514–6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is amending its regulations on Procedures for the Implementation of 18 U.S.C. 4205(g). A final rule on this subject was published in the **Federal Register** October 21, 1983 (48 FR 48973).

The regulations have been revised for two main reasons. First, the revisions now include sentence modifications as stated in 18 U.S.C. 3582(c)(1)(A), the provisions applicable to inmates sentenced under the 1984 Sentencing Guidelines, as well as the sentence modifications found in 18 U.S.C. 4205(g) for those inmates eligible for parole under the prior sentencing rules. Also, the regulations have modified the language of the standard employed to conform to the statutory language of "extraordinary and compelling" reasons for the request. The standards to evaluate requests for early release remain the same. The only additional procedure required of inmates who request early release is the inclusion of a proposed release plan. The plan verifies that the inmate will be properly cared for upon release, and it may be completed by staff if the inmate is unable to complete the proposal.

Additional changes include the removal of former § 572.42 in conformance with revised regulations of the Parole Commission, the removal of the requirement that the inmate provide in the request information which can be obtained by staff through a review of the inmate's record, and the addition of new § 571.64 noting the ineligibility of certain offenders.

As an editorial amendment, the revised compassionate release provisions have been redesignated from part 572 to part 571 in order to reflect applicability to new law commitments. A cross-reference remains in part 572.

Because the revised rule imposes no additional burdens or restrictions on inmates, the Bureau finds good cause for exempting the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment, and delay in effective date. Members of the public may submit comments concerning this rule by writing to the previously cited address. These comments will be considered but will receive no response in the **Federal Register**.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866; this rule was reviewed by the Office of Management and Budget pursuant to E.O. 12866. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96–354), does not have a significant impact on a substantial number of small entities.

List of Subjects in 28 CFR Parts 571 and 572

Prisoners.

Kathleen M. Hawk,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), parts 571 and 572 in subchapter D of 28 CFR, chapter V are amended as set forth below.

SUBCHAPTER D—COMMUNITY PROGRAMS AND RELEASE

PART 571—RELEASE FROM CUSTODY

1. The authority citation for 28 CFR part 571 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3565, 3568–3569 (Repealed in part as to offenses committed on or after November 1, 1987), 3582, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 and 4201–4218 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5031–5042; 28 U.S.C. 509, 510; U.S. Const., Art. II, Sec. 2; 28 CFR 0.95–0.99, 1.1–1.10.

2. In part 571, subpart G, consisting of §§ 571.60 through 571.64, is added to read as follows:

Subpart G—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 3582(c)(1)(A) and 4205(g))

Sec.
571.60 Purpose and scope.
571.61 Initiation of request—extraordinary or compelling circumstances.
571.62 Approval of request.
571.63 Denial of request.
571.64 Ineligible offenders.

Subpart G—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 3582(c)(1)(A) and 4205(g))

§ 571.60 Purpose and scope.

Under 18 U.S.C. 4205(g), a sentencing court, on motion of the Bureau of Prisons, may make an inmate with a minimum term sentence immediately eligible for parole by reducing the minimum term of the sentence to time served. Under 18 U.S.C. 3582(c)(1)(A), a sentencing court, on motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment of an inmate sentenced under the Comprehensive Crime Control Act of 1984. The Bureau uses 18 U.S.C. 4205(g) and 18 U.S.C. 3582(c)(1)(A) in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing.

§ 571.61 Initiation of request—extraordinary or compelling circumstances.

(a) A request for a motion under 18 U.S.C. 4205(g) or 3582(c)(1)(A) shall be submitted to the Warden. Ordinarily, the request shall be in writing, and submitted by the inmate. An inmate may initiate a request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) only when there are particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the

court at the time of sentencing. The inmate's request shall at a minimum contain the following information:

(1) The extraordinary or compelling circumstances that the inmate believes warrant consideration.

(2) Proposed release plans, including where the inmate will reside, how the inmate will support himself/herself, and, if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment.

(b) The Bureau of Prisons processes a request made by another person on behalf of an inmate in the same manner as an inmate's request. Staff shall refer a request received at the Central Office or at a Regional Office to the Warden of the institution where the inmate is confined.

§ 571.62 Approval of request.

(a) The Bureau of Prisons makes a motion under 18 U.S.C. 4205(g) or 3582(c)(1)(A) only after review of the request by the Warden, the Regional Director, the General Counsel, and either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals, and with the approval of the Director, Bureau of Prisons.

(1) The Warden shall promptly review a request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A). If the Warden, upon an investigation of the request determines that the request warrants approval, the Warden shall refer the matter in writing with recommendation to the Regional Director.

(2) If the Regional Director determines that the request warrants approval, the Regional Director shall prepare a written recommendation and refer the matter to the Office of General Counsel.

(3) If the General Counsel determines that the request warrants approval, the General Counsel shall solicit the opinion of either the Medical Director or the Assistant Director, Correctional Programs Division depending upon the nature of the basis of the request. With this opinion, the General Counsel shall forward the entire matter to the Director, Bureau of Prisons, for final decision.

(4) If the Director, Bureau of Prisons, grants a request under 18 U.S.C. 4205(g), the Director will contact the U.S. Attorney in the district in which the inmate was sentenced regarding moving the sentencing court on behalf of the Bureau of Prisons to reduce the minimum term of the inmate's sentence to time served. If the Director, Bureau of Prisons, grants a request under 18 U.S.C. 3582(c)(1)(A), the Director will contact the U.S. Attorney in the district in which the inmate was sentenced regarding moving the sentencing court on behalf of the Director of the Bureau of Prisons to reduce the inmate's term of imprisonment to time served.

(b) Upon receipt of notice that the sentencing court has entered an order granting the motion under 18 U.S.C. 4205(g), the Warden of the institution where the inmate is confined shall schedule the inmate for hearing on the earliest Parole Commission docket. Upon receipt of notice that the sentencing court has entered an order granting the motion under 18 U.S.C. 3582(c)(1)(A), the Warden of the institution where the inmate is confined shall release the inmate forthwith.

(c) In the event the basis of the request is the medical condition of the inmate, staff shall expedite the request at all levels.

§ 571.63 Denial of request.

(a) When an inmate's request is denied by the Warden or Regional Director, the disapproving official shall provide the inmate with a written notice and statement of reasons for the denial. The inmate may appeal the denial through the Administrative Remedy Procedure (28 CFR part 542, subpart B).

(b) When an inmate's request for consideration under 18 U.S.C. 4205(g) or 3582(c)(1)(A) is denied by the General Counsel, the General Counsel shall provide the inmate with a written notice and statement of reasons for the denial. This denial constitutes a final administrative decision.

(c) When the Director, Bureau of Prisons, denies an inmate's request, the Director shall provide the inmate with a written notice and statement of reasons for the denial within 20 workdays after receipt of the referral from the Office of General Counsel. A denial by the Director constitutes a final administrative decision.

(d) Because a denial by the General Counsel or Director, Bureau of Prisons, constitutes a final administrative decision, an inmate may not appeal the denial through the Administrative Remedy Procedure.

§ 571.64 Ineligible offenders.

The Bureau of Prisons has no authority to initiate a request under 18 U.S.C. 4205(g) or 3582(c)(1)(A) on behalf of state prisoners housed in Bureau of Prisons facilities or D.C. Code offenders confined in federal institutions. The Bureau of Prisons cannot initiate such a motion on behalf of federal offenders who committed their offenses prior to November 1, 1987, and received non-parolable sentences.

PART 572—PAROLE

3. The authority citation for part 572 is revised to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4205, 5015 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

4. In part 572, subpart E, consisting of §§ 572.40 through 572.44, is revised to consist of § 572.40 as follows.

Subpart E—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 4205(g))

Sec.

572.40 Compassionate release under 18 U.S.C. 4205(g).

Subpart E—Compassionate Release (Procedures for the Implementation of 18 U.S.C. 4205(g))

§ 572.40 Compassionate release under 18 U.S.C. 4205(g).

18 U.S.C. 4205(g) was repealed effective November 1, 1987, but remains the controlling law for inmates whose offenses occurred prior to that date. For inmates whose offenses occurred on or after November 1, 1987, the applicable statute is 18 U.S.C. 3582(c)(1)(A). Procedures for compassionate release of an inmate under either provision are contained in 28 CFR part 571, subpart G.

[FR Doc. 94–366 Filed 1–6–94; 8:45 am]

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 545, 550

RIN 1120–AA16

Control, Custody, Care, Treatment and Instruction of Inmates; Drug Abuse Treatment Programs

AGENCY: Bureau of Prisons, Justice.

ACTION: Proposed rule.

SUMMARY: In this document, the Bureau of Prisons is proposing to amend its rule on Chemical Abuse Programs by renaming it as Drug Abuse Treatment Programs, by expanding programming available to inmates, and by requiring participation from certain inmates. Any inmate who has been recommended for drug programming by the sentencing judge, or whose presentence investigation contains evidence that alcohol or other drug use contributed to the commission of the instant offense, or for whom alcohol or drug abuse was a reason for violation of parole or probation will be required to participate in drug abuse education courses. Further program opportunities are presented through voluntary participation in residential and non-residential programs and through transitional services. This amendment also proposes conforming changes with respect to program eligibility and inmate financial responsibility requirements and with respect to mandatory work requirements. This amendment is intended to fulfill statutory requirements to make available to inmates appropriate substance abuse treatment.

DATES: Comments due by March 8, 1994.

ADDRESSES: Office of General Counsel, Bureau of Prisons, HOLC room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514–6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons is proposing to amend its regulations on Chemical Abuse Programs. A final rule on this subject was published in the **Federal Register** on July 18, 1986 (51 FR 26129). The Bureau is also proposing conforming or related amendments to its regulations on Inmate Financial Responsibility and on Inmate Work and Performance Pay Program. A final rule on Inmate Financial Responsibility was published in the **Federal Register** on May 21, 1991 (56 FR 23477). A final rule on Inmate Work and Performance Pay was published in the **Federal Register** on October 1, 1984 (49 FR 38915), and was amended on May 21, 1991 (56 FR 23478) and on July 10, 1991 (56 FR 31531).

Section 2903 of Public Law 101–647 (18 U.S.C. 3621(b)) requires the Bureau to make available appropriate substance abuse treatment for each inmate the Bureau determines has a treatable condition of substance addiction or abuse. Existing Bureau regulations in subpart F (§§ 550.50 through 550.51) of 28 CFR part 550 allow for the voluntary participation by inmates in chemical abuse programs. This proposed amendment renames such programming as drug abuse treatment programs and distinguishes between mandatory and voluntary requirements for inmate participation in these programs.

Proposed § 550.52 requires participation in a drug abuse education course by any inmate who has been recommended for drug programming by the sentencing judge, or whose presentence investigation contains evidence that alcohol or other drug use contributed to the commission of the instant offense, or for whom alcohol or drug abuse was a reason for violation of parole or probation. This section includes provision for exemption to the mandatory requirement. Participation by other inmates in drug abuse treatment programs remains voluntary, but such participation requires recommendation by the screening psychologist or drug abuse treatment staff. The section defines program completion and notes the effects of program failure for inmates whose participation is required.

Section 550.53 specifies requirements for participation in an institution's residential and non-residential program, while § 550.54 covers transitional services available to inmates.

This proposed amendment makes conforming changes to the Bureau's provisions on inmate financial responsibility (28 CFR 545.11) to specify that an inmate must meet his or her financial program responsibility obligations before being able to receive an incentive for his or her residential program participation. Another conforming change is being made to the provisions on institution work and performance pay (28 CFR 545.23) to allow for an inmate's voluntary participation in drug programming in lieu of working full time.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Bureau of Prisons, 320 First Street, NW., HOLC Room 754, Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. All comments received remain on file for public inspection at the above address. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866. After review of the law and regulations, the Director, Bureau of Prisons has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96–354), does not have a significant impact on a substantial number of small entities.

List of Subjects in 28 CFR Parts 545 and 550

Prisoners.

Kathleen M. Hawk,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), parts 545 and 550 in subchapter C of 28 CFR, chapter V are proposed to be amended as set forth below.

SUBCHAPTER C—INSTITUTIONAL MANAGEMENT

PART 550—DRUG PROGRAMS

1. The authority citation for 28 CFR part 550 is added to read as follows, and all other authority citations within the part are removed:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4251–4255, 5006–5024 (repealed October 12, 1984 as to conduct occurring after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

2. Subpart F, consisting of §§ 550.50 and 550.51, is revised to consist of §§ 550.50 through 550.54 as follows:

Subpart F—Drug Abuse Treatment Programs

Sec.
550.50 Purpose and scope.
550.51 Institution staff roles/responsibilities.
550.52 Drug abuse education course.
550.53 Institution residential and non-residential program.
550.54 Transitional services.

Subpart F—Drug Abuse Treatment Programs

§ 550.50 Purpose and scope.

The Bureau of Prisons provides, to the extent practicable, appropriate drug abuse treatment programs to inmates.

§ 550.51 Institution staff roles/responsibilities.

(a) The Warden shall designate a Drug Abuse Treatment Program Coordinator (DATC) for his/her institution.

(b) The DATC shall ensure that:

(1) Each institution shall provide new inmates during the Admission and Orientation information about drug abuse treatment opportunities and procedures available at the institution and throughout the Bureau; and

(2) A psychologist or drug abuse treatment staff member shall screen all new institution admissions for drug abuse problems.

(c) The DATC may designate a drug abuse treatment specialist to conduct drug education or drug abuse treatment in non-residential or residential settings.

§ 550.52 Drug abuse education course.

(a) An inmate is required to participate in the institution's drug abuse education course if that inmate has been sentenced or returned to custody as a violator after September 30, 1991 and it is determined by unit and/or drug abuse treatment program staff, through a combination of interview and file review, that:

(1) There is evidence in the Presentence Investigation that alcohol or other drug use contributed to the commission of the instant offense;

(2) Alcohol or other drug use was a reason for violation of either supervision or BOP community status (CCC placement) for which the inmate is now incarcerated; or

(3) The inmate was recommended for drug programming during incarceration by the sentencing judge. An inmate may be exempted from the required drug abuse education course due to cognitive impairment or other learning disabilities only after evaluation and recommendation by a psychologist. An inmate may also be exempted from the drug abuse education course if that inmate has volunteered for immediate admission to a residential drug abuse treatment program, and then proceeds to complete that program.

(b) An inmate who is not required by paragraph (a) of this section to participate in the drug abuse education course, but for whom participation is recommended or approved by the screening psychologist or drug abuse treatment staff for participation, shall be offered the opportunity to participate voluntarily in the drug abuse education course, provided it is approved by the DATC, space is available, and the inmate signs an agreement acknowledging the requirements for participating in this course.

(c) Completion of the drug abuse education course requires participating in, and passing an examination on the course. A certificate of achievement will be awarded to all who successfully complete the program. Inmates required to participate in this program ordinarily are provided at least three chances to pass the final examination before privileges are lost (see paragraph (d) of this section).

(d) Any inmate who is required by paragraph (a) of this section to participate in the drug abuse education course, but who refuses this participation, who withdraws, who is expelled, or who otherwise fails to meet the attendance and testing standards shall be held at the lowest pay grade within the institution and shall be ineligible for community programs. The Warden, for good cause, may make exception to this paragraph, with such exemptions documented in writing.

§ 550.53 Institution residential and non-residential program.

(a) Participation by an inmate in an institution's residential and/or nonresidential drug treatment program is voluntary, but such participation must be recommended by unit and/or drug treatment staff.

(1) An inmate may apply for these programs by submitting a request to a staff member (ordinarily, a member of the inmate's unit team or the DATC).

(2) An inmate who volunteers to participate in one of the drug abuse treatment programs is required to sign an agreement acknowledging his/her program responsibility.

(b) An inmate may apply for an institution's residential treatment program at any time during that inmate's incarceration. Residential treatment ordinarily consists of treatment in a unit-based setting within the institution. Where an institution does not have a residential program, the unit team, in coordination with the DATC, may consider the inmate for transfer to an institution with this type of program.

(c) An inmate may receive incentives for his or her involvement in the residential program. These incentives may include, but are not limited to, the following.

(1) Limited financial awards, based upon the inmate's achievement/completion of program phases.

(2) Consideration for the maximum period of time (currently 180 days) in a Community Corrections Center placement, provided the inmate is otherwise eligible for this designation.

(3) Local institution incentives such as preferred living quarters or special recognition privileges. An inmate must meet his/her financial program responsibility obligations (see 28 CFR part 545) prior to being able to receive an incentive for his/her residential program participation.

(d) An inmate may voluntarily withdraw from a residential drug abuse program or, based on disruptive or negative behavior, may be removed by staff. Removal from the residential program is within the discretion of the DATC, and may result, in part, in the inmate's being returned to his/her prior institution (when the inmate had been specifically transferred for the purpose of program participation), and/or return of tangible incentives previously achieved.

(e) When residential treatment programming cannot be used due to time constraints, staff may refer the inmate for the institution's non-residential drug treatment. Non-residential treatment ordinarily consists of individual and/or group counseling and self-help programming.

§ 550.54 Transitional services.

(a) Transitional treatment programming is required for all inmates completing an institutions's residential treatment program. Transitional treatment includes treatment provided to inmates who, upon completing the residential program, return to the general population of that or another institution. An inmate's refusal to participate in this program is considered a program failure and disqualifies the inmate for any additional incentives consideration, and may result in the inmate's redesignation.

(b) An inmate who successfully completes a residential drug abuse program and who, based on eligibility, is transferred to a Community Corrections Center (CCC), is required to participate in a community-based treatment program each week, in addition to the required employment and other program activities of the CCC. The inmate's failure to meet the requirements of treatment may result in the inmate's being returned to the institution for refusing a program assignment.

(c) Staff may offer an inmate who has not been involved in the institution's drug abuse treatment program the opportunity to become involved in the transitional drug treatment program as

part of the inmate's CCC placement. In addition, with DATC approval, an inmate may volunteer, and be accepted for transitional drug treatment programming.

3. The authority citation for 28 CFR part 545 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3013, 3571, 3621, 3622, 3624, 3663, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4126, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

4. In § 545.11, a new paragraph (d)(11) is added to read as follows:

§ 545.11 Procedures.

* * * * *

(d) * * *

(11) The inmate will not receive an incentive for participation in residential drug treatment programs.

5. In § 545.23, paragraph (a) is amended by revising the last sentence to read as follows:

§ 545.23 Inmate work/program assignment.

(a) * * * An inmate, for whom educational, vocational, or drug treatment participation is not required by either policy or statute, may request and, upon approval of the Warden or designee, participate in an educational or vocational training program or drug treatment program rather than work full-time.

* * * * *

6. In § 545.25, new paragraph (d) is added to read as follows:

§ 545.25 Eligibility for performance pay.

* * * * *

(d) An inmate who is required by 28 CFR 550.51 (c)(1) to participate in drug education programming but who fails to do so because he or she refuses participation, withdraws, is expelled, or fails to meet attendance and testing standards, shall be held at the lowest pay grade within the institution.

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Part V

Department of Housing and Urban Development

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Parts 945 and 960
Public Housing Designated for Occupancy by Disabled, Elderly, or Disabled and Elderly Families; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Parts 945 and 960

[Docket No. R-94-1694; FR-3425-P-01]

RIN 2577-AB27

Designated Housing; Public Housing Designated for Occupancy by Disabled, Elderly, or Disabled and Elderly Families

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement section 622(a) of the Housing and Community Development Act of 1992. Section 622(a) provides public housing agencies (PHAs) with the option, subject to certain requirements, to designate public housing projects, or portions of public housing projects, for occupancy by disabled families; elderly families; or disabled families and elderly families.

This proposed rule would also amend existing regulations, which currently provide for preference for elderly families and disabled families, and discretionary preference for near-elderly families in "public housing projects for the elderly"—that is, public housing projects that house both elderly families and disabled families. The regulations would continue to provide for preference for disabled families and elderly families in public housing projects that house a population of disabled families and elderly families. However, certain amendments would be made to include new and revised definitions pertaining to "family" as set forth in section 621 of the 1992 Act, and to provide for recognition of the designated housing process.

DATES: Comment due date: March 8, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of General Counsel, Rules Docket Clerk, room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying on weekdays between 7:30 a.m. and 5:30 p.m. at the above address.

FOR FURTHER INFORMATION CONTACT: Edward Whipple, Director, Occupancy Division, Department of Housing and Urban Development, 451 Seventh Street, SW., room 4206, Washington, DC 20410. Telephone number (202) 708-0744 (this is not a toll-free number). Hearing-impaired persons may contact these offices via TDD by calling (202) 708-9300 or 1-(800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act Statement

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1980. No person may be subjected to a penalty for failure to comply with these information collection requirements until the requirements have been approved and assigned an OMB control number. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**. The public reporting burden for the collection of information requirements contained in this proposed rule is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Information on the estimated public reporting burden is provided under the preamble heading, *Other Matters*. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3001, Washington, DC 20503, Attention: HUD Desk Officer.

II. Overview of Section 622(a) of the 1992 Act

Section 622(a) of the Housing and Community Development Act of 1992 (Pub.L. 102-550, approved October 28, 1992) (the 1992 Act) amended section 7 of the United States Housing Act of 1937 (the 1937 Act) (42 U.S.C. 1437e) to provide public housing agencies (PHAs)[1] with the option, subject to certain requirements, to designate public housing projects, or portions of public housing projects for occupancy by (1) disabled families; (2) elderly families; or (3) disabled families and elderly families. (Section 7 of the 1937 Act, previously titled "Congregate Housing" was retitled "Designated Housing" by the 1992 Act. Unless the context indicates otherwise, the references to section 7 in this preamble are to section 7 as amended by section 622(a) of the 1992 Act.)

Section 7 provides for designation of public housing projects, or portions of public housing projects (see section 7(a)(1)). Section 7 further provides that in determining priority for occupancy in designated projects, a PHA may make units in the designated project available only to the types of families for whom the project is designated (see section 7(a)(2)).

Section 7(f) provides that a project may be designated following HUD review and approval of the PHA's written plan for allocating its housing resources among the various populations that it serves, and its plan for securing additional housing resources sufficient to provide housing assistance to not less than the number of non-elderly disabled families that would have been housed by the PHA if occupancy in a project, or portion thereof, was not restricted to certain families as a result of a PHA's designation of a project. The information, at a minimum, to be contained in the allocation plan, and which is listed in section 7(f)(2), is information pertaining to current residents of the project to be designated, the PHA's current housing inventory, families on waiting lists, and future demand for particular types of housing. Section 7(f)(4) establishes the criteria by which the Department will approve or disapprove a PHA's allocation plan.

In connection with allocating its housing resources among the various populations that it serves, section 7(d) provides that each PHA shall meet, to the extent practicable, the housing and service needs of eligible families applying for assistance under this title, as provided in any allocation plan of the PHA. (This "title" refers to title VI of the 1992 Act—"Housing for Elderly Persons and Persons with Disabilities.") To meet such needs, section 7(d) provides that PHAs, wherever practicable and in accordance with any allocation plan, may: (1) Provide housing in which supportive services are provided, facilitated, or coordinated, such as mixed housing, shared housing, family housing, group homes, congregate housing and other housing as the PHA considers appropriate; (2) carry out major reconstruction of obsolete public

[1] Section 626 of the 1992 Act provides that the amendments made by subtitle B of title VI of the 1992 Act (which amendments pertain to the authority of PHAs to provide designated housing) shall not apply to lower income housing developed or operated pursuant to a contract between HUD and an Indian housing authority.

housing projects and reconfiguration of public housing dwelling units; and (3) provide tenant-based assistance under section 811(b)(1) of the National Affordable Housing Act (NAHA) (Pub. L. 101–625, approved November 28, 1990; see 42 U.S.C. 8013).

With respect to projects to be designated for occupancy by disabled families, section 7(e) requires the PHA to comply with all the requirements of section 7 (which include submission of the allocation plan) and to submit for HUD review and approval an "application for designated housing for disabled families." This application requires the PHA to include a supportive services plan, which describes the needs of the disabled families that the designated housing is expected to serve, and provides for delivery of supportive services appropriate to meet the disabled family's needs.

Section 7(f)(5) requires PHAs that receive permission to operate designated housing to submit not less than once every two years, an updated allocation plan, and describes the information that must be included, at a minimum, in the updated plan. This information is directed to helping the PHA and the Department determine whether the initial data and projections provided in the allocation plan were accurate.

Section 7 establishes certain requirements that must be followed in the PHA's operation of designated housing. (See sections 7(a)(4), 7(b), 7(c) and 7(g).) These requirements address, among other things, such issues as (1) tenant choice to live in designated projects; (2) vacancies in designated projects (i.e., units that are vacant for more than 60 consecutive days), and (3) prohibition against requiring tenants (who are not members of the group for whom a project was designated) to vacate designated housing.

III. Proposed Rule

This section of the preamble provides a summary of the proposed organization and principal provisions of new part 945, and the proposed conforming amendments that would be made to 24 part 960, subpart D.

Proposed Part 945—Designated Housing—PHA Housing Designated for Occupancy by Disabled, Elderly, or Disabled and Elderly Families

New part 945 would be divided into three subparts: Subpart A—General; Subpart B—Application and Approval Procedures; and Subpart C—Operating Designated Housing.

Subpart A—General

Subpart A would set forth the purpose of part 945, and the general policies applicable to the designated housing process. These general policies include, among others, that designation of projects is limited to PHAs, and "projects" eligible for designation are limited to public housing projects.

Subpart A also would define the principal terms used in part 945. Several terms proposed to be included in the definition section of subpart A are those defined in section 621 of the 1992 Act, which amended section 3(b) of the 1937 Act. Section 3(b) contains the statutory definitions for certain terms used in the 1937 Act. Several of the terms defined in section 621 are applicable to the designated housing process, such as: "family," "elderly person," "near-elderly person," and "person with disabilities."

The definitions for "family" and "elderly person" and other related terms (e.g., "single person") are currently contained in 24 CFR part 912, entitled "Definition of Family and Other Related Terms; Occupancy by Single Persons." Part 912, however, has not yet been amended to reflect the revised definitions provided by section 621 or to add the new terms defined in section 621. (For example, the definition of "person with disabilities" would replace two definitions in part 912—"disabled person" and "handicapped person.") Under separate final rulemaking, part 912 will be amended to include several of the revised and new definitions set forth in section 621 (and which are proposed by this rule to be included in part 945). If the part 912 final rule is published before the part 945 final rule, the part 945 final rule, rather than define terms such as "family," and "elderly person," will list these terms in the part 945 definition section, and cross-reference to the definitions provided in part 912. If the part 945 final rule is published before the part 912 final rule, the definition section of the part 945 will be amended at the time of publication of the part 912 final rule to cross-reference to the definitions provided in part 912. The advantage in keeping these definitions in part 912 (which was established to define "family" and related terms) is that part 912 offers a convenient location to place the definitions for terms that are applicable to all public housing programs. Additionally, by placing these definitions in one location, it reduces the number of program regulations that must be amended to reflect changes in these terms as a result of statutory amendments, or administrative policy decisions.

Other terms defined in part 945 include "housing," "project," "portion of project," "public housing," "service provider," "supportive services," and "public housing projects for disabled families and elderly families."

"Housing," and "public housing" would have the same meaning as "project" in part 945 to reflect the interchangeable use of these terms in section 7. "Project" would be defined to mean low-income housing developed, acquired or assisted by a PHA under the U.S. Housing Act of 1937 (other than section 8) and for which there is an Annual Contributions Contract (ACC) between HUD and the PHA.

The definition for "project" would provide that, unless otherwise indicated in part 945, wherever the term "project" appears in part 945 it includes the plural, and also includes the term "portion of a project." Project is defined in this encompassing manner because a PHA may request designation of one or more of the following: A single project, one or more projects, a portion of a project, or portions of several projects.

The term "portion of a project" would be defined to include a building or buildings (in a multi-building project), a floor or floors of a building or buildings, or a certain number of dwelling units in a project or projects. The definition would clarify that designation of a portion of a project does not require that the buildings, floors, or units designated for occupancy by disabled families or elderly families be contiguous. The buildings, floors, and units may be scattered throughout PHA projects.

The definition for "service provider" would be modeled on the definition provided for this term in the Congregate Housing Service Program interim rule published in the **Federal Register** on December 8, 1992 (57 FR 58042).

With respect to "public housing projects for disabled families and elderly families," part 945 will include this term in its definition section, and cross-reference to the definition provided in part 960, subpart D. As will be discussed later in this preamble under the proposed amendments to part 960, the term "public housing project for disabled families and elderly families" will be defined to mean (1) a public housing project or portion of a project that was reserved for occupancy by disabled families and elderly families at its inception (and has retained that character), or (2) although not so reserved at its inception, a public housing project or portion of a project for which the PHA has obtained HUD's approval to give preference in tenant

selection for all units in the project to disabled families and elderly families. Subpart D currently uses the term "designated" and not "reserved." However, to avoid confusion with the designated housing process provided by new part 945, a process which requires the submission of an allocation plan, HUD proposes to use the term "reserved" in connection with projects for which a PHA provides preference for disabled families and elderly families in accordance with part 960, subpart D.

Subpart B—Application and Approval Procedures

Subpart B would incorporate the requirements established by section 7 for obtaining HUD approval to designate public housing for occupancy by disabled families or elderly families. Consistent with section 7, subpart B would provide that to designate a public housing project for occupancy by disabled families or elderly families, a PHA must submit to HUD, and receive HUD approval of, the allocation plan required by section 7(f).

The allocation plan would consist of the data required to be included by section 7(f), and includes additional items added by the Department, which items are consistent with the type of information solicited under section 7(f). The information solicited by section 7(f) is intended to help the PHA and HUD determine whether designation of a project will (1) benefit the group for whom the project is proposed to be designated, and (2) not adversely affect families who are not members of the group for whom the project is to be designated.

In incorporating the statutory components of the allocation plan, the Department has altered the statutory language of an information item only where the Department considered further clarification or elaboration was needed. The Department does not propose through this rule to prescribe methods by which the PHA should calculate the number of families, number of units, or the number of times housing assistance may be denied or delayed to a family in order to arrive at the information required to be included in the allocation plan. The Department prefers to allow each PHA to rely on its own occupancy policies and procedures (including procedures for maintaining waiting lists) and other methods that may be derived by the PHA for producing the information required to be included in the allocation plan.

* * * The Department, however, specifically requests comment from PHAs on whether additional guidance is needed on how to determine one or more of the information items required to be included in the allocation plan.

The Department added to the allocation plan requirements the goals or objectives which the PHA should strive to achieve in allocating its housing resources among the population it serves. These goals or objectives include the following.

First, the PHA should strive to provide, regardless of the designation proposed to be made, as broad a range of housing choices (with respect to types of housing, types of housing features (e.g. accessible units for persons with disabilities) and accessible location to social, commercial facilities, such as shopping markets) that would be available to elderly families and disabled families if there was no designation of projects in accordance with part 945.

Second, the PHA should strive to provide its disabled families with the most integrated setting possible. Under the designated housing process, the PHA only should seek to provide public housing that separates families on the basis of disability when the types of supportive services required by disabled families necessitate the concentration of families in a single location (i.e., a building, contiguous floors or units). An example of a supportive service that may require the concentration of families in a single location is the service of a live-in attendant, and to achieve efficiency in cost and delivery of this service, several families may share the services of this attendant.

The Department may disapprove an allocation plan which fails to indicate that the PHA strived to (1) provide as broad a range of housing choices that would have been available to elderly families and disabled families if there had been no designation, or (2) provide its disabled families with the most integrated setting possible.

In addition to the above two objectives, section 7 requires that the allocation plan disclose the PHA's strategy for securing additional housing resources that will be sufficient to provide housing assistance to not less than the number of non-elderly disabled families that would have been housed by the PHA if there was no designated project. The proposed rule would provide, consistent with section 7(f)(2)(G) that these resources must be owned or controlled by the PHA, or that the PHA has received preliminary notification that it will obtain these resources, or the PHA intends to apply for these resources. The requirement to secure housing resources sufficient to address the housing needs of the PHA's non-elderly disabled families who would have been housed but for the designation of a project is not to be construed as a requirement for one-for-one replacement of housing assistance. Rather, this requirement is intended to ensure that persons with disabilities not be under-served by the PHA that designates a project for occupancy only by elderly families. The types of housing resources available to the PHA, and the methods by which a PHA may obtain additional housing resources include the following:

The PHA may utilize vacancies and turnover in other public housing projects that are not designated and that are not intended to be designated, as well as turnover in section 8 certificates and vouchers.

The PHA may provide local preferences for a specific number of non-elderly disabled persons, in accordance with 24 CFR 960.211, for public housing general occupancy projects, public housing projects for disabled families and elderly families as provided in 24 CFR part 960, subpart D, or for the section 8 certificate or voucher program. In choosing this method, the PHA must demonstrate that the preference will result in the desired increase in the number of non-elderly disabled persons housed.

The PHA may provide for allocation of a certain number of public housing units (existing or new) or section 8 certificates or vouchers, which will be accompanied by a supportive services package. This may be achieved by the PHA entering into an agreement with a supportive service provider to make available a certain number of units in exchange for the provider delivering supportive services to disabled families. In accordance with the objective to maintain the most integrated housing setting, public housing units allocated for this purpose should not be contiguous, except where the type of supportive services to be provided require that the families be concentrated in a single location. The units or certificates or vouchers provided under this method would be allocated to non-elderly disabled families in the order of their application date on the waiting list. Clients of the service provider delivering the supportive services would not be provided these units, or certificates or vouchers, before other non-elderly disabled families already on the PHA's waiting list who need the supportive services being offered with this housing assistance. Additionally, occupancy of these units may not be limited to members of a particular disability group, but may be limited to persons who need the available

supportive services (as will be discussed later in this preamble, projects designated for disabled families may not be designated for occupancy only by persons with a specific disability). This type of additional housing resource may be selected by a PHA that has a population of non-elderly disabled families who would not otherwise benefit from the housing without the supportive services.

The PHA may use modernization funds to reconfigure units and buildings to appropriate sizes or uses for non-elderly disabled families.

The PHA may designate projects, or portions of projects, for occupancy by disabled families (note that projects designated for occupancy by disabled families must have a supportive service plan).

The PHA may allocate to non-elderly disabled families the units vacated in other PHA projects by elderly families who intend to relocate to a project designated for occupancy by elderly families.

Consistent with section 7(d)(1), the PHA may utilize housing owned or controlled by the PHA in which supportive services are provided, facilitated, or coordinated, such as mixed housing, shared housing, family housing, group homes, congregate housing, and other housing as the PHA considers appropriate.

Consistent with section 7(d)(2), the PHA may use development funds or funds for major reconstruction of obsolete public housing (MROP) to provide housing for disabled families in accordance with section 624 of the 1992 Act, which provides for development and reconstruction of housing for disabled families from funds, which may be not less than five percent, of funds reserved, respectively, for public housing development and for MROP.

Consistent with section 7(d)(3), the PHA may provide tenant-based assistance under the Supportive Housing for Persons with Disabilities Program (section 811 of the NAHA).

Additionally, a PHA may use all or a portion of net increases in units available for occupancy in a project as a result of the rehabilitation of vacant units in the project which previously had been uninhabitable.

The foregoing provides a few examples of ways in which PHAs may secure additional housing resources for non-elderly disabled families.

* * * The Department specifically requests comment from PHAs on any problems they may foresee with the above examples provided by the Department, and suggestions for other methods by which PHAs may obtain additional housing resources.

In securing additional housing resources, PHAs must take into account the supportive service needs of disabled persons, especially those persons with disabilities who require units with accessible features. The PHA should be able to make this assessment on information provided by its public housing waiting list, and from information collected in the comprehensive housing affordability strategy (CHAS) provided in accordance with section 105 of the NAHA. Consideration of the accessibility needs of persons with disabilities is not a new requirement proposed to be imposed on PHAs through this proposed rule. The Department's regulations at 24 CFR part 8 implementing section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) require PHAs to assess, on a PHA-wide basis, the needs of current tenants and applicants on its waiting list for accessible units. In reiterating this requirement in this proposed rule, the Department seeks to ensure that PHAs will not reduce the availability of accessible units that would have been allocated to persons with disabilities were it not for the designation of a project as elderly-only.

In reviewing a PHA's strategy for addressing the current and future housing needs of the families in the PHA's jurisdiction, HUD will examine closely both the PHA's proposed allocation of its immediately available housing resources (e.g., vacancies in projects, available section 8 certificates or vouchers), and the PHA's plan to secure and allocate additional housing resources that it owns or controls. HUD will not approve an allocation plan that does not adequately provide for the housing needs of (1) families who are members of the group for whom a project was designated, (2) families who are not members of the group for whom a project was designated, or (3) both of these groups. In deciding how its housing resources will be allocated, the PHA should strive to provide disabled families and elderly families with dwelling units, whether in designated housing or non-designated housing, that are comparable to units that would have been offered to them if there were no designated project.

HUD also will not approve an allocation plan that reduces the available current supply of housing for non-elderly disabled families, and provides for increased housing for these families at some distant, or indefinite, point in the future. For example, HUD will not approve an allocation plan submitted by a PHA that has a percentage of non-elderly disabled families on its waiting list that is two to three times the percentage residing in public housing, and through which plan the PHA (1) requests designation of an elderly-only project, and (2) proposes, as its only additional housing resource for non-elderly disabled families on its waiting list, a public housing project that has yet to be built. Since development of public housing is a complex and competitive process, such a proposal falls substantially short of adequately addressing the housing needs of non-elderly disabled families on a PHA's waiting list.

An approvable allocation plan is one that, given the housing inventory of the PHA and the population it serves, provides its disabled families and elderly families with as broad a range of housing choice as possible, with respect to the level of supportive services provided, the availability of accessible units, and integration with other family groups (i.e., non-elderly families, non-disabled families, and families with children).

Subpart B would not require a PHA to submit an allocation plan and seek formal designation for public housing projects which currently house a combination of disabled families and elderly families, or for a project in which the PHA intends to house a combination of disabled families and elderly families. The Department does not seek to impose on PHAs the administrative burden of preparing an allocation plan for providing housing to a combination of disabled families and elderly families where no administrative burden of this type is currently imposed on PHAs for this type of housing. (As will be discussed later in this preamble, PHAs must, however, obtain approval for this type of housing under 24 part 960, subpart D.) To require submission of an allocation plan solely for the purpose that the PHA may provide, continue to provide, or provide in the future, public housing projects that house a combination of disabled families and elderly families may discourage PHAs from continuing to provide this type of housing.

The proposed rule, however, would require that public housing projects for disabled families and elderly families must obtain designation as housing for disabled families and elderly families when a PHA decides to submit an allocation plan for designation of a public housing project, or portion thereof, for occupancy by disabled families, or by elderly families. In its allocation plan, the PHA would identify any public housing projects that house disabled families and elderly families

and that were approved as housing for these two types of families in accordance with 24 CFR part 960, subpart D. "Designation" as housing for disabled families and elderly families would be granted to these projects when designation is granted for the PHA's proposed housing for disabled families or housing for elderly families. If a PHA does not seek designation of housing for elderly families or for disabled families, the PHA is not required to obtain designation for its mixed housing of disabled families and elderly families.

For designation of housing for occupancy by disabled families, section 7(e) requires submission and approval of an "application for designated housing for disabled families" in addition to the PHA meeting the other requirements imposed by section 7, which requirements include the submission of the allocation plan. The information required by section 7(e) to be contained in this application largely focuses on the PHA's supportive services plan. Section 7(e) requires that the PHA describe the supportive service needs of the persons with disabilities that the proposed designated project is expected to serve, and the manner in which these services will be provided to the disabled families; and identify the service provider who will provide the supportive services to the designated housing population. (The service provider is the person or entity licensed under applicable State or local law to provide the supportive services for the designated housing population.)

The application for designated housing for disabled families should not be construed to mean, and subpart B would clarify that it does not mean, that PHAs only may provide supportive services to disabled families occupying designated projects for disabled families. As discussed earlier in Section II of this preamble, section 7(d) provides that PHAs shall meet, to the extent practicable, the housing and supportive service needs of eligible families applying for assistance under this title. Since eligible families applying for assistance under title VI of the 1992 Act include elderly families, the regulation encourages PHAs to provide supportive services to projects designated for occupancy by elderly families, and by disabled families and elderly families, in addition to providing supportive services to those projects designated for occupancy by disabled families. The Department recognizes that PHAs have been providing supportive services to elderly families occupying public housing. A supportive services plan is not necessary to continue the delivery of these services to elderly families, or to initiate the delivery of supportive services to elderly families occupying designated housing for elderly families.

In designating a project (or portion thereof) for occupancy by disabled families, a PHA may not designate the project for occupancy by persons who have a specific disability. For example, PHAs may not designate a project for occupancy only by persons who have developmental disabilities, or by persons with HIV disease. PHAs may limit access to a designated project to only those persons who need the types of services that are being provided.

In addition to listing the information required to be contained in the allocation plan and in the application for designated housing for disabled families, subpart B would list the information to be included in the PHA's updated allocation plan. Consistent with section 7, subpart B requires each PHA that owns or operates a designated housing project to update its allocation plan not less than once every two years. The updated allocation plan allows HUD to determine whether the projections made by the PHA (e.g., with respect to occupancy in the designated housing project, availability of housing for families who are not members of the group for whom the project was designated) were accurate.

Subpart B also would specify the criteria governing approval of these documents, and the procedures applicable to the submission of these documents to HUD, and notification of approval or disapproval by HUD.

* * * The Department specifically invites PHAs and other interested members of the public to comment on the requirements of the allocation plan and of the application for designated housing for disabled families, and to offer any suggestions on how these requirements may be revised in a way that will facilitate the production of this information by the PHA without, however, forfeiting any information that is necessary to accurately assess the impact of designated housing on the families served by the PHA. As noted earlier in this preamble, the purpose of the information required to be submitted in subpart B is to assist the PHA and the Department in assessing the advantages and disadvantages, if any, of designated housing. Therefore, in commenting on the requirements of subpart B, the Department requests the commenters to be mindful of this purpose, and of those requirements that are statutorily imposed.

Subpart C—Operating Designated Housing

Subpart C would require designated projects to be operated in conformity with all applicable public housing regulations and requirements, including compliance with nondiscrimination and accessibility requirements and regulations. Subpart C also would incorporate the special admission and occupancy requirements imposed by section 7.

The special admission and occupancy requirements applicable to designated housing include, among others, that in determining priority for admission to occupancy in projects that have been designated in accordance with the procedures established in section 7, the PHA may make units in such projects available only to the types of families for whom the project is designated. For designated projects for elderly families, section 7 permits PHAs to make units available to near-elderly families if there are an insufficient number of elderly families to fill all the units in a designated project.

The special admission and occupancy requirements applicable to designated housing also include a provision that, notwithstanding the authority to make units in a designated project available only to the types of families for whom the project is designated, the PHA shall make any dwelling unit that is ready for occupancy in such a project and that has been vacant for more than 60 consecutive days generally available for occupancy without regard to the types of families for whom the project was designated.

Compliance with Nondiscrimination and Accessibility Requirements in the Designated Housing Process.

With respect to compliance with nondiscrimination and accessibility requirements, the proposed rule would provide that the approval to operate a designated project does not relieve a PHA of its obligations to comply with the Fair Housing Act (42 U.S.C. 3601–3619) and with section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). While a PHA may designate a project or portion thereof for occupancy solely by disabled families and/or elderly families, in accordance with the procedures of part 945, the PHA also must administer the designated project, as well as its additional housing resources, in a manner that does not violate either section 504 or the Fair Housing Act.

An example of application of the Fair Housing Act requirements is as follows. A person with a disability who is residing in a project designated for

occupancy by disabled families requires an accommodation in service that differs from the supportive services provided to the designated project. If it is determined that the accommodation (1) may be necessary to afford the individual equal opportunity for the use and enjoyment of a dwelling unit or public and common use areas, and (2) is reasonable (i.e., a reasonable accommodation), the accommodation must be provided by the PHA in accordance with the requirements of the Fair Housing Act. Alternatively, if a person with a disability requires a reasonable accommodation and has been offered, but has declined, to live in a designated project where supportive services are provided, the PHA must provide the reasonable accommodation, even if the accommodation is identical or similar to the services provided in the designated project.

An example of the application of section 504 requirements is as follows. A PHA designates a certain number of units scattered within a public housing project for occupancy by persons with disabilities, some of whom are in need of various features of accessible design within the dwelling units and premises, and all of whom are in need of a range of regularly provided supportive services, such as meal services, transportation, nonmedical counseling, and assistance with housekeeping and other chores. The PHA cannot require a person who uses a wheelchair to live in the designated project. Section 504 requires, to the maximum extent feasible, and subject to reasonable health and safety requirements, that accessible dwelling units be made available throughout the PHA's projects, and in a range of sizes and amenities. Section 504 also requires housing adjustments when such adjustments to policies and practices do not change the basic nature of the program, or result in undue financial and administrative burdens. Section 504 also requires PHAs to operate each existing housing program or activity receiving Federal financial assistance so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. Providing the person who uses a wheelchair with an accessible unit (other than a unit in the designated project) that accommodates the individual's needs would comply with the requirements of section 504. Further, it should be noted that section 7(b)(1) provides that the decision of any disabled family not to accept occupancy in an appropriate type of project shall not adversely affect the family's opportunities to be offered other appropriate housing assistance.

In addition to compliance with the Fair Housing Act and section 504 requirements, the Department has determined that title II of the Americans with Disabilities Act (ADA) (42 U.S.C. 12101–12165) applies to all PHAs, regardless of their source of funding. Title II of the ADA ("Public Services") applies to any program, service, or activity provided or made available by States and local governments or any department, agency, special purpose district or other instrumentality of a State or local government. (The Department will be publishing guidance for PHAs with respect to title II of the ADA in the near future.)[2]

IV. Proposed Amendments to Part 960, Subpart D

Subpart D of part 960, titled "Preference for Elderly Families and Discretionary Preference for Near Elderly Families in Public Housing Projects for the Elderly," establishes a preference for elderly families and disabled families in "public housing projects for the elderly." Under existing subpart D, the term "elderly family" is defined to include "disabled family," and although subpart D is titled "preference for elderly families," subpart D in fact establishes a preference for elderly families and disabled families in projects that house a combination of elderly families and disabled families. Subpart D also permits a PHA to give preference to near-elderly families for admission to public housing projects for elderly families and disabled families when the PHA determines, in accordance with § 960.407 (Selection Preference), that there are not enough elderly families and disabled families to fill all the units in the project that are currently vacant, or that are expected to be vacant in the next 12 months.

Existing subpart D provides that a public housing project, or portion of a project, acquires the identity of a public housing project that is reserved for occupancy by elderly (and disabled) families if the project (1) was "designated for occupancy by the elderly at its inception (and has retained that character)," or (2) "although not so designated, for which the PHA gives preference in tenant selection (with HUD approval) for all units in the project (or for a portion of units in the project) to elderly families."

Because section 621 of the 1992 Act distinguishes between elderly families and disabled families, and because section 622 provides for a "designated housing process," changes are required to be made to subpart D. This proposed rule would amend subpart D to clarify that the preference established by subpart D for elderly families for admission to "public housing projects for elderly families" is a preference for elderly families and disabled families, and that projects for elderly families are projects for elderly families and disabled families. Accordingly, subpart D would be retitled "Preference for Disabled Families and Elderly Families in Public Housing Projects for Elderly Families and Disabled Families."

As noted earlier in this preamble, a public housing project for disabled families and elderly families is a public housing project, or portion of a project, that was reserved for occupancy by disabled families and elderly families at its inception (and has retained that character), or although it was not so reserved at its inception, the PHA has obtained HUD approval to give preference in tenant selection for all units in the project to disabled families and elderly families. As also noted earlier in this preamble, although subpart D uses the term "designated" and not "reserved" HUD proposes to use "reserved" in connection with the preference process provided by subpart D to avoid confusion with "designated housing process" provided by new part 945. Additionally, to date, the public housing projects for disabled families and elderly families provided in accordance with subpart D have not established a limit on the number or percentage of disabled families that may be admitted to these projects.

Subpart D, as proposed to be revised by this rule, would continue this practice, and would not establish a limitation or cap on the number of disabled families that may be admitted to these projects, but would clarify that the absence of such a limitation is a condition for approval to operate public housing reserved for occupancy by disabled families and elderly families. For example, approval to operate a public housing project for disabled families and elderly families would not be granted or would be withdrawn if the PHA establishes a policy of admitting disabled families to only 10 percent of

[2] The Department notes that title III of the ADA (Public Accommodations and Services Operated by Private Entities) may apply to PHAs in certain situations. Although title III pertains to private entities, and not public entities (which include PHAs), the applicability of title III to PHAs may arise in the designated housing process in connection with housing at which certain activities are conducted that would cause the housing to be classified as a "place of accommodation" under title III. PHAs are encouraged to obtain further information from the Department of Justice about the possible applicability of title III.

the units with the remaining 90 percent of the units reserved for elderly families.

The discretionary preference which subpart D currently provides for near-elderly families in public housing projects for elderly families (as this term is used in existing subpart D) would be removed. The discretionary preference for near-elderly families would be limited to admission to housing designated for occupancy by elderly families under part 945, in accordance with the requirements of amended section 7, which imposes such limit.

The amendments that would be made to part 960, subpart D, would provide for the definitions of "family" and related terms to cross-reference to the definitions for these terms provided in part 945. Again, however, if the part 912 final rule is published before the part 945 final rule, then subpart D would provide for a cross-reference to the definition section in part 912.

V. Submission of Allocation Plans in Advance of Final Rulemaking

Allocation plans submitted to HUD before final rulemaking is completed will be required to comply with the final regulations.

VI. Other Matters

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implements section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA). This Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, room 10276, 451 Seventh Street, SW., Washington, DC 20410.

Executive Order 12866

This proposed rule was reviewed by the Office of Management and Budget under Executive Order 12866 as a significant regulatory action.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that the proposed rule will not have a significant impact on a substantial number of small entities. The proposed rule would establish the requirements and procedures by which PHAs may designate projects, or portions of projects, for occupancy only by: (1) Elderly families, (2) disabled families, or (3) disabled families and elderly families. The proposed rule would incorporate the requirements established by statute for such designation. The designation of housing for occupancy by elderly families, disabled families, or disabled families and elderly families is an option provided to, not a requirement imposed on, PHAs by this proposed rule.

Executive Order 12606, The Family

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this proposed rule would not have potential for significant impact on family formation, maintenance, and general well-being within the meaning of the order. This proposed rule would implement the designation process provided by section 622 of the 1992 Act, the purpose of which is to assist PHAs in meeting the housing and supportive service needs of disabled families and elderly families. The supportive services provided by PHAs to disabled and elderly families are expected to assist these families in avoiding possible institutionalization, and to reduce unnecessary stress and financial burden on these families. Thus, the supportive services component of the program is anticipated to have a beneficial impact on disabled families and elderly families.

Since the designation process, however, provides for elderly-only housing and disabled-only housing, there is the possibility that the designation process authorized by section 622 of the 1992 Act would limit the availability of housing for (1) disabled families (if a PHA designates elderly family-only housing), (2) elderly families (if a PHA designates disabled family-only housing) or (3) families with children (if a PHA designates disabled families and/or elderly family-only housing), and thus adversely impact the maintenance and well-being of these families. (Although it should be noted that PHAs would be required to admit eligible elderly families with children to designated projects for elderly families, and admit eligible disabled families with children to projects designated for disabled families.) The proposed rule, however, would provide certain protections for all family types, including the protection provided by HUD's review and approval of a PHA's housing allocation plan. The purpose of this review is to ensure that the availability of public housing, and other housing resources available to the PHA, is not reduced for any of these families, especially non-elderly disabled families. Thus, the impact on family maintenance and well being that may result from the designation process, as proposed to be implemented by the Department through this rule, would not be significant within the meaning of the order.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that this proposed rule would not have substantial, direct effects on States, on their political subdivisions, or on their relationship with the Federal government, or on the distribution of power and responsibilities among the various levels of government. The proposed rule is limited to implementing the procedures under which PHAs may opt, subject to certain requirements and procedures, to designate public housing projects, or portions of public housing projects, for occupancy by elderly families, disabled families, or disabled families and elderly families.

Regulatory Agenda

This proposed rule was listed as sequence number 1635 in the Department's Semiannual Agenda of Regulations, published on October 25, 1993 (58 FR 56402, 56448) under Executive Order 12866 and the Regulatory Flexibility Act.

Public Reporting Burden

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520). The following provisions of the proposed rule have been determined by the Department to contain collection of information requirements:

Information collection requirement	Reference in proposed rule	Number of respondents	Number of responses per respondent	Hours per response	Total hours [1]
Allocation plan	§ 945.203	795	1	20	15,900

Information collection requirement	Reference in proposed rule	Number of respondents	Number of responses per respondent	Hours per response	Total hours [1]
Application for designated housing for disabled families	§ 945.205	80	1	30	2,400
Total burden hours					16,300

[1] There is no annual submission requirement. A PHA may submit an allocation plan or application for designated housing anytime the PHA seeks to designate a housing project for occupancy by disabled families or elderly families. Additionally, a PHA may seek designation of more than one project in one allocation plan or one application.

List of Subjects

24 CFR Part 945

Aged, Grant programs—housing and community development, Individuals with disabilities, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 960

Aged, Grant programs—housing and community development, Individuals with disabilities, Public housing.

Accordingly, chapter IX of title 24 of the Code of Federal Regulations would be amended as follows:

1. A new part 945, consisting of §§ 945.101 through 945.303, would be added to read as follows:

PART 945—DESIGNATED HOUSING—PUBLIC HOUSING DESIGNATED FOR OCCUPANCY BY DISABLED, ELDERLY, OR DISABLED AND ELDERLY FAMILIES

Subpart A—General

Sec.
945.101 Purpose.
945.103 General policies.
945.105 Definitions.

Subpart B—Application and Approval Procedures

945.201 Approval to designate housing.
945.203 Allocation plan.
945.205 Application for designated housing for disabled families.

Subpart C—Operating Designated Housing

945.301 General requirements.
945.303 Requirements governing occupancy in designated housing.

Authority: 42 U.S.C. 1473e and 3535(d).

Subpart A—General

§ 945.101 Purpose.

The purpose of this part is to implement the designated housing process established by section 7 of the U.S. Housing Act of 1937 (42 U.S.C. 1437e). Section 7 provides public housing agencies with the option, subject to the requirements and procedures of this part, to designate public housing projects, or portions of public housing projects, for occupancy by disabled families, elderly families, or disabled families and elderly families.

§ 945.103 General policies.

(a) *Agency participation.* Participation in this program is limited to public housing agencies (PHAs) (as this term is defined in 24 CFR 913.102) that elect to designate public housing projects for occupancy by disabled, elderly, or disabled and elderly families, as provided by this part.

(b) *Eligible housing.* (1) *Designation of public housing.* Projects eligible for designation under this part are public housing projects as described in the definition of "project" in § 945.105.

(2) *Additional housing resources.* To meet the housing and supportive service needs of elderly families, and disabled families, including non-elderly disabled families, who will not be housed in a designated project, PHAs shall utilize housing resources which they own, control, or have received preliminary notification that they will obtain (e.g., section 8 certificates and vouchers). PHAs also may utilize any housing facilities which they own or control and in which supportive services are already provided, facilitated or coordinated, such as mixed housing, shared housing, family housing, group homes, and congregate housing.

(3) *Exemption of public housing projects for disabled families and elderly families.* Except as provided in § 945.201, a PHA which seeks to house all of its disabled families and elderly families in public housing projects that have been reserved for occupancy by both disabled families and elderly families is not required to meet the designation requirements of this part, but is required to meet the requirements of 24 CFR part 960, subpart D.

(c) *Family participation in designated housing.* (1) *Voluntary participation.* The election to reside in designated housing is voluntary on the part of a family. No disabled family or elderly family may be required to reside in designated housing, nor shall a decision not to reside in designated housing adversely affect the family with respect to occupancy of another appropriate project.

(2) *Meeting stated eligibility requirements.* Nothing in this part shall be construed to require or permit a PHA to accept for admission to a designated project a disabled family or elderly family who does not meet the stated eligibility requirements for occupancy in the project (for example, income), as set forth in HUD's regulations in 24 CFR parts 912 and 913, and in the PHA's admission policies.

(d) *Supportive services.* The requirement in § 945.205 to submit a supportive services plan for approval to designate housing for disabled families shall not be construed to mean that PHAs only may provide supportive services to disabled families occupying designated housing for disabled families. In accordance with section 7(d) of the Act, PHAs should seek to provide supportive services to all families occupying designated housing which need such services.

§ 945.105 Definitions.

As used in this part:

Act means the United States Housing Act of 1937 (42 U.S.C. 1437–1440).

Allocation Plan. See § 945.201.

CHAS means the comprehensive housing affordability strategy required by section 105 of the National Affordable Housing Act (42 U.S.C. 12705).

Designated housing or *designated project* means a project (or projects), or a portion of a project (or projects) (as these terms are defined in this section), that has been designated for occupancy by either disabled families, elderly families, or disabled families and elderly families, in accordance with the requirements of this part.

Disabled families means families whose heads (or their spouses), or whose sole members are persons with disabilities. The term "disabled families" includes a person with disabilities, two or more persons with disabilities living together, and one or more persons with disabilities living with one or more persons who are determined to be essential to the care or well-being of the person or persons with disabilities.

Elderly families means families whose heads (or their spouses), or whose sole members are elderly persons. The term "elderly families" includes an elderly person, two or more elderly persons living together, and one or more elderly persons living with one or more persons who are determined to be essential to the care or well-being of the elderly person or persons.

Elderly person means a person who is at least 62 years of age.

Families includes but is not limited to a single person (as defined in 24 CFR part 912), one or more single persons, a displaced person (as defined in 24 CFR part 912), disabled families, elderly families, near-elderly families, and families with children.

FY means Federal Fiscal Year (starting with October 1, and ending September 30, and designated by the calendar year in which it ends).

Housing has the same meaning as "project," which is defined in this section.

HUD or *Department* means the Department of Housing and Urban Development including its Regional and Field Offices to which authority has been delegated to perform functions under this part.

NAHA means the National Affordable Housing Act (Pub. L. 101–625, approved November 28, 1990).

Near-elderly families means families whose heads (or their spouses), or whose sole members are near-elderly persons. The term "near-elderly families" includes two or more near-elderly persons living together, and one or more near-elderly persons living with one or more persons who are determined to be essential to the care or well-being of the near-elderly person or persons.

Near-elderly person means a person who is at least 50 years of age but below the age of 62.

Person with disabilities means a person who:

(1) Has a disability as defined in section 223 of the Social Security Act (42 U.S.C. 423); or

(2) Is determined, pursuant to regulations issued by the Secretary, to have a physical, mental, or emotional impairment which:

(i) Is expected to be of long-continued and indefinite duration,

(ii) Substantially impedes his or her ability to live independently, and

(iii) Is of such a nature that such ability could be improved by more suitable housing conditions, or

(3) Has a developmental disability as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(5)).

The term "person with disabilities" shall not exclude persons who have the disease of acquired immunodeficiency syndrome or any conditions arising from the etiologic agent for acquired immunodeficiency syndrome.

Portion of project includes but is not limited to: one or more buildings in a multi-building project; one or more floors of a project or projects; a certain number of dwelling units in a project or projects. (Designation of a portion of a project does not require that the buildings, floors or units be contiguous.)

Project means low-income housing developed, acquired, or assisted by a PHA under the U.S. Housing Act for 1937 (other than section 8) for which there is an Annual Contributions Contract (ACC) between HUD and the PHA. For purposes of this part, the terms "housing" and "public housing" mean the same as project. Additionally, as used in this part, and unless the context indicates otherwise, the term "project" when used in the singular includes the plural, and when used in the plural, includes the singular, and also includes a "portion of a project," as defined in this section.

Public housing or *public housing project*. See definition of "project" in this section.

Public housing agency or *PHA* means any State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing.

Public housing project for disabled families and elderly families. See definition in 24 CFR part 960, subpart D.

Secretary means the Secretary of Housing and Urban Development.

Service provider means a person or organization licensed or otherwise approved in writing by a State or local agency (e.g., Department of Health, Department of Human Services or Welfare) to provide supportive services. The service provider may provide the service on either a for-profit or not-for-profit basis.

Single person includes a person who lives alone or intends to live alone, and includes an elderly person, a disabled person, a displaced person, and the remaining member of a tenant family.

Supportive service plan. See § 945.205.

Supportive services means services designed to meet the special needs of tenants, and may include meal services, health-related services, mental health services, services for nonmedical counseling, meals, transportation, personal care, bathing, toileting, housekeeping, chore assistance, safety, group and socialization activities, assistance with medications (in accordance with any applicable State laws), case management, personal emergency response, and other appropriate services.

Subpart B—Application and Approval Procedures

§ 945.201 Approval to designate housing.

(a) *Designated housing for elderly families*. To designate a project for occupancy by elderly families, a PHA must have a HUD-approved allocation plan that meets the requirements of § 945.203.

(b) *Designated housing for disabled families*. To designate a project for occupancy by disabled families, a PHA must have a HUD-approved allocation plan that meets the requirements of § 945.203, and a HUD-approved application, which includes a supportive service plan, as required by § 945.205.

(c) *Designated housing for disabled families and elderly families*. (1) A PHA which seeks to provide a project for occupancy by only disabled families and elderly families is not required to meet the requirements of this part, but is required to meet the requirements of 24 CFR part 960, subpart D.

(2) Designation of a project that already has been approved for occupancy by disabled families and elderly families under 24 CFR part 960, subpart D is not necessary unless a PHA seeks to provide designated housing for disabled families or designated housing for elderly families.

(3) A PHA which seeks to provide designated housing for disabled families or designated housing for elderly families must identify in its allocation plan, in accordance with § 945.203(6), any public housing projects that have been reserved for occupancy by disabled families and elderly families under 24 CFR part 960, subpart D. Designation of projects approved under 24 CFR part 960, subpart D, as designated housing for disabled families and elderly families will be made automatically upon HUD's approval of:

(i) The PHA's allocation plan, in the case of designated housing for elderly families; and

(ii) The PHA's allocation plan and application, in the case of designated housing for disabled families.

§ 945.203 Allocation Plan.

(a) *General*. (1) *Applicable terminology*. As used in this section, the

terms "initial allocation plan" refers to the PHA's first submission of an allocation plan, and "updated allocation plan" refers to the biennial update (once every two years) of this plan, which is described in paragraph (f) of this section. As provided in § 945.105, the term "project" includes the plural ("projects") and includes a portion of a project.

(2) *Allocation of housing resources.* The PHA, in developing a plan to allocate its housing resources among the population it serves:

(i) Should strive to provide, regardless of the designation proposed to be made, as broad a range of housing choice as possible to elderly families and disabled families with respect to the level of supportive services, and the availability of accessible units;

(ii) Should strive to provide, regardless of the designation proposed to be made, housing for disabled families in the most integrated setting possible (designated units need not be contiguous);

(iii) For designated housing for disabled families, may make units available in conjunction with a specific package of services (such units may not be limited to persons with a specific disability, but rather must be made available to all disabled persons who need the types of services that are being offered).

(b) *Consultation in plan development.* In preparing the initial allocation plan, or any update of the allocation plan as provided in paragraph (f) of this section, the PHA shall consult with:

(1) The State or unit of general local government in whose jurisdiction the area served by the PHA is located;

(2) Public and private service providers;

(3) Advocates for the interests of disabled families, elderly families, and families with children;

(4) Representatives of the residents of the PHA's projects, including representatives from resident councils or resident management corporations where they exist; and

(5) Other interested parties, including management and residents of independent living centers, congregate housing and group homes.

(c) *Contents of initial plan.* The initial allocation plan shall contain, at a minimum, the information set forth in paragraph (c) of this section:

(1) *Identification of the project to be designated and type of designation to be made.* The first item to be addressed in the allocation plan is identification of the project to be designated and the type of designation to be made. The PHA must describe the building or buildings, floor or floors or units which will comprise the "designated project" and their location in the PHA's jurisdiction. (In providing the identification or location of floors or units to be designated, the PHA need not identify the precise floors or units to be designated (e.g., units 202–208, but should identify the projects in which the designated floors or units are located. The floors or units need not be contiguous.) The PHA also must state the type of designation to be made (i.e., housing for disabled families or housing for elderly families) and the reasons for designation. In discussing the reasons for the designation, the PHA may refer to data that will be provided in other parts of the allocation plan.

(2) *Identification of groups and persons consulted and comments submitted.* This component of the plan documents that the PHA's proposal to designate housing under this part was based on consideration of comments, suggestions and recommendations of all interested parties. This component of the plan must:

(i) Identify the groups and persons with whom the PHA has consulted in the development of the allocation plan;

(ii) Include a summary of comments received on the plan from the groups and persons consulted (these comments, and transcripts of any meetings that may have been held on the PHA's proposal to designate a project, must be maintained for a period of five years from the date of submission of the allocation plan, and must be available for review by HUD, if HUD requests review); and

(iii) Describe how the plan addresses these comments.

(3) *Profile of proposed designated project in its pre-designation state.* This component of the plan provides information on the project proposed to be designated as the project exists and operates in its pre-designation stage. This component of the plan must include:

(i) The total number of families currently occupying the project; and

(A) The number of families who are members of the group for whom the project is to be designated; and

(B) The number of families who are not members of the group for whom the project is to be designated;

(ii) An estimate of the total number of elderly families and of disabled families who are potential tenants of the project (i.e., as the project now exists), based on information provided by:

(A) The waiting list for the project; and

(B) The Comprehensive Housing Affordability Strategy (CHAS) for the jurisdiction within which the area served by the PHA is located;

(iii) If the project is proposed to be designated as housing for elderly families, an estimate of the number of potential tenants who are non-elderly disabled families based on the same sources of information provided in paragraphs (c)(3)(ii) (A) and (B) of this section.

(iv) An estimate of the number of potential tenants who will need accessible units based on information provided by:

(A) The needs assessment prepared in accordance with 24 CFR 8.25, and

(B) The CHAS for the jurisdiction within which the area served by the PHA is located;

(v) The number of units in the project which became vacant and available for occupancy during the year preceding the date of submission of the allocation plan to HUD;

(vi) The average length of vacancy for dwelling units in the project for the year preceding the date of submission of the allocation plan to HUD;

(vii) An estimate of the number of units in the project that are anticipated to become vacant and available for occupancy during the two-year period following the date of submission of the allocation plan to HUD.

(viii) An estimate of the average length of time all applicants currently have to wait for a dwelling unit in the project.

(4) *Projected profile of project in designated stage.* This component of the plan provides information on projected or anticipated changes of the information provided in paragraph (c)(3) of this section as a result of designation of the project. This component of the plan must:

(i) Discuss the advantages and disadvantages that the choice of designation is expected to have on families who are members of the group for whom the project is to be designated for occupancy, and families who are not members of the group for whom the project is to be designated;

(ii) Identify the source of selection of families for the designated project (e.g., from current residents of the project, families currently on the waiting list for the project, residents of other projects, and potential tenants for the project based on information provided by the CHAS);

(iii) For projects proposed to be designated for occupancy by elderly families, provide an estimate of the number of near-elderly families who may be needed to fill units in the designated project for elderly families, as provided in § 945.303(c);

(iv) Describe how the PHA will document:

(A) The number of families who are members of the designated group who will be denied or delayed housing because of a lack of a sufficient number of designated units; and

(B) The number of families who are not members of the designated group who will be denied or delayed housing because of an insufficient number of non-designated units as a result of the designation;

(v) Provide an estimate of the average length of time all applicants will have to wait for a dwelling unit as a result of designation of a project (i.e., this information should be given both for applicants who are members of the group for whom the project is to be designated, and for applicants who are not members of the group for whom the group to be designated).

(5) *PHA occupancy policies and procedures.* This component of the plan provides information on the PHA's existing occupancy policies and procedures, and how these policies and procedures may need to be altered for purposes of operating designating housing. This component of the plan must:

(i) Contain a description of the PHA's HUD-Approved Tenant Selection and Assignment Plan, admission policies and procedures, including:

(A) How these policies and procedures apply to disabled families and elderly families, especially the preference system and the transfer policy;

(B) How the waiting list is maintained; and

(C) How dwelling units are assigned;

(ii) Describe any changes the PHA intends to make in its admission policies to accommodate the designation.

(6) Strategy for addressing the current and future housing needs of the families in the PHA's jurisdiction. This component of the plan describes the PHA's strategy for meeting the current and future housing needs of the families in the PHA's jurisdiction. This component of the plan must:

(i) Identify any "public housing projects for disabled families and elderly families," planned or in existence, as provided in 24 CFR part 960, subpart D;

(ii) Describe the steps to be taken by the PHA to ensure that disabled families (if a project is to be designated for occupancy by elderly families) or elderly families (if a project is to be designated for occupancy by disabled families) maintain access to services and housing facilities similar to those that otherwise would have been available to them if the project had not been designated, and a description of the housing choices currently available, and anticipated to be available to these families;

(iii) Describe the steps to be taken by the PHA to replace any accessible units (accessible to persons with varying types of disabilities) that will be unavailable (as a result of the designation of a project that contained such units) to families who need accessible units;

(iv) In the case of designation of a project for elderly families, identify the additional housing resources which the PHA determines will be sufficient to provide assistance to not less than the number of non-elderly disabled families that would have been housed by the PHA if occupancy in units in the designated project were not restricted to elderly families, and the PHA's plan for securing these additional housing resources (one-for-one replacement is not required). These additional housing resources may include but are not limited to:

(A) Providing local preferences for a specific number of non-elderly disabled persons for general occupancy projects in accordance with the preference provisions of 24 CFR 960.211; for public housing projects for disabled families and elderly families, as provided in 24 CFR part 960, subpart D; or for section 8 certificates and vouchers. Within the context of the PHA's overall preference system, there must be a demonstration that the preference will result in the desired increase in the number of non-elderly disabled persons housed;

(B) Allocation of a certain number of existing or new public housing units or section 8 certificates or vouchers, which will be accompanied by a supportive services package, which may be achieved by the PHA entering into an agreement with a supportive service provider to make these units or certificates or vouchers available in exchange for the provider delivering supportive services to disabled families. Clients of the service provider delivering the supportive services may not be provided these units or certificates or vouchers before other non-elderly disabled families already on the PHA's waiting list.

(C) Use of modernization funds to reconfigure units and buildings to appropriate sizes or uses for non-elderly disabled families;

(D) Designation of projects for occupancy only by disabled families (projects designated for occupancy by disabled families must have a supportive services plan in accordance with the requirements of § 945.205);

(E) Allocation to non-elderly disabled families those units in other projects owned or controlled by the PHA that will be vacated by elderly families who will relocate to the project designated for occupancy by elderly families;

(F) Use of public housing development funds, or funds appropriated for major reconstruction of obsolete public housing to provide housing for disabled families;

(G) Use of all or a portion of net increases in units available for occupancy in a project as a result of the rehabilitation of vacant units in this project which had been uninhabitable.

(v) Describe any incentives that the PHA intends to offer:

(A) To families who are members of the group for whom a project was designated for occupancy to achieve voluntary transfers to the designated project; and

(B) To families who are not members of the group for whom a project was designated for occupancy to achieve voluntary transfers from the project proposed to be designated;

(vi) Summarize how the PHA's allocation plan strives to meet the objectives described in paragraph (a)(2) of this section.

(d) *Criteria for allocation plan approval.* HUD shall approve an initial allocation plan, or updated allocation plan, if HUD determines that:

(1) The information contained in the plan is complete and accurate (a plan that is incomplete, i.e., missing required statements or items, will be disapproved), and the projections are reasonable;

(2) Implementation of the plan will not result in excessive vacancy rates in the project identified in paragraph (c)(1) of this section;

(3) Implementation of the plan will not result in excessive denial or delay in housing assistance to families on the PHA's waiting list;

(4) The plan for securing sufficient additional housing resources for non-elderly disabled persons, as provided under paragraph (c)(6) of this section, can reasonably be achieved; and

(5) The plan conforms to the requirements of this part.

(e) *Allocation plan approval or disapproval.* (1) *Written notification.* HUD shall notify each PHA, in writing, of approval or disapproval of the initial or updated allocation plan.

(2) *Timing of notification.* An allocation plan, which meets the requirements and contains the information required by paragraphs (b) through (d) of this section, shall be

considered to be approved by HUD if HUD fails to provide the PHA with notification of approval or disapproval of the plan, as required by paragraph (e)(1) of this section, within:

(i) 90 days after the date of submission of an allocation plan that contains comments, as provided in paragraph (c)(2) of this section; or

(ii) 45 days after the date of submission of all other plans, including

(A) Initial plans for which no comments were received;

(B) Updated plans, as provided in paragraph (f) of this section; and

(C) Revised initial plans or revised updated plans, as provided in paragraph (e)(4) of this section.

(3) *Approval limited solely to approval of designated housing.* HUD's approval of an initial plan or updated allocation plan under this section may not be construed to constitute approval of any request for assistance for major reconstruction of obsolete projects, assistance for development or acquisition of public housing, or assistance under 24 CFR part 890 (supportive housing for persons with disabilities).

(4) *Resubmission following disapproval.* If HUD disapproves an initial allocation plan, a PHA shall have a period of not less than 45 days following notification of disapproval as provided in paragraph (e)(2) of this section, to submit amendments to the plan, or to submit a revised plan.

(f) *Biennial update of plan.* (1) *General.* Each PHA that owns or operates a public housing project that is designated for occupancy under this part shall update its allocation plan not less than once every two years, from the date of HUD approval of the initial allocation plan.

(2) *Failure to submit updated plan.* Failure by the PHA to submit the updated plan as required by paragraph (f) of this section shall result in the PHA's designated housing losing its designation in accordance with the provisions of paragraph (f)(4)(ii) of this section.

(3) *Contents of updated plan.* The updated allocation plan shall contain, at a minimum, the following information:

(i) A review of the data and projections contained in the allocation plan, and the most recent update of the data and projections;

(ii) An assessment of the accuracy of the projections contained in the initial allocation plan and in the updated allocation plan;

(iii) The number of times a vacancy was filled in accordance with § 945.303(d);

(iv) The number of times an application for housing assistance by a disabled family or elderly family was denied or delayed because of a lack of appropriately designated units;

(v) The number of times an application for housing assistance by any family type (disabled, elderly, non-elderly, non-disabled, families with children, etc.) was denied or delayed because of a lack of an appropriate number of non-designated units;

(vi) A plan for adjusting the allocation of designated units, if necessary. This adjustment or reallocation plan shall reflect:

(A) the use of and demand for the designated and non-designated dwelling units, as revealed by the information submitted as part of the updated allocation plan; and

(B) An assessment of the availability and adequacy of the supportive services; and

(4) *Criteria for approval of updated plan.* (i) HUD shall approve an updated allocation plan based on HUD's review and assessment of the updated plan, and where HUD considers appropriate or necessary, any on-site review and monitoring of PHA performance in the administration of its designated housing and in the allocation of the PHA's housing resources. Notification of approval or disapproval of the updated allocation plan shall be provided in accordance with § 945.203(e);

(ii) If a PHA's updated plan is not approved, existing projects that have been designated for occupancy by disabled families or elderly families will revert to their project type before designation. New projects (for which there was no previous project type) designated for occupancy by disabled families or elderly families, will be considered general occupancy projects. PHAs may request that an existing or new project which lost its designation as a result of disapproval of the updated plan be approved as a public housing project for disabled families and elderly families in accordance with 24 CFR part 960, subpart D.

(5) *Notification of approval or disapproval of updated plan.* HUD shall notify each PHA submitting an updated plan of approval or disapproval of the updated plan, in accordance with the form of notification and within the time periods required by paragraph (e) of this section.

§ 945.205 Application for designated housing for disabled families.

(a) *General.* To designate a project for occupancy by disabled families, a PHA must submit an application, which shall consist of the allocation plan required by § 945.203, and the supportive service plan described in paragraph (b) of this section. A project may not be designated for occupancy by persons with a specific disability. A PHA, however, may limit access to a designated project for disabled families to only those persons who need the types of services that are being offered.

(b) *Supportive service plan.* The supportive service plan shall describe how the PHA will provide or arrange for the provision of supportive services appropriate to meet the needs of the disabled families who will occupy the designated housing. The supportive service plan, at a minimum, must:

(1) Identify the number of disabled families that will need supportive services;

(2) Describe the types of supportive services that will be needed, and, where known, the length of time the supportive services will be needed;

(3) Identify the service provider, and describe the experience of the service provider in providing supportive services;

(4) Describe the manner in which the supportive services will be provided to the disabled families that the designated housing is expected to serve (the manner in which the services will be provided depends upon the type of service offered; e.g., if the package includes transportation assistance, how will transportation assistance be provided to disabled families);

(5) If applicable, explain why the supportive services to be provided require that the disabled families to be served live in contiguous units;

(6) Identify all sources of funding available to the PHA (State, local, other Federal, or private funding) for providing supportive services to residents of the proposed designated housing, or the supportive service resources to be provided in lieu of funding;

(7) Submit evidence of the commitment(s) provided to the PHA by these sources to make the funds, or the delivery of supportive services available to the PHA for at least two calendar years, and evidence of a general ongoing commitment from these or other sources to continue to provide funding or supportive services relevant to the needs of the families that the designated housing is expected to serve;

(8) Identify any public and private service providers, advocates for the interests of designated housing families, and other interested parties with whom the PHA consulted in the development of this supportive service plan, and summarize the comments and recommendations made by these parties

(these comments must be maintained for a period of five years from the date of submission of the application, and be available for review by HUD, if HUD requests review of the comments);

(9) If applicable, address the ability to provide residential supervision of disabled families (on-site supervision within the designated housing);

(10) Include any other information which the PHA determines would assist HUD in assessing the suitability of the PHA's supportive service plan; and

(11) Include any additional information which HUD may request, and which is appropriate to a determination of the suitability of the supportive services plan.

(c) *Approval.* HUD shall approve an application for designated housing for disabled families if the allocation plan meets the requirements of § 945.203, and if HUD determines on the basis of the information provided in the supportive services plan that:

(1) The persons with disabilities who will occupy the designated project will receive supportive services based on their individual needs;

(2) The supportive services are adequately designed to meet the special needs of the disabled families;

(3) The service provider has sufficient experience in providing supportive services (i.e., the service provider currently administers or has past experience administering an effective supportive service delivery program for persons with disabilities, or has demonstrated capability to obtain expertise based on other supportive service program delivery experience;

(4) Residential supervision will be provided in the designated housing sufficient to facilitate the provision of supportive services, if necessary. (If residential supervision is to be provided, the supportive plan includes written commitments from the providers of supportive services to provide appropriate resident supervision);

(5) Written commitment(s) of support from organizations and entities appear to be sufficient to provide, or fund the cost of providing, the supportive services needed by the disabled families that are expected to occupy the designated housing.

Subpart C—Operating Designated Housing

§ 945.301 General requirements.

Designated projects shall be operated in conformity with the regulations of this part, and the regulations applicable to PHAs in 24 CFR chapter IX, including 24 CFR parts 913, 960 and 966, and, in particular, the nondiscrimination requirements of 24 CFR 960.211(b)(3), which include but are not limited to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), Fair Housing Act (42 U.S.C. 3601–3619), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), the Age Discrimination Act (42 U.S.C. 6101–6107), Executive Order 11246 (3 CFR, 1964–1965 Comp., p. 339), Executive Order 11063, as amended by Executive Order 12259 (3 CFR, 1958–1963 Comp., p. 652 and 3 CFR, 1980 Comp., p. 307), the Americans with Disabilities Act (42 U.S.C. 12101–12213) (to the extent the Americans with Disabilities Act is applicable) and the implementing regulations of these statutes and authorities; and other applicable Federal, State, and local laws prohibiting discrimination and promoting equal opportunity.

§ 945.303 Requirements governing occupancy in designated housing.

(a) *Priority for occupancy.* Except as provided in paragraphs (c) and (d) of this section, in determining priority for admission to designated housing, the PHA shall make units in the designated housing available only to the category of families for whom the project has been designated for occupancy.

(b) *Compliance with preference regulations.* Among the category of families for whom a project has been designated for occupancy, the PHA shall give preference for occupancy in accordance with the occupancy preferences set forth in 24 CFR part 960, subpart B.

(c) *Eligibility of near-elderly families for designated housing for the elderly.* If a PHA determines that there are insufficient numbers of elderly families to fill all the units in a project designated for occupancy by elderly families, the PHA may, in accordance with an approved allocation plan, provide that near-elderly families, who qualify for preferences for occupancy under 24 CFR part 960, subpart B, may occupy dwelling units in the project. If there are insufficient numbers of near-elderly families to fill all the units in a project designated for elderly families, the provisions of paragraph (d) of this section shall apply.

(d) *Vacancies in designated housing.* Notwithstanding the authority provided by this part to designate housing for occupancy by disabled families, elderly families, or disabled families and elderly families, a PHA shall make available to families, other than the category of families for whom occupancy in the project has been designated, any dwelling unit in the designated housing that is:

(1) Ready for re-rental and for a new lease to take effect; and

(2) Vacant for more than 60 consecutive days.

(e) *Tenant choice of housing.* (1) Subject to paragraph (e)(2) of this section, the decision of any disabled family or elderly family not to occupy or accept occupancy in designated housing shall not adversely affect:

(i) The family's right to continued occupancy in public housing; or

(ii) The family's admission to public housing; or

(iii) The family's place on a public housing waiting list or the family's placement on a public housing waiting list.

(2) The protection provided by paragraph (e)(1) of this section shall not apply to any family whose refusal to occupy or accept occupancy in designated housing is based on the race, color, religion, sex, disability, familial status, or national origin of the occupants of the designated housing or the surrounding area. The protection provided by paragraph (e)(1) of this section shall apply to an elderly family or disabled family that declines to accept occupancy, respectively, in a designated project for elderly families or a designated project for disabled families, and requests occupancy in a general occupancy project or a project that houses both disabled families and elderly families.

(f) *Appropriateness of dwelling unit to family size.* This part may not be construed to require a PHA to offer occupancy in a designated housing dwelling unit to any family who is not of appropriate family size for the dwelling unit. The temporary absence of a child from the home due to placement in foster care is not considered in determining family composition and family size.

(g) *Prohibition of evictions.* Any tenant who is lawfully residing in a dwelling unit in a public housing project may not be evicted or otherwise required to vacate the unit because of the designation of the project, or because of any action taken by HUD or the PHA in accordance with this part.

(h) Reserved.

(i) *Prohibition of coercion to accept supportive services.* As with other HUD-assisted housing, no disabled family or elderly family residing in designated housing may be required to accept supportive services made available by the PHA under this part.

(j) *Availability of grievance procedures in 24 CFR part 966.* The

grievance procedures in 24 CFR part 966, subpart B, are applicable to this part.

PART 960—ADMISSION TO, AND OCCUPANCY OF, PUBLIC HOUSING

2. The authority citation for part 960 would continue to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437n, 3535(d).

3. The heading of subpart D would be revised, § 960.409 would be removed, and §§ 960.401, 960.403, 960.405, and 960.407 would be revised to read as follows:

Subpart D—Preference for Disabled Families and Elderly Families in Public Housing Projects for Disabled Families and Elderly Families

Sec.
960.401 Purpose.
960.403 Applicability.
960.405 Definitions.
960.407 Selection preference; other preferences; single person occupancy.

§ 960.401 Purpose.

This subpart establishes a preference for disabled families and elderly families for admission to public housing projects for disabled families and elderly families, as defined in § 960.405.

§ 960.403 Applicability.

This subpart applies to all dwelling units in public housing projects, or portions of public housing projects, for disabled families and elderly families assisted under the U.S. Housing Act of 1937. This subpart does not apply to section 23 and section 10(c) leased housing projects or the section 23 Housing Assistance Payments Program where the owners enter into leases directly with the tenants, or to the Section 8 Housing Assistance Payments Program, the Low-Rent Housing Homeownership Opportunities Program (Turnkey III), the Mutual Help Homeownership Opportunities Program, or to Indian Housing Authorities. (For applicability to Indian Housing Authorities, see part 905 of this chapter.) Additionally, this subpart is not applicable to projects designated for occupancy by disabled families or elderly families in accordance with 24 CFR part 945.

§ 960.405 Definitions.

Designated housing. See definition of "designated housing" in 24 CFR part 945.

Disabled families. See definition of "disabled families" in 24 CFR part 945.

Elderly families. See definition of "elderly families" in 24 CFR part 945.

Public housing project for disabled families and elderly families means a public housing project, or portion of a project, that was reserved for occupancy by disabled families and elderly families at its inception (and has retained that character), or although it was not so reserved at its inception, the PHA has obtained HUD approval to give preference in tenant selection for all units in the project to disabled families and elderly families.

§ 960.407 Selection preference; other preferences; single person occupancy.

(a) A PHA must give preference to disabled families and elderly families in determining priority for admission to public housing projects for disabled families and elderly families. A PHA may not establish a limit on the number of disabled families or elderly families who may be accepted for occupancy in a public housing project for disabled families and elderly families.

(b) The PHA must follow its policies and procedures for applying the Federal preferences contained in subpart B of this part when selecting applicants for admission from among disabled families and elderly families.

(c) Disabled families and elderly families who do not qualify for a Federal preference contained in subpart B of this part, and who are given preference for admission under paragraph (a) of this section over non-elderly families and non-disabled families that qualify for such a Federal preference, are not subject to the statutory 10 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as provided in 24 CFR 960.211(b)(2)(ii).

(d) If a disabled or elderly applicant is a single person, as this term is defined in 24 CFR part 912, the disabled single person or the elderly single person shall be given a preference for admission to public housing projects for disabled families and elderly families.

(e) In offering available units to disabled families and elderly families in public housing projects for disabled families and elderly families, units with accessible features should first be offered to persons with disabilities that require the accessibility features of the unit in accordance with the requirements of 24 CFR 8.27 and 24 CFR 100.202(c)(3).

Dated: November 18, 1993.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 94–259 Filed 1–6–94; 8:45 am]

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federal register

Friday
January 7, 1994

Part VI

The President

Proclamation 6644—Death of Thomas P. O'Neill, Jr.

Federal Register
Vol. 59, No. 5
Friday, January 7, 1994

Presidential Documents

Title 3—

The President

Proclamation 6644 of January 6, 1994

Death of Thomas P. O'Neill, Jr.

By the President of the United States of America

A Proclamation

As a mark of respect for the memory of the Honorable Thomas P. O'Neill, Jr., former Speaker of the House of Representatives, I hereby order, by the authority vested in me as President of the United States of America by section 175 of title 36 of the United States Code, that the flag of the United States shall be flown at half-staff upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until his interment. I also direct that the flag shall be flown at half-staff for the same length of time at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of January, in the year of our Lord nineteen hundred and ninety-four, and of the Independence of the United States of America the two hundred and eighteenth.

William J. Clinton

[FR Doc. 94–591
Filed 1–6–94; 11:32 am]
Billing code 3195–01–P

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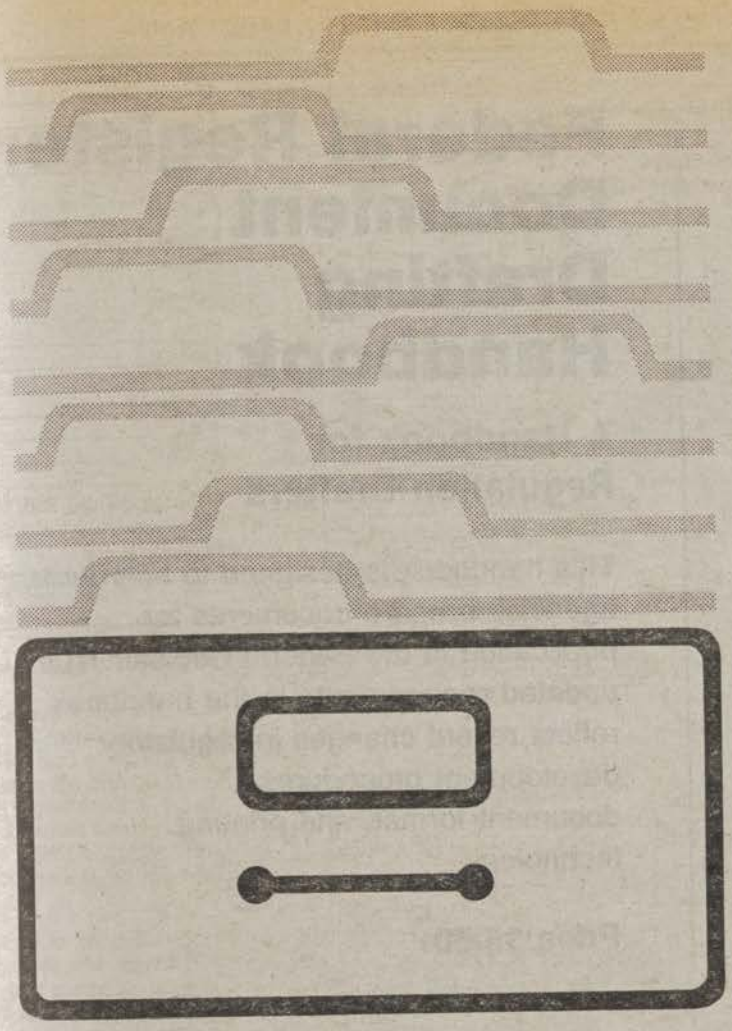

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in the Code of Federal Regulations (CFR)

GUIDE: Revised January 1, 1992

SUPPLEMENT: Revised January 1, 1993

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The various abstracts in the GUIDE tell the user (1) what records must be kept, (2) who must keep them, and (3) how long they must be kept.

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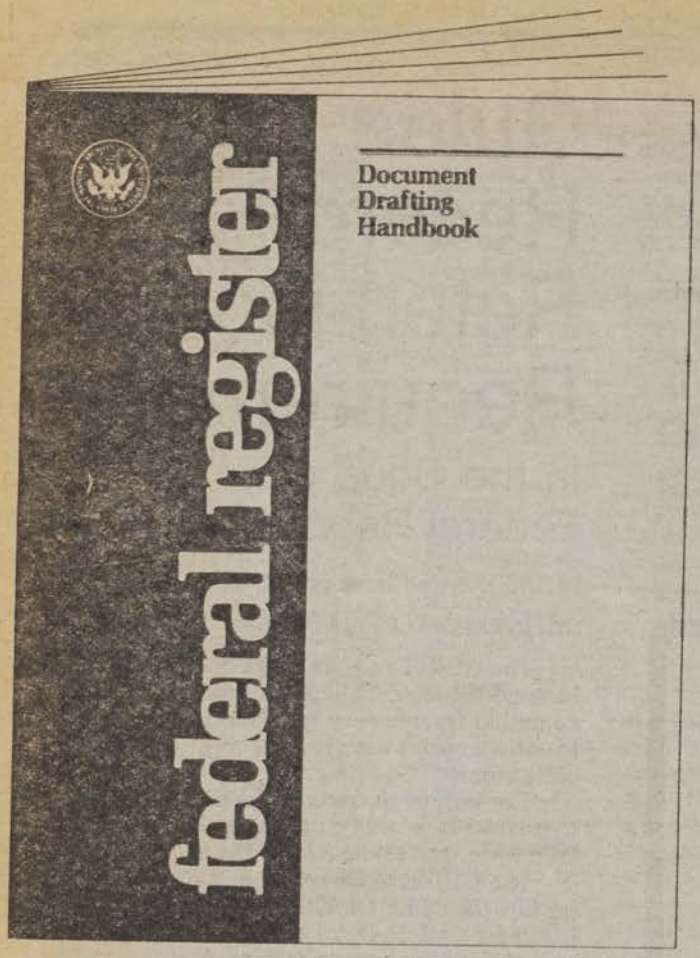

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