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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 AGRICULTURE

Rural Utilities Service

7 CFR Part 1714

Pre-Loan Policies and Procedures for Insured Electric Loans

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises the manner in which the Rural Utilities Service (RUS) notifies Borrowers of the schedule of interest rates for municipal rate loans. RUS will post the quarterly interest rates for municipal rate loans on the RUS website at the beginning of each calendar quarter to allow for a quicker notification of the municipal interest rates to RUS Borrowers.

EFFECTIVE DATE: April 9, 2002.

FOR FURTHER INFORMATION CONTACT: Gail P. Salgado, Management Analyst, Policy Analysis and Loan Management Staff, Rural Utilities Service, U.S. Department of Agriculture, STOP 1560, 1400 Independence Ave., SW., Washington, DC 20250–1522.

SUPPLEMENTARY INFORMATION: The Rural Utilities Service is making this change to the Electric Program's procedure for publishing interest rates for municipal rate loans to minimize the administrative burden and allow for a quicker notification of the municipal interest rates to RUS Borrowers.

Since formulation of procedures for municipal rate loans, RUS has published the interest rates for municipal rate loans quarterly in the **Federal Register**, and more recently in both the **Federal Register** and on the RUS website. Electronic notification of the interest rates for municipal rate loans allows RUS Borrowers immediate access to the quarterly municipal loan interest rates. RUS municipal loan interest rates can be found on the RUS Web site, *http://www.usda.gov/rus/electric/.*

The administrative changes being made will enable RUS to post interest rates for municipal rate loans on the RUS website, Electric Program HomePage, not later than the beginning of each calendar quarter.

This rule relates to agency procedures and, therefore, pursuant to 5 U.S.C. 553, notice of proposed rule making and opportunity for comment are not required. Further, since this rule relates to agency procedures, it is exempt from the provisions of Executive Order Nos. 12866 and 12988. This action will not have an effect on a substantial number of small businesses and thus, is exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

List of Subjects in 7 CFR Part 1714

Electric power, Loan programs-energy, Rural areas.

For the reasons set forth in the preamble, chapter XVII of title 7 of the Code of Federal Regulations, is amended as follows:

PART 1714—GENERAL INFORMATION

1. The authority citation for part 1714 is revised to read as follows:

Authority: 7 U.S.C. 901 *et seq.*; 1921 *et seq.*; and 6941 *et seq.*

Subpart A—General

2. Amend § 1714.5 by revising the first sentence in paragraph (a) to read as follows:

§ 1714.5 Determination of interest rates on municipal rate loans.

(a) RUS will post on the RUS website, Electric Program HomePage, a schedule of interest rates for municipal rate loans at the beginning of each calendar quarter.* * *

* * * * *

Dated: March 13, 2002.

Hilda Gay Legg,

Administrator, Rural Utilities Service.

[FR Doc. 02–8546 Filed 4–8–02; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 3565

RIN 0575–AC26

Guaranteed Rural Rental Housing Program

AGENCY: Rural Housing Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Housing Service (RHS) is amending its regulations for the Guaranteed Rural Rental Housing Program (GRRHP). The Housing Act of 1949, which authorizes RHS to administer GRRHP, was amended on December 27, 2000. The intended effect of this final rule change is limited to the implementation of five statutory changes. The revisions range from adding a definition of an ''Indian tribe'' to authorizing loans to be made for 25 years with an amortization of 40 years (*i.e.,* balloon payments).

EFFECTIVE DATE: May 9, 2002.

FOR FURTHER INFORMATION CONTACT: Douglas H. MacDowell, Senior Loan Specialist, Multi-Family Housing Processing Division, Rural Housing Service, U.S. Department of Agriculture, STOP 0781, 1400 Independence Avenue SW., Washington, DC 20250–0781, Telephone (202) 720–1604.

SUPPLEMENTARY INFORMATION:

Classification

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

Paperwork Reduction Act

The information collection requirements contained in this regulation have been previously approved by OMB under the provisions of 44 U.S.C. chapter 35 and this regulation has been assigned OMB control number 0575–0174, in accordance with the Paperwork Reduction Act of 1995. This rule does not impose any new information collection requirements from those approved by OMB.

Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice

Reform. In accordance with this Executive Order: (1) All state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings in accordance with 7 CFR part 11 must be exhausted before bringing suit in court challenging action taken under this rule.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, RHS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to state, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires RHS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

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

Executive Order 13132, Federalism

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

Programs Affected

The affected program is listed in the Catalog of Federal Domestic Assistance under Number 10.438, section 538 Rural Rental Housing Guaranteed Loans.

Intergovernmental Consultation

For the reasons contained in the notice related to 7 CFR part 3015, subpart V this program is not subject to Executive Order 12372 which requires intergovernmental consultation with state and local officials.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' It is the determination of RHS that this action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969, Pub. L. 91–190, an Environmental Impact Statement is not required.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The undersigned has determined and certified by signature of this document that this rule will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not involve a new or expanded program nor does it require any more action on the part of a small business than a large entity.

Background

GRRHP has been designed to increase the availability of affordable multifamily housing in rural areas. Qualified lenders are authorized to originate, underwrite, and close loans for multifamily housing projects guaranteed under this program. Projects may be for new construction or acquisition with substantial rehabilitation of at least $15,000 per unit. RHS guarantees such loans upon review of the lender's underwriting package, appraisal report, appropriate certifications, project information, and satisfactory completion of the appropriate level of environmental review by the Agency. Lenders are expected to provide servicing or contract for servicing of each loan it underwrites. Loans which are guaranteed may not exceed 90% of the total development cost of a project. This leaves 10% of the total development cost that must be provided from other sources. The guarantee itself is then limited to 90% of the loan amount.

GRRHP is a relatively new program which was operated as a pilot program by RHS in 1996 and 1997 and as a permanent program since. During the early stages of the program, RHS identified barriers in the program's authorizing statute (section 538 of the Housing Act of 1949) that limited the success of the program.

Congress subsequently addressed these barriers in the American Homeownership and Economic Act of 2000 (Pub. L. 106–569). This regulation incorporates those statutory changes by (1) defining ''Indian tribe'', (2) outlining how to handle loan defaults on reservations, (3) authorizing guaranteed loans with repayment terms of not less than 25 nor greater than 40 years, and (4) removes the restriction on releasing borrowers from liability.

Procedural Background

This final rule is limited to the implementation of the statutory changes made on December 27, 2000. The Agency has no discretion implementing these changes. Notice and public comment, therefore, are impractical, unnecessary, and contrary to the public interest.

List of Subjects in 7 CFR Part 3565

Banks, Conflict of interests, Credit, Environmental impact statements, Fair housing, Hearing and appeal procedures, Low and moderate income housing, Mortgages, Real property acquisition.

Therefore, chapter XXXV, title 7, Code of Federal Regulations, part 3565 is amended as follows:

PART 3565—GUARANTEED RURAL RENTAL HOUSING PROGRAM

1. The authority citation for part 3565 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989; 42 U.S.C. 1480.

Subpart A—General Provisions

2. Section 3565.3 is amended by adding, in alphabetical order, a definition of ''Indian tribe.''

§ 3565.3 Definitions.

* * * * *

Indian tribe. Any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation, as defined by or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians pursuant to the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 *et seq.*); or any entity established by the governing body of an Indian tribe, as described in this definition, for the purpose of financing economic development.

* * * * *

Subpart E—Loan Requirements

3. Section 3565.209 is revised to read as follows:

§ 3565.209 Loan amortization.

Each guaranteed loan shall be made for a period of not less than 25 nor greater than 40 years from the date the loan was made and may provide for amortization of the loan over a period of not to exceed 40 years with a final payment of the balance due at the end of the loan term.

§ 3565.214 [Removed and Reserved]

4. Section 3565.214 is removed and reserved.

Subpart I—Servicing Requirements

§ 3565.403 [Amended]

5. Section 3565.403(b)(2) is amended by removing the last sentence.

Subpart J—Assignment, Conveyance, and Claims

6. Section 3565.452 is revised to read as follows:

§ 3565.452 Decision to liquidate.

(a) A decision to liquidate shall be made when it is determined that the default cannot be cured through actions contained in § 3565.403 of subpart I or it has been determined that it is in the best interest of the Agency and the lender to liquidate.

(b) In the event of a default involving a loan to an Indian tribe or tribal corporation made under this section which is secured by an interest in land within such tribe's reservation (as determined by the Secretary of the Interior), including a community in Alaska incorporated by the Secretary of the Interior pursuant to the Indian Reorganization Act (25 U.S.C. 461 *et seq.*), the lender shall only pursue liquidation after offering to transfer the account to an eligible tribal member, the tribe, or the Indian housing authority serving the tribe. If the lender subsequently proceeds to liquidate the account, the lender shall not sell, transfer, or otherwise dispose of or alienate the property except to one of the entities described in the preceding sentence.

Dated: April 3, 2002.

Arthur A. Garcia,

Administrator, Rural Housing Service.

[FR Doc. 02–8528 Filed 4–8–02; 8:45 am]

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket No. 02–04]

RIN 1557–AB14

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R–1085]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AC17

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 567

[No. 2002–5]

RIN 1550–AB11

Risk-Based Capital Standards: Claims on Securities Firms

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); and Office of Thrift Supervision, Treasury (OTS).

ACTION: Final rule.

SUMMARY: The OCC, Board, FDIC, and OTS (collectively, the Agencies) are amending their respective risk-based capital standards for banks, bank holding companies, and savings associations (collectively, institutions or banking organizations) with regard to the risk weighting of claims on, and claims guaranteed by, qualifying securities firms. This rule reduces the risk weight applied to certain claims on, and claims guaranteed by, qualifying securities firms incorporated in the United States and in other countries that are members of the Organization for Economic Cooperation and Development (OECD) from 100 percent to 20 percent under the Agencies' risk-based capital rules. In addition, consistent with the existing rules of the FRB and the OCC, the FDIC and OTS are amending their risk-based capital standards to permit a zero percent risk weight for certain claims on qualifying securities firms that are collateralized by cash on deposit in the lending institution or by securities issued or guaranteed by the United States or other OECD central governments.

DATES: This final rule is effective on July 1, 2002. The Agencies will not object if an institution wishes to apply the provisions of this final rule beginning on the date it is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

OCC: Margot Schwadron, Risk Expert (202/874–5070), Capital Policy Division; or Ron Shimabukuro, Counsel (202/874–5090), Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

Board: Norah Barger, Deputy Associate Director (202/452–2402), Barbara Bouchard, Assistant Director (202–452–3072), or John F. Connolly, Supervisory Financial Analyst (202/452–3621), Division of Banking Supervision and Regulation; or Mark E. Van Der Weide, Counsel (202/452–2263), Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. For users of Telecommunications Device for the Deaf (''TDD'') only, contact 202/263–4869.

FDIC: For supervisory issues, Stephen G. Pfeifer, Examination Specialist (202/898–8904), Accounting Section, Division of Supervision; for legal issues, Leslie Sallberg, Counsel, (202/898–8876), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

OTS: David W. Riley, Project Manager, (202/906–6669), Supervision Policy; Teresa A. Scott, Counsel, Banking and Finance (202/906–6478), Regulations and Legislation Division, Office of the Chief Counsel, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: The Agencies' risk-based capital standards are based upon principles contained in the July 1988 agreement entitled ''International Convergence of Capital Measurement and Capital Standards'' (Basel Accord or Accord). The Basel Accord was developed by the Basel Committee on Banking Supervision (Basel Committee) and endorsed by the central bank governors of the Group of Ten (G–10) countries.[1] The Basel Accord provides a framework for

[1] The G–10 countries are Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, the United Kingdom, and the United States. The Basel Committee is comprised of representatives of the central banks and supervisory authorities from the G–10 countries, Luxembourg, and Spain.

assessing the capital adequacy of a bank by risk weighting its assets and off-balance-sheet exposures primarily based on credit risk.

The original Basel Accord imposed a 20 percent risk weight for claims on banks incorporated in the United States or other OECD countries [2] and a 100 percent risk weight for claims on securities firms and most other nonbanking firms. In April 1998, the Basel Committee amended the Basel Accord to lower the risk weight from 100 percent to 20 percent for claims on, and claims guaranteed by, securities firms incorporated in OECD countries if such firms are subject to supervisory and regulatory arrangements that are comparable to those imposed on OECD banks.[3] Such arrangements must include risk-based capital requirements that are comparable to those applied to banks under the Accord and its amendment to incorporate market risks. The term ''comparable'' is also intended to require that qualifying securities firms (but not necessarily their parent organizations) be subject to consolidated regulation and supervision with respect to their subsidiaries.

One of the primary reasons that the Basel Committee amended the Accord was to make it consistent with the European Union's (EU) Capital Adequacy Directive (CAD). A number of European countries have followed the CAD for some time. The CAD, which subjects EU banks and securities firms to the same capital requirements, applies a 20 percent risk weight to claims on both banks and securities firms.

Proposed Rule

The Agencies proposed to reduce from 100 percent to 20 percent the risk weight applied to certain claims on, and claims guaranteed by, qualifying securities firms under the Agencies' risk-based capital rules.[4] Under the proposal, as under the Basel Accord, qualifying securities firms must be incorporated in an OECD country and subject to supervisory and regulatory arrangements comparable to those imposed on OECD banks.

With respect to securities firms incorporated in the United States, the proposal would have required U.S. securities firms to be broker-dealers registered with the Securities and Exchange Commission (SEC) to be qualifying securities firms. Qualifying U.S. securities firms also had to be subject to and in compliance with the SEC's net capital rule, and margin and other regulatory requirements applicable to registered broker-dealers.

To be qualifying securities firms, the proposal would have required securities firms incorporated in any other OECD country to be subject to consolidated supervision and regulation (covering their subsidiaries, but not necessarily their parent organizations) comparable to that imposed on depository institutions in OECD countries. This includes risk-based capital requirements comparable to those applied to banks under the Accord [5] and banking organizations under the Agencies' capital rules.

Finally, for claims on a qualifying securities firm to be accorded a 20 percent risk weight, the proposal would have required the firm to satisfy a rating standard. As proposed, a qualifying securities firm, or its parent consolidated group, would have been required to have a long-term issuer credit rating,[6] or a rating on at least one issue of long-term (i.e., one year or longer) unsecured debt, from a nationally recognized statistical rating organization (rating agency) that is in one of the three highest investment grade rating categories [7] used by the rating agency.[8]

Comment Analysis

The Agencies received five comments. Four were from banking organizations, while one was from a securities industry trade association.

The five commenters supported the proposal to apply a 20 percent risk weight to claims on, or guaranteed by, qualifying securities firms. Two commenters indicated that the rule change would appropriately recognize the relatively low credit risk of claims on qualifying securities firms in OECD countries that are subject to supervision and regulation, including a risk-based capital requirement, comparable to supervision and regulation of banks in those countries. Two commenters stated that adopting the rule change would create a greater degree of equality

[2] The OECD is an international organization of countries that are committed to market-oriented economic policies, including the promotion of private enterprise and free market prices, liberal trade policies, and the absence of exchange controls. For purposes of the Basel Accord, OECD countries are those countries that are full members of the OECD or that have concluded special lending arrangements associated with the International Monetary Fund's General Arrangements to Borrow. A listing of OECD member countries is available at *www.oecdwash.org.* Any OECD country that has rescheduled its external sovereign debt, however, may not receive the preferential capital treatment generally granted to OECD countries under the Accord for five years after such rescheduling.

[3] Prior to this 1998 amendment, the Basel Accord generally permitted claims on securities firms to receive a preferential risk weight only if the claims were covered by a qualifying guarantee or secured by qualifying collateral. In general, under the Agencies' risk-based capital standards, qualifying guarantees are limited to guarantees by central governments (including U.S. government agencies), U.S. government-sponsored agencies, state and local governments of the OECD-based group of countries, multilateral lending institutions, regional development banks, U.S. depository institutions, and certain foreign banks. Qualifying collateral is generally limited to cash on deposit in the lending bank, securities issued or guaranteed by the U.S. or other OECD central governments (including U.S. government agencies), and securities issued or guaranteed by U.S. government-sponsored agencies, multilateral lending institutions, or regional development banks. Claims covered by a qualifying guarantee or secured by qualifying collateral generally are accorded a risk weight of either zero percent or 20 percent.

[4] 65 FR 76180 (Dec. 6, 2000).

[5] This standard generally would include firms engaged in securities activities in the EU that are subject to the CAD. Securities firms in other OECD countries would need to demonstrate to institutions and the Agencies that their supervision and regulation qualify as comparable under this rule and the Accord.

[6] A long-term issuer credit rating is one that assesses a firm's overall capacity and willingness to pay on a timely basis its unsecured financial obligations. Under the proposed rule, issuer credit ratings that are assigned to a non-broker-dealer subsidiary or affiliate of the securities firm (other than the parent consolidated group), or debt ratings on long-term unsecured debt issues of such a subsidiary or affiliate of the securities firm, would not satisfy the rating criterion.

[7] The Agencies recognize that recent international consultative papers and a rule issued by the banking agencies used the two highest investment grade rating categories to identify assets that would qualify for a 20 percent risk weight. Both the Basel Committee's June 1999 consultative paper entitled ''A New Capital Adequacy Framework'', and the Committee's January 2001 second consultative paper entitled ''The New Basel Capital Accord'', proposed that a bank, commercial firm, or securitization position rated in one of the two highest investment grade rating categories would qualify for a 20 percent risk weight. In addition, the Agencies' November 2001 final rule on recourse and direct credit substitutes provides that a securitization position rated in one of the two highest investment grade rating categories may qualify for a 20 percent risk weight. 66 FR 59614 (November 29, 2001) (Recourse Rule).

The Agencies considered a rating requirement for securities firms consistent with these other proposals, but decided it would be appropriate to propose requiring qualifying securities firms to be rated in one of the top three rating categories of a rating agency. In addition to meeting the rating standard, qualifying securities firms would be subject to supervision and regulation comparable to depository institutions in OECD countries. This supervision distinguishes qualifying securities firms from other types of entities, such as commercial firms. Further, under the current Basel Accord, claims on OECD banks and securities firms receive a 20 percent risk weight without satisfying a similar credit rating requirement. Thus, while the Agencies considered both a higher rating requirement, on the one hand, and no rating requirement, on the other, the Agencies concluded the proposed rating requirement struck an appropriate balance.

[8] The Recourse Rule defined ''nationally recognized statistical rating organization'' as an entity recognized by the Division of Market Regulation of the SEC as a nationally recognized statistical rating organization for various purposes, including the Commission's uniform net capital requirements for brokers and dealers.

between U.S. institutions and non-U.S. institutions that already apply the 1998 Basel revision for claims on securities firms.

One of the commenters did not object to the Agencies' adoption of a rating criterion for qualifying securities firms even though it is more conservative than the Basel provision. Three commenters, however, opposed the adoption of a rating standard. First, these commenters believed that the qualifying criteria requiring adequate supervision, regulation, and capital are sufficient indicators of creditworthiness without a rating requirement. Specifically, SEC supervision of broker-dealers, including its net capital rule, provides a rigorous supervisory framework not warranting the additional rating requirement. Second, two commenters stated that elimination of the rating standard from the proposed U.S. rule would make it consistent with the Basel provision and would eliminate the competitive disparity with foreign banks applying the Basel provision. Two commenters also indicated that imposing a rating requirement on securities firms is inconsistent with the provision of the Agencies' current capital rule granting a 20 percent risk weight to claims on OECD banks without a rating requirement. Two commenters noted that many high quality securities firms in the United States do not issue debt in the public debt markets and therefore do not have a credit rating from a rating agency. They contended that the Agencies should not put such firms into the position of either obtaining ratings without a business need or being disadvantaged (i.e., paying higher rates) when they borrow from banking organizations. Another commenter argued that the Agencies should not vest government authority in, and increase institutions' reliance on, a small group of private rating agencies.

Upon further consideration, the Agencies have decided that market practices for certain types of transactions and banking organizations' credit risk exposure from such transactions do not necessitate compliance with a rating standard for certain types of collateralized transactions. Accordingly, the Agencies are differentiating the treatment of uncollateralized transactions and certain types of collateralized transactions satisfying designated prudential criteria.

Accordingly, with regard to claims on qualifying securities firms that do not meet such prudential collateralization criteria (or that are not otherwise covered by a qualifying guarantee or secured by qualifying collateral), the Agencies are retaining the proposed rating standard as a uniform way of assessing the credit risk of securities firms in the United States and in other OECD countries. The use of such credit ratings represents a market-based approach for credit assessment because investors and market participants rely on such ratings in making investment and business decisions. The Agencies recognize the value of the supervisory and regulatory oversight of securities firms in the United States and other OECD countries. However, the Agencies believe that applying a rating standard as a uniform credit standard for securities firms both domestically and internationally is a sound prudential supplement to ensure that only claims on, or guaranteed by, high quality securities firms are accorded a 20 percent risk weight. Because a ratings-based approach increases the risk sensitivity of the risk-based capital framework, the Agencies also adopted such an approach in the recently issued Recourse Rule.[9] In addition, the use of external ratings is under consideration by the Basel Committee as part of the revisions to the Accord.

One commenter believed that claims on a qualifying securities firm that is unrated should be given a 20 percent risk weight only if the claims are guaranteed by the securities firm's parent company and the parent company is rated in one of the top three investment grade rating categories. The parent company need not be a qualifying securities firm. Such a guarantee legally ensures that a parent company with a high credit rating will support claims on its qualifying securities firm subsidiary. Accordingly, the final rule allows 20 percent risk weighting on a claim on an unrated qualifying securities firm if the parent company guarantees the claim and satisfies the rating standard.

One commenter believed that the Agencies should allow banking organizations to rely on ratings generated by their internal ratings systems and analytical models. These systems and models cover a wide range of securities firms and are relied upon by banking organizations for the allocation of economic capital and for other purposes. This commenter argued that reliance on such systems is consistent with the internal-ratings-based approach that is a major focus of the potential revisions to the Basel Accord set forth in the Basel Committee's January 2000 consultative paper. However, it is premature to adopt such an option in this rulemaking. The broader Basel consultative process is addressing outstanding issues related to the adoption of such an internal ratings approach, and the Agencies may reconsider this position once the Basel process is concluded.

In response to commenters who argued that the rule could force some securities firms to obtain unneeded ratings to avoid higher borrowing costs, the Agencies have decided to accord a 20 percent risk weight to certain collateralized claims on qualifying securities firms, without regard to the rating standard, provided the claims satisfy certain specified criteria. The Agencies have determined that the requirements imposed by the market on certain collateralized transactions, particularly reverse repurchase/repurchase agreements and securities lending/borrowing transactions, ensure that such claims on qualifying securities firms pose very low credit risk to banking organizations. These market practices are incorporated in the prudential requirements imposed by the final rule.

Under the final rule, the collateralized portion of a claim on a qualifying securities firm is eligible for a 20 percent risk weight provided that the claim arises under a contract that: (1) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation; (2) is collateralized by liquid and readily marketable debt or equity securities; (3) is marked to market daily; (4) is subject to a daily margin maintenance requirement under the standard industry documentation [10]; and (5) can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant jurisdiction.[11] The

[9] Furthermore, consistent with the Recourse Rule, if ratings are available from more than one rating agency, the lowest rating will be used to determine whether the rating standard has been met.

[10] The collateralized portion of the claim is the portion covered by the market value of the collateral. Remargining of collateral should be executed on a daily basis, taking into account any change in a banking organization's exposure to the counterparty under the claim in relation to the market value of the collateral held in support of the claim.

[11] For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code, respectively (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation

Continued

collateralization of such a claim should be consistent with sound industry practice for the type of transaction, such as a securities borrowing transaction. The final rule accords such collateralized claims on qualifying securities firms a 20 percent risk weight (if the claims are not otherwise eligible for a zero percent risk weight) without the need for the qualifying securities firm or its parent company to comply with the rating standard of the final rule. If the claim were off balance sheet, the claim would continue to be converted to an on-balance sheet credit equivalent amount according to each Agency's risk-based capital rules and then risk weighted.

One commenter contended that the rule should accord a 20 percent risk weight to claims on, or guaranteed by, a subsidiary of a qualifying securities firm if the subsidiary is subject to the same supervision and regulation as its parent qualifying securities firm. However, the Agencies believe that this approach would require extensive qualitative assessment of the regulation of subsidiaries of qualifying securities firms both domestically and internationally and, thus, is of little practical use in setting the risk weight for claims. Consequently, the Agencies have not made this suggested revision to the proposal.

One commenter urged the Agencies to eliminate the reference to ''other regulatory requirements'' in the criteria for qualifying U.S. securities firms. This commenter stated that the term includes regulatory requirements unrelated to securities firms' financial condition and would impose a substantial compliance burden on lending institutions. The commenter believed that a banking organization should be able to rely on representations of a broker-dealer that it meets the relevant regulatory requirements. The Agencies have decided to revise the language of the rule to require qualified U.S. securities firms to be broker-dealers registered with the SEC and comply with the SEC's net capital rule, 17 CFR 240.15c3–1. Thus, the only requirement that banking organizations must track is whether a securities firm is in compliance with its net capital requirement. This requirement should not be burdensome to monitor because securities firms not in compliance with the net capital rule must immediately cease conducting business as broker-dealers, which would usually be well known in the financial sector. Absent information to the contrary, however, the Agencies would allow banking organizations to rely on annual reports or other confirmations of compliance provided by securities firms.

Two commenters urged the Agencies to extend the 20 percent risk weight to over-the-counter (OTC) derivatives dealers registered with the SEC. They noted that such firms are subject to substantial regulation, supervision, and capital requirements. These include limits on the scope of their activities, specified internal risk management controls, recordkeeping and reporting obligations, and a net capital rule. Although these commenters recognized that the oversight of OTC derivatives dealers is less rigorous than for standard broker-dealers, they contended that the level of oversight is sufficient to support a 20 percent risk weight for claims on such firms. One commenter also believed that a risk weight less than 100 percent should be applied to entities subject to regulatory reporting as Material Associated Persons (MAPs) under the SEC's risk assessment rules. This commenter also believed that, if a MAP voluntarily reports information under the guidelines of the Derivatives Policy Group, the risk weight applicable to claims on the MAP should be reduced further.

The Agencies have retained their proposed requirement that U.S. firms must be fully regulated registered broker-dealers as a prerequisite to being qualifying securities firms. The Agencies continue to believe that only claims on those firms that are subject to the SEC's full oversight and net capital requirements should qualify for a capital charge that is only 20 percent of the requirement applied to a broad array of claims on other supervised financial firms, including bank holding companies. The Agencies believe that such oversight and supervision is needed to be consistent with the terms of the revised provision of the Basel Accord giving a 20 percent risk weight to claims on securities firms subject to such supervision and oversight. Accordingly, the final rule only reduces the risk weight of U.S. securities firms that are fully regulated, registered broker-dealers satisfying their net capital requirements. Furthermore, the Agencies are cognizant that claims on OTC derivatives dealers, MAPs, and other companies, with high quality ratings, may qualify for reduced risk weightings under the standardized ratings-based approach currently being considered as part of the revisions to the Basel Accord. The Agencies may reconsider this issue when the Basel Accord is amended.

Finally, one commenter stated that the Agencies should conduct a comprehensive review of all of their regulations to eliminate regulations that are unnecessary or outmoded, thereby hindering the flexibility needed by banking organizations as they adapt to the changing financial services industry. The Agencies note that the Basel risk-based capital framework is undergoing an overall review and revision to make it more risk-focused and flexible for banking organizations. Furthermore, the Agencies currently conduct comprehensive scheduled reviews of their regulations, including their capital guidelines.

In addition to the modifications discussed previously, the final rule states expressly that a claim (including a subordinated claim) on a qualifying securities firm that is an instrument used by the firm to satisfy its applicable capital requirement will be ineligible for the 20 percent risk weight. The Agencies have decided to impose this restriction because banks make subordinated loans to, and purchase subordinated debt of, securities firms that are included in the securities firms' capital under the SEC's net capital rule. As subordinated debt, the credit risk of these loans is higher than on the securities firms' senior debt and general unsecured obligations.

The collateralization provision of the final rule, in general, provides a 20 percent risk weight to claims on, or guaranteed by, qualifying securities firms that are collateralized by debt and equity securities, including corporate debt and equity securities. The Agencies note that the current rules of the OCC and the Board give a zero percent risk weight to certain claims that are collateralized by cash on deposit in the banking organization or by securities issued or guaranteed by the U.S. government or its agencies or other OECD central governments. [12] These current rules of the OCC and the Board require a positive margin of collateral to be maintained on such a claim on a daily basis, taking into account any change in a banking organization's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim. Claims qualifying for a zero percent risk weight under the current rules of the OCC and the Board are unaffected by this final rule giving a 20

Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR part 231).

[12] 12 CFR part 3, appendix A, 3(a)(1)(viii); 12 CFR part 208, appendix A, III.C (1); and 12 CFR part 225, appendix A, III. (C)(1).

percent risk weight to certain claims on qualifying securities firms.[13]

By contrast, OTS and FDIC rules apply a 20 percent risk weight to claims that are collateralized by cash on deposit in depository institutions or by securities issued or guaranteed by OECD governments.[14] To ensure uniform treatment of claims on qualifying securities firms under the final rule, the FDIC and OTS are amending their rules to provide a zero percent risk weight to these claims.[15] The FDIC and OTS are reviewing whether to make further rule changes to apply this risk weight to claims on other entities that are collateralized in this manner, *e.g.,* claims on borrowers that are secured by certificates of deposit.

Final Rule

After careful consideration of the comments received and for the reasons discussed, the Agencies have decided to adopt a final rule according a 20 percent risk weight to certain claims on, or guaranteed by, certain qualifying OECD securities firms. Qualifying U.S. securities firms are broker-dealers that are registered with the Securities and Exchange Commission and satisfy their net capital requirements. Qualifying securities firms incorporated in other OECD countries are those firms that are subject to consolidated supervision and regulation comparable to that applied to banks in such countries. Such regulation must include risk-based capital requirements comparable to those applied to banks under the Basel Accord. With respect to OECD countries that are members of the European Union, compliance with the CAD generally satisfies this requirement.

The final rule applies a 20 percent risk weight to a claim on, or guaranteed by, a qualifying securities firm that has a long-term issuer credit rating or a rating on at least one issue of long-term unsecured debt in one of the three highest investment-grade-rating categories from a rating agency. However, if ratings are available from more than one rating agency, the lowest rating will be used to determine whether the rating standard has been met. The final rule also gives a 20 percent risk weight to a claim on a qualifying securities firm not satisfying the rating criterion if the firm's parent company satisfies the rating criterion and guarantees the claim. In addition, the final rule accords a 20 percent risk weight to a collateralized claim on, or guaranteed by, a qualifying securities firm if the claim arises under a contract that: (1) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed under standard industry documentation; (2) is collateralized by liquid and readily marketable debt or equity securities; (3) is marked to market daily; (4) is subject to a daily margin maintenance requirement under the standard industry documentation; and (5) can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant jurisdiction.

The Agencies are adopting this rule giving a 20 percent risk weight to certain claims on certain qualifying securities firms for several reasons. First, claims on qualifying securities firms satisfying the criteria of the final rule generally pose relatively low credit risk to banking organizations. Second, the 100 percent risk weight applied to claims on securities firms under the Agencies' current capital rules is more stringent than the 20 percent risk weight permitted for claims on qualifying securities firms under the Basel Accord and the CAD. This results in a competitive inequity for U.S. depository institutions, which would be reduced by this final rule.

The Agencies note that this rule will address collateralized transactions conducted with qualifying securities firms where the collateral is a marketable security other than an U.S. or other OECD government security. As noted previously, the OCC and the Board will permit transactions that are collateralized by cash or an U.S. or other OECD government security to be risk weighted according to each Agency's existing risk-based capital rules for collateralized transactions. Furthermore, consistent with the current rules of the OCC and the Board, the FDIC and the OTS are modifying their risk-based capital standards to permit a zero percent risk weight to be assigned to certain claims on qualifying securities firms collateralized by cash on deposit in a bank or securities issued or guaranteed by the central governments of OECD countries (e.g., securities of the U.S. Government and its agencies), as discussed previously. Finally, if the banking organization is subject to the market risk rules of the OCC, Board, or FDIC, and the transaction is a securities borrowing transaction, the risk-based capital for the transaction should be determined according to the Interim Rule on Securities Borrowing Transactions.[16]

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act, the Agencies certify that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it will not have a significant impact on the amount of capital required to be held by small institutions. The rule: (1) Only covers a narrow category of assets, (2) decreases the amount of capital that an institution must hold for those assets, (3) does not significantly change the amount of total capital an institution must hold, and (4) will have a positive impact on an affected institution's capital compliance. Accordingly, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The Agencies have determined that this final rule does not involve a collection of information pursuant to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the use of "plain language" in all proposed and final rules published after January 1, 2001. The Agencies invited comments on whether the proposed rule was written in "plain language" and how to make the proposed rule easier to understand. No commenter indicated that the proposed rule needs to be revised to make it easier to understand. The final rule is substantially similar to the proposed rule and the Agencies believe the final rule is written plainly and clearly.

[13] Also, this final rule is in addition to, and does not modify, the current rules of the Agencies that already permit a 20 percent risk weight to be assigned to certain claims that are collateralized by securities issued or guaranteed by U.S. government-sponsored agencies, multilateral lending institutions, or regional development banks.

[14] 12 CFR part 325, Appendix A, II.C and 12 CFR 567.6(a)(ii)(B) and (N).

[15] The Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4803(a)) requires the Agencies to work jointly to make uniform their regulations and guidelines implementing common statutory or supervisory policies. Although the current risk-based capital rules of the OCC and the Board with regard to collateralized claims that qualify for the zero percent risk weighting are not affected by this final rule, the FDIC and OTS are amending their risk-based capital standards to ensure that the Agencies have consistency of application in how claims on qualifying securities firms are risk-weighted when the claims are collateralized by cash on deposit in the lending depository institution or by securities issued or guaranteed by the U.S. or other OECD central governments (including U.S. government agencies).

[16] 12 CFR part 3, appendix B, 3(a)(1)(ii) (OCC); 12 CFR part 208, appendix E, 3(a)(1)(Board); 12 CFR part 225, appendix E, 3(a)(1)(Board); and 12 CFR part 325, appendix C, 3(a)(1)(FDIC).

Executive Order 12866

The Comptroller of the Currency and the Director of the OTS have determined that this final rule is not a ''significant regulatory action'' for purposes of Executive Order 12866. This rule reduces the current risk weighting applied to claims on qualifying securities firms and will not impose additional cost or burden on institutions.

OCC and OTS—Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4, (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. As discussed in the preamble, this final rule reduces the current risk-based capital charge for claims on, and claims guaranteed by, qualifying securities firms. Accordingly, the OCC and OTS have determined that this rule will not result in the expenditure by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. In fact, this rule will not impose any new cost or burden on state, local, or tribal governments, or the private sector. Therefore, the OCC and OTS have not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

FDIC Assessment of Impact of Federal Regulation On Families

The FDIC has determined that this final rule will not affect family well being within the meaning of section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L.105–277).

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Capital, National banks, Reporting and recordkeeping requirements, Risk.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Crime, Currency, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities.

12 CFR Part 325

Administrative practice and procedure, Banks, banking, Capital adequacy, Reporting and recordkeeping requirements, Savings associations, State non-member banks.

12 CFR Part 567

Capital, Reporting and recordkeeping requirements, Savings associations.

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set out in the joint preamble, the Office of the Comptroller of the Currency amends part 3 of chapter I of title 12 of the Code of Federal Regulations as follows:

PART 3—MINIMUM CAPITAL RATIOS; ISSUANCE OF DIRECTIVES

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

Authority: 12 U.S.C. 93a, 161, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, and 3909.

2. In appendix A to part 3:

A. In section 1, paragraphs (c)(19) through (c)(34) are redesignated as (c)(20) through (c)(35);

B. In section 1, new paragraph (c)(19) is added;

C. In section 3, footnotes 11a and 11b are redesignated as 11b and 11c;

D. In section 3, new paragraphs (a)(2)(xiii) and (a)(4)(x) are added; and

E. In section 3, new footnote 11a is added.

The additions read as follows:

Appendix A to Part 3—Risk-Based Capital Guidelines

Section 1. Purpose, Applicability of Guidelines, and Definitions.

* * * * *

(c) * * *

(19) *Nationally recognized statistical rating organization (NRSRO)* means an entity recognized by the Division of Market Regulation of the Securities and Exchange Commission (or any successor Division) (Commission or SEC) as a nationally recognized statistical rating organization for various purposes, including the Commission's uniform net capital requirements for brokers and dealers.

* * * * *

Section 3. Risk Categories/Weights for On-Balance Sheet Assets and Off-Balance Sheet Items.

* * * * *

(a) * * *

(2) * * *

(xiii) Claims on, or guaranteed by, a securities firm incorporated in an OECD country, that satisfies the following conditions:

(A) If the securities firm is incorporated in the United States, then the firm must be a broker-dealer that is registered with the SEC and must be in compliance with the SEC's net capital regulation (17 CFR 240.15c3(1)).

(B) If the securities firm is incorporated in any other OECD country, then the bank must be able to demonstrate that the firm is subject to consolidated supervision and regulation, including its subsidiaries, comparable to that imposed on depository institutions in OECD countries; such regulation must include risk-based capital standards comparable to those applied to depository institutions under the Basel Capital Accord.[11a]

(C) The securities firm, whether incorporated in the United States or another OECD country, must also have a long-term credit rating in accordance with section 3(a)(2)(xiii)(C)(*1*) of this appendix A; a parent company guarantee in accordance with section 3(a)(2)(xiii)(C)(*2*) of this appendix A; or a collateralized claim in accordance with section 3(a)(2)(xiii)(C)(*3*) of this appendix A. Claims representing capital of a securities firm must be risk weighted at 100 percent in accordance with section 3(a)(4) of this Appendix A.

(*1*) *Credit rating.* The securities firm must have either a long-term issuer credit rating or a credit rating on at least one issue of long-term unsecured debt, from a NRSRO that is in one of the three highest investment-grade categories used by the NRSRO. If the securities firm has a credit rating from more than one NRSRO, the lowest credit rating must be used to determine the credit rating under this paragraph.

(*2*) *Parent company guarantee.* The claim on, or guaranteed by, the securities firm must be guaranteed by the firm's parent company, and the parent company must have either a long-term issuer credit rating or a credit rating on at least one issue of long-term unsecured debt, from a NRSRO that is in one of the three highest investment-grade categories used by the NRSRO.

(*3*) *Collateralized claim.* The claim on the securities firm must be collateralized subject to all of the following requirements:

(*i*) The claim must arise from a reverse repurchase/repurchase agreement or securities lending/borrowing contract executed using standard industry documentation.

[11a] *See* Accord on International Convergence of Capital Measurement and Capital Standards as adopted by the Basle Committee on Banking Regulations and Supervisory Practices (renamed as the Basel Committee on Banking Supervision), dated July 1988 (amended 1998).

(*ii*) The collateral must consist of debt or equity securities that are liquid and readily marketable.

(*iii*) The claim and collateral must be marked-to-market daily.

(*iv*) The claim must be subject to daily margin maintenance requirements under standard industry documentation.

(*v*) The contract from which the claim arises can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceedings, and the security or collateral agreement will not be stayed or avoided under the applicable law of the relevant jurisdiction. To be exempt from the automatic stay in bankruptcy in the United States, the claim must arise from a securities contract or a repurchase agreement under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (912 U.S.C. 4407), or the Regulation EE (12 CFR part 231).

* * * * *

(4) * * *

(x) Claims representing capital of a securities firm notwithstanding section 3(a)(2)(xiii) of this appendix A.

* * * * *

Dated: March 25, 2002.

John D. Hawke, Jr.,

Comptroller of the Currency.

Federal Reserve System

12 CFR Chapter II

For the reasons set forth in the joint preamble, parts 208 and 225 of chapter II of title 12 of the Code of Federal Regulations are amended as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for part 208 continues to read as follows:

Authority: 12 U.S.C. 24, 36, 92a, 93a, 248(a), 248(c), 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1816, 1818, 1820(d)(9), 1823(j), 1828(o), 1831, 1831o, 1831p–1, 1831r–1, 1835(a), 1882, 2901–2907, 3105, 3310, 3331–3351, and 3906–3909; 15 U.S.C. 78b, 78l(b), 781(g), 781(i), 78o–4(c)(5), 78q, 78q–1, and 78w; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

2. In appendix A to part 208, the following amendments are made:

a. In sections III. and IV., footnotes 38 through 54 are redesignated as footnotes 41 through 57;

b. In section III.C.2. under the title *Category 2: 20* percent, the three existing paragraphs are designated as 2.a. through 2.c., and a new paragraph 2.d. is added with new footnotes 38, 39, and 40;

c. In section III.C.4.b., a new sentence is added at the end of the paragraph; and

d. In Attachment III, under Category 2, new paragraphs 12 and 13 are added. The revision and additions read as follows:

Appendix A to Part 208—Capital Adequacy Guidelines for State Member Banks: Risk-Based Measure

* * * * *

III. * * *

C. * * *

2. * * *

d. This category also includes claims [38] on, or guaranteed by, a qualifying securities firm incorporated in the United States or other member of the OECD-based group of countries [39] provided that: The qualifying securities firm has a long-term issuer credit rating, or a rating on at least one issue of long-term debt, in one of the three highest investment grade rating categories from a nationally recognized statistical rating organization; or the claim is guaranteed by the firm's parent company and the parent company has such a rating. If ratings are available from more than one rating agency, the lowest rating will be used to determine whether the rating requirement has been met. This category also includes a collateralized claim on a qualifying securities firm in such a country, without regard to satisfaction of the rating standard, provided that the claim arises under a contract that:

(1) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(2) Is collateralized by debt or equity securities that are liquid and readily marketable;

(3) Is marked-to-market daily;

(4) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(5) Can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant jurisdiction.[40]

* * * * *

4. * * *

b. * * * This category also includes claims representing capital of a qualifying securities firm.

* * * * *

Attachment III—Summary of Risk Weights and Risk Categories for State Member Banks

* * * * *

Category 2: 20 Percent * * *

12. Claims on, and claims guaranteed by, qualifying securities firms incorporated in the United States or other member of the OECD-based group of countries provided that:

a. The qualifying securities firm has a rating in one of the top three investment grade rating categories from a nationally recognized statistical rating organization; or

b. The claim is guaranteed by a qualifying securities firm's parent company with such a rating.

13. Certain collateralized claims on qualifying securities firms in the United States or other member of the OECD-based group of countries, without regard to satisfaction of the rating standard, provided that the claim arises under a contract that:

a. Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

b. Is collateralized by liquid and readily marketable debt or equity securities;

c. Is marked to market daily;

d. Is subject to a daily margin maintenance requirement under the standard industry documentation; and

e. Can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant jurisdiction.

* * * * *

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p-1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3907, and 3909.

2. In appendix A to part 225, the following amendments are made:

---

[38] Claims on a qualifying securities firm that are instruments the firm, or its parent company, uses to satisfy its applicable capital requirements are not eligible for this risk weight.

[39] With regard to securities firms incorporated in the United States, qualifying securities firms are those securities firms that are broker-dealers registered with the Securities and Exchange Commission (SEC) and are in compliance with the SEC's net capital rule, 17 CFR 240.15c3–1. With regard to securities firms incorporated in any other country in the OECD-based group of countries, qualifying securities firms are those securities firms that a bank is able to demonstrate are subject to consolidated supervision and regulation (covering their direct and indirect subsidiaries, but not necessarily their parent organizations) comparable to that imposed on banks in OECD countries. Such regulation must include risk-based capital requirements comparable to those applied to banks under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998) (Basel Accord).

[40] For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code, respectively (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231).

a. In sections III. and IV., footnotes 42 through 58 are redesignated as footnotes 45 through 61;

b. In section III.C.2. under the title Category 2: 20 percent, the three existing paragraphs are designated as 2.a. through 2.c., and a new paragraph 2.d. is added with new footnotes 42, 43, and 44;

c. In section III.C.4.b., a new sentence is added at the end of the paragraph; and

d. In Attachment III, under Category 2, new paragraphs 12 and 13 are added.

The revision and additions read as follows:

Appendix A to Part 225—Capital Adequacy Guidelines for Bank Holding Companies: Risk-Based Measure

* * * * *

III. * * *

C. * * *

2. * * *

d. This category also includes claims [42] on, or guaranteed by, a qualifying securities firm [43] incorporated in the United States or other member of the OECD-based group of countries provided that: the qualifying securities firm has a long-term issuer credit rating, or a rating on at least one issue of long-term debt, in one of the three highest investment grade rating categories from a nationally recognized statistical rating organization; or the claim is guaranteed by the firm's parent company and the parent company has such a rating. If ratings are available from more than one rating agency, the lowest rating will be used to determine whether the rating requirement has been met. This category also includes collateralized claims on, or guaranteed by, a qualifying securities firm in such a country, without regard to satisfaction of the rating standard, provided the claim arises under a contract that:

(1) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed under standard industry documentation;

(2) Is collateralized by debt or equity securities that are liquid and readily marketable;

(3) Is marked-to-market daily;

(4) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(5) Can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant jurisdiction. [44]

* * * * *

4. * * *

b.* * * This category also includes claims representing capital of a qualifying securities firm.

* * * * *

Attachment III—Summary of Risk Weights and Risk Categories for Bank Holding Companies

* * * * *

Category 2: 20 Percent * * *

12. Claims on, and claims guaranteed by, qualifying securities firms incorporated in the United States or other member of the OECD-based group of countries provided that:

a. The qualifying securities firm has a rating in one of the top three investment grade rating categories from a nationally recognized statistical rating organization; or

b. The claim is guaranteed by a qualifying securities firm's parent company with such a rating.

13. Certain collateralized claims on qualifying securities firms in the United States or other member of the OECD-based group of countries, without regard to satisfaction of the rating standard, provided that the claim arises under a contract that:

a. Is a reverse repurchase/ repurchase agreement or securities lending/borrowing transaction executed under standard industry documentation;

b. Is collateralized by liquid and readily marketable debt or equity securities;

c. Is marked to market daily;

d. Is subject to a daily margin maintenance requirement under the standard industry documentation; and

e. Can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant jurisdiction.

* * * * *

4. * * * This category also includes claims representing capital of a qualifying securities firm.

* * * * *

By order of the Board of Governors of the Federal Reserve System, March 27, 2002.

Jennifer J. Johnson,

Secretary of the Board.

Federal Deposit Insurance Corporation

12 CFR Chapter III

For the reasons set forth in the joint preamble, part 325 of chapter III of title 12 of the Code of Federal Regulations is amended as follows:

PART 325—CAPITAL MAINTENANCE

1. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819 (Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note).

2. In appendix A to part 325:

a. In section II.B.3., the phrase ''U.S. depository institutions and foreign banks'' is removed and the phrase ''U.S. depository institutions, foreign banks, and qualifying OECD-based securities firms'' is added in its place;

b. Redesignate footnotes 27 through 47 as footnotes 30 through 50;

c. Add new footnotes 27 through 29;

d. In section II.C., under *Category 1—Zero Percent Risk Weight*, add a new paragraph to follow the existing two paragraphs, and redesignate these three paragraphs as paragraphs a. through c.

e. In section II.C., under *Category 2—20 Percent Risk Weight,* amend paragraph a. by adding three new sentences and paragraphs (1) through (5);

f. In section II.C., under *Category 4—100 Percent Risk Weight,* add a new paragraph (b)(12);

g. In Table II, add a new paragraph (7) under *Category 1—Zero Percent Risk Weight,* and

h. In Table II, add new paragraphs (13) and (14) under *Category 2—20 Percent Risk Weight.*

Appendix A to Part 325—Statement of Policy on Risk-Based Capital

* * * * *

II. * * *

C. * * *

Category 1—Zero Percent Risk Weight

c. This category also includes claims on, and claims guaranteed by, qualifying

[42] Claims on a qualifying securities firm that are instruments the firm, or its parent company, uses to satisfy its applicable capital requirement are not eligible for this risk weight.

[43] With regard to securities firms incorporated in the United States, qualifying securities firms are those securities firms that are broker-dealers registered with the Securities and Exchange Commission and are in compliance with the SEC's net capital rule, 17 CFR 240.15c3–1. With regard to securities firms incorporated in other countries in the OECD-based group of countries, qualifying securities firms are those securities firms that a banking organization is able to demonstrate are subject to consolidated supervision and regulation (covering their direct and indirect subsidiaries, but not necessarily their parent organizations) comparable to that imposed on banks in OECD countries. Such regulation must include risk-based capital requirements comparable to those applied to banks under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998) (Basel Accord).

[44] For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or repurchase agreement subject to section 555 or 559 of the Bankruptcy Code, respectively (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR Part 231).

securities firms incorporated in the United States or other members of the OECD-based group of countries that are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States or OECD central governments (including U.S. government agencies), provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

Category 2—20 Percent Risk Weight

a. * * * This category also includes a claim [27] on, or guaranteed by, qualifying securities firms incorporated in the United States or other member of the OECD-based group of countries [28] provided that: the qualifying securities firm has a long-term issuer credit rating, or a rating on at least one issue of long-term debt, in one of the three highest investment grade rating categories from a nationally recognized statistical rating organization; or the claim is guaranteed by the firm's parent company and the parent company has such a rating. If ratings are available from more than one rating agency, the lowest rating will be used to determine whether the rating requirement has been met. This category also includes a collateralized claim on a qualifying securities firm in such a country, without regard to satisfaction of the rating standard, provided that the claim arises under a contract that:

(1) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(2) Is collateralized by debt or equity securities that are liquid and readily marketable;

(3) Is marked-to-market daily;

(4) Is subject to a daily margin maintenance requirement under the standardized documentation; and

(5) Can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant jurisdiction. [29]

* * * * *

Category 4—100 Percent Risk Weight

(b) * * *

(12) Claims representing capital of a qualifying securities firm.

* * * * *

Table II—Summary of Risk Weights and Risk Categories

* * * * *

Category 1—Zero Percent Risk Weight

* * * * *

(7) Claims on, or guaranteed by, qualifying securities firms incorporated in the United States or other members of the OECD-based group of countries that are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States or OECD central governments (including U.S. government agencies), provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

* * * * *

Category 2—20 Percent Risk Weight

* * * * *

(13) Claims on, and claims guaranteed by, qualifying securities firms incorporated in the United States or other member of the OECD-based group of countries provided that:

a. The qualifying securities firm has a rating in one of the top three investment grade rating categories from a nationally recognized statistical rating organization; or

b. The claim is guaranteed by a qualifying securities firm's parent company with such a rating.

(14) Certain collateralized claims on qualifying securities firms in the United States or other member of the OECD-based group of countries, without regard to satisfaction of the rating standard, provided that the claim arises under a contract that:

a. Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed under standard industry documentation;

b. Is collateralized by liquid and readily marketable debt or equity securities;

c. Is marked to market daily;

d. Is subject to a daily margin maintenance requirement under the standard documentation; and

e. Can be liquidated, terminated, or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided, under applicable law of the relevant country.

* * * * *

By order of the Board of Directors.

Dated at Washington, DC, this 29th day of January, 2002.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

Office of Thrift Supervision

12 CFR Chapter V

For the reasons set forth in the joint preamble, the Office of Thrift Supervision amends part 567 of chapter V of title 12 of the Code of Federal Regulations as follows:

PART 567—CAPITAL

1. The authority citation for part 567 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828 (note).

2. Section 567.1 is amended by adding the definition of qualified securities firm to read as follows:

§ 567.1 Definitions.

* * * * *

Qualifying securities firm. The term *qualifying securities firm* means: (1) A securities firm incorporated in the United States that is a broker-dealer that is registered with the Securities and Exchange Commission (SEC) and that complies with the SEC's net capital regulations (17 CFR 240.15c3(1)); and

(2) A securities firm incorporated in any other OECD-based country, if the savings association is able to demonstrate that the securities firm is subject to consolidated supervision and regulation (covering its subsidiaries, but not necessarily its parent organizations) comparable to that imposed on depository institutions in OECD countries. Such regulation must include risk-based capital requirements comparable to those imposed on depository institutions under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998).

* * * * *

[27] Claims on a qualifying securities firm that are instruments the firm, or its parent company, uses to satisfy its applicable capital requirements are not eligible for this risk weight.

[28] With regard to securities firms incorporated in the United States, qualifying securities firms are those securities firms that are broker-dealers registered with the Securities and Exchange Commission (SEC) and are in compliance with the SEC's net capital rule, 17 CFR 240.15c3–1. With regard to securities firms incorporated in any other country in the OECD-based group of countries, qualifying securities firms are those securities firms that a bank is able to demonstrate are subject to consolidated supervision and regulation (covering their direct and indirect subsidiaries, but not necessarily their parent organizations) comparable to that imposed on banks in OECD countries. Such regulation must include risk-based capital requirements comparable to those applied to banks under the Accord on International Convergence of Capital Measurement and Capital Standards (1988, as amended in 1998) (Basel Accord). Claims on a qualifying securities firm that are instruments the firm, or its parent company, uses to satisfy its applicable capital requirements are not eligible for this risk weight and are generally assigned to at least a 100 percent risk weight. In addition, certain claims on qualifying securities firms are eligible for a zero percent risk weight if the claims are collateralized by cash on deposit in the lending bank or by securities issued or guaranteed by the United States or OECD central governments (including U.S. government agencies), provided that a positive margin of collateral is required to be maintained on such a claim on a daily basis, taking into account any change in a bank's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

[29] For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code, respectively (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or the Board's Regulation EE (12 CFR part 231).

3. Section 567.6 is amended by adding paragraphs (a)(1)(i)(H) and (a)(1)(ii)(H) to read as follows:

§ 567.6 Risk-based capital credit risk-weight categories.

(a) * * *

(1) * * *

(i) * * *

(H) Claims on, and claims guaranteed by, a qualifying securities firm that are collateralized by cash on deposit in the savings association or by securities issued or guaranteed by the United States Government or its agencies, or the central government of an OECD country. To be eligible for this risk weight, the savings association must maintain a positive margin of collateral on the claim on a daily basis, taking into account any change in a savings association's exposure to the obligor or counterparty under the claim in relation to the market value of the collateral held in support of the claim.

(ii) * * *

(H) Claims on, and claims guaranteed by, a qualifying securities firm, subject to the following conditions:

(*1*) A qualifying securities firm must have a long-term issuer credit rating, or a rating on at least one issue of long-term unsecured debt, from a NRSRO. The rating must be in one of the three highest investment grade categories used by the NRSRO. If two or more NRSROs assign ratings to the qualifying securities firm, the savings association must use the lowest rating to determine whether the rating requirement of this paragraph is met. A qualifying securities firm may rely on the rating of its parent consolidated company, if the parent consolidated company guarantees the claim.

(*2*) A collateralized claim on a qualifying securities firm does not have to comply with the rating requirements under paragraph (a)(1)(ii)(H)(*1*) of this section if the claim arises under a contract that:

(*i*) Is a reverse repurchase/repurchase agreement or securities lending/borrowing transaction executed using standard industry documentation;

(*ii*) Is collateralized by debt or equity securities that are liquid and readily marketable;

(*iii*) Is marked-to-market daily;

(*iv*) Is subject to a daily margin maintenance requirement under the standard industry documentation; and

(*v*) Can be liquidated, terminated or accelerated immediately in bankruptcy or similar proceeding, and the security or collateral agreement will not be stayed or avoided under applicable law of the relevant jurisdiction. For example, a claim is exempt from the automatic stay in bankruptcy in the United States if it arises under a securities contract or a repurchase agreement subject to section 555 or 559 of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)), or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4401–4407), or Regulation EE (12 CFR part 231).

(*3*) If the securities firm uses the claim to satisfy its applicable capital requirements, the claim is not eligible for a risk weight under this paragraph (a)(1)(ii)(H);

* * * * *

Dated: February 1, 2002.

By the Office of Thrift Supervision.

James E. Gilleran,

Director.

[FR Doc. 02–8142 Filed 4–8–02; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1118]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; official staff interpretation.

SUMMARY: The Board is publishing revisions to the official staff commentary to Regulation Z, which implements the Truth in Lending Act. The commentary applies and interprets the requirements of Regulation Z. The revisions clarify how creditors that place Truth in Lending Act disclosures on the same document with the credit contract may satisfy the requirement for providing the disclosures, in a form the consumer may keep, before consummation. In addition, the revisions provide guidance on disclosing costs for certain credit insurance policies and on the definition of ''business day'' for purposes of the right to rescind certain home-secured loans. The Board is also publishing technical corrections to the commentary and regulation.

DATES: The rule is effective April 9, 2002.

FOR FURTHER INFORMATION CONTACT: David A. Stein, Senior Attorney, or Dan S. Sokolov, Attorney; Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (''TDD'') only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, is to promote the informed use of consumer credit by providing for disclosures about its terms and cost. The act requires creditors to disclose the cost of credit as a dollar amount (the finance charge) and as an annual percentage rate. Uniformity in creditors' disclosures is intended to assist consumers in comparison shopping for credit. TILA requires additional disclosures for loans secured by consumers' homes and permits consumers to rescind certain transactions that involve their principal dwelling. In addition, the act regulates certain practices of creditors.

TILA is implemented by the Board's Regulation Z (12 CFR part 226). The Board's official staff commentary (12 CFR part 226 (Supp. I)) interprets the regulation, and provides guidance to creditors in applying the regulation to specific transactions. Good faith compliance with the commentary affords protection from liability under section 130(f) of TILA (15 U.S.C. 1640(f)). The commentary is a substitute for individual staff interpretations; it is updated periodically to address significant questions that arise.

In December 2001, the Board published for comment proposed changes to the commentary (66 FR 64381, December 13, 2001). The Board received approximately 50 comment letters. About half of the comments were from financial institutions, other creditors, and their representatives. Most of the remaining comment letters were from consumer advocates. The comment letters focused mainly on the proposed comment concerning disclosures placed on the same document with the credit contract. Although commenters generally supported the proposal, most requested additional clarifications. Commenters also supported the proposed clarification concerning disclosure of insurance premiums, but were divided on the proposed comment concerning the definition of ''business day.''

As discussed below, the commentary is being adopted substantially as proposed. In response to commenters' suggestions, some revisions have been made for clarity. In addition, several technical corrections are being made to the commentary and regulation. The

revisions represent a clarification of the existing law and do not impose new requirements.

Generally, updates to the Board's staff commentary are effective upon publication. Consistent with the requirements of TILA section 105(d), the Board typically provides an implementation period of six months or longer. During that period compliance with the published update is optional to afford creditors time to adjust their disclosure documents. The commentary revisions discussed below do not involve different disclosure requirements. Accordingly, the Board has determined that delayed implementation of the revisions is unnecessary.

II. Proposed Revisions

Subpart A—General

Section 226.2 Definitions and Rules of Construction

2(a) Definitions

2(a)(6) Business Day

Generally, when consumers have a right to rescind a home-secured loan, they may exercise the right until midnight of the third business day following consummation or the delivery of certain disclosures, whichever occurs last. For purposes of rescission, section 226.2(a)(6) defines ''business day'' to mean all calendar days except Sundays and the federal legal holidays listed in 5 U.S.C. 6103(a). The statute lists ten legal holidays; it identifies four holidays by a specific date (New Year's Day, January 1; Independence Day, July 4; Veterans Day, November 11; Christmas Day, December 25). Comment 2(a)(6)-2 was proposed to clarify that for these four holidays, only the date specified in the statute is considered a legal holiday for purposes of rescission. Thus, if the date specified in the statute falls on a weekend, the Friday before the specified date or the Monday following it are considered business days even if government offices are closed in observance of the holiday.

Comments on this proposal were about evenly divided. Several industry trade associations supported the proposal. Some consumer advocates and a few commenters representing small financial institutions were concerned that confusion would result if weekdays observed as holidays are considered business days. Some commenters expressed concern that consumers might lose a day of their rescission period if they are unable to postmark or otherwise deliver their written notice of rescission on weekdays observed as holidays.

The comment is being adopted as proposed. The comment does not represent a new rule, but merely restates and clarifies the requirement contained in section 226.2(a)(6) of the regulation. Consumers' ability to exercise their right to rescind is not affected because consumers can mail a notice of rescission on the observed holiday; the notice is not required to be postmarked or delivered on that day. Consumers are not likely to be confused because the rescission notice must indicate the specific date that the rescission period expires. *See* § 226.15(b)(5), § 226.23(b)(1)(v). A creditor may extend the rescission period at its option.

Section 226.4 Finance Charge

4(d) Insurance and Debt Cancellation Coverage

Comment 4(d)–12(i) is adopted substantially as proposed. Under section 226.4(d), amounts paid for credit insurance or debt cancellation coverage may be excluded from the finance charge if the creditor discloses the fee or premium for the initial term of coverage, among other conditions. As revised, comment 4(d)–12(i) clarifies that creditors have the option of providing disclosures on the basis of one year of coverage where the fee or premium for the coverage is assessed periodically and the consumer is under no obligation to continue the coverage. The revision clarifies that this option applies when the consumer can cancel the coverage, whether or not the consumer has made an initial payment. Those that commented on this aspect of the proposal generally supported the change.

Several industry commenters urged the Board to specify that unit-cost disclosures would be permissible when premiums for coverage on closed-end loans are assessed periodically and the coverage can be cancelled. Regulation Z permits unit-cost disclosures in closed-end transactions only in limited circumstances. See § 226.4(d)(1)(ii). Accordingly, the commenters' suggestion is beyond the scope of the proposed commentary revision.

Subpart B—Open-End Credit

Section 226.6 Initial Disclosure Statement

6(b) Other Charges

The Board is adopting a technical amendment to comment 6(b)–1 to conform the citation in paragraph vi. to comment 4(a)–4, as amended (60 FR 16771, April 3, 1995). No substantive change is intended.

Subpart C—Closed-End Credit

Section 226.17 General Disclosure Requirements

17(a) Form of Disclosures

The Board is adopting a technical amendment to footnote 38 to conform the citation regarding variable-rate disclosures to § 226.18(f)(1)(iv) of the regulation. No substantive change is intended.

17(b) Time of Disclosures

The Board proposed to add comment 17(b)–3 to clarify how creditors that use a single document for the credit contract and TILA disclosures may satisfy the requirement that disclosures be provided to the consumer before consummation in a form the consumer may keep. For the reasons discussed below, the comment is being adopted substantially as proposed.

The practice of putting TILA disclosures on the same document with the credit contract is common in connection with motor vehicle installment sales. Several recent court decisions have addressed whether creditors that use a single document must provide consumers with a separate copy of the disclosures to keep before providing a second copy that the consumer may execute to become obligated on the credit contract. The court decisions have not been uniform in their result.

The comment clarifies that creditors satisfy TILA by giving a copy of the document containing the disclosures to the consumer to read and sign. Commenters generally agreed with this aspect of the proposal. In response to commenters' suggestions, the final comment has been revised to clarify that a creditor need not give the consumer two copies.

Comment 17(b)–3 also clarifies that it is not sufficient for the creditor merely to show the document containing the TILA disclosures to the consumer before the consumer signs and becomes obligated. Rather, a creditor must give the disclosures to the consumer, so that the consumer is free to take possession of and review the disclosures in their entirety before signing.

Commenters disagreed over the extent to which the comment should address the ability of a consumer to take physical possession of, and keep, the document containing the disclosures. Consumer advocates believe that a consumer should be able to take possession of and keep the disclosure whether or not the consumer consummates the transaction at that time. Some industry commenters

contended that the creditor need only present or show the document to the consumer.

Comment 17(b)–3 is being adopted substantially as proposed. Allowing a consumer to take possession of and review TILA disclosures in their entirety—including any required information that may be on the reverse side or continued on the next page—is essential to meaningful disclosure and fulfillment of the regulation's requirement that disclosure be in a form the consumer may keep. Whether or not the consumer signs and becomes obligated, the consumer will have received a copy of the disclosures.

Some industry commenters asserted that even though creditors must provide consumers written disclosures before consummation, there is no requirement that consumers receive a copy to keep at the time the credit transaction is consummated. These commenters suggest that creditors are required only to give consumers a copy to keep within a reasonable time after consummation. The Board believes such a result would be inconsistent with the regulation's requirement that consumers receive a copy, in a form they may keep, before consummation. Under the final comment as adopted, consumers must receive a copy to keep at the time they become obligated.

A few commenters were concerned that the proposal could be interpreted to require a creditor to keep open indefinitely its offer of credit if a consumer decides not to sign and retains a copy of the unsigned document. The extent to which an offer of credit remains open is a matter of state law and is not determined by TILA.

Several commenters questioned whether the language in the proposed comment allowing consumers to ''take possession'' of the disclosures was consistent with creditors' ability to provide the disclosures electronically if the consumer consents. Comment 17(b)–3 is not intended to affect the rules governing the use of electronic communications under Regulation Z.

Subpart E—Special Rules for Certain Home Mortgage Transactions

Section 226.32 Requirements for Certain Closed-end Home Mortgages

32(c) Disclosures

The Board is republishing comment 32(c)(3)–3 in its entirety, as amended in December 2001, to reinsert language that was inadvertently deleted due to a technical error (66 FR 65604, December 20, 2001). A technical amendment is also made to comment 32(c)(4)–1 to conform a citation to section 226.19(b)(2), as amended. No substantive changes are intended.

List of Subjects in 12 CFR Part 226

Consumer protection, Disclosures, Federal Reserve System, Truth in lending.

Text of Revisions

Comments are numbered to comply with **Federal Register** publication rules. For the reasons set forth in the preamble, the Board amends 12 CFR part 226 as follows:

PART 226—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604 and 1637(c)(5).

§ 226.17 [Amended]

2. Section 226.17, in paragraph (a)(1), footnote 38, is amended by removing ''§ 226.18(f)(4)'' and adding ''§ 226.18(f)(1)(iv)'' in its place.

3. In Supplement I to Part 226:

a. Under *Section 226.2—Definitions and Rules of Construction, under 2(a)(6) Business Day,* paragraph 2. is revised.

b. Under *Section 226.4—Finance Charge,* under *4(d) Insurance and Debt Cancellation Coverage,* paragraph 12. is revised.

c. Under *Section 226.6—Initial Disclosure Requirements,* under *Paragraph 6(b),* paragraph 1.vi. is amended by removing ''comment 4(a)–5'' and adding ''comment 4(a)–4'' in its place.

d. Under *Section 226.17—General Disclosure Requirements,* under *17(b) Time of Disclosures,* a new paragraph 3. is added.

e. Under *Section 226.32—Requirements for Certain Closed-End Home Mortgages,* under *Paragraph 32(c)(3),* paragraph 1. is revised; and under *Paragraph 32(c)(4),* paragraph 1. is amended by removing ''§ 226.19(b)(2)(x)'' and adding § 226.19(b)(2)(viii)(B)'' in its place.

Supplement I to Part 226—Official Staff Interpretations

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Subpart A—General

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§ 226.2—Definition and Rules of Construction

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2(a)(6) Business day.

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2. *Rescission rule.* A more precise rule for what is a business day (all calendar days except Sundays and the federal legal holidays listed in 5 U.S.C. 6103(a)) applies when the right of rescission or mortgages subject to § 226.32 are involved. (See also comment 31(c)(1)–1.) Four federal legal holidays are identified in 5 U.S.C. 6103(a) by a specific date: New Year's Day, January 1; Independence Day, July 4; Veterans Day, November 11; and Christmas Day, December 25. When one of these holidays (July 4, for example) falls on a Saturday, federal offices and other entities might observe the holiday on the preceding Friday (July 3). The observed holiday (in the example, July 3) is a business day for purposes of rescission or the delivery of disclosures for certain high-cost mortgages covered by § 226.32.

* * * * *

§ 226.4—Finance Charge

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4(d) Insurance and debt cancellation coverage.

* * * * *

12. *Initial term; alternative.* i. *General.* A creditor has the option of providing cost disclosures on the basis of an assumed initial term of one year of insurance or debt-cancellation coverage instead of a longer initial term (provided the premium or fee is clearly labeled as being for one year) if:

A. The initial term is indefinite or not clear, or

B. The consumer has agreed to pay a premium or fee that is assessed periodically but the consumer is under no obligation to continue the coverage, whether or not the consumer has made an initial payment.

ii. *Open-end plans.* For open-end plans, a creditor also has the option of providing unit-cost disclosure on the basis of a period that is less than one year if the consumer has agreed to pay a premium or fee that is assessed periodically, for example monthly, but the consumer is under no obligation to continue the coverage.

iii. *Examples.* To illustrate:

A. A credit life insurance policy providing coverage for a 30-year mortgage loan has an initial term of 30 years, even though premiums are paid monthly and the consumer is not required to continue the coverage. Disclosures may be based on the initial term, but the creditor also has the option of making disclosures on the basis of coverage for an assumed initial term of one year.

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Subpart C—Closed-End Credit

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§ 226.17—General Disclosure Requirements

* * * * *

17(b) Time of disclosures.

* * * * *

3. *Disclosures provided on credit contracts.* Creditors must give the required disclosures to the consumer in writing, in a form that the consumer may keep, before consummation of the transaction. *See* § 226.17(a)(1) and (b). Sometimes the disclosures are placed on the

same document with the credit contract. Creditors are not required to give the consumer two separate copies of the document before consummation, one for the consumer to keep and a second copy for the consumer to execute. The disclosure requirement is satisfied if the creditor gives a copy of the document containing the unexecuted credit contract and disclosures to the consumer to read and sign; and the consumer receives a copy to keep at the time the consumer becomes obligated. It is not sufficient for the creditor merely to show the consumer the document containing the disclosures before the consumer signs and becomes obligated. The consumer must be free to take possession of and review the document in its entirety before signing.

i. *Example.* To illustrate:

A. A creditor gives a consumer a multiple-copy form containing a credit agreement and TILA disclosures. The consumer reviews and signs the form and returns it to the creditor, who separates the copies and gives one copy to the consumer to keep. The creditor has satisfied the disclosure requirement.

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

§ 226.32—Requirements for Certain Closed-End Home Mortgages

* * * * *

Paragraph 32(c)(3) Regular payment; balloon payment.

1. *General.* The regular payment is the amount due from the borrower at regular intervals, such as monthly, bimonthly, quarterly, or annually. There must be at least two payments, and the payments must be in an amount and at such intervals that they fully amortize the amount owed. In disclosing the regular payment, creditors may rely on the rules set forth in § 226.18(g); however, the amounts for voluntary items, such as credit life insurance, may be included in the regular payment disclosure only if the consumer has previously agreed to the amounts.

i. If the loan has more than one payment level, the regular payment for each level must be disclosed. For example:

A. In a 30-year graduated payment mortgage where there will be payments of $300 for the first 120 months, $400 for the next 120 months, and $500 for the last 120 months, each payment amount must be disclosed, along with the length of time that the payment will be in effect.

B. If interest and principal are paid at different times, the regular amount for each must be disclosed.

C. In discounted or premium variable-rate transactions where the creditor sets the initial interest rate and later rate adjustments are determined by an index or formula, the creditor must disclose both the initial payment based on the discount or premium and the payment that will be in effect thereafter. Additional explanatory material which does not detract from the required disclosures may accompany the disclosed amounts. For example, if a monthly payment is $250 for the first six months and then increases based on an index and margin, the creditor could use language such as the following: ''Your regular monthly payment will be $250 for six months. After six months your regular monthly payment will be based on an index and margin, which currently would make your payment $350. Your actual payment at that time may be higher or lower.''

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs and the Secretary of the Board under delegated authority, April 2, 2002.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 02–8373 Filed 4–8–02; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–NM–86–AD; Amendment 39–12699; AD 2002–07–05]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B2, A300 B4, A300 B4–600, and A300 B4–600R Series Airplanes; and Model A300 F4–605R Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all Airbus Model A300 B2, A300 B4, A300 B4–600, and A300 B4–600R series airplanes, and Model A300 F4–605R airplanes. This AD requires repetitive inspections for cracking of certain fittings, corrective action if necessary, and, for certain airplanes, a modification. This AD also provides an optional terminating action for the repetitive inspections. The actions specified by this AD are intended to detect and correct propagation of cracks on the frame 40 aft fittings due to local stress concentrations at the upper flange runout of frame 40, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective May 14, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 14, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Airbus Model A300 B2, A300 B4, A300 B4–600, and A300 B4–600R series airplanes; and Model A300 F4–605R airplanes; was published as a supplemental notice of proposed rulemaking (NPRM) in the **Federal Register** on January 4, 2002 (67 FR 530). That action proposed to require repetitive inspections for cracking of certain fittings, corrective action if necessary, and, for certain airplanes, a modification; and would have provided for optional terminating action for the repetitive inspections.

Comments

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

Provide Credit for Prior Inspection and Refer to Terminating Action

One commenter asks the FAA to revise the proposed rule to provide credit for an inspection already performed in accordance with the original issue of Airbus Service Bulletin A300–53–6048, dated January 16, 1996, provided that the inspection is accomplished in conjunction with Airbus Service Bulletin A300–57–6053. The commenter states that this would make the proposed rule consistent with the original issue of the corresponding French airworthiness directive, 98–481–270(B), dated December 2, 1998.

The same commenter also requests that we revise the proposed rule to provide for optional terminating action on Model A300 B4–600 and A300 B4–600R series airplanes and Model A300 F4–605R airplanes. The commenter states that inspection and rework per

Airbus Service Bulletins A300–57–6052 and A300–57–6053 constitutes terminating action for airplanes on which no cracks are found and no subsequent rework is required.

The FAA concurs with the intent of the commenter's request, but we have already accommodated the request previously. We added Note 2 to the first supplemental NPRM to provide credit for an inspection done in accordance with the original issue of Airbus Service Bulletin A300–53–6048. In addition, we revised paragraph (b)(8) and paragraph (e) in the first supplemental NPRM to clarify that modification per Airbus Service Bulletin A300–57–6053, Revision 1, dated October 31, 1995, or Revision 02, dated June 2, 1999, terminates the proposed requirements, regardless of the inspection results. No change to the final rule is necessary.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed in the second supplemental NPRM.

Cost Impact

The FAA estimates that 70 Model A300 B2, A300 B4, A300 B4–600, and A300 B4–600R series airplanes; and Model A300 F4–605R airplanes; of U.S. registry will be affected by this AD.

For affected airplanes, it will take approximately 92 work hours per airplane to accomplish the required modification, at an average labor rate of $60 per work hour. Required parts will cost as much as $874 per airplane. Based on these figures, the cost impact of the required modification is estimated to be as much as $6,394 per airplane.

It will take approximately 10 work hours per airplane to accomplish the required inspection, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the required inspection on U.S. operators is estimated to be $42,000, or $600 per airplane, per inspection cycle.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2002–07–05 Airbus Industrie: Amendment 39–12699. Docket 99–NM–86–AD.

Applicability: All Model A300 B2, A300 B4, A300 B4–600, and A300 B4–600R series airplanes; and Model A300 F4–605R airplanes; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (g) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct propagation of cracks on the frame 40 aft fittings due to local stress concentrations at the upper flange runout of frame 40, which could result in reduced structural integrity of the airplane, accomplish the following:

Modification

(a) For airplanes on which Airbus Modification 10430 has not been done before the effective date of this AD: Concurrently with the inspection required by paragraph (b) of this AD, modify the profile of frame 40 aft fittings per the service information specified in Table 1, as follows:

TABLE 1.—SERVICE INFORMATION

For Model—	Do the actions in accordance with either—	Of Airbus Service Bulletin—	Dated—
(1) A300 B2 and A300 B4 series airplanes	(i) Revision 01 or	A300–53–0296	September 30, 1998.
	(ii) Revision 02	A300–53–0296	May 12, 1999.
(2) A300 B4–600 and A300 B4–600R series airplanes and Model A300 F4–605R airplanes.	(i) Revision 01 or	A300–53–6048	September 30, 1998.
	(ii) Revision 03	A300–53–6048	February 21, 2000.

Note 2: For Model A300 B4–600 and A300 B4–600R series airplanes and Model A300 F4–605R airplanes: Actions performed in accordance with Airbus Service Bulletin A300–53–6048, dated January 16, 1996; or Revision 02, dated May 12, 1999; are

acceptable for compliance with the applicable requirements of this AD.

Note 3: Airbus Service Bulletin A300–53–6048 refers to Airbus Service Bulletin A300–53–6063 as an additional source of service information for accomplishment of certain repairs.

Inspection

(b) For all airplanes, inspect the airplane per Table 2, as follows:

TABLE 2.—INSPECTION REQUIREMENTS

Requirements	Description
(1) Area to inspect	The frame 40 AFT fitting.
(2) Type of inspection	Nondestructive test (NDT).
(3) Compliance time	As specified by paragraph (c) of this AD.
(4) Discrepancies to detect	Cracking.
(5) Service information	Inspect in accordance with the applicable service bulletin listed in Table 1 of this AD.
(6) Follow-on actions if you find no cracking	Repeat the inspection thereafter at the applicable interval specified by Table 3 of this AD.
(7) Corrective actions if you find cracking	Do the actions specified by paragraph (d) of this AD.
(8) Terminating action	The modification specified by paragraph (e) of this AD terminates the requirements of this AD.

Note 4: An NDT per Non-destructive Testing Manual 53–15–30, Part 6, Procedure C, is also acceptable for compliance with the requirements of paragraph (b) of this AD.

(c) Perform the inspection required by paragraph (b) of this AD per the schedule in Table 3 of this AD. For airplanes on which this inspection has been accomplished before the effective date of this AD, the initial compliance time may be extended by the repetitive interval following the date the inspection was accomplished. Table 3 follows:

TABLE 3.—COMPLIANCE TIMES FOR INSPECTION

For Model—	If the total flight cycles accumulated on the airplane as of the effective date of this AD is—	Then inspect—	And repeat the inspection at least every—
(1) A300 B4–600 and A300 B4–600R series airplanes and Model A300 F4–605R airplanes, pre-Modification 10430.	(i) Fewer than 6,200	Before the airplane accumulates 7,700 total flight cycles or 17,710 total flight hours, whichever occurs first.	7,500 flight cycles or 17,250 flight hours, whichever occurs first.
	(ii) At least 6,200 and fewer than 9,700.	Within 1,500 flight cycles or 3,450 flight hours after the effective date of this AD, whichever occurs first.	7,500 flight cycles or 17,250 flight hours, whichever occurs first.
	(iii) At least 9,700	Within 750 flight cycles or 1,725 flight hours after the effective date of this AD, whichever occurs first.	7,500 flight cycles or 17,250 flight hours, whichever occurs first.
(2) A300 B4–600 and A300 B4–600R series airplanes and Model A300 B–4605R airplanes, post-Modification 10430.	(i) Fewer than 19,600	Before the airplane accumulates 21,100 total flight cycles or 48,530 total flight hours, whichever occurs first.	7,500 flight cycles or 17,250 flight hours, whichever occurs first.
	(ii) At least 19,600 and fewer than 23,100.	Within 1,500 flight cycles or 3,450 flight hours after the effective date of this AD, whichever occurs first.	7,500 flight cycles or 17,250 flight hours, whichever occurs first.
	(iii) At least 23,100	Within 750 flight cycles or 1,725 flight hours after the effective date of this AD, whichever occurs first.	7,500 flight cycles or 17,250 flight hours, whichever occurs first.
(3) A300 B2 series airplanes	(i) Fewer than 12,00	Before the airplane accumulates 14,000 total flight cycles or 15,120 total flight hours, whichever occurs first.	5,500 flight cycles or 5,940 flight hours, whichever occurs first.
	(ii) At least 12,000 and fewer than 17,000.	Within 2,000 flight cycles or 2,160 flight hours after the effective date of this AD, whichever occurs first.	5,500 flight cycles or 5,940 flight hours, whichever occurs first.
	(iii) At least 17,000	Within 1,000 flight cycles or 1,080 flight hours after the effective date of this AD, whichever occurs first.	5,500 flight cycles or 5,940 flight hours, whichever occurs first.
(4) A300 B4–100 series airplanes.	(i) Fewer than 9,500	Before the airplane accumulates 11,500 total flight cycles or 15,295 total flight hours, whichever occurs first.	4,500 flight cycles or 5,985 flight hours, whichever occurs first.
	(ii) At least 9,500 and fewer than 14,500.	Within 2,000 flight cycles or 2,660 flight hours after the effective date of this AD, whichever occurs first.	4,500 flight cycles or 5,985 flight hours, whichever occurs first.
	(iii) At least 14,500	Within 1,000 flight cycles or 1,330 flight hours after the effective date of this AD, whichever occurs first.	4,500 flight cycles or 5,985 flight hours, whichever occurs first.

TABLE 3.—COMPLIANCE TIMES FOR INSPECTION—Continued

For Model—	If the total flight cycles accumulated on the airplane as of the effective date of this AD is—	Then inspect—	And repeat the inspection at least every—
(5) A300 B4–200 series airplanes.	(i) Fewer than 8,500	Before the airplane accumulates 10,500 total flight cycles or 21,840 total flight hours, whichever occurs first.	4,000 flight cycles or 8,320 flight hours, whichever occurs first.
	(ii) At least 8,500 and fewer than 13,500.	Within 2,000 flight cycles or 4,160 flight hours after the effective date of this AD, whichever occurs first.	4,000 flight cycles or 8,320 flight hours, whichever occurs first.
	(iii) At least 13,500	Within 1,000 flight cycles or 2,080 flight hours after the effective date of this AD, whichever occurs first.	4,000 flight cycles or 8,320 flight hours, whichever occurs first.

Note 5: An NDT inspection is also required by AD 98–25–07, amendment 39–10933, to be repetitively performed on Model A300 B4–600 and A300 B4–600R series airplanes and Model A300 F4–605R airplanes on which Airbus Modification 10453 has not been installed. For those airplanes, if the inspection is done within the applicable compliance time specified by paragraph (c) of this AD, the threshold for the initial inspection of paragraph (b) of this AD may be extended by 1,500 flight cycles.

Corrective Actions

(d) If any cracking is found during any inspection required by paragraph (b) of this AD: Except as required by paragraph (f) of this AD, prior to further flight, perform all applicable corrective actions in accordance with the applicable service bulletin identified in Table 1 of this AD.

Terminating Action

(e) Accomplishment of the applicable modification in accordance with the applicable service bulletin specified by paragraph (e)(1) or (e)(2) of this AD terminates the requirements of this AD.

(1) For Model A300 B4–600 and A300 B4–600R series airplanes: In accordance with Airbus Service Bulletin A300–57–6053, Revision 1, dated October 31, 1995; or Revision 02, dated June 2, 1999.

(2) For Model A300 B2 and A300 B4 series airplanes: In accordance with Airbus Service Bulletin A300–53–0297, Revision 2, dated October 31, 1995.

Exception to Service Bulletin Instructions

(f) During any inspection required by this AD, if the service bulletin specifies to contact the manufacturer for an appropriate action: Prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent).

Alternative Methods of Compliance

(g) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

Note 6: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM–116.

Special Flight Permits

(h) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(i) Except as required by paragraph (f) of this AD, the required actions shall be done in accordance with the applicable service documents identified in Table 4 and Table 5 of this AD, as follows:

TABLE 4.—REFERENCED SERVICE DOCUMENTS FOR REQUIRED ACTIONS

Service bulletin and date	Page numbers	Revision level shown on the page	Date shown on page
Airbus Service Bulletin A300–53–0296, Revision 01, September 30, 1998.	1–38	01	September 30, 1998.
Airbus Service Bulletin A300–53–0296, Revision 02, May 12, 1999.	1–3, 8, 15, 16,18, 20, 22, 23,24	02	May 12, 1999.
	4–7, 9–14, 17, 19, 21, 25, 26, 27–38.	01	September 30, 1998.
Airbus Service Bulletin A300–53–6048, Revision 01, September 30, 1998.	1–31	01	September 30, 1998.
Airbus Service Bulletin A300–53–6048, Revision 03, February 21, 2000.	1–32	03	February 21, 2000.

TABLE 5.—REFERENCED SERVICE DOCUMENTS FOR OPTIONAL TERMINATING ACTION

Service bulletin and date	Page numbers	Revision level shown on the page	Date shown on page
Airbus Service Bulletin A300–57–6053, Revision 1, October 31, 1995.	1, 7–9, 11–15, 19–24, 35, 36, 41, 42, 45–47.	1	October 31, 1995.
	2–6, 10, 16–18, 25–34, 37–40, 43, 44	Original	February 21, 1995.

TABLE 5.—REFERENCED SERVICE DOCUMENTS FOR OPTIONAL TERMINATING ACTION—Continued

Service bulletin and date	Page numbers	Revision level shown on the page	Date shown on page
Airbus Service Bulletin A300–57–6053, Revision 02, June 2, 1999.	1–6, 8, 23, 23a, 46, 47	02	June 2, 1999.
	7, 9, 11, 12, 13–15, 19–22, 35, 36, 41, 42, 45.	1	October 31, 1995.
	10, 16–18, 25, 26, 27–34, 37–40, 43, 44.	Original	February 21, 1995.
Airbus Service Bulletin A300–53–0297, Revision 2, October 31, 1995.	1–60	2	October 31, 1995.

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 7: The subject of this AD is addressed in French airworthiness directive 1998–481–270(B) R1, dated July 12, 2000.

Effective Date

(j) This amendment becomes effective on May 14, 2002.

Issued in Renton, Washington, on March 28, 2002.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–8278 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–324–AD; Amendment 39–12700; AD 2002–07–06]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 Series Airplanes; and C–9 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 series airplanes; and C–9 airplanes; that requires repetitive visual and x-ray inspections to detect cracks of the upper and lower corners and upper center of the door cutout of the aft pressure bulkhead; corrective actions, if necessary; and follow-on actions. For certain airplanes, the amendment also requires modification of the ventral aft pressure bulkhead. The actions specified by this AD are intended to detect and correct fatigue cracks in the corners and upper center of the door cutout of the aft pressure bulkhead, which could result in rapid decompression of the fuselage and consequent reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective May 14, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 14, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California.

FOR FURTHER INFORMATION CONTACT: Wahib Mina, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627–5324; fax (562) 627–5210.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain McDonnell Douglas Model DC–9–10, –20, –30, –40, and –50 series airplanes; and C–9 airplanes; was published in the **Federal Register** on September 20, 2001 (66 FR 48384). That action proposed to require repetitive general visual and x-ray inspections to detect cracks of the upper and lower corners and upper center of the door cutout of the aft pressure bulkhead; corrective actions, if necessary; and follow-on actions. For certain airplanes, the amendment also requires modification of the ventral aft pressure bulkhead.

Comments

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

Requests To Revise Certain Inspection Requirements

Three commenters request revision of the inspection requirements in paragraph (b) of the proposed rule. The rationales for these requests are as follows:

- One commenter suggests revising paragraph (b) of the proposed rule to specify the same inspections cited in McDonnell Douglas Service Bulletin DC9–53–137, Revision 07, dated February 6, 2001, which was cited as the appropriate source of service information for this AD. The commenter states that paragraph (b) of the proposed rule is misleading because it incorrectly implies that a repair will always be required or that a preventive modification is required. In addition, that paragraph does not allow for continuing visual and x-ray inspections as specified in the previously referenced service bulletin.
- One commenter requests clarification of the inspection procedures specified in the proposed rule. Paragraph (b) of the proposed rule specifies visual and eddy current inspections within 8,000 landings after accomplishment of the visual and x-ray inspections required by paragraph (a) of this AD. However, Service Bulletin DC9–53–137, Revision 07, specifies visual and eddy current inspections after a repair or preventive modification is installed. The proposed rule would

not require a preventive modification if no cracks are found. However, the no-crack procedures specified in the service bulletin provide the option of either accomplishing the preventive modification and thereafter a visual and eddy current inspection, or not accomplishing the modification and continuing the visual and x-ray inspections at various intervals depending on the condition.

• One commenter considers that the proposed rule should require visual and eddy current inspections only if no cracks are found and interim preventive repairs are performed per Service Bulletin DC9–53–137, Revision 07. The commenter suggests clarifying that interim preventive repairs are to be performed per the service bulletin, and that continued visual and x-ray inspections are required for unmodified corners. The inspection requirements of paragraph (b) are different from those specified in the previously referenced service bulletin. Although paragraph (b) of the proposed rule requires inspections at intervals of 8,000 landings after accomplishment of the inspections required by paragraph (a) of the proposed rule, the service bulletin specifies inspections after accomplishment of a repair or preventive modification. The service bulletin also provides the option of either accomplishing the preventive modification followed by the inspections, or not accomplishing the modification and continuing the inspections at specific intervals.

The FAA concurs with the commenter's requests to revise and clarify the inspection requirements. In making this decision, we have reviewed the Accomplishment Instructions of the service bulletin and the inspection requirements of paragraph (b) of the proposed rule. We point out that the intent of paragraph (b) of the proposed rule is to require the same inspections as those specified by the service bulletin. Therefore, we have revised paragraph (b) in the final rule to also include paragraphs (b)(1) and (b)(2). We consider that this change provides an acceptable level of safety for the fleet.

Request To Clarify the Repetitive Inspection Intervals

One commenter states that, if no crack is detected, paragraph (b) in the proposed rule requires visual and eddy current inspections per Revision 07 of Service Bulletin DC9–53–137, within 8,000 landings after accomplishing the visual and x-ray inspections required by paragraph (a) of the proposed rule. The commenter states that it had previously accomplished modifications per Revision 04, or earlier, of McDonnell Douglas DC–9 Service Bulletin 53–137, and that an alternative method of compliance (AMOC) to AD 85–01–02 R1, amendment 39–5241 (51 FR 6101, February 20, 1986), permits repetitive inspections at intervals of 15,000 landings until accomplishment of the terminating action per McDonnell Douglas DC–9 Service Bulletin 53–166. With this in mind, the commenter asks whether the repetitive intervals of previously modified airplanes will be reduced from 15,000 landings to 8,000 landings regardless of modification/repair status.

The FAA concurs that clarification of the repetitive inspection intervals for previously repaired or modified airplanes (interim preventive repairs) is necessary. We point out that McDonnell Douglas DC–9 Service Bulletin 53–137, Revision 05, dated August 29, 2000, changed the inspection method and the inspection intervals for the aft pressure bulkhead corners that previously have been repaired or modified per earlier revisions of the service bulletin. In addition, the inspection procedures specified in Revision 05 of the service bulletin also were approved as an AMOC for the accomplishment of AD 85–01–02 R1. Although earlier revisions of the service bulletin specify ''visual and x-ray'' inspections of previously repaired or modified corners, Revision 05 and later revisions of the service bulletin specify ''visual and eddy current'' inspections for those airplanes. After the type of inspection was changed, the manufacturer reconsidered the inspection intervals necessary for previously repaired or modified corners if no cracks are detected. As a result, for those airplanes, the manufacturer recommends inspection intervals of 8,000 landings for ''visual and eddy current'' inspections instead of 15,000 landings for ''visual and x-ray'' inspections.

After reconsidering the manufacturer's recommendation, we have determined that the compliance times recommended in Revision 07 of the service bulletin are adequate in maintaining the safety of the fleet. It is necessary to revise paragraph (b) of the proposed rule to clarify our intent regarding the type of inspection and inspection intervals that are specified in paragraph 3.B. (''Work Instructions'') of the service bulletin (which was cited in the proposed rule as the appropriate source of service information). We point out that the compliance times specified in Revision 07 of the service bulletin vary according to the conditions and groups of airplanes specified in paragraph 3.B. (''Work Instructions'') of the service bulletin. As a result, we have reformatted paragraph (b) of the final rule to include paragraphs (b)(1) and (b)(2), which require accomplishment of the inspections at the times specified in Revision 07 of the service bulletin, as applicable. We consider that these changes only clarify the required inspections and related compliance times, and do not impose an additional burden on any operator or necessitate providing an additional opportunity for public comment.

Request To Revise Type of Inspection per the Service Information

One commenter states that the definition of a ''general visual inspection'' in Note 2 of the proposed rule is not the same as that of a ''visual inspection'' in Service Bulletin DC9–53–137, Revision 07. The commenter states that the service bulletin has specific visual inspection requirements that are included in Service Sketch 2934E and SN09530002. The commenter considers that the proposed rule should reflect the same type of inspection as that cited in the service information.

The FAA concurs and agrees that the final rule should reflect the same inspections specified by the service information. In the final rule we have deleted Note 2 to remove the definition of a ''general visual inspection.'' We also have changed all references throughout the final rule, including paragraphs (a) and (b), to specify a ''visual inspection'' instead of a ''general visual inspection.''

Request To Give Credit for Previously Accomplished Alternative Methods of Compliance (AMOCs)

One commenter requests that credit be given to operators who have accomplished previously approved AMOCs per AD 85–01–02 R1 or AD 96–10–11, amendment 39–9618 (61 FR 24675, May 16, 1996). Another commenter asks how the requirements of this AD affect previous AMOC approvals for inspections, repairs, and modifications per AD 85–01–02 R1 and AD 96–10–11. In addition, this commenter asks whether AMOCs issued per AD 90–18–03, amendment 39–6701 (55 FR 34704, August 24, 1990), are still considered valid.

The FAA concurs. In addition, we point out that AD 90–18–03 was superseded by AD 96–10–11, which gave credit for AMOCs previously issued per AD 90–18–03. However, because AD 90–18–03 was removed from the regulations, it is only necessary to give credit for the prior accomplishment of AD 85–01–02 R1

and AD 96–10–11 in paragraph (i)(2) of the final rule. We have revised the final rule accordingly.

Request To Clarify Previously Issued ADs and Effect on Compliance Times in Follow-on ADs

One commenter requests clarification of the difference between a standalone AD that supersedes an earlier AD, and a separate AD with a later action to rescind that AD. The commenter also asks the following questions:

• If the FAA rescinds AD 85–01–02 R1, what happens to AD 80–10–03, amendment 39–3769 (45 FR 31052, May 15, 1980), that was superseded by AD 85–01–02, amendment 39–4978 (50 FR 2043, January 15, 1985), and how are the concurrent service bulletin requirements affected by this decision?

• AD 85–01–02 R1 requires that the procedures specified by the service bulletins be accomplished within landing or time limits that have already passed for most applicable airplanes. How does rescinding AD 85–01–02 R1 affect this compliance?

The FAA concurs and agrees that it is necessary to clarify the difference between the two types of ADs. In response, we point out that in the preamble of the proposed AD, in ''Other Relevant Rulemaking,'' we stated that the FAA normally would issue a proposed AD to supersede AD 85–01–02 R1. However, because of the complexity of the requirements in AD 85–01–02 R1, we issued a standalone AD, which includes terminating action for the repetitive inspection requirements of AD 85–01–02 R1. Once a final rule has been issued and becomes effective, we plan to rescind AD 85–01–02 R1. After considering the commenter's two questions, we infer that the commenter wants us to clarify how previously issued ADs affect the compliance times in follow-on ADs. In response, we point out that AD 80–10–03 was superseded by AD 85–01–02, which removed AD 80–10–03 from the regulations. As a result, the concurrent service bulletin procedures required by AD 80–10–03 are no longer in effect. Likewise, after AD 85–01–02 R1 is rescinded, the compliance times required by that AD per the service bulletins are no longer a factor. No change to the final rule is necessary in this regard.

Request To Include Additional Corrective Actions

The commenter states that the proposed rule needs to address what happens if an operator finds ''something on a corner of an airplane'' that they are unable to inspect per Revision 07 of Service Bulletin DC9–53–137. The commenter adds that guidance is needed when the proposed rule cannot be complied with, and operators need to know what to do. After contacting the manufacturer for clarification of what was meant by ''something on a corner of an airplane,'' the commenter stated that the phrase refers to any previous repair on the aft pressure bulkhead that any operator may not be able to inspect per the service bulletin.

The FAA does not concur. We point out that the proposed rule does not need to include additional corrective actions because paragraph (i)(1) of this AD includes a provision for operators to request an AMOC for such an inspection requirement. No change to the final rule is necessary in this regard.

Request To Cite an Additional Service Bulletin

The commenter asks why some of the Boeing service bulletins listed in AD 85–01–02 R1 are included in the proposed rule and others are not. For example, McDonnell Douglas DC–9 Service Bulletin A53–144 is cited in AD 85–01–02 R1, but is not cited in this proposed rule. The commenter considers that, if certain other service bulletins specified in that AD are included in this proposed rule, we also need to include DC–9 Service Bulletin A53–144. This is necessary in case any airplane that has not been modified per the AD is brought into the United States, and to prevent any operator from performing a repair in the area and not also accomplishing the modification.

The FAA does not concur. We point out that it is unnecessary to include a reference to a service bulletin unless the specified procedures are required by the proposed rule. Because the procedures specified in DC–9 Service Bulletin A53–144 are not required by the final rule, no change to the final rule is necessary in this regard.

Explanation of Changes Made to the Proposal

The FAA has determined that it is necessary to revise the final rule and has made the following changes:

• In the ''Cost Impact'' section, we have clarified that 5 work hours per airplane is required for accomplishment of the required ''inspections'' instead of the required ''actions.''

• Paragraph (a) specifies that the requirements of that paragraph also apply to airplanes on which the modification has not been accomplished per paragraph (g) of this AD, which specifies terminating action for the repetitive inspections required by paragraphs (b) and (c) of this AD. This change clarifies that if the specified modification has not been done, visual and x-ray inspections must be done within the compliance time specified in paragraph (a) of this AD.

• Paragraph (d)(2) specifies that accomplishment of the modification specified by paragraph (d)(2) constitutes terminating action for the repetitive inspection requirements of paragraphs (b) and (c)(2) of this AD.

• Paragraph (i) includes two new subparagraphs. Paragraph (i)(2) is added to give credit for AMOCs previously accomplished in accordance with AD 85–01–02 R1 or AD 96–10–11. Paragraph (i)(3) is added to specify that, if an inspection of the aft pressure bulkhead cannot be accomplished per the service bulletin, operators also may accomplish the inspection per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the FAA to make such findings.

Conclusion

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

Cost Impact

There are approximately 700 Model DC–9–10, –20, –30, –40, and –50 series airplanes; and C–9 airplanes of the affected design in the worldwide fleet. The FAA estimates that 397 airplanes of U.S. registry will be affected by this AD.

It will take approximately 5 work hours per airplane to accomplish the required inspections, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $119,100, or $300 per airplane.

For certain airplanes, it will take approximately between 21 and 26 work hours per airplane depending on the airplane configuration to accomplish the modification specified in McDonnell Douglas DC–9 Service Bulletin 53–165, Revision 3, dated May 3, 1989, at an average labor rate of $60 per work hour. Required parts will cost approximately between $3,470 and $11,831 per airplane, depending on the airplane configuration. Based on these figures, the cost impact of this modification on U.S. operators is estimated to be between $4,730, or $13,391 per airplane.

For certain airplanes, it will take approximately 9 work hours per

airplane to accomplish the modification specified in McDonnell Douglas DC–9 Service Bulletin 53–157, Revision 1, dated January 7, 1985, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of this modification on U.S. operators is estimated to be $540 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2002–07–06 McDonnell Douglas: Amendment 39–12700. Docket 2000–NM–324–AD.

Applicability: Model DC–9–10, –20, –30, –40, and –50 series airplanes, and C–9 airplanes; certificated in any category; equipped with a floor level hinged (ventral) door of the aft pressure bulkhead; as listed in McDonnell Douglas Service Bulletin DC9–53–137, Revision 07, dated February 6, 2001; except for those airplanes on which the modification required by paragraph (d) or (e) of AD 96–10–11, amendment 39–9618, or paragraph K. of AD 85–01–02 R1, amendment 39–5241, has been done.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (i)(1) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracks in the corners and upper center of the door cutout of the aft pressure bulkhead, which could result in rapid decompression of the fuselage and consequent reduced structural integrity of the airplane, accomplish the following:

Visual and X-Ray Inspection

(a) For airplanes on which the modification has NOT been accomplished per paragraph (g) of this AD: Except as provided by paragraph (h) of this AD, prior to the accumulation of 15,000 total landings, or within 4,000 landings after the effective date of this AD, whichever occurs later, do a visual inspection and an x-ray inspection to detect cracks of the upper and lower corners and upper center of the door cutout of the aft pressure bulkhead, per McDonnell Douglas Service Bulletin DC9–53–137, Revision 07, dated February 6, 2001.

No Crack Detected: Repetitive Inspections

(b) If no crack is detected during any inspection required by paragraph (a) of this AD, do the action specified in either paragraph (b)(1) or (b)(2) of this AD per paragraph 3.B. ''Work Instructions'' of McDonnell Douglas Service Bulletin DC9–53–137, Revision 07, dated February 6, 2001, as applicable:

(1) If interim preventive repairs have been performed per the service bulletin; AD 85–01–02 R1 or AD 96–10–11: Do a visual inspection and an eddy current inspection at the times specified in the service bulletin. Repeat the applicable repetitive inspections at intervals not to exceed the times specified in the service bulletin, until accomplishment of the action required by paragraph (d) or (g) of this AD; or

(2) If interim preventive repairs have NOT been performed per the service bulletin, do either paragraph (b)(2)(i) or (b)(2)(ii) of this AD:

(i) Before further flight, install an interim preventive repair identified in Conditions I through XLIII inclusive, excluding Conditions XXI, XXXVII, and XXXVIII (not used at this time), per the service bulletin. At the times specified in the service bulletin, do a visual inspection and an eddy current inspection. At intervals not to exceed the times specified in the service bulletin, repeat the visual and eddy current inspections until accomplishment of the action specified in paragraph (d) or (g) of this AD; or

(ii) At intervals not to exceed the times specified in the service bulletin, repeat the visual inspection and x-ray inspection required by paragraph (a) of this AD, until accomplishment of the action specified in paragraph (d) or (g) of this AD.

Any Crack Detected: Corrective Actions and Repetitive Inspections

(c) If any crack is detected during any inspection required by paragraph (a) or (b) of this AD, do the actions specified in paragraphs (c)(1) and (c)(2) of this AD per McDonnell Douglas Service Bulletin DC9–53–137, Revision 07, dated February 6, 2001.

(1) Before further flight, do the applicable corrective actions (i.e., modification of the bulkhead; trim forward facing flange; stop drill ends of cracks; install repair kit; replacement of cracked part with new parts; and install additional doublers) identified in Conditions I through XLIII inclusive, excluding Conditions XXI, XXXVII, and XXXVIII (not used at this time), of the Accomplishment Instructions of the service bulletin; and

(2) At the times specified in the Accomplishment Instructions of the service bulletin, do the applicable repetitive inspections, until accomplishment of the action specified in paragraph (d) or (g) of this AD.

Concurrent Requirements

(d) Except as provided by paragraph (h) of this AD, modify the ventral aft pressure bulkhead structure by accomplishing all actions specified in the Accomplishment Instructions of McDonnell Douglas DC–9 Service Bulletin 53–165, Revision 3, dated May 3, 1989, per the service bulletin; at the applicable time specified in paragraph (d)(1), (d)(2), or (d)(3) of this AD.

Note 2: Modification before the effective date of this AD per McDonnell Douglas DC–9 Service Bulletin 53–165, dated January 31, 1983; Revision 1, dated February 20, 1984; or Revision 2, dated August 29, 1986; is

considered acceptable for compliance with the requirements of paragraph (d) of this AD.

(1) For airplanes on which the bulkhead modification specified in McDonnell Douglas DC–9 Service Bulletin 53–139, dated September 26, 1980, or Revision 1, dated April 30, 1981, has been done, except as provided by paragraph (d)(3) of this AD: Modify within 15,000 landings after accomplishment of the bulkhead modification, or within 4,000 landings after the effective date of this AD, whichever occurs later. Accomplishment of this modification constitutes terminating action for the repetitive inspection requirements of paragraphs (b) and (c)(2) of this AD.

(2) For airplanes on which the production equivalent of the modification specified in paragraph (d)(1) of this AD has been done before delivery, except as provided by paragraph (d)(3) of this AD: Modify before the accumulation of 15,000 total landings, or within 4,000 landings after the effective date of this AD, whichever occurs later. Accomplishment of this modification constitutes terminating action for the repetitive inspection requirements of paragraphs (b) and (c)(2) of this AD.

(3) For airplanes listed in McDonnell Douglas DC–9 Service Bulletin 53–165, Revision 3, dated May 3, 1989, that are specified in paragraph (e) of this AD: Modify in conjunction with the requirements of paragraph (e) of this AD, or within 18 months after accomplishment of the requirements of paragraph (e) of this AD.

Modification: Ventral Aft Pressure Bulkhead

(e) For Model DC–9–30 and ''50 series airplanes, and C–9 airplanes, as listed in McDonnell Douglas DC–9 Service Bulletin 53–157, Revision 1, dated January 7, 1985: Except as provided by paragraph (h) of this AD, within 18 months after the effective date of this AD, modify the ventral aft pressure bulkhead per the service bulletin.

Note 3: Modification before the effective date of this AD per McDonnell Douglas DC–9 Service Bulletin 53–157, dated August 11, 1981, is considered acceptable for compliance with the requirements of paragraph (e) of this AD.

Compliance with AD 85–01–02 R1

(f) Accomplishment of the visual and x-ray inspections required by paragraph (a) of this AD constitutes terminating action for the repetitive inspection requirements of AD 85–01–02 R1.

Terminating Modification

(g) Accomplishment of the modification (reference McDonnell Douglas DC–9 Service Bulletin 53–166) required by paragraph (d) or (e) of AD 96–10–11 (which references ''DC–9/MD–80 Aging Aircraft Service Action Requirements Document'' (SARD), McDonnell Douglas Report No. MDC K1572, Revision A, dated June 1, 1990; or Revision B, dated January 15, 1993; as the appropriate source of service information for accomplishing the modification) terminates the repetitive inspection requirements of paragraphs (b) and (c) of this AD.

Exception to Inspections and Modifications

(h) As of the effective date of this AD, the inspections and modifications required by this AD do NOT need to be done during any period that the airplane is operated without cabin pressurization and a placard is installed in the cockpit in full view of the pilot that states the following: ''OPERATION WITH CABIN PRESSURIZATION IS PROHIBITED.''

Alternative Methods of Compliance (AMOC)

(i)(1) An AMOC or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

(2) AMOCs approved previously in accordance with AD 85–01–02 R1, amendment 39–4978; or AD 96–10–11, amendment 39–9618; are approved as AMOCs for paragraph (a) or (c) of this AD, as appropriate.

(3) An AMOC for any inspection required by paragraph (a) or (c) of this AD that provides an acceptable level of safety may be used per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Los Angeles ACO, to make such findings.

Note 4: Information concerning the existence of approved AMOCs with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permit

(j) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(k) The actions shall be done in accordance with McDonnell Douglas Service Bulletin DC9–53–137, Revision 07, dated February 6, 2001; McDonnell Douglas DC–9 Service Bulletin 53–165, Revision 3, dated May 3, 1989; and McDonnell Douglas DC–9 Service Bulletin 53–157, Revision 1, dated January 7, 1985; as applicable. This incorporation by reference was approved previously by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(l) This amendment becomes effective on May 14, 2002.

Issued in Renton, Washington, on March 28, 2002.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–8279 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–30–AD; Amendment 39–12701; AD 2002–07–07]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777–200 Series Airplanes Equipped With General Electric GE90 Series Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 777–200 series airplanes equipped with General Electric GE90 series engines. This action requires repetitive inspections of the diagonal brace and forward seals of the aft fairing of the strut to find discrepancies, and corrective actions, if necessary. This action is necessary to prevent primary engine exhaust from entering the aft fairing of the strut and elevating the temperature, which could lead to heat damage of the seals and diagonal brace. Such damage could result in cracking and fracture of the forward attachment point of the diagonal brace, loss of the diagonal brace load path, and consequent separation of the strut and engine from the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective April 24, 2002.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 24, 2002.

Comments for inclusion in the Rules Docket must be received on or before June 10, 2002.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002-NM–

30–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2002-NM–30-AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Vann, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1024; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: The FAA has received reports that, during routine inspections of the aft fairing of the strut, evidence of an elevated temperature in the interior cavity of the aft fairing has been found on several Boeing Model 777–200 series airplanes equipped with General Electric GE90 series engines. One operator reported significant heat damage to the forward end of the diagonal brace on the left strut of a General Electric GE90 powered airplane. The diagonal brace material is aluminum 7075–T73, with a specified conductivity range of 38.0 through 42.5 percent International Annealed Copper Standard (IACS). The damaged brace assembly had a conductivity reading of 47 percent IACS. Investigation revealed that the damage was caused by primary engine exhaust entering the aft fairing of the strut through a gap in the heat shield and elevating the temperature, resulting in heat damage to the primary fire seal, heat shield seal, and secondary fluid seal. The damaged seals allowed the exhaust to pass into the aft fairing cavity causing heat damage to the diagonal brace assembly. Such damage, if not found and fixed, could result in cracking and fracture of the forward attachment point of the diagonal brace, loss of the diagonal brace load path, and consequent separation of the strut and engine from the airplane.

Related Rulemaking

In light of this AD, the FAA is considering withdrawing Notice of Proposed Rulemaking (NPRM) 2001–NM–93–AD (66 FR 54727, October 30, 2001). That NPRM proposed to require installation of a high temperature silicone foam seal to fill the gap in the strut aft fairing fire seal and firewall.

Since the issuance of that NPRM, the FAA has received new information that indicates that the unsafe condition would not be prevented by the installation of the high temperature silicone foam seal alone. Of primary importance is the integrity of the existing primary fire, heat shield, and secondary fluid seals to prevent heat damage to the diagonal brace. This AD is being issued to require the inspection and maintenance of those existing seals, in addition to the inspection and maintenance of the diagonal brace. The installation of the high temperature silicone foam seal recommended in Boeing Service Bulletin 777–54A0015, dated January 18, 2001 (referenced in the NPRM as the appropriate source of service information for accomplishment of the specified actions), is not currently being mandated, and the FAA is considering withdrawal of the NPRM.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin 777–54A0017, dated December 21, 2001, which describes the following procedures:

- Part 1 of the service bulletin specifies repetitive detailed inspections of the diagonal brace and forward seals of the aft fairing of the strut to find discrepancies, and corrective actions, if necessary. The discrepancies include heat damage to the diagonal brace and/or forward seals, and cracks and/or fracture of the diagonal brace. Part 1 also specifies either replacing the diagonal brace per Part 4 of the service bulletin if any crack or fracture is found, or contacting Boeing for rework instructions.
- If necessary, due to findings from the detailed inspection specified in Part 1 of the service bulletin, Part 2 of the service bulletin specifies a conductivity inspection to verify the conductivity of the diagonal brace material. If the diagonal brace is within the specified conductivity limits (38.0 through 42.5 percent IACS), the detailed inspection specified in Part 1 is repeated. If the diagonal brace is not within the specified conductivity limits (greater than 42.5 percent and less than or equal to 44 percent IACS), Part 2 specifies inspecting the strut to wing attachments and reworking if additional damage is found, and within 18 months, replacing the diagonal brace. If the conductivity limit is greater than 44 percent IACS, Part 2 specifies immediately replacing the diagonal brace. If the diagonal brace is within the specified limits, Part 2 specifies repeating the Part 1 inspection.
- Part 3 of the service bulletin specifies replacing any damaged seal (primary fire seal, heat shield seal, or secondary fluid seal, with a new seal), then repeating the Part 1 inspection. Part 3 also specifies contacting Boeing for alternate repair instructions for the seals.
- Part 4 of the service bulletin specifies replacing any damaged diagonal brace with a new brace, then repeating the Part 1 inspection.

We also have reviewed and approved Boeing All Operator Message M–7200–02–00173, dated January 30, 2002, which describes procedures for a temporary repair of the forward seals of the aft fairing of the strut.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design, this AD requires accomplishment of the actions specified in the service information described previously, except as discussed below.

Differences Between This AD and the Alert Service Bulletin

Part 2 of the referenced service bulletin specifies a compliance time of 18 months for replacement of the diagonal brace if the brace is not within the specified conductivity limits (greater than 42.5 percent and less than or equal to 44 percent IACS); however, this AD requires the replacement be done within 90 days after the initial conductivity inspection if the brace is not within the specified conductivity limits.

In developing an appropriate compliance time for this AD, the FAA considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the modifications. In light of all of these factors, the FAA finds a compliance time of 90 days for completing the replacement to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

The service bulletin also specifies that all actions for which the Boeing 777 Airplane Maintenance Manual (AMM) is specified as the appropriate source of service information for work instructions may instead be done according to an ''operator's equivalent procedure.'' However, the FAA finds that Chapter 54–54–03 of the AMM must be used to accomplish the inspection of the forward seals of the aft fairing of the strut for signs of heat damage, which is specified in the Work Instructions in the service bulletin. For this inspection, an ''operator's equivalent procedure'' may be used only if approved as an alternative method of compliance per paragraph (c) of this AD.

Although the service bulletin specifies that the manufacturer may be contacted for disposition of certain rework/repairs, this proposed AD would require all rework/repairs to be accomplished per a method approved by the FAA, or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle Aircraft Certification Office, to make such findings.

Interim Action

This is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NM–30–AD.'' The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a ''significant regulatory action'' under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2002–07–07 Boeing: Amendment 39–12701. Docket 2002–NM–30–AD.

Applicability: Model 777–200 series airplanes equipped with General Electric GE90 series engines, as listed in Boeing Alert Service Bulletin 777–54A0017, dated December 21, 2001, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent heat damage of the diagonal brace and forward seals of the aft fairing of the strut, which could result in cracking and fracture of the forward attachment point of the diagonal brace, loss of the diagonal brace load path, and consequent separation of the strut and engine from the airplane; accomplish the following:

Repetitive Inspections

(a) Within 500 flight hours after the effective date of this AD: Do a detailed inspection of the diagonal brace and forward seals of the aft fairing of the strut to find discrepancies (heat damage to the diagonal brace and/or forward seals, and cracks and/or fracture of the diagonal brace), per Part 1 of the Accomplishment Instructions of Boeing Alert Service Bulletin 777–54A0017, dated December 21, 2001. If no discrepancies are found, repeat the inspection after that every 1,000 flight hours.

Corrective Actions

(1) If any sign of heat damage to the diagonal brace is found: Before further flight, do the conductivity inspection of all areas of the forward clevis lugs and brace body of the diagonal brace, as specified in and per Part 2 of the Accomplishment Instructions of the service bulletin.

(i) If the conductivity readings are all within the specified range of 38.0 through 42.5 percent International Annealed Copper Standard (IACS); then repeat the inspection required by paragraph (a) of this AD every 1,000 flight hours.

(ii) If any conductivity readings are within the specified range of greater than 42.5 percent and less than or equal to 44 percent IACS, before further flight, do the inspection specified in and per Part 2 of the Accomplishment Instructions of the service bulletin. If additional damage is found, repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative (DER) who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD. Within 90 days after doing the conductivity inspection, replace the diagonal brace with a new brace per Part 4 of the Accomplishment Instructions of the service bulletin. Then, repeat the inspection required by paragraph (a) of this AD every 1,000 flight hours.

(iii) If any conductivity readings are greater than 44 percent IACS, before further flight, replace the diagonal brace per Part 4 of the Accomplishment Instructions of the service bulletin. Then, repeat the inspection required by paragraph (a) of this AD every 1,000 flight hours.

(2) If any crack or fracture of the diagonal brace is found, before further flight, replace the diagonal brace with a new brace per Part 4 of the Accomplishment Instructions of the service bulletin; or rework the diagonal brace per a method approved by the Manager, Seattle ACO, or per data meeting the type certification basis of the airplane approved by a Boeing Company DER who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD. Then, repeat the inspection required by paragraph (a) of this AD every 1,000 flight hours.

(3) If any sign of heat damage to any seal is found, before further flight, replace the seal per Part 3 of the Accomplishment Instructions of the service bulletin, or do the actions required by paragraph (a)(3)(i) or (a)(3)(ii) of this AD, as applicable. Then, repeat the inspection required by paragraph (a) of this AD every 1,000 flight hours.

(i) If there is any damage to any seal but no leakage of the seal is found, do a detailed inspection of the seal every 50 flight hours until the replacement or temporary repair is done per Boeing All Operator Message (AOM) M–7200–02–00173, dated January 30, 2002. Do the repair within 500 flight hours after the initial inspection required by paragraph (a) of this AD, or do the replacement within 1,000 flight hours after that initial inspection, as applicable. If the temporary repair is done, inspect the repaired seal every 500 flight hours until the seal is replaced. Replacement of the seal must be done within 1,000 flight hours after the repair is done.

(ii) If there is damage to any seal and leakage of the seal is found, before further flight, do the replacement or temporary repair of the seal per the AOM. If the temporary repair is done, inspect the repaired seal every 250 flight hours until the seal is replaced. Replacement of the seal must be done within 1,000 flight hours after the repair is done.

''Operator's Equivalent Procedure''

(b) Though Boeing Alert Service Bulletin 777–54A0017, dated December 21, 2001, specifies that an ''operator's equivalent procedure'' may be used for the inspection of the forward seals of the aft fairing of the strut for signs of heat damage, that inspection must be done according to Chapter 54–54–03 of the Boeing 777 Airplane Maintenance Manual, as specified in the service bulletin.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(d) Special flight permits may be issued in accordance with §§ 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) Except as provided by paragraphs (a)(1)(ii), (a)(2), and (b) of this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 777–54A0017, dated December 21, 2001; and Boeing All Operator Message M–7200–02–00173, dated January 30, 2002; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(f) This amendment becomes effective on April 24, 2002.

Issued in Renton, Washington, on March 29, 2002.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–8280 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NE–16–AD; Amendment 39–12698; AD 2002–07–04]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney JT9D–7R4 Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), that is applicable to Pratt & Whitney (PW) JT9D–7R4 series turbofan engines. This amendment requires a one-time inspection of low pressure turbine (LPT) 5th stage disks for evidence of blend repairs and mechanical damage, and replacement of the affected disks based on the extent of those repairs and damage. This amendment is prompted by a report of a PW JT9D–7R4G2 turbofan engine that experienced an uncontained failure of the LPT 5th stage disk. The actions specified by this AD are intended to prevent uncontained failure of the LPT 5th stage disk, due to incomplete blend repairs, resulting in in-flight shutdown and damage to the airplane.

DATES: Effective date May 14, 2002. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 14, 2002.

ADDRESSES: The service information referenced in this AD may be obtained from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770; fax (860) 565–4503. This information may be examined, by appointment, at the Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tara Goodman, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Office Park, Burlington, MA 01803–5299; telephone (781) 238–7130, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that is applicable to PW JT9D–7R4 series turbofan engines was published in the **Federal Register** on August 30, 2001 (66 FR 45789). That action proposed to require a one-time inspection of low pressure turbine (LPT) 5th stage disks for evidence of blend repairs and mechanical damage, and replacement of the affected disks based on the extent of those repairs and damage, in accordance with PW service bulletin (SB) JT9D–7R4–72–574, Revision 1, dated June 26, 2001.

Comments

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

Clarification of Areas To Be Inspected

One commenter states that the areas of inspection are not defined for the requirement to remove disks with five or more blended or unblended areas of damage by any cause. By not defining the areas of inspection, blends or areas of damage anywhere on the disk could be counted. The commenter states that blends to remove part markings such as TT and TC marks or other blends on fir trees, for example, should not be counted toward the five or more rejection limit.

Another commenter requests clarification of whether a disk may be returned to service after five or more blended or unblended damage areas are found on the disk but all of the damage is identified as non-tiebolt damage. The clarification is requested because the blended areas or areas of damage called out in the NPRM are not specific. The commenter also asks if the determination of acceptance of a disk could be done on a case-by-case basis.

The FAA agrees that the proposal does not specify where on the disk to look for blended areas or areas of damage. Therefore the FAA has changed paragraph (a)(2) of this final rule to specify that the areas to be inspected are the forward and aft web and bore areas. The FAA disagrees, however, that disks with five or more areas of damage in the forward and aft web areas may be returned to service, even if the damage is known to be unrelated to a tiebolt failure during operation. Operators may request case-by-case review using the procedure to request an Alternative Methods of Compliance, paragraph (c).

Use the Same Wording as the Service Bulletin

One commenter requests that the FAA use the same wording in the compliance instructions for the AD as that which is contained in PW Service Bulletin (SB) JT9D–7R4–72–574. Paragraph (a)(1) of the proposal states: ''remove from service those LPT 5th stage disks that were installed in engines that experienced a tiebolt fracture AND are found with blended or unblended damage in the web and bore areas, and replace with a serviceable disk.'' In place of the AND above, the SB uses the word OR. Using the word AND, implies that the final rule would require both tiebolt fracture history and damage to meet replacement criteria.

The FAA disagrees that any change to Paragrap (a)(1) is necessary, but agrees that the final rule could be worded clearer. Paragraph (a)(1) of the proposal covered those disks for which the operator knew that the damage was due to tiebolt failure. Paragraph (a)(2) of the proposal covers those disks for which the tiebolt fracture history is unknown. The FAA has changed final rule paragraph (a)(1) to clarify that it applies to disks for which there is a known history of tiebolt failure in operation.

Exclude Damage Caused by Tierod Removal

One commenter states that many disks have tierod removal damage on the rear side of the disk, due to tierod fracture during disassembly. The commenter requests that damage found on the rear side of the disk, that is in line with the tierod holes should not be taken into account because it is due to tierod removal. The commenter requests that alternate inspection requirements be provided that identify the type of damage rather than the number of damaged areas.

The FAA partially agrees. The FAA agrees that the wording should include the specification that the tierod damage occurs during operation. Therefore, the FAA has changed the wording in final rule paragraph (a)(1) to specify that the damage must be due to tiebolt fracture during operation. This change is justified because high-energy damage to the disk caused by a tiebolt fracture occurs during operation rather than during LPT disassembly. However, the FAA does not agree that the type of damage, as a result of tiebolt failure during operation, should be specified differently than specified in PW SB JT9D–7R4–72–574. A tiebolt fracture during operation is capable of damaging the aft side of the disk in the web and bore areas. The FAA expects operators to use good maintenance practices to prevent damage to disks during LPT disassembly. If damage occurs during disassembly, the Engine Manual must be used to determine serviceability.

Concern for Engine Manual Revision

One commenter expresses concern that neither the proposal nor PW SB JT9D–7R4–72–574 indicate that the Engine Manual-provided blend repair (Section 72–52–11, Repair-01 for JT9D–7R4G2 Engines) will be revised to effectively address the tiebolt failure mode and cause. The compliance in the proposal does not prevent future blending of the disk web and bore when the disk is routed for repair after the one-time mandated visual inspection has been completed. The commenter requests that the Engine Manual blend repair be referenced in the final rule.

The FAA agrees that the AD and the Engine Manual should address future situations where the one-time mandated visual inspections are completed. The manufacturer will include a requirement in the Engine Manual to remove from service any LPT 5th stage disk that experienced damage to the fore and aft web and bore areas from a fractured tiebolt during operation. The intent of the AD is to specify a one-time inspection of LPT 5th stage disks. In addition, the AD will more clearly state in paragraph (b) of the compliance section that any LPT 5th stage disk that experiences damage to the fore and aft web and bore areas from a fractured tiebolt during operation must be removed from service. The repair and serviceability requirements for LPT 5th stage disks are not part of the AD.

Revision to Manufacturer's Service Information

The manufacturer comments that since the publication of the proposal, Revision 2 of the SB has been published, which provides a revised Figure 2 and a consistent description of the one-time inspection rejection criteria.

The FAA agrees and has added this SB Revision to the incorporation by reference.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden

on any operator nor increase the scope of the AD.

Economic Analysis

There are approximately 647 Pratt & Whitney (PW) JT9D–7R4 series turbofan engines of the affected design in the worldwide fleet. The FAA estimates that 151 engines installed on airplanes of U.S. registry would be affected by this AD. The FAA also estimates that it would take approximately one work hour per engine to accomplish the proposed actions, and that the average labor rate is $60 per work hour. A replacement disk would cost approximately $145,260 per engine. Based on these figures, the total cost effect of the AD on U.S. operators is estimated to be $21,943,320.

Regulatory Analysis

This final rule does not have federalism implications, as defined in Executive Order 13132, because it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the FAA has not consulted with state authorities prior to publication of this final rule.

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

2002–07–04 Pratt & Whitney: Amendment 39–12698. Docket No. 2001–NE–16–AD.

Applicability

This airworthiness directive (AD) is applicable to Pratt & Whitney (PW) JT9D–7R4D, –7R4D1, –7R4E, –7R4E1, –7R4E4, –7R4G2, and 7R4H1 series turbofan engines with LPT 5th stage disks, part numbers (P/N's) 787905, 787905–001, and 798305 installed. These engines are installed on, but not limited to Airbus Industrie A300 and A310 series, and Boeing 747 and 767 series airplanes.

Note 1: This AD applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance

Compliance with this AD is required as indicated at the next separation of the LPT module from the engine, unless already done.

To prevent uncontained failure of the low pressure turbine (LPT) 5th stage disk due to incomplete blend repairs, resulting in in-flight shutdown and damage to the airplane, do the following:

(a) Perform a one-time visual inspection for evidence of blend repairs of LPT 5th stage disks, P/N's 787905, 787905–001, and 798305 in accordance with the Accomplishment Instructions section of PW service bulletin (SB) JT9D–7R4–72–574, Revision 1, dated June 26, 2001, or SB JT9D–7R4–72–574, Revision 2, dated January 21, 2002.

(1) Remove from service those LPT 5th stage disks that have any amount of blended or unblended damage in the forward and aft web and bore areas, that was caused by a tiebolt fracture during operation, and replace with a serviceable part.

(2) Remove from service LPT 5th stage disks that have five or more areas of blended or unblended damage by any cause in the forward and aft web and bore areas and replace with a serviceable part.

(b) After the effective date of this AD, do not install any LPT module that contains an LPT 5th stage disk, P/N 787905, 787905–001, or 798305 unless that disk has been inspected as specified in paragraph (a) of this AD. After the effective date of this AD, do not install any LPT 5th stage disk that experiences damage to the fore and aft web and bore areas from a fractured tiebolt during operation.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Engine Certification Office (ECO). Operators must submit their request through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, ECO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the ECO.

Documents That Have Been Incorporated by Reference

(d) The inspection must be done in accordance with the following Pratt & Whitney Service Bulletins (SB's):

Document No.	Pages	Revision	Date
SB JT9D–7R4–72–574	All	1	June 26, 2001.
Total pages: 16			
SB JT9D–7R4–72–574	1–3	2	January 21, 2002.
	4–9	1	June 26, 2001.
	10–12	2	January 21, 2002.
	13	1	June 26, 2001.
	14	2	January 21, 2002.
	15–16	1	June 26, 2001.
Total pages: 16			

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–8770; fax (860) 565–4503. Copies may be inspected, by appointment, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

Effective Date

(e) This amendment becomes effective on May 14, 2002.

Issued in Burlington, Massachusetts, on March 29, 2002.

Robert G. Mann,

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

[FR Doc. 02–8171 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF DEFENSE

Department of the Air Force

32 CFR Part 935

RIN 0701–AA65

Wake Island Code

AGENCY: Department of the Air Force, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Air Force has revised its regulations dealing with the Wake Island Code to reflect current and anticipated use. This was necessary because in 1994 the Air Force terminated operations on the island and removed its personnel. The small number of personnel currently on the island work for the Department of the Army or its contractors and it is not anticipated that Wake Island will again host a permanent population.

EFFECTIVE DATE: April 10, 2002.

FOR FURTHER INFORMATION CONTACT: Mr. Philip Sheuerman, Associate General Counsel, Department of the Air Force, SAF/GCN, Room 4C921, 1740 Air Force Pentagon, Washington, DC 20330–1740, (703–695–4691).

SUPPLEMENTARY INFORMATION: The Department of the Air Force has determined that this rule is not a major rule because it will not have an annual effect on the economy of $100 million or more. The Secretary of the Air Force has certified that this rule is exempt from the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, because this rule does not have a significant economic impact on small entities as defined by the Act, and does not impose any obligatory information requirements beyond internal Air Force use. The Department of the Air Force proposed a revised Wake Island Code, consisting of Part 935 of Title 32 of the Code of Federal Regulations, in the **Federal Register** on October 25, 2000 (65 FR 63826).

Comments on Proposed Rule 32 CFR Part 935

Comments were received from only one source, the U.S. Army Space and Missile Defense Command.

Comment: ''As the current operator of Wake Island, at least in the short term, SMDC and its employees and contractors are likely to be the parties most affected by these revisions. As a general matter, it is not evident that the current operating arrangement or makeup of the workforce (mostly foreign nationals) was considered in the current revisions. For example, the permitting authority in § 935.11, and other functions, powers, and duties of the Commander of Wake Island in § 935.12, do not appear to consider the contractual relationship between the Army and its operating contractor on Wake Island, which requires the contractor to perform many of these functions. In addition, the provisions relating to the jurisdiction and procedures for the judiciary appear to be more appropriate for an active base with a substantial American population than for the current operational situation on Wake Island.''

Response: Many of the comments received from the U.S. Army Space and Missile Defense Command were based on the supposition that the Army would continue to be the primary presence on the island. That is no longer the case. The Air Force plans to resume responsibility for host management of the island at the beginning of fiscal year 2002. The Air Force has responsibility to provide the necessary level of civil administration for Wake Island considering all probable situations. That includes the possibility that it may return to an active or semi-active status. It is entirely appropriate for the Code to have provisions that contemplate a larger population than currently present or one made up of American nationals. To the extent that an Army contractor is exercising authorities covered by the Code that have not been delegated to it by the Air Force Commander, the contractor is acting without authority. No change will be made in response to this comment.

Comment: ''The summary of the proposed rule states that one of its major purposes is to ''provide for civil government not otherwise provided by law''. However, Section 644a of Title 48 of the U.S. Code extended the jurisdiction of the U.S. District Court for the District of Hawaii to ''all civil and criminal cases arising on or within * * * Wake Island. * * *'' It is not clear how the judicial authority of the Wake Island Court relates to the authority of the U.S. District Court for the District of Hawaii.''

Response: The Code has provided for over a quarter century and will continue to provide a civil government not otherwise provided by law. This includes those matters such as traffic laws and other general police powers not included in general federal law. It is clear that the authority of the Wake Island Court is subordinate to that of the U.S. District Court. No change will be made in response to this comment.

Comment: ''Section 935.13—Revocation or suspension of permits and registrations. The provision for a personal hearing before the Commander within 30 days could be difficult to implement from this remote location. Substantial travel by the petitioner or the presence on Wake Island of an Air Force commissioned officer with the Commander's delegated authority would be required to implement the provision.''

Response: Under current circumstances, a personal hearing could pose a difficulty if the Island Commander were not present on the island and the applicant wanted to make a personal appearance. However, a personal appearance is not required for such a hearing and the applicant is within his rights to waive a personal appearance. Since the alternative is to grant no right of appeal to a revocation or suspension of a permit, the current provision is appropriate for the circumstances. There is no known instance of any applicant for a permit or registration having been unduly burdened by this provision. No change will be made in response to this comment.

Comment: ''Section 935.14—Autopsies. This provision assumes that the Wake Island medical officer or someone under his supervision would be qualified to perform autopsies. This may not be a correct assumption.''

Response: This provision makes no such assumption. Autopsies can only be performed by a medical officer or a person under his supervision upon authorization of the Island Commander or a Judge of the Wake Island Court. The authorizing official would have to determine that the medical officer or other person were qualified to perform an autopsy prior to granting

authorization. No change will be made in response to this comment.

Comment: ''Section 935.15—Notaries Public. The purpose of the $50.00 fee for a person applying for commission as a notary public is not evident. The presence of a notary on Wake Island should be viewed as a public service. The fee could remove the incentive to become a notary public.''

Response: Since there is no prohibition of a person commissioned as a notary public from charging for his services, an appropriate fee to defray the costs of the United States in granting the commission is entirely appropriate. No change will be made in response to this comment.

Comment: ''Section 935.40—Criminal Offenses. (1) The use of the term ''assignation'' in subsection (c) may not be understood by many to whom it could apply. Recommend a more generally understood term to avoid ambiguity. (2) The prohibition in subsection (h) prohibiting entry upon areas ''immediately adjacent to'' assigned residential quarters without permission of the occupant is also subject to ambiguous interpretation. Recommend this language be clarified to reflect the actual residential situation on Wake Island. (3) The prohibition in subsection (j) against committing ''any act of nuisance'' under the listing of criminal offenses appears overbroad and difficult to enforce. Nuisance is normally not criminalized but is handled under the civil law of the respective jurisdiction. (4) The prohibition in subsection (n) against loitering also appears overbroad and difficult to enforce. The need for this provision is not evident, and the terms ''without any lawful purpose'' and ''late and unusual hours of the night'' are ambiguous. What is the Air Force experience with this provision on other AF bases?''

Response: These provisions have been in place since 1972 without change. They apply to the peculiar circumstances of Wake Island. There is no known instance of difficulty in applying them. Since the Air Force does not have civil administrative authority over its other installations, it has no experience elsewhere to compare this to. No change will be made in response to this comment.

Comment: ''(5) SMDC objects to the prohibition in subsection 935.40(v) against importing onto or keeping on Wake Island non-indigenous animals (pets). This is not a restriction under the current operating arrangement, and there are believed to be less restrictive ways to achieve the Air Force objectives (such as a requirement that pets be neutered).''

Response: The goal of this change is to reduce the already existing problem of non-indigenous animals being allowed to breed into feral populations, thereby endangering the indigenous wildlife populations. The alternative to a ban is to institute a cumbersome and expensive program to quarantine animals and require inspections. Such a program would create a burdensome expense and consumption of resources for the Air Force. Since there is no current authority for the personnel now on Wake Island to maintain such non-indigenous animals, this provision should pose no problem for them. Were they to have such animals there now, they would be in violation of the permit allowing their presence on the island. No change will be made in response to this comment.

Comment: ''Section 935.65(a)—Jurisdiction. This provision appears to give the Wake Island Court jurisdiction over ''civil actions'' equivalent to a small claims court. However, there does not appear to be a requirement that the claim have arisen on Wake Island or that the parties be resident on Wake Island. Without such a limitation, there could be numerous problems concerning the applicable law and the enforceability of the court's decrees. In addition, it is not apparent how vesting jurisdiction over civil actions in the Wake Island Court is superior to relying on the U.S. District Court in Hawaii to adjudicate these issues.''

Response: Since the Wake Island Court can only exercise its authority in relation to matters under this part, its jurisdiction is necessarily limited to actions on Wake Island or its appurtenant waters since this part is only applicable to those areas. Since there has never before been a problem in this regard, there is no compelling reason to transfer jurisdiction to the U.S. District Court, even assuming it could assume that jurisdiction. No change will be made in response to this comment.

Comment: ''Section 935.80—Subpoenas. The requirement of subsection (d) for collection of a witness fee for each subpoena requested by a party other than the United States could have a chilling effect on a defendant's right to conduct a defense against criminal charges brought under the Wake Island Code. It is not clear whether this requirement would apply to civil actions. If so, the chilling effect would also be present in civil actions tried by the Wake Island Court.''

Response: Arguably, all fees have a chilling effect on the person desiring to take action. Nevertheless, it is widely accepted that the Government may charge fees, including fees to defray the cost of judicial services. No change will be made in response to this comment.

Comment: ''Section 935.97—Garnishment. Is there precedent or authority for the judgment of a court with the limited jurisdiction of the Wake Island Court being honored by other jurisdictions, so as to make this provision effective in carrying out garnishments?''

Response: The authority of the Wake Island Court is founded in federal law. Since all courts have limitations on their jurisdiction, that alone cannot be considered as defeating the authority to garnish wages. No change will be made in response to this comment.

Comment: ''Sections 935.120 and 935.121—Authority and Qualifications of peace officers, respectively. In discussions with both the Marshals Service and U.S. Attorney's Office in Hawaii in March of 1996, the undersigned learned that a procedure for deputizing individuals at Wake Island could be implemented. This would enable U.S. citizens (including contractors) to perform these functions. We recommend that further consideration be given to this option as a way to perform peace officer functions on Wake Island, either to augment or substitute for the peace officers to be appointed by the provisions in the proposed rule.''

Response: The authority to perform the functions of a peace officer under the Code flows from a delegation by either the Code or the Island Commander. The Code does not address the authority of U.S. Marshals to enforce the laws of the United States within the territory of the United States. Since the Air Force does not currently have any permanent party personnel on Wake Island and exercises no control over the Army's contractor personnel, it is not inclined to consent to the deputization of such contractor personnel to enforce laws on Wake Island. Such a deputization would detract from the authority of the Island Commander to maintain order and control on the island. No change will be made in response to this comment.

Comment: ''Section 935.139—Motor vehicle operator qualifications. The benefit of the Commander issuing vehicle operator's permits, instead of having this function performed under the operating contract, is not clear.''

Response: Control of motor vehicle operations on Air Force installations is within the authority of the installation commander. It is not delegated to contractor personnel, and certainly not contractor personnel of another agency

over which the Air Force exercises no control. No change will be made in response to this comment.

Comment: ''Section 935.140—Motor vehicle maintenance and equipment. This function is encompassed in the operating contract at Wake Island. There does not appear to be a benefit from having the function under the direction of the Commander. This comment also applies to Sections 935.150 and 935.151, and some of the provisions in 935.152.''

Response: As noted above, the authority to regulate activities on Wake Island is in the hands of the Island Commander, not an Army contractor. The Army cannot delegate authority it does not have. No change will be made in response to this comment.

List of Subjects in 32 CFR Part 935

Courts, Law enforcement, Military law, Motor vehicles, Penalties, Safety, Wake Island.

For the reasons set forth in the preamble, the Department of the Air Force is revising 32 CFR Part 935 to read as follows:

PART 935—WAKE ISLAND CODE

Subpart A—General

Sec.
935.1 Applicability.
935.2 Purpose.
935.3 Definitions.
935.4 Effective date.

Subpart B—Civil Administration Authority

935.10 Designation and delegation of authority.
935.11 Permits.
935.12 Functions, powers, and duties.
935.13 Revocation or suspension of permits and registrations.
935.14 Autopsies.
935.15 Notaries public.
935.16 Emergency authority.

Subpart C—Civil Law

935.20 Applicable law.
935.21 Civil rights, powers, and duties.

Subpart D—Criminal Law

935.30 General.

Subpart E—Petty Offenses

935.40 Criminal offenses.

Subpart F—Penalties

935.50 Petty offenses.
935.51 Motor vehicle violations.
935.52 Violations of Subpart O or P of this part.
935.53 Contempt.

Subpart G—Judiciary

935.60 Wake Island Judicial Authority
935.61 Wake Island Court.
935.62 Island Attorney.
935.63 Public Defender.
935.64 Clerk of the Court.
935.65 Jurisdiction.
935.66 Court of Appeals.
935.67 Clerk of the Court of Appeals.
935.68 Jurisdiction of the Court of Appeals.
935.69 Qualifications and admission to practice.

Subpart H—Statute of Limitations

935.70 Limitation of actions.

Subpart I—Subpoenas, Wake Island Court

935.80 Subpoenas.

Subpart J—Civil Actions

935.90 General.
935.91 Summons.
935.92 Service of complaint.
935.93 Delivery of summons to plaintiff.
935.94 Answer.
935.95 Proceedings; record; judgment.
935.96 Execution of judgment.
935.97 Garnishment.

Subpart K—Criminal Actions

935.100 Bail.
935.101 Seizure of property.
935.102 Information.
935.103 Motions and pleas.
935.104 Sentence after a plea of guilty.
935.105 Trial.

Subpart L—Appeals and New Trials

935.110 Appeals.
935.111 New trial.

Subpart M—Peace Officers

935.120 Authority.
935.121 Qualifications of peace officers.
935.122 Arrests.
935.123 Warrants.
935.124 Release from custody.
935.125 Citation in place of arrest.

Subpart N—Motor Vehicle Code

935.130 Applicability.
935.131 Right-hand side of the road.
935.132 Speed limits.
935.133 Right-of-way.
935.134 Arm signals.
935.135 Turns.
935.136 General operating rules.
935.137 Operating requirements.
935.138 Motor bus operation.
935.139 Motor vehicle operator qualifications.
935.140 Motor vehicle maintenance and equipment.

Subpart O—Registration and Island Permits

935.150 Registration.
935.151 Island permit for boat or vehicle.
935.152 Activities for which permit is required.

Subpart P—Public Safety

935.160 Emergency requirements and restrictions.
935.161 Fire hazards.
935.162 Use of special areas.
935.163 Unexploded ordnance material.
935.164 Boat operations.
935.165 Floating objects.

Authority: Sec. 48, Pub. L. 86–624, 74 Stat. 424; E.O. 11048, Sept. 1, 1962, 27 FR 8851, 3 CFR, 1959–1963 Comp., p. 632; agreement between the Department of Interior and Department of the Air Force, dated 19 June 1972, 37 FR 12255; and Secretary of the Air Force Order 111.1, dated 26 April 1999.

Subpart A—General

§ 935.1 Applicability.

(a) The local civil and criminal laws of Wake Island consist of this part and applicable provisions of the laws of the United States.

(b) For the purposes of this part, Wake Island includes Wake, Peale, and Wilkes Islands, and the appurtenant reefs, shoals, shores, bays, lagoons, keys, territorial waters, and superadjacent airspace of them.

§ 935.2 Purpose.

The purpose of this part is to provide—

(a) For the civil administration of Wake Island;

(b) Civil laws for Wake Island not otherwise provided for;

(c) Criminal laws for Wake Island not otherwise provided for; and

(d) A judicial system for Wake Island not otherwise provided for.

§ 935.3 Definitions.

In this part—

(a) *General Counsel* means the General Counsel of the Air Force or his successor in office.

(b) *Commander* means the Commander, Wake Island.

(c) *Commander, Wake Island* means the Commander of Pacific Air Forces or such subordinate commissioned officer of the Air Force to whom he may delegate his authority under this part.

(d) *He* or *his* includes both the masculine and feminine genders, unless the context implies otherwise.

(e) *Judge* includes Judges of the Wake Island Court and Court of Appeals.

§ 935.4 Effective date.

This part was originally applicable at 0000 June 25, 1972. Amendments to this part apply April 10, 2002.

Subpart B—Civil Administration Authority

§ 935.10 Designation and delegation of authority.

(a) The civil administration authority at Wake Island is vested in the Secretary of the Air Force. That authority has been delegated to the General Counsel of the Air Force with authority to redelegate all or any part of his functions, powers, and duties under this part to such officers and employees of the Air Force as he may designate, but excluding redelegation of the power to promulgate, amend, or repeal this part, or any part thereof. Such redelegation must be in writing and must be in accordance with

any applicable Secretary of the Air Force Orders. Such redelegation may be further redelegated subject to such restrictions as the delegating authority may impose. A redelegation may also be made to a commissioned officer serving in another United States military service who exercises military command, but such redelegation must explicitly and specifically list the powers redelegated and shall not include the power or authority to issue permits, licenses, or other outgrants unless individually approved by the Air Force official who made the redelegation. The Commander is the agent of the Secretary, his delegate and designee when carrying out any function, power, or duty assigned under this part.

(b) The authority of the General Counsel to appoint Judges shall not be delegated.

(c) Judges and officers of the court may not redelegate their powers or authorities except as specifically noted in this part.

§ 935.11 Permits.

(a) Permits in effect on the dates specified in § 935.4 continue in effect until revoked or rescinded by the Commander. Permits issued by the Commander shall conform to the requirements of Air Force Instruction 32–9003 (Available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.). No permit or registration shall be issued under other authority that is inconsistent with this part. The Commander may issue island permits or registration for—

(1) Businesses, including any trade, profession, calling, or occupation, and any establishment where food or beverages are prepared, offered, or sold for human consumption.

(2) Self-propelled motor vehicles, except aircraft, including attached trailers.

(3) Vehicle operators.

(4) Boats.

(5) Food handlers.

(6) Drugs, narcotics, and poisons.

(7) Construction.

(8) Burials.

(b) To the extent it is not inconsistent with this part, any permit or registration issued pursuant to Air Force directives or instructions as applicable to Wake Island shall constitute a permit or registration under this section, and no other permit or registration shall be required.

§ 935.12 Functions, powers, and duties.

The Commander may—

(a) Appoint Peace Officers;

(b) Direct the abatement of any public nuisance upon failure of any person to comply with a notice of removal;

(c) Direct sanitation and fire prevention inspections;

(d) Establish records of vital statistics;

(e) Direct the registration and inspections of motor vehicles, boats, and aircraft;

(f) Impose quarantines;

(g) Direct the impoundment and destruction of unsanitary food, fish, or beverages;

(h) Direct the evacuation of any person from a hazardous area;

(i) Commission notaries public;

(j) Establish and maintain a facility for the restraint or confinement of persons and provide for their care;

(k) Direct the removal of any person from Wake Island and prohibit his future presence on the island;

(l) Issue traffic regulations that are not inconsistent with this part, and post traffic signs;

(m) Prohibit the posting, distribution, or public display of advertisements, signs, circulars, petitions, or similar materials, soliciting, picketing, or parading in any public place or area if he determines it would interfere with public business or endanger the health and safety of persons and property on Wake Island;

(n) Perform or direct any other acts, not inconsistent with this part or applicable laws and regulations, if he considers it necessary for protection of the health or safety of persons and property on Wake Island; and

(o) Issue any order or notice necessary to implement this section. Any order or notice issued pursuant to Air Force directives and instructions as applicable to Wake Island shall constitute an order or notice issued pursuant to this section.

§ 935.13 Revocation or suspension of permits and registrations.

(a) The Commander may revoke or suspend any island permit or registration for cause, with or without notice.

(b) The holder of any revoked or suspended permit or registration may demand a personal hearing before the Commander within 30 days after the effective date of the revocation or suspension.

(c) If a hearing is demanded, it shall be granted by the Commander within 30 days of the date of demand. The applicant may appear in person and present such documentary evidence as is pertinent. The Commander shall render a decision, in writing, setting forth his reasons, within 30 days thereafter.

(d) If a hearing is not granted within 30 days, a written decision is not rendered within 30 days after a hearing, or the applicant desires to appeal a decision, he may, within 30 days after the latest of any of the foregoing dates appeal in writing to the General Counsel, whose decision shall be final.

§ 935.14 Autopsies.

The medical officer on Wake Island, or any other qualified person under his supervision, may perform autopsies upon authorization of the Commander or a Judge of the Wake Island Court.

§ 935.15 Notaries public.

(a) To the extent he considers there to be a need for such services, the Commander may commission one or more residents of Wake Island as notaries public. The Commander of Pacific Air Forces may not redelegate this authority.

(b) A person applying for commission as a notary public must be a citizen of the United States and shall file an application, together with evidence of good character and a proposed seal in such form as the Commander requires, with a fee of $50 which shall be deposited in the Treasury as a miscellaneous receipt.

(c) Upon determining there to be a need for such a service and after such investigation as he considers necessary, the Commander may commission an applicant as a notary public. Commissions shall expire 3 years after the date thereof, and may be renewed upon application upon payment of a fee of $25.

(d) Judges and the Clerk of the Wake Island Court and the Island Attorney shall have the general powers of a notary public.

§ 935.16 Emergency authority.

During the imminence and duration of any emergency declared by him, the Commander may perform or direct any acts necessary to protect life and property.

Subpart C—Civil Law

§ 935.20 Applicable law.

Civil acts and deeds taking place on Wake Island shall be determined and adjudicated as provided in this part; and otherwise, as provided in the Act of June 15, 1950 (64 Stat. 217) (48 U.S.C. 644a), according to the laws of the United States relating to such an act or deed taking place on the high seas on board a merchant vessel or other vessel belonging to the United States.

§ 935.21 Civil rights, powers, and duties.

In any case in which the civil rights, powers, and duties of any person on Wake Island are not otherwise

prescribed by the laws of the United States or this part, the civil rights, powers, and duties as they obtain under the laws of the State of Hawaii will apply to persons on Wake Island.

Subpart D—Criminal Law

§ 935.30 General.

In addition to any act made criminal in this part, any act committed on Wake Island that would be criminal if committed on board a merchant vessel or other vessel belonging to the United States is a criminal offense and shall be adjudged and punished according to the laws applicable on board those vessels on the high seas.

Subpart E—Petty Offenses

§ 935.40 Criminal offenses.

No person may on Wake Island—

(a) Sell or give an alcoholic beverage manufactured for consumption (including beer, ale, or wine) to any person who is not at least 21 years of age;

(b) Procure for, engage in, aid or abet in, or solicit for prostitution;

(c) Use any building, structure, vehicle, or public lands for the purpose of lewdness, assignation, or prostitution;

(d) Possess or display (publicly or privately) any pornographic literature, film, device, or any matter containing obscene language, that tends to corrupt morals;

(e) Make any obscene or indecent exposure of his person;

(f) Commit any disorderly, obscene, or indecent act;

(g) Commit any act of voyeurism (Peeping Tom);

(h) Enter upon any assigned residential quarters or areas immediately adjacent thereto, without permission of the assigned occupant;

(i) Discard or place any paper, debris, refuse, garbage, litter, bottle, can, human or animal waste, trash, or junk in any public place, except into a receptacle or place designated or used for that purpose;

(j) Commit any act of nuisance;

(k) With intent to provoke a breach of the peace or under such circumstances that a breach of the peace may be occasioned thereby, act in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to any other person;

(l) Be drunk in any public place;

(m) Use any profane or vulgar language in a public place;

(n) Loiter or roam about Wake Island, without any lawful purpose, at late and unusual hours of the night;

(o) Lodge or sleep in any place without the consent of the person in legal possession of that place;

(p) Grossly waste any potable water;

(q) Being a male, knowingly enter any area, building, or quarters reserved for women, except in accordance with established visiting procedures;

(r) Smoke or ignite any fire in any designated and posted ''No Smoking'' area, or in the immediate proximity of any aircraft or fueling pit;

(s) Enter any airplane parking area or ramp, unless he is on duty therein, is a passenger under appropriate supervision, or is authorized by the Commander to enter that place;

(t) Interfere or tamper with any aircraft or servicing equipment or facility, or put in motion the engine of any aircraft without the permission of its operator;

(u) Post, distribute, or publicly display advertisements, signs, circulars, petitions, or similar materials, or solicit, picket, or parade in any public place or area where prohibited by the Commander pursuant to § 935.12;

(v) Import onto or keep on Wake Island any plant or animal not indigenous to the island, other than military working dogs or a guide dog for the blind or visually-impaired accompanying its owner; or

(w) Import or bring onto or possess while on Wake Island any firearm, whether operated by air, gas, spring, or otherwise, or explosive device, including fireworks, unless owned by the United States.

Subpart F—Penalties

§ 935.50 Petty offenses.

Whoever is found guilty of a violation of any provision of subpart E of this part is subject to a fine of not more than $500 or imprisonment of not more than 6 months, or both.

§ 935.51 Motor vehicle violations.

Whoever is found guilty of a violation of subpart N of this part is subject to a fine of not more than $100, imprisonment of not more than 30 days, or suspension or revocation of his motor vehicle operator's permit, or any combination or all of these punishments.

§ 935.52 Violations of Subpart O or P of this part.

(a) Whoever is found guilty of a violation of subpart O or P of this part is subject to a fine of not more than $100, or imprisonment of not more than 30 days, or both.

(b) The penalties prescribed in paragraph (a) of this section are in addition to and do not take the place of any criminal penalty otherwise applicable and currently provided by the laws of the United States.

§ 935.53 Contempt.

A Judge may, in any civil or criminal case or proceeding, punish any person for disobedience of any order of the Court, or for any contempt committed in the presence of the Court, by a fine of not more than $100, or imprisonment of not more than 30 days, or both.

Subpart G—Judiciary

§ 935.60 Wake Island Judicial Authority.

(a) The judicial authority under this part is vested in the Wake Island Court and the Wake Island Court of Appeals.

(b) The Wake Island Court and the Wake Island Court of Appeals shall each have a seal approved by the General Counsel.

(c) Judges and Clerks of the Courts may administer oaths.

§ 935.61 Wake Island Court.

(a) The trial judicial authority for Wake Island is vested in the Wake Island Court.

(b) The Wake Island Court consists of one or more Judges, appointed by the General Counsel as needed. The term of a Judge shall be for one year, but he may be re-appointed. When the Wake Island Court consists of more than one Judge, the General Counsel shall designate one of the Judges as the Chief Judge who will assign matters to Judges, determine when the Court will sit individually or en banc, and prescribe rules of the Court not otherwise provided for in this Code. If there is only one Judge appointed, that Judge shall be the Chief Judge.

(c) Sessions of the Court are held on Wake Island or Hawaii at times and places designated by the Chief Judge.

§ 935.62 Island Attorney.

There is an Island Attorney, appointed by the General Counsel as needed. The Island Attorney shall serve at the pleasure of the General Counsel. The Island Attorney represents the United States in the Wake Island Court and in the Wake Island Court of Appeals.

§ 935.63 Public Defender.

There is a Public Defender, appointed by the General Counsel as needed. The Public Defender shall serve at the pleasure of the General Counsel. The Public Defender represents any person charged with an offense under this part who requests representation and who is not able to afford his own legal representation.

§ 935.64 Clerk of the Court.

There is a Clerk of the Court, who is appointed by the Chief Judge. The Clerk shall serve at the pleasure of the Chief Judge. The Clerk maintains a public docket containing such information as the Chief Judge may prescribe, administers oaths, and performs such other duties as the Court may direct. The Clerk is an officer of the Court.

§ 935.65 Jurisdiction.

(a) The Wake Island Court has jurisdiction over all offenses under this part and all actions of a civil nature, cognizable at law or in equity, where the amount in issue is not more than $1,000, exclusive of interests and costs, but not including changes of name or domestic relations matters.

(b) The United States is not subject to suit in the Court.

(c) The United States may intervene in any matter in which the Island Attorney determines it has an interest.

§ 935.66 Court of Appeals.

(a) The appellate judicial authority for Wake Island is vested in the Wake Island Court of Appeals.

(b) The Wake Island Court of Appeals consists of a Chief Judge and two Associate Judges, appointed by the General Counsel as needed. The term of a judge shall be for one year, but he may be reappointed. The Chief Judge assigns matters to Judges, determines whether the Court sits individually or en banc, and prescribes rules of the Court not otherwise provided for in this part.

(c) Sessions of the Court of Appeals are held in the National Capital Region at times and places designated by the Chief Judge. The Court may also hold sessions at Wake Island or in Hawaii.

(d) A quorum of the Court of Appeals will consist of one Judge when sitting individually and three Judges when sitting en banc.

(e) The address of the Court of Appeals is—Wake Island Court of Appeals, SAF/GC, Room 4E856, 1740 Air Force Pentagon, Washington, D.C. 20330–1740.

§ 935.67 Clerk of the Court of Appeals.

There is a Clerk of the Court of Appeals, who is appointed by the Chief Judge. The Clerk serves at the pleasure of the Chief Judge. The Clerk maintains a public docket containing such information as the Chief Judge may prescribe, administers oaths, and performs such other duties as the Court directs. The Clerk is an officer of the Court.

§ 935.68 Jurisdiction of the Court of Appeals.

The Court of Appeals has jurisdiction over all appeals from the Wake Island Court.

§ 935.69 Qualifications and admission to practice.

(a) No person may be appointed a Judge, Island Attorney, or Public Defender under this part who is not a member of the bar of a State, Commonwealth, or Territory of the United States or of the District of Columbia.

(b) Any person, other than an officer or employee of the Department of the Air Force, appointed as a Judge, Island Attorney, Public Defender, or to any other office under this part shall, prior to entering upon the duties of that office, take an oath, prescribed by the General Counsel, to preserve, protect, and defend the Constitution of the United States. Such oath may be administered by any officer or employee of the Department of the Air Force.

(c) Civilian officers and employees of the Department of the Air Force may be appointed as a Judge, Island Attorney, Public Defender, or Clerk, as an additional duty and to serve without additional compensation. Officers and employees of the Department of the Air Force, both civilian and military, who serve in positions designated as providing legal services to the Department and who are admitted to practice law in an active status before the highest court of a State, Commonwealth, or territory of the United States, or of the District of Columbia, and are in good standing therewith, are admitted to the Bar of the Wake Island Court and the Wake Island Court of Appeals.

(d) No person may practice law before the Wake Island Court or the Wake Island Court of Appeals who is not admitted to Bar of those courts. Any person admitted to practice law in an active status before the highest court of a State, Commonwealth, or territory of the United States, or of the District of Columbia, and in good standing therewith, may be admitted to the Bar of the Wake Island Court and the Wake Island Court of Appeals. Upon request of the applicant, the Court, on its own motion, may grant admission. A grant of admission by either court constitutes admission to practice before both courts.

Subpart H—Statute of Limitations

§ 935.70 Limitation of actions.

(a) No civil action may be filed more than 1 year after the cause of action arose.

(b) No person is liable to be tried under this part for any offense if the offense was committed more than 1 year before the date the information or citation is filed with the Clerk of the Wake Island Court.

Subpart I—Subpoenas, Wake Island Court

§ 935.80 Subpoenas.

(a) A Judge or the Clerk of the Court shall issue subpoenas for the attendance of witnesses. The subpoena must include the name of the Court and the title, if any, of the proceeding; and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The Clerk may issue a subpoena for a party requesting it, setting forth the name of the witness subpoenaed.

(b) A Judge or the Clerk may also issue a subpoena commanding the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The Court may direct that books, papers, documents, or other objects designated in the subpoena be produced before the Court at a time before the trial or before the time when they are to be offered into evidence. It may, upon their production, allow the books, papers, documents, or objects or portions thereof to be inspected by the parties and their representatives.

(c) Any peace officer or any other person who is not a party and who is at least 18 years of age may serve a subpoena. Service of a subpoena shall be made by delivering a copy thereof to the person named.

(d) The Clerk of the Court shall assess and collect a witness fee of $40 for each subpoena requested by any party other than the United States, which shall be tendered to the witness as his witness fee together with service of the subpoena. Witnesses subpoenaed by the Island Attorney shall be entitled to a fee of $40 upon presentment of a proper claim therefor on the United States. No duly summoned witness may refuse, decline, or fail to appear or disobey a subpoena on the ground that the witness fee was not tendered or received.

(e) Upon a showing that the evidence is necessary to meet the ends of justice and that the defendant is indigent, the Public Defender may request the Court to direct the Island Attorney to obtain the issuance of a subpoena on behalf of a defendant in a criminal case. Witnesses so called on behalf of the defendant shall be entitled to the same witness fees as witnesses requested by the Island Attorney.

(f) Subpoenas may be credited only to persons or things on Wake Island.

(g) No person who is being held on Wake Island because of immigration status shall be entitled to a witness fee, but shall nevertheless be subject to subpoena like any other person.

Subpart J—Civil Actions

§ 935.90 General.

(a) The Federal Rules of Civil Procedure (28 U.S.C.) apply to civil actions in the Court to the extent the presiding Judge considers them applicable under the circumstances.

(b) There is one form of action called the ''Civil Action.''

(c) Except as otherwise provided for in this part, there is no trial by jury.

(d) A civil action begins with the filing of a complaint with the Court. The form of the complaint is as follows except as it may be modified to conform as appropriate to the particular action:

In the Wake Island Court

[Civil Action No. _____]

_____ *(Plaintiff)* vs. _____, *(Defendant)*

Complaint

_____ plaintiff alleges that the defendant is indebted to plaintiff in the sum of $_____; that plaintiff has demanded payment of said sum; that defendant has refused to pay; that defendant resides at _____ on Wake Island; that plaintiff resides at _____.

§ 935.91 Summons.

Upon the filing of a complaint, a Judge or Clerk of the Court shall issue a summons in the following form and deliver it for service to a peace officer or other person specifically designated by the Court to serve it:

In the Wake Island Court

[Civil Action No. _____]

_____*(Plaintiff),* vs. _____ *(Defendant)*

Summons

To the above-named defendant:

You are hereby directed to appear and answer the attached cause at _____ on _____ day of _____ 20—, at _____ -.M. and to have with you all books, papers, and witnesses needed by you to establish any defense you have to said claim.

You are further notified that in case you do not appear, judgment will be given against you, for the amount of said claim, together with cost of this suit and the service of this order.

Dated: _____, 20 _____.
(Clerk, Wake Island Court)

_____

§ 935.92 Service of complaint.

(a) A peace officer or other person designated by the Court to make service shall serve the summons and a copy of the complaint at Wake Island upon the defendant personally, or by leaving them at his usual place of abode with any adult residing or employed there.

(b) In the case of a corporation, partnership, joint stock company, trading association, or other unincorporated association, service may be made at Wake Island by delivering a copy of the summons and complaint to any of its officers, a managing or general agent, or any other agent authorized by appointment or by law to receive service.

§ 935.93 Delivery of summons to plaintiff.

The Clerk of the Court shall promptly provide a copy of the summons to the plaintiff, together with notice that if the plaintiff fails to appear at the Court at the time set for the trial, the case will be dismissed. The trial shall be set at a date that will allow each party at least 7 days, after the pleadings are closed, to prepare.

§ 935.94 Answer.

(a) The defendant may, at his election, file an answer to the complaint.

(b) The defendant may file a counterclaim, setoff, or any reasonable affirmative defense.

(c) If the defendant elects to file a counterclaim, setoff, or affirmative defense, the Court shall promptly send a copy of it to the plaintiff.

§ 935.95 Proceedings; record; judgment.

(a) The presiding Judge is responsible for the making of an appropriate record of each civil action.

(b) All persons shall give their testimony under oath or affirmation. The Chief Judge shall prescribe the oath and affirmation that may be administered by any Judge or the Clerk of the Court.

(c) Each party may present witnesses and other forms of evidence. In addition, the presiding Judge may informally investigate any controversy, in or out of the Court, if the evidence obtained as a result is adequately disclosed to all parties. Witnesses, books, papers, documents, or other objects may be subpoenaed as provided for in § 935.80 for criminal cases.

(d) The Court may issue its judgment in writing or orally from the bench. However, if an appeal is taken from the judgment, the presiding Judge shall, within 10 days after it is filed, file a memorandum of decision as a part of the record. The Judge shall place in the memorandum findings of fact, conclusions of law, and any comments that he considers will be helpful to a thorough understanding and just determination of the case on appeal.

§ 935.96 Execution of judgment.

(a) If, after 60 days after the date of entry of judgment (or such other period as the Court may prescribe), the judgment debtor has not satisfied the judgment, the judgment creditor may apply to the Court for grant of execution on the property of the judgment debtor.

(b) Upon a writ issued by the Court, any peace officer may levy execution on any property of the judgment debtor except—

(1) His wearing apparel up to a total of $300 in value;

(2) His beds, bedding, household furniture and furnishings, stove, and cooking utensils, up to a total of $300 in value; and

(3) Mechanics tools and implements of the debtor's trade up to a total of $200 in value.

(c) Within 60 days after levy of execution, a peace officer shall sell the seized property at public sale and shall pay the proceeds to the Clerk of the Court. The Clerk shall apply the proceeds as follows:

(1) First, to the reasonable costs of execution and sale and court costs.

(2) Second, to the judgment.

(3) Third, the residue (if any) to the debtor.

(d) In any case in which property has been seized under a writ of execution, but not yet sold, the property seized shall be released upon payment of the judgment, court costs, and the costs of execution.

§ 935.97 Garnishment.

(a) If a judgment debtor fails to satisfy a judgment in full within 60 days after the entry of judgment (or such other period as the Court may prescribe), the Court may, upon the application of the judgment creditor issue a writ of garnishment directed to any person having money or property in his possession belonging to the judgment debtor or owing money to the judgment debtor. The following are exempt from judgment:

(1) Ninety percent of so much of the gross wages as does not exceed $200 due to the judgment debtor from his employer.

(2) Eighty percent of so much of the gross wages as exceeds $200 but does not exceed $500 due to the judgment debtor from his employer.

(3) Fifty percent of so much of the gross wages as exceeds $500 due to the judgment debtor from his employer.

(b) The writ of garnishment shall be served on the judgment debtor and the garnishee and shall direct the garnishee to pay or deliver from the money or property owing to the judgment debtor such money or property as the Court may prescribe.

(c) The garnished amount shall be paid to the Clerk of the Court, who shall apply it as follows:

(1) First, to satisfy the costs of garnishment and court costs.

(2) Second, to satisfy the judgment.

(3) Third, the residue (if any) to the judgment debtor.

(d) Funds of the debtor held by the United States are not subject to garnishment.

Subpart K—Criminal Actions

§ 935.100 Bail.

(a) A person who is arrested on Wake Island for any violation of this part is entitled to be released on bail in an amount set by a Judge or Clerk of the Court, which may not exceed the maximum fine for the offense charged. If the defendant fails to appear for arraignment, trial or sentence, or otherwise breaches any condition of bail, the Court may direct a forfeiture of the whole or part of the bail and may on motion after notice to the surety or sureties, if any, enter a judgment for the amount of the forfeiture.

(b) The Chief Judge of the Wake Island Court may prescribe a schedule of bail for any offense under this part which the defendant may elect to post and forfeit without trial, in which case the Court shall enter a verdict of guilty and direct forfeiture of the bail.

(c) Bail will be deposited in cash with the Clerk of the Court.

§ 935.101 Seizure of property.

Any property seized in connection with an alleged offense (unless the property is perishable) is retained pending trial in accordance with the orders of the Court. The property must be produced in Court, if practicable. At the termination of the trial, the Court shall restore the property or the funds resulting from the sale of the property to the owner, or make such other proper order as may be required and incorporate its order in the record of the case. Any item used in the commission of the offense, may, upon order of the Court, be forfeited to the United States. All contraband, which includes any item that is illegal for the owner to possess, shall be forfeited to the United States; such forfeiture shall not relieve the owner from whom the item was taken from any costs or liability for the proper disposal of such item.

§ 935.102 Information.

(a) Any offense may be prosecuted by a written information signed by the Island Attorney. However, if the offense is one for which issue of a citation is authorized by this part and a citation for the offense has been issued, the citation serves as an information.

(b) A copy of the information shall be delivered to the accused, or his counsel, as soon as practicable after it is filed.

(c) Each count of an information may charge one offense only and must be particularized sufficiently to identify the place, the time, and the subject matter of the alleged offense. It shall refer to the provision of law under which the offense is charged, but any error in this reference or its omission may be corrected by leave of Court at any time before sentence and is not grounds for reversal of a conviction if the error or omission did not mislead the accused to his prejudice.

§ 935.103 Motions and pleas.

(a) Upon motion of the accused at any time after filing of the information or copy of citation, the Court may order the prosecutor to allow the accused to inspect and copy or photograph designated books, papers, documents, or tangible objects obtained from or belonging to the accused, or obtained from others by seizure or process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.

(b) When the Court is satisfied that it has jurisdiction to try the accused as charged, it shall require the accused to identify himself and state whether or not he has counsel. If he has no counsel, but desires counsel, the Court shall give him a reasonable opportunity to procure counsel.

(c) When both sides are ready for arraignment, or when the Court determines that both sides have had adequate opportunities to prepare for arraignment, the Court shall read the charges to the accused, explain them (if necessary), and, after the reading or stating of each charge in Court, ask the accused whether he pleads ''guilty'' or ''not guilty''. The Court shall enter in the record of the case the plea made to each charge.

(d) The accused may plead ''guilty'' to any or all of the charges against him, except that the Court may in its discretion refuse to accept a plea of guilty, and may not accept a plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.

(e) The accused may plead ''not guilty'' to any or all of the charges against him. The Court shall enter a plea of not guilty if the answer of the accused to any charge is such that it does not clearly amount to a plea of guilty or not guilty.

(f) The accused may, at any stage of the trial, with the consent of the Court, change a plea of not guilty to one of guilty. The Court shall then proceed as if the accused had originally pleaded guilty.

§ 935.104 Sentence after a plea of guilty.

If the Court accepts a plea of guilty to any charge or charges, it shall make a finding of guilty on that charge. Before imposing sentence, the Court shall hear such statements for the prosecution and defense, if any, as it requires to enable it to determine the sentence to be imposed. The accused or his counsel may make any reasonable statement he wishes in mitigation or of previous good character. The prosecution may introduce evidence in aggravation, or of bad character if the accused has introduced evidence of good character. The Court shall then impose any lawful sentence that it considers proper.

§ 935.105 Trial.

(a) If the accused pleads not guilty, he is entitled to a trial on the charges in accordance with procedures prescribed in the Rules of Criminal Procedure for the U.S. District Courts (18 U.S.C.), except as otherwise provided for in this part, to the extent the Court considers practicable and necessary to the ends of justice. There is no trial by jury.

(b) All persons shall give their testimony under oath or affirmation. The Chief Judge shall prescribe the oath and affirmation that may be administered by any Judge or the Clerk of the Court.

(c) Upon completion of the trial, the Court shall enter a judgment consisting of a finding or findings and sentence or sentences, or discharge of the accused.

(d) The Court may suspend any sentence imposed, may order the revocation of any Island automobile permit in motor vehicle cases, and may place the accused on probation. It may delay sentencing pending the receipt of any presentencing report ordered by it.

Subpart L—Appeals and New Trials

§ 935.110 Appeals.

(a) Any party to an action may, within 15 days after judgment, appeal an interlocutory order, issue of law, or judgment, except that an acquittal may not be appealed, by filing a notice of appeal with the Clerk of the Wake Island Court and serving a copy on the opposing party. Judgment is stayed while the appeal is pending.

(b) Upon receiving a notice of appeal with proof of service on the opposing party, the Clerk shall forward the record of the action to the Wake Island Court of Appeals.

(c) The appellant shall serve on the opposing party and file a memorandum setting forth his grounds of appeal with the Wake Island Court of Appeals within 15 days after the date of the judgment. The appellee may serve and file a reply memorandum within 15 days thereafter. An appeal and the reply shall be deemed to be filed when deposited in the U.S. mail with proper postage affixed, addressed to the Clerk, Wake Island Court of Appeals, at his address in Washington, DC. The period for filing an appeal may be waived by the Court of Appeals when the interests of justice so require.

(d) The Court of Appeals may proceed to judgment on the record, or, if the Court considers that the interests of justice so require, grant a hearing.

(e) The decision of the Court of Appeals shall be in writing and based on the record prepared by the Wake Island Court, on the proceedings before the Court of Appeals, if any be had, and on any memoranda that are filed. If the Court of Appeals considers the record incomplete, the case may be remanded to the Wake Island Court for further proceedings.

(f) The decision of the Court of Appeals is final.

§ 935.111 New trial.

A Judge of the Wake Island Court may order a new trial as required in the interest of justice, or vacate any judgment and enter a new one, on motion made within a reasonable time after discovery by the moving party of matters constituting the grounds upon which the motion for new trial or vacation of judgment is made.

Subpart M—Peace Officers

§ 935.120 Authority.

Peace officers—

(a) Have the authority of a sheriff at common law;

(b) May serve any process on Wake Island that is allowed to be served under a Federal or State law; the officer serving the process shall execute any required affidavit of service;

(c) May conduct sanitation or fire prevention inspections;

(d) May inspect motor vehicles, boats, and aircraft;

(e) May confiscate property used in the commission of a crime;

(f) May deputize any member of the Air Force serving on active duty or civilian employee of the Department of the Air Force to serve as a peace officer;

(g) May investigate accidents and suspected crimes;

(h) May direct vehicular or pedestrian traffic;

(i) May remove and impound abandoned or unlawfully parked vehicles, boats, or aircraft, or vehicles, boats, or aircraft interfering with fire control apparatus or ambulances;

(j) May take possession of property lost, abandoned, or of unknown ownership;

(k) May enforce quarantines;

(l) May impound and destroy food, fish, or beverages found unsanitary;

(m) May be armed;

(n) May exercise custody over persons in arrest or confinement;

(o) May issue citations for violations of this part; and

(p) May make arrests, as provided for in § 935.122.

§ 935.121 Qualifications of peace officers.

Any person appointed as a peace officer must be a citizen of the United States and have attained the age of 18 years. The following persons, while on Wake Island on official business, shall be deemed peace officers: special agents of the Air Force Office of Special Investigations, members of the Air Force Security Forces, agents of the Federal Bureau of Investigation, United States marshals and their deputies, officers and agents of the United States Secret Service, agents of the United States Bureau of Alcohol, Tobacco, and Firearms, agents of the United States Customs Service, and agents of the United States Immigration and Naturalization Service.

§ 935.122 Arrests.

(a) Any person may make an arrest on Wake Island, without a warrant, for any crime (including a petty offense) that is committed in his presence.

(b) Any peace officer may, without a warrant, arrest any person on Wake Island who violates any provision of this part or commits a crime that is not a violation of this part, in his presence, or that he reasonably believes that person to have committed.

(c) In making an arrest, a peace officer must display a warrant, if he has one, or otherwise clearly advise the person arrested of the violation alleged, and thereafter require him to submit and be taken before the appropriate official on Wake Island.

(d) In making an arrest, a peace officer may use only the degree of force needed to effect submission, and may remove any weapon in the possession of the person arrested.

(e) A peace officer may, whenever necessary to enter any building, vehicle, or aircraft to execute a warrant of arrest, force an entry after verbal warning.

(f) A peace officer may force an entry into any building, vehicle, or aircraft whenever—

(1) It appears necessary to prevent serious injury to persons or damage to property and time does not permit the obtaining of a warrant;

(2) To effect an arrest when in hot pursuit; or

(3) To prevent the commission of a crime which he reasonably believes is being committed or is about to be committed.

§ 935.123 Warrants.

Any Judge may issue or direct the Clerk to issue a warrant for arrest if, upon complaint, it appears that there is probable cause to believe an offense has been committed and that the person named in the warrant has committed it. If a Judge is not available, the warrant may be issued by the Clerk and executed, but any such warrant shall be thereafter approved or quashed by the first available Judge. The issuing officer shall—

(a) Place the name of the person charged with the offense in the warrant, or if his name is not known, any name or description by which he can be identified with reasonable certainty;

(b) Describe in the warrant the offense charged;

(c) Place in the warrant a command that the person charged with the offense be arrested and brought before the Wake Island Court;

(d) Sign the warrant; and

(e) Issue the warrant to a peace officer for execution.

§ 935.124 Release from custody.

The Chief Judge may authorize the Clerk to issue pro forma orders of the Court discharging any person from custody, with or without bail, pending trial, whenever further restraint is not required for protection of persons or property on Wake Island. Persons not so discharged shall be brought before a Judge or U.S. Magistrate as soon as a Judge or Magistrate is available. Judges may discharge defendants from custody, with or without bail or upon recognizance, or continue custody pending trial as the interests of justice and public safety require.

§ 935.125 Citation in place of arrest.

In any case in which a peace officer may make an arrest without a warrant, he may issue and serve a citation if he considers that the public interest does not require an arrest. The citation must briefly describe the offense charged and direct the accused to appear before the Wake Island Court at a designated time and place.

Subpart N—Motor Vehicle Code

§ 935.130 Applicability.

This subpart applies to self-propelled motor vehicles (except aircraft), including attached trailers.

§ 935.131 Right-hand side of the road.

Each person driving a motor vehicle on Wake Island shall drive on the right-hand side of the road, except where necessary to pass or on streets where a sign declaring one-way traffic is posted.

§ 935.132 Speed limits.

Each person operating a motor vehicle on Wake Island shall operate it at a speed—

(a) That is reasonable, safe, and proper, considering time of day, road and weather conditions, the kind of motor vehicle, and the proximity to persons or buildings, or both; and

(b) That does not exceed 40 miles an hour or such lesser speed limit as may be posted.

§ 935.133 Right-of-way.

(a) A pedestrian has the right-of-way over vehicular traffic when in the vicinity of a building, school, or residential area.

(b) In any case in which two motor vehicles have arrived at an uncontrolled intersection at the same time, the vehicle on the right has the right-of-way.

(c) If the driver of a motor vehicle enters an intersection with the intent of making a left turn, he shall yield the right-of-way to any other motor vehicle that has previously entered the intersection or is within hazardous proximity.

(d) When being overtaken by another motor vehicle, the driver of the slower vehicle shall move it to the right to allow safe passing.

(e) The driver of a motor vehicle shall yield the right-of-way to emergency vehicles on an emergency run.

§ 935.134 Arm signals.

(a) Any person operating a motor vehicle and making a turn or coming to a stop shall signal the turn or stop in accordance with this section.

(b) A signal for a turn or stop is made by fully extending the left arm as follows:

(1) Left turn—extend left arm horizontally.

(2) Right turn—extend left arm upward.

(3) Stop or decrease speed—extend left arm downward.

(c) A signal light or other device may be used in place of an arm signal prescribed in paragraph (b) of this section if it is visible and intelligible.

§ 935.135 Turns.

(a) Each person making a right turn in a motor vehicle shall make the approach and turn as close as practicable to the right-hand curb or road edge.

(b) Each person making a left turn in a motor vehicle shall make the approach and turn immediately to the right of the center of the road, except that on multi-lane roads of one-way traffic flow he may make the turn only from the left lane.

(c) No person may make a U-turn in a motor vehicle if he cannot be seen by the driver of any approaching vehicle within a distance of 500 feet.

(d) No person may place a vehicle in motion from a stopped position, or change from or merge into a lane of traffic, until he can safely make that movement.

§ 935.136 General operating rules.

No person may, while on Wake Island—

(a) Operate a motor vehicle in a careless or reckless manner;

(b) Operate or occupy a motor vehicle while he is under the influence of a drug or intoxicant;

(c) Consume an alcoholic beverage (including beer, ale, or wine) while he is in a motor vehicle;

(d) Operate a motor vehicle that is overloaded or is carrying more passengers than it was designed to carry;

(e) Ride on the running board, step, or outside of the body of a moving motor vehicle;

(f) Ride a moving motor vehicle with his arm or leg protruding, except when using the left arm to signal a turn;

(g) Operate a motor vehicle in a speed contest or drag race;

(h) Park a motor vehicle for a period longer than the posted time limit;

(i) Stop, park, or operate a motor vehicle in a manner that impedes or blocks traffic;

(j) Park a motor vehicle in an unposted area, except adjacent to the right-hand curb or edge of the road;

(k) Park a motor vehicle in a reserved or restricted parking area that is not assigned to him;

(l) Sound the horn of a motor vehicle, except as a warning signal;

(m) Operate a tracked or cleated vehicle in a manner that damages a paved or compacted surface;

(n) Operate any motor vehicle contrary to a posted traffic sign;

(o) Operate a motor vehicle as to follow any other vehicle closer than is safe under the circumstances;

(p) Operate a motor vehicle off of established roads, or in a cross-country manner, except when necessary in conducting business;

(q) Operate a motor vehicle at night or when raining on the traveled part of a street or road, without using operating headlights; or

(r) Operate a motor vehicle without each passenger wearing a safety belt; this shall not apply to military combat vehicles designed and fabricated without safety belts.

§ 935.137 Operating requirements.

Each person operating a motor vehicle on Wake Island shall—

(a) Turn off the highbeam headlights of his vehicle when approaching an oncoming vehicle at night; and

(b) Comply with any special traffic instructions given by an authorized person.

§ 935.138 Motor bus operation.

Each person operating a motor bus on Wake Island shall—

(a) Keep its doors closed while the bus is moving with passengers on board; and

(b) Refuse to allow any person to board or alight the bus while it is moving.

§ 935.139 Motor vehicle operator qualifications.

(a) No person may operate a privately owned motor vehicle on Wake Island unless he has an island operator's permit.

(b) The Commander may issue an operator's permit to any person who is at least 18 years of age and satisfactorily demonstrates safe-driving knowledge, ability, and physical fitness.

(c) No person may operate, on Wake Island, a motor vehicle owned by the United States unless he holds a current operator's permit issued by the United States.

(d) Each person operating a motor vehicle on Wake Island shall present his operator's permit to any peace officer, for inspection, upon request.

§ 935.140 Motor vehicle maintenance and equipment.

(a) Each person who has custody of a motor vehicle on Wake Island shall present that vehicle for periodic safety inspection, as required by the Commander.

(b) No person may operate a motor vehicle on Wake Island unless it is in a condition that the Commander considers to be safe and operable.

(c) No person may operate a motor vehicle on Wake Island unless it is equipped with an adequate and properly functioning—

(1) Horn;

(2) Wiper, for any windshield;

(3) Rear vision mirror;

(4) Headlights and taillights;

(5) Brakes;
(6) Muffler;
(7) Spark or ignition noise suppressors; and
(8) Safety belts.
(d) No person may operate a motor vehicle on Wake Island if that vehicle is equipped with a straight exhaust or muffler cutoff.

Subpart O—Registration and Island Permits

§ 935.150 Registration.

(a) Each person who has custody of any of the following on Wake Island shall register it with the Commander.
(1) A privately owned motor vehicle.
(2) A privately owned boat.
(3) An indigenous animal, military working dog, or guide dog for the blind or visually-impaired accompanying its owner.
(4) A narcotic or dangerous drug or any poison.
(b) Each person who obtains custody of an article described in paragraph (a)(4) of this section shall register it immediately upon obtaining custody. Each person who obtains custody of any other article described in paragraph (a) of this section shall register it within 10 days after obtaining custody.

§ 935.151 Island permit for boat and vehicle.

(a) No person may use a privately owned motor vehicle or boat on Wake Island unless he has an island permit for it.
(b) The operator of a motor vehicle shall display its registration number on the vehicle in a place and manner prescribed by the Commander.

§ 935.152 Activities for which permit is required.

No person may engage in any of the following on Wake Island unless he has an island permit:
(a) Any business, commercial, or recreational activity conducted for profit, including a trade, profession, calling, or occupation, or an establishment where food or beverage is prepared, offered, or sold for human consumption (except for personal or family use).
(b) The practice of any medical profession, including dentistry, surgery, osteopathy, and chiropractic.
(c) The erection of any structure or sign, including a major alteration or enlargement of an existing structure.
(d) The burial of any human or animal remains, except that fish and bait scrap may be buried at beaches where fishing is permitted, without obtaining a permit.
(e) Keeping or maintaining an indigenous animal.
(f) Importing, storing, generating, or disposing of hazardous materials.
(g) Importing of solid wastes and importing, storing, generating, treating, or disposing of hazardous wastes, as they are defined in the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 *et seq.*, and its implementing regulations (40 CFR chapter I).

Subpart P—Public Safety

§ 935.160 Emergency requirements and restrictions.

In the event of any fire, crash, search and rescue, natural disaster, national peril, radiological hazard, or other calamitous emergency—
(a) No person may impede or hamper any officer or employee of the United States or any other person who has emergency authority;
(b) No unauthorized persons may congregate at the scene of the emergency; and
(c) Each person present shall promptly obey the instructions, signals, or alarms of any peace officer, fire or crash crew, or other authorized person, and any orders of the Commander.

§ 935.161 Fire hazards.

(a) Each person engaged in a business or other activity on Wake Island shall, at his expense, provide and maintain (in an accessible location) fire extinguishers of the type, capacity, and quantity satisfactory for protecting life and property in the areas under that person's control.
(b) To minimize fire hazards, no person may store any waste or flammable fluids or materials except in a manner and at a place prescribed by the Commander.

§ 935.162 Use of special areas.

The Commander may regulate the use of designated or posted areas on Wake Island, as follows:
(a) Restricted areas—which no person may enter without permission.
(b) Prohibited activities areas—in which no person may engage in any activity that is specifically prohibited.
(c) Special purpose areas-in which no person may engage in any activity other than that for which the area is reserved.

§ 935.163 Unexploded ordnance material.

Any person who discovers any unexploded ordnance material on Wake Island shall refrain from tampering with it and shall immediately report its site to the Commander.

§ 935.164 Boat operations.

The operator of each boat used at Wake Island shall conform to the limitations on its operations as the Commander may prescribe in the public interest.

§ 935.165 Floating objects.

No person may anchor, moor, or beach any boat, barge, or other floating object on Wake Island in any location or manner other than as prescribed by the Commander.

Pamela D. Fitzgerald,
Air Force Federal Register Liaison Officer.

[FR Doc. 02–8303 Filed 4–8–02; 8:45 am]
BILLING CODE 5001–05–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KY–200215; FRL–7168–6]

Approval and Promulgation of Implementation Plans; Commonwealth of Kentucky: Approval of Revisions to the 1-Hour Ozone Maintenance State Implementation Plan for the Edmonson County and the Owensboro-Daviess County Area; Clarification

AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule; clarification.

SUMMARY: EPA is clarifying its approval of revisions to the 1-hour ozone maintenance plans for the Owensboro area (i.e., Daviess and a portion of Hancock counties), and Edmonson County portions of the Kentucky State Implementation Plan (SIP) submitted on April 16, 1998, by the Commonwealth of Kentucky through the Natural Resources and Environmental Protection Cabinet. Although not explicit in the language of the document for the approval, the Commonwealth's request and EPA's action involved the approval of an update for emission projections that were originally developed with an earlier version of the EPA mobile emissions model. That same approval action also identified the emission projections as the motor vehicle emissions budgets (or ''budgets'') for nitrogen oxides (NO_X) and volatile organic compounds (VOC) for use in transportation conformity determinations. However, that action did not specify for what year the ''budgets'' were being established. This action merely clarifies for which year the ''budgets'' for NO_X and VOC were being established.

EFFECTIVE DATE: This clarification is effective on May 9, 2002.

FOR FURTHER INFORMATION CONTACT: Lynorae Benjamin, Air Quality Modeling and Transportation Section,

Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9040. Ms. Benjamin can also be reached via electronic mail at *benjamin.lynorae@epa.gov.*

SUPPLEMENTARY INFORMATION: The following subsections provide a brief overview of EPA's previous approval action and the clarification being provided by this action.

A. What Is the Background for This Action?

Through direct final rulemaking, published in the **Federal Register** on September 3, 1998, (63 FR 46894) EPA approved revisions to the 1-hour ozone maintenance plans for the Owensboro area (i.e., Daviess and Hancock counties), and Edmonson County. These revisions to the Kentucky SIP were submitted on April 16, 1998, by the Commonwealth of Kentucky. The purpose of our action was to incorporate revised motor vehicle emissions budgets for NO_X and VOCs for the Owensboro area and Edmonson County, Kentucky, into the federally-approved SIP. Specifically, that SIP revision updated emission projections previously developed with the MOBILE 4.1 emissions model with emissions projections developed with the MOBILE 5a emissions model. Our approval specified that the emission projections were being considered as ''budgets'' to be used for demonstration of conformity of transportation plans, programs, and projects with the Kentucky SIP for the Edmonson County and Owensboro ozone maintenance areas. However, Kentucky's SIP for these areas did not explicitly specify for which years the new conformity budgets would apply.

B. Why Is EPA Taking This Action?

EPA is taking this action to provide clarity for the transportation and air quality partners in this area that work together to implement the transportation conformity rule. EPA recently reviewed all of the maintenance plans that were submitted by Kentucky in 1994 and any subsequent revisions to these maintenance plans. This review revealed that while Kentucky had included emissions projections for VOCs and NO_X for several years in each of these submittals, it was only in the case of the Owensboro area and Edmonson County that EPA had approved all of these years as conformity budgets. Based on this review, EPA is taking action to correct the approval of the maintenance plans for the Owensboro area and Edmonson County. Specifically, EPA is taking this action to explicitly state that 2004 is the year for which the budgets were established by Kentucky, and that the VOC and NO_X emission projections for 2004, which is the last year of the maintenance plans, are the ''budgets'' to be used for the purposes of transportation conformity. This action is administrative and does not involve any technical changes to the Commonwealth's previous submittal for which EPA granted approval.

C. What Are the Motor Vehicle Emissions Budgets for the Edmonson County and Owensboro Areas?

As mentioned previously, this action is administrative and does not involve any technical changes to the emission projections supplied by the State in the April 16, 1998, Kentucky SIP revision request. The following tables highlight the motor vehicle emissions budgets for NO_X and VOCs for the Edmonson County and Owensboro maintenance areas in Kentucky.

2004 MOTOR VEHICLE EMISSIONS BUDGETS FOR EDMONSON COUNTY

VOC (tons per day)	NO_X (tons per day)
0.72	0.78

2004 MOTOR VEHICLE EMISSIONS BUDGETS FOR OWENSBORO

VOC (tons per day)	NO_X (tons per day)
6.64	5.22

Final Action

EPA is clarifying its previous approval for revisions to the 1-hour ozone maintenance plans to the Owensboro area (i.e., Daviess and Hancock counties), and Edmonson County portions of the Kentucky SIP, which were submitted on August 16, 1998 by the Commonwealth of Kentucky. This action specifies 2004 as the ''budget'' year to be used for the purposes of transportation conformity.

Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This action also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely clarifies EPA's approval of a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In addition, since this action is only correcting a federal citation for a SIP submission that has already been approved by EPA, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a

rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 10, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements.

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

Dated: March 21, 2002.

Michael V. Peyton,

Acting Regional Administrator, Region 4.

[FR Doc. 02–8295 Filed 4–8–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 61, and 69

[CC Docket No. 96–128; FCC 02–39]

Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission declined to modify its accounting safeguards in the manner requested by the Inmate Calling Services Provider Coalition (ICSPC) in part because the Commission's existing rules already provide for much of the relief that the ICSPC requested. The intended effect of this document is to maintain the existing Commission rules regarding the accounting safeguards.

FOR FURTHER INFORMATION CONTACT: Joi Roberson Nolen, Wireline Competition Bureau, 202–418–1537.

SUPPLEMENTARY INFORMATION: Section 276 of the Communications Act of 1934, as amended (the Act), directs the Commission to ''establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.'' *See* 47 U.S.C. 276(b)(1)(A). The ICSPC sought reconsideration of certain issues relating to inmate calling services. *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96–128, Order on Reconsideration, 11 FCC Rcd 21233 (1996), 61 FR 65341 (Dec. 12, 1996)(Order on Reconsideration) *aff'd in part and remanded in part, Illinois Pub. Tel. Ass'n v. FCC,* 117 F.3d 555 (D.C. Cir. 1997), *cert. denied sub nom., Virginia State Corp. Comm'n v. FCC,* 523 U.S. 1046 (1998). ICSPC, along with numerous other parties, initially sought review of the Order on Reconsideration before the United States Court of Appeals for the District of Columbia Circuit and consolidated its appeal under the lead case Illinois Public Telecommunications Association v. FCC. The court subsequently severed ICSPC's appeal, and later remanded it at the Commission's request. The Commission issued a Public Notice asking parties to update and refresh the record with respect to the issues raised in ICSPC's appeal.

In this order, the Commission concluded that section 276's fair compensation requirement does not require either preemption of state local collect calling caps or imposition of a federally-tariffed surcharge above state rate caps for local inmate calls. The Commission also concluded that ICSPC's requested nonstructural safeguards are not necessary, in light of those that section 276 and our rules already impose. In addition, the Commission initiated a Notice of Proposed Rulemaking to examine the costs associated with the provision of inmate calling services. *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96–128, Notice of Proposed Rulemaking, FCC 02–39 (Feb. 21, 2002) (published elsewhere in this issue) .

Accordingly, it is ordered that, pursuant to the authority contained in sections 1, 4(i)–4(j), and 276 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 276, the Petition for Partial Reconsideration and Clarification of the Inmate Calling Services Providers Coalition is *denied*.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–8343 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 26

[WT Docket No. 00–32; FCC 02–47]

The 4.9 GHz Band Transferred From Federal Government Use

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission allocates 50 megahertz of spectrum in the 4940–4990 MHz band (4.9 GHz band) for fixed and mobile services (except aeronautical mobile service) and designates this band for use in support of public safety. The allocation and designation provide public safety users with additional spectrum to support new broadband applications. This action is pursuant to statutory requirements of the Omnibus Budget Reconciliation Act of 1993. The Commission also continues its ongoing effort to streamline rules and eliminate redundancy by removing part 26.

DATES: Effective May 9, 2002.

ADDRESSES: Parties who choose to file comments by paper must file an original and four copies to William F. Caton, Acting Secretary, Office of the Secretary, Federal Communications Commission, 445 12th St., SW., Room TW-A325, Washington, DC 20554. Comments may also be filed using the Commission's Electronic Filing System, which can be accessed via the Internet at *www.fcc.gov/e-file/ecfs.html*.

FOR FURTHER INFORMATION CONTACT: Genevieve Augustin, Esq., *gaugusti@fcc.gov*, or Roberto Mussenden, Esq., rmussend@fcc.gov, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, (202) 418–0680, or TTY (202) 418–7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Second Report and Order, FCC 02–47, adopted on February 14, 2002, and released on February 27, 2002. The full text of this

document is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

1. In this *Second Report and Order (Second R&O)*, the Commission allocates 50 megahertz of spectrum in the 4940–4990 MHz band (4.9 GHz band) for fixed and mobile services (except aeronautical mobile service) and designates this band for use in support of public safety. This allocation and designation will provide public safety users with additional spectrum to support new broadband applications such as high-speed digital technologies and wireless local area networks (WLANs) for incident scene management. The spectrum will also support dispatch operations and vehicular/personal communications. The Commission believes this decision aligns with new national priorities focusing on homeland security, and will ensure that agencies involved in the protection of life and property possess the communications resources needed to successfully carry out their mission. Furthermore, we seek to transition to an environment in which the public safety community enjoys maximum access to emerging broadband technologies. This action effectuates the transfer of this spectrum from Federal Government to non-Federal Government use pursuant to statutory requirements of the Omnibus Budget Reconciliation Act of 1993. We also continue our ongoing effort to streamline our Rules and eliminate redundancy by removing part 26 of our rules.

A. Allocation of the 4.9 GHz Band

2. The Commission allocates the 4.9 GHz band to non-Government fixed and mobile services, excluding aeronautical mobile service, on a co-primary basis. This allocation permits flexibility and a wide range of fixed and mobile services. The Commission allows licensees to utilize this spectrum for any service permitted within any of the allocation categories of fixed and mobile, to include any fixed, land mobile, or maritime mobile service. The Commission excludes aeronautical mobile service from the entire 4.9 GHz band for the protection of radio astronomy operations in the 4950–4990 MHz sub-band and the 4990–5000 MHz band. The Commission deletes the Government fixed and mobile service allocations from the 4.9 GHz band. The Commission concludes that a flexible allocation would be in the public interest. Such flexibility would not deter investment in communications and services, or technology development; and would not cause harmful interference among users.

B. Sharing With Passive Operations

3. Regarding radio astronomy use of the 4.9 GHz band, the Commission deletes footnote US257 from the Table of Frequency Allocations and merges it into a revised footnote US311, requiring that every practical effort be made to protect radio astronomy observations in the 4950–4990 MHz band, which operate on an unprotected basis at certain Radio Astronomy Observatories listed. The Commission declines the exclusion of non-aeronautical mobile operation and the imposition of frequency coordination procedures on fixed or non-aeronautical mobile operation within the radio astronomy zones.

C. Removal of Part 26 of the Commission's Rules

4. Inasmuch as there are no part 26 licensees, and the Commission no longer has jurisdiction over the frequencies to which these rules are applicable, the Commissions removes this part from its rules.

D. Designation of the 4.9 GHz Band for Use in Support of Public Safety

5. The Commission concludes that the 4.9 GHz band should be designated for use in support of public safety providing public safety users with access to state of the art technologies that will enhance their critical operations capabilities. The acts of terrorism committed against the United States on September 11, 2001 reinforce the critical nature of the public safety community's responsibilities to our Nation's safety and well being. nevertheless, then numerous public safety entities have filed in this proceeding supporting public safety use of the 4.9 GHz band to implement and utilize the technologies described previously. The record does not support the Commission's previous tentative conclusion, set forth, that the designation of spectrum in the 700 MHz band for public safety use obviates a need to allocate spectrum in the 4.9 GHz band for use in support of public safety. Finally, we agree with Motorola that the Commission is not statutorily required to use competitive bidding to license the 4.9 GHz band and therefore licensing this band for public safety is fully consistent with the Communications Act.

II. Final Regulatory Flexibility Certification (Second Report and Order)

6. The Regulatory Flexibility Act (RFA) requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' The RFA generally defines ''small entity'' as having the same meaning as the term ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

7. This *Second R&O* allocates the band 4940–4990 MHz to the fixed and mobile, except aeronautical mobile, services on a co-primary basis, to be used exclusively by public safety. This allocation affects public safety users by providing them with additional spectrum to support new broadband applications such as high-speed digital technologies and wireless local area networks for incident scene management, dispatch operations, and vehicular/personal communications, and thus enables public safety providers to more effectively, efficiently and safely serve their communities. In addition, our action may affect indirectly equipment manufacturers by ultimately potentially increasing the demand for their goods and services. Both of these effects are positive benefits, with no associated additional compliance burdens. Also, an indirect affect of this allocation on some small entities is the potential enhancement of their protection from crime and hazards, and of their receipt of emergency services.

8. Therefore, we certify that the requirements of this *Second R&O* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Second R&O*, including a copy of this final certification, in a report to Congress pursuant to the Congressional Review Act, see U.S.C. 801(a)(1)(A). In addition, the *Second R&O* and this certification will be sent

to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**. See U.S.C. 605(b).

III. Ordering Clauses

9. Pursuant to sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 403, this *Report and Order is hereby adopted*.

10. Part 2 of the Commission's rules *is amended* as specified in rule changes and such rule amendments shall be effective May 9, 2002.

11. Pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), that Part 26 of the Commission's rules, 47 CFR part 26, is no longer in the public interest, and therefore *is Removed*, effective May 9, 2002.

List of Subjects

47 CFR Part 2

Communications equipment, Radio.

47 CFR Part 26

Communications common carrier, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 2 as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

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

Authority: 47 U.S.C. 154, 302(a), 303, and 336, unless otherwise noted.

2. Amend § 2.106, as follows:

a. Revise page 55.

b. In the list of United States (US) footnotes, remove footnote US257 and revise footnote US311.

c. In the list of Federal Government (G) Footnotes, revise footnote G122.

The revisions read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

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3700-5650 MHz (SHF)

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 3600-4200 MHz	3700-4200 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile		3700-4200	3700-4200 FIXED NG41 FIXED-SATELLITE (space-to-Earth)	International Fixed (23) Satellite Communications (25) Fixed Microwave (101)
4200-4400 AERONAUTICAL RADIONAVIGATION S5.438 S5.437 S5.439 S5.440			4200-4400 AERONAUTICAL RADIONAVIGATION S5.440 US261		Aviation (87)
4400-4500 FIXED MOBILE			4400-4500 FIXED MOBILE	4400-4500	
4500-4800 FIXED FIXED-SATELLITE (space-to-Earth) S5.441 MOBILE			4500-4800 FIXED MOBILE US245	4500-4800 FIXED-SATELLITE (space-to-Earth) 792A US245	
4800-4990 FIXED MOBILE S5.442 Radio astronomy S5.149 S5.339 S5.443			4800-4940 FIXED MOBILE S5.149 US203	4800-4940 S5.149 US203	
			4940-4990 S5.149 S5.339 US311 G122	4940-4990 FIXED MOBILE except aeronautical mobile S5.149 S5.339 US311	Private Land Mobile (90) Fixed Microwave (101)
4990-5000 FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY Space research (passive) S5.149			4990-5000 RADIO ASTRONOMY US74 Space research (passive) US246		
5000-5150 AERONAUTICAL RADIONAVIGATION S5.367 S5.444 S5.444A			5000-5250 AERONAUTICAL RADIO-NAVIGATION US260	5000-5150 AERONAUTICAL RADIO-NAVIGATION US260 S5.367 S5.444 S5.444A US211 US344	Satellite Communications (25) Aviation (87)

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United States (US) Footnotes

* * * * *

US311 Radio astronomy observations may be made in the bands 1350–1400 MHz and 4950–4990 MHz on an unprotected basis at the following radio astronomy observatories:

Allen Telescope Array, Hat Creek, California	Rectangle between latitudes 40° 00′ N and 42° 00′ N and between longitudes 120° 15′ W and 122° 15′ W.
NASA Goldstone Deep Space Communications Complex, Goldstone, California.	80 kilometers (50 mile) radius centered on latitude 35° 18′ N, longitude 116° 54′ W.
National Astronomy and Ionosphere Center, Arecibo, Puerto Rico	Rectangle between latitudes 17° 30′ N and 19° 00′ N and between longitudes 65° 10′ W and 68° 00′ W.
National Radio Astronomy Observatory, Socorro, New Mexico	Rectangle between latitudes 32° 30′ N and 35° 30′ N and between longitudes 106° 00′ W and 109° 00′ W.
National Radio Astronomy Observatory, Green Bank, West Virginia	Rectangle between latitudes 37° 30′ N and 39° 15′ N and between longitudes 78° 30′ W and 80° 30′ W.

National Radio Astronomy Observatory, Very Long Baseline Array Stations	80 kilometers (50 mile) radius centered on: Latitude (North)	Longitude (West)
Brewster, WA	48° 08′	119° 41′
Fort Davis, TX	30° 38′	103° 57′
Hancock, NH	42° 56′	71° 59′
Kitt Peak, AZ	31° 57′	111° 37′
Los Alamos, NM	35° 47′	106° 15′
Mauna Kea, HI	19° 48′	155° 27′
North Liberty, IA	41° 46′	91° 34′
Owens Valley, CA	37° 14′	118° 17′
Pie Town, NM	34° 18′	108° 07′
Saint Croix, VI	17° 46′	64° 35′

Owens Valley Radio Observatory, Big Pine, California	Two contiguous rectangles, one between latitudes 36° 00′ N and 37° 00′ N and between longitudes 117° 40′ W and 118° 30′ W and the second between latitudes 37° 00′ N and 38° 00′ N and between longitudes 118° 00′ W and 118° 50′ W.

Every practicable effort will be made to avoid the assignment of frequencies in the bands 1350–1400 MHz and 4950–4990 MHz to stations in the fixed and mobile services that could interfere with radio astronomy observations within the geographic areas given above. In addition, every practicable effort will be made to avoid assignment of frequencies in these bands to stations in the aeronautical mobile service which operate outside of those geographic areas, but which may cause harmful interference to the listed observatories. Should such assignments result in harmful interference to these observatories, the situation will be remedied to the extent practicable.

* * * * *

Government (G) Footnotes

* * * * *

G122 In the bands 2390–2400 MHz, 2402–2417 MHz, and 4940–4990 MHz, Government operations may be authorized on a non-interference basis to authorized non-Government operations, but shall not hinder the implementation of any non-Government operations.

* * * * *

PART 26—[Removed]

3. Under the authority 47 U.S.C. 154, amend 47 CFR chapter I by removing part 26.

[FR Doc. 02–8482 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 36

[CC Docket Nos. 78–72, 80–286; DA 01–2427]

MTS and WATS Market Structure and Establishment of a Joint Board

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Office of the Managing Director (Managing Director) grants the petition of US West Communications, Inc. (U.S. West) and makes technical revisions to the Commission's jurisdictional separations rules. Specifically, the Managing Director amends the Commission's rules to correct misspellings and to remove certain text inadvertently added to a rule section upon original publication in the Code of Federal Regulations.

DATES: Effective May 9, 2002.

FOR FURTHER INFORMATION CONTACT: Andrew Firth, Attorney, Common Carrier Bureau, Accounting Policy Division, (202) 418–2694.

SUPPLEMENTARY INFORMATION: This is a summary of the Managing Director's Order in CC Docket Nos. 78–72 and 80–286, adopted on October 17, 2001 and released on October 18, 2001. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC, 20554.

1. In this Order, pursuant to authority delegated to the Managing Director at § 0.231(b) of the Commission's rules, we make certain technical and non-substantive corrections to the Commission's part 36 jurisdictional separations rules to reflect a printing error brought to our attention by US West Communications, Inc. (U.S. West) in a Petition for Technical Corrections. In its Petition, U.S. West notes that the Commission's 1989 *Decision and Order* in this docket (*MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, CC

Docket Nos. 78–72 and 80–286, 4 FCC Rcd. 5660), 54 FR 31032 (July 26, 1989), revised the description of Subcategory 1.1 of Category 1 Exchange Line Cable and Wire Facilities.

2. US West notes that, when the revised rule as stated above was published in the **Federal Register** and adopted into the Code of Federal Regulations at 47 CFR 36.154(a), the word ''carrying'' was misspelled as ''carring'' and certain text was inadvertently added to the section.

3. Pursuant to the procedure set forth in § 0.231(b) of the Commission's rules, the Commission's Common Carrier Bureau (Bureau) has reviewed the US West petition. As the Commission has not adopted any modification to the rule that originally appeared in the 1989 *Decision and Order*, the Bureau agrees with US West that technical correction of 47 CFR 36.154(a) is appropriate and has approved this correction. We therefore direct that the current language found in the Code of Federal Regulations at 47 CFR 36.154(a) be amended to reflect exactly the original language in the 1989 *Decision and Order*. Because the amendment we are making is merely a technical correction that does not alter the substance of the rule, we find, for good cause, that notice and comment under the Administrative Procedure Act is not necessary.

Ordering Clause

4. Pursuant to sections 1–2, 4, 201–205, 215, 218, 220, 229, 254 and 410 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154, 201–205, 215, 218, 220, 229, 254, and 410, the Administrative Procedure Act, 5 U.S.C. 533(b)(3)(B), and pursuant to authority delegated to the Managing Director at section 0.231(b) of the Commission's rules, 47 CFR 0.231(b), that the Petition for Technical Corrections filed by US West, Communications Inc. on February 16, 2000, is granted.

5. The non-substantive technical correction to the Code of Federal Regulations, specifically at 47 CFR 36.154(a), as outlined in the Rule Changes, is adopted.

List of CFR Subjects 47 CFR Part 36

Communications common carriers, Reporting and recordkeeping requirements, Telephone, Uniform System of Accounts.

Federal Communications Commission.

Katherine L. Schroder,

Division Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends part 36 of title 47 of the Code of Federal Regulations as follows:

PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES

Subpart B—Telecommunications Property

1. The authority citation for part 36 continues to read:

Authority: 47 U.S.C. Secs. 151, 154 (i) and (j), 205, 221 (c), 254, 403 and 410.

2. In § 36.154(a), Subcategory 1.1 is revised to read as follows:

§ 36.154. Exchange Line Cable and Wire Facilities (C&WF)—Category 1—Apportionment Procedures.

(a) * * *

Subcategory 1.1—State Private Lines and State WATS Lines. This subcategory shall include all private lines and WATS lines carrying exclusively state traffic as well as private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes ten percent or less of the total traffic on the line.

* * * * *

[FR Doc. 02–8498 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[CC Docket No. 96–45, 98–171, 90–571, 92–237, 99–200, 95–116, and 98–170; FCC 02–43]

Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: The Federal Communications Commission published in the **Federal Register** of March 13, 2002, a document concerning certain modifications, to the existing federal universal service contribution system. Inadvertently, in the heading and supplementary sections, the docket numbers were listed incorrectly. This document corrects the docket numbers listed in the previous document.

DATES: Effective April 12, 2002.

FOR FURTHER INFORMATION CONTACT: Paul Garnett, Attorney, Common Carrier Bureau, Accounting Policy Division, (202) 418–7400.

SUPPLEMENTARY INFORMATION: This summary contains corrections to the headings section and the supplementary section of the Commission's Report and Order, CC Docket Nos. 96–45, 98–171, 90–571, 92–237, 99–200, 95–116, and 98–170; FCC 02–43, 67 FR 11254 (March 13, 2002). The full text of the Commission's Report and Order is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC, 20554.

Correction

In rule FR Doc. 02–6028 published on March 13, 2002 (67 FR 11254), make the following corrections:

1. On page 11254, in the second column, ''[CC Docket Nos. 96–45, 98–77, 90–571, 92–237, 99–200, and 95–116; FCC 02–43]'' is corrected to read ''[CC Docket Nos. 96–45, 98–171, 90–571, 92–237, 99–200, 95–116, and 98–170; FCC 02–43]''.

2. On page 11254, in the second column in the last paragraph, ''CC Docket Nos. 96–45, 98–171, 90–571, 92–237, 99–200, and 95–'' is corrected to read ''CC Docket Nos. 96–45, 98–171, 90–571, 92–237, 99–200, 95–116,''.

3. On page 11254, in the third column in the first line, ''116, FCC 02–43'' is corrected to read ''and 98–170; FCC 02–43''.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–8481 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[FCC 02–35, MM Docket No. 90–66, RM–7139, RM–7368, RM–7369]

FM Broadcasting Services; Lincoln, Osage Beach, Steelville, and Warsaw, MO

AGENCY: Federal Communications Commission.

ACTION: Final rule; application for review denied.

SUMMARY: In this proceeding involving mutually exclusive proposals to amend the FM Table of Allotments, the Commission affirmed the staff's dismissal of a counterproposal filed by Twenty-One Sound Communications to upgrade its Station KNSX(FM), Steelville, Missouri, from Channel 227C2 to Channel 227C1 for failure to comply with the verification requirements of Section 1.52 of the Commission's Rules. The Commission also affirmed the grant of a mutually exclusive proposal to upgrade Station KYLC(FM), Osage Beach, Missouri, from Channel 228A to Channel 228C3. *See* 62 FR 25557 (May 9, 1997) and 61 FR 29311 (June 10, 1996). *See also* Supplemental Information.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Memorandum Opinion and Order, MM Docket 90–66, adopted February 8, 2002, and released March 25, 2002. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Information Center (room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may be also purchased from the Commission's copy contractor, Qualex International Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554.

Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his or her address stated. Since Twenty-One Sound had failed to include an affidavit verifying that the statements contained in its counterproposal were true to the best of its knowledge, the counterproposal was dismissed. Twenty-One Sound had contended that the rule was unfairly applied to its counterproposal because it was filed before the Commission had announced that it would strictly apply the verification rule in allotment proceedings. The Commission disagreed, finding that in situations where the Commission waived the verification rule, it had done so if there would not be prejudice to another mutually exclusive proposal that had complied with the Commission's Rules. Since waiver of the verification rule in this case would prejudice a party that had filed a proposal compliant with the Commission's technical rules, Twenty-One Sound's counterproposal was properly dismissed.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–8480 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98–120, CS Docket No. 00–96; CS Docket No. 00–2, FCC 01–22]

Carriage of Digital Television Broadcast Signals

AGENCY: Federal Communications Commission.

ACTION: Correcting amendments.

SUMMARY: This document makes a number of minor corrections to the Commission rules pertaining to retransmission consent which were published in the **Federal Register** of Monday March 26, 2001 (66 FR 16533) regarding carriage of digital television broadcast signals.

DATES: Effective April 9, 2002.

FOR FURTHER INFORMATION CONTACT: Kenneth Lewis, Media Bureau, (202) 418–2622.

SUPPLEMENTARY INFORMATION: The First Report and Order, FCC 01–22, adopted January 18, 2001; released January 23, 2001, approved a final rule for carriage of digital television broadcast signals. In this document we make non-substantive rules changes to correct errors in the publication of §76.64 of the Commission's rules.

Need for Correction

As published, the final regulations contain errors which may prove to be misleading and need to be clarified.

List of Subjects in 47 CFR Part 76

Retransmission consent.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Accordingly, 47 CFR part 76 is corrected by making the following correcting amendments:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1.The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 336, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2.Revise paragraphs (j), (k) and (l) of § 76.64 to read as follows:

§ 76.64 Retransmission consent.

* * * * *

(j) Retransmission consent agreements between a broadcast station and a multichannel video programming distributor shall be in writing and shall specify the extent of the consent being granted, whether for the entire signal or any portion of the signal. This rule applies for either the analog or the digital signal of a television station.

(k) A cable system commencing new operation is required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service. Commercial broadcast stations must notify the cable system within 30 days of the receipt of such notice of their election for either must-carry or retransmission consent with respect to such new cable system. If the commercial broadcast station elects must-carry, it must also indicate its channel position in its election statement to the cable system. Such election shall remain valid for the remainder of any three-year election interval, as established in § 76.64(f)(2). Noncommercial educational broadcast stations should notify the cable operator of their request for carriage and their channel position. The new cable system must notify each station if its signal quality does not meet the standards for carriage and if any copyright liability would be incurred for the carriage of such signal. Pursuant to § 76.57(e), a commercial broadcast station which fails to respond to such a notice shall be deemed to be a must-carry station for the remainder of the current three-year election period.

(l) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make or negotiate any agreement with one multichannel video programming distributor for carriage to the exclusion of other multichannel video programming distributors. This paragraph shall terminate at midnight on December 31, 2005.

* * * * *

[FR Doc. 02–8558 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1823, 1836 and 1852

RIN 2700–AC33

Safety and Health

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This final rule amends the NASA FAR Supplement (NFS) by revising the prescription for the use of NASA Safety and Health solicitation provisions and contract clauses; removing references to the Service Contract Act (SCA) and Walsh-Healey Public Contracts Act regulations; adding references to the Occupational Safety and Health Act (OSHA) and Department of Transportation (DOT) regulations; and clarifying when a Safety and Health Plan is to be included in a contract or solicitation. This final rule also requires the use of NASA's safety and health provisions instead of the FAR Accident Prevention clause, and allows for oral notification, with written confirmation to the contractor, of Safety and Health noncompliance that may pose a serious or imminent danger to safety and health.

EFFECTIVE DATE: April 9, 2002.

FOR FURTHER INFORMATION CONTACT: Jeff Cullen, (202) 358–1784, *jcullen@hq.nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the **Federal Register** on December 13, 2001 (66 FR 64391–64392). One comment was received from industry. The comment was supportive of the rule and did not recommended any changes. This final rule adopts the proposed rule without change. NASA has required the inclusion of a NASA Safety and Health clause and submission of a contractor Safety and Health Plan for contracts that are greater than $1 million, involve construction, or have hazardous deliverable end items or operations. Exclusion of the clause has been allowed when the Contracting Officer determined that Walsh-Healey or Service Contract Act (if applicable) regulations constituted adequate safety and health protection. This final rule removes the dollar threshold from the Safety and Health clause prescription since safety and health requirements should be determined by the risks rather than cost of the contract requirements. Also, to assure that contractors are held to the same standards for mishap prevention as the Government, the revised guidance requires use of a Safety and Health clause and submission of a Safety and Health Plan when performance is on a Government facility or when assessed risk warrants inclusion. This final rule also revises the conditions that must be met for excluding the clause from contracts, reflecting the greater Government and industry use of Occupational Safety and Health Administration (OSHA) and Department of Transportation (DOT), rather than Walsh-Healey or Service Contract Act safety and heath regulations, and includes new NFS guidance on use of the NASA Safety and Health clause instead of the FAR Accident Prevention clause. Furthermore, this final rule makes the requirements for the use of the NASA Safety and Health clause for subcontracts consistent with prime contract requirements.

B. Regulatory Flexibility Act

NASA certifies that this rule will not have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 USC 601, *et seq.*) because these changes clarify existing policy and reflect appropriate safety and health regulations.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the NFS do not impose any recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 41 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 1823, 1836 and 1852

Government procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

Accordingly, 48 CFR parts 1823, 1836 and 1852 are amended as follows:

1. The authority citation for 48 CFR parts 1823, 1836 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1823—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

2. Amend section 1823.7001 in the second sentence of paragraph (c) by removing ''clause'' and adding ''provision'' in its place; and revising paragraphs (a) and (b) to read as follows:

1823.7001 NASA solicitation provisions and contract clauses.

(a) The clause at 1852.223–70, Safety and Health, shall be included in all solicitations and contracts when one or more of the following conditions exist:

(1) The work will be conducted completely or partly on premises owned or controlled by the Government.

(2) The work includes construction, alteration, or repair of facilities in excess of the simplified acquisition threshold.

(3) The work, regardless of place of performance, involves hazards that could endanger the public, astronauts and pilots, the NASA workforce (including contractor employees working on NASA contracts), or high value equipment or property, and the hazards are not adequately addressed by Occupational Safety and Health Administration (OSHA) or Department of Transportation (DOT) regulations (if applicable).

(4) When the assessed risk and consequences of a failure to properly manage and control the hazard(s) warrants use of the clause.

(b) The clause prescribed in paragraph (a) of this section may be excluded, regardless of place of performance, when the contracting officer, with the approval of the installation official(s) responsible for matters of safety and occupational health, determines that the application of OSHA and DOT regulations constitutes adequate safety and occupational health protection.

* * * * *

PART 1836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

3. Add section 1836.513 to read as follows:

1836.513 Accident prevention.

The contracting officer must insert the clause at 1852.223–70, Safety and Health, in lieu of FAR clause 52.236–13, Accident Prevention, and its Alternate I.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend the clause at section 1852.223–70 by revising the date of the clause; revising paragraphs (f)(1) and (g); redesignating paragraphs (h) and (i) as (i) and (j) respectively, and adding a new paragraph (h) to read as follows:

1852.223–70 Safety and Health.

* * * * *

Safety and Health (April 2002)

* * * * *

(f)(1) The Contracting Officer may notify the Contractor in writing of any

noncompliance with this clause and specify corrective actions to be taken. When the Contracting Officer becomes aware of noncompliance that may pose a serious or imminent danger to safety and health of the public, astronauts and pilots, the NASA workforce (including contractor employees working on NASA contracts), or high value mission critical equipment or property, the Contracting Officer shall notify the Contractor orally, with written confirmation. The Contractor shall promptly take and report any necessary corrective action.

* * * * *

(g) The Contractor (or subcontractor or supplier) shall insert the substance of this clause, including this paragraph (g) and any applicable Schedule provisions and clauses, with appropriate changes of designations of the parties, in all solicitations and subcontracts of every tier, when one or more of the following conditions exist:

(1) The work will be conducted completely or partly on premises owned or controlled by the Government.

(2) The work includes construction, alteration, or repair of facilities in excess of the simplified acquisition threshold.

(3) The work, regardless of place of performance, involves hazards that could endanger the public, astronauts and pilots, the NASA workforce (including Contractor employees working on NASA contracts), or high value equipment or property, and the hazards are not adequately addressed by Occupational Safety and Health Administration (OSHA) or Department of Transportation (DOT) regulations (if applicable).

(4) When the Contractor (or subcontractor or supplier) determines that the assessed risk and consequences of a failure to properly manage and control the hazard(s) warrants use of the clause.

(h) The Contractor (or subcontractor or supplier) may exclude the provisions of paragraph (g) from its solicitation(s) and subcontract(s) of every tier when it determines that the clause is not necessary because the application of the OSHA and DOT (if applicable) regulations constitute adequate safety and occupational health protection. When a determination is made to exclude the provisions of paragraph (g) from a solicitation and subcontract, the Contractor must notify and provide the basis for the determination to the Contracting Officer. In subcontracts of every tier above the micro-purchase threshold for which paragraph (g) does not apply, the Contractor (or subcontractor or supplier) shall insert the substance of paragraphs (a), (b), (c), and (f) of this clause).

* * * * *

5. Amend the clause at section 1852.223–72 by revising the date of the clause, and revising paragraph (d) to read as follows:

1852.223–72 Safety and Health (Short Form).

* * * * *

Safety and Health (Short Form) (April 2002)

* * * * *

(d) The Contracting Officer may notify the Contractor in writing of any noncompliance with this clause and specify corrective actions to be taken. In situations where the Contracting Officer becomes aware of noncompliance that may pose a serious or imminent danger to safety and health of the public, astronauts and pilots, the NASA workforce (including Contractor employees working on NASA contracts), or high value mission critical equipment or property, the Contracting Officer shall notify the Contractor orally, with written confirmation. The Contractor shall promptly take and report any necessary corrective action. The Government may pursue appropriate remedies in the event the Contractor fails to promptly take the necessary corrective action.

* * * * *

6. Revise the provision at section 1852.223–73 and the introductory text of Alternate I to the provision to read as follows:

1852.223–73 Safety and Health Plan.

* * * * *

Safety and Health Plan (April 2002)

(a) The offeror shall submit a detailed safety and occupational health plan as part of its proposal (see NPG 8715.3, NASA Safety Manual, Appendices). The plan shall include a detailed discussion of the policies, procedures, and techniques that will be used to ensure the safety and occupational health of Contractor employees and to ensure the safety of all working conditions throughout the performance of the contract.

(b) When applicable, the plan shall address the policies, procedures, and techniques that will be used to ensure the safety and occupational health of the public, astronauts and pilots, the NASA workforce (including Contractor employees working on NASA contracts), and high-value equipment and property.

(c) The plan shall similarly address subcontractor employee safety and occupational health for those proposed subcontracts that contain one or more of the following conditions:

(1) The work will be conducted completely or partly on premises owned or controlled by the government.

(2) The work includes construction, alteration, or repair of facilities in excess of the simplified acquisition threshold.

(3) The work, regardless of place of performance, involves hazards that could endanger the public, astronauts and pilots, the NASA workforce (including Contractor employees working on NASA contracts), or high value equipment or property, and the hazards are not adequately addressed by Occupational Safety and Health Administration (OSHA) or Department of Transportation (DOT) regulations (if applicable).

(4) When the assessed risk and consequences of a failure to properly manage and control the hazards warrants use of the clause.

(d) This plan, as approved by the Contracting Officer, will be included in any resulting contract.

(End of provision)

Alternate I (April 2002)

As prescribed in 1823.7001(c), delete the first sentence in paragraph (a) of the basic provision and substitute the following:

* * * * *

[FR Doc. 02–8548 Filed 4–8–02; 8:45 am]

BILLING CODE 7510–01–P

Proposed Rules

Federal Register
Vol. 67, No. 68
Tuesday, April 9, 2002

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1219

[Docket No. FV–01–705 RO]

Hass Avocado Promotion, Research, and Information Order; Referendum Order

AGENCY: Agricultural Marketing Service, Agriculture.

ACTION: Referendum order.

SUMMARY: This document directs that a referendum be conducted among eligible producers and importers of Hass avocados to determine whether they favor implementation of the Hass Avocado Promotion, Research, and Information Order (Order).

DATES: The registration period will be from May 13 through May 31, 2002. The referendum will be conducted from June 24 to July 12, 2002. To vote in this referendum, current producers and importers must have produced or imported Hass avocados during the period from January 1, 2000, through December 31, 2001 (two years).

ADDRESSES: Copies of the Order may be obtained from: Referendum Agent, Research and Promotion Branch (RP), Fruit and Vegetable Programs (FV), AMS, USDA, Stop 0244, Room 2535–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244.

FOR FURTHER INFORMATION CONTACT: Julie A. Morin, RP, FV, AMS, USDA, Stop 0244, Room 2535–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244, telephone 888–720–9917 (toll free), fax 202–205–2800, e-mail *julie.morin@usda.gov*.

SUPPLEMENTARY INFORMATION: Pursuant to the Hass Avocado Promotion, Research, and Information Act (Act) [7 U.S.C. 7801–7813], it is hereby directed that a referendum be conducted to ascertain whether implementation of the Order is favored by Hass avocado producers and importers. The Order is authorized under the Act.

The representative period for establishing voter eligibility for the referendum shall be the period from January 1, 2000, through December 31, 2001 (two years). Persons who are producers or importers of Hass avocados at the time of the referendum and during the representative period are eligible to vote. Producers and importers must register with the U.S. Department of Agriculture (Department) in order to receive a ballot to vote in the referendum. Registration will be conducted by mail and by fax. The referendum shall be conducted by mail ballot and by fax from June 24 through July 12, 2002. Ballots must be received by the referendum agent no later than July 12, 2002, to be counted.

Section 1206(a) of the Act requires the Department to conduct a referendum prior to the Order's effective date and that the Order shall become effective only if it is determined that the Order has been approved by a simple majority of all votes cast in a referendum.

In accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the referendum ballot has been approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0197. It is estimated that there are approximately 6,000 producers and 200 importers who will be eligible to vote in the referendum. It will take an average of 15 minutes for each producer and importer to read the registration instructions and register for the referendum. It will take an average of 15 minutes for each registered producer and importer to read the voting instructions and complete the referendum ballot.

Referendum Order

Julie A. Morin, Margaret B. Irby, and Martha B. Ransom, RP, FV, AMS, USDA, Stop 0244, Room 2535–S, 1400 Independence Avenue, SW., Washington, DC 20250–0244, are designated as the referendum agents to conduct this referendum. The referendum procedures [7 CFR 1219.100 through 1219.109], which were issued pursuant to the Act, shall be used to conduct the referendum.

The referendum agents will mail registration instructions to all known Hass avocado producers and importers in advance of the referendum. Any producer or importer who does not receive registration instructions should contact the referendum agents no later than one week before the end of the registration period. Prior to the first day of the voting period, the referendum agents will mail the ballots to be cast in the referendum and voting instructions to all registered voters. Persons who are producers or importers at the time of the referendum and during the representative period are eligible to vote. Any eligible producer or importer who does not receive a ballot should contact the referendum agents no later than one week before the end of the voting period. Ballots must be received by the referendum agents on or before July 12, 2002, to be counted.

List of Subjects in 7 CFR Part 1219

Advertising, Agricultural research, Hass avocados, Imports, Reporting and recordkeeping requirements.

Authority: 7 U.S.C. 7801–7813.

Dated: April 3, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 02–8547 Filed 4–8–02; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1710

RIN 0572–AB80

Useful Life of Facility Determination

AGENCY: Rural Utilities Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Utilities Service (RUS) proposes to eliminate the requirement to use depreciation rates as found in Bulletin 183–1, for determining the useful life of a facility. If the proposed useful life of a facility is deemed inappropriate by RUS, other means to establish an appropriate term for the loan will apply. Current reliance on the fixed range of depreciation rates found in Bulletin 183–1, to be used across the country, has been determined to not be as appropriate as looking at proposals on a case-by-case basis. This proposed rule is made as part of the RUS efforts to continually look for ways to streamline lending requirements and make regulations useful and direct.

DATES: Written comments must be received by RUS or carry a postmark or equivalent no later than May 9, 2002.

ADDRESSES: Written comments should be addressed to F. Lamont Heppe, Jr., Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, STOP 1522, 1400 Independence Ave., SW., Washington, DC 20250–1522. RUS requests a signed original and three copies of all comments (7 CFR 1700.4). Comments will be available for public inspection during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: Patrick R. Sarver, Management Analyst, Rural Utilities Service, Electric Program, Room 4024 South Building, Stop 1560, 1400 Independence Ave., SW., Washington, DC 20250–1560, Telephone: 202–690–2992, FAX: 202–690–0717, E-mail: *psarver@rus.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

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

Executive Order 12372

This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. See the final rule related notice titled ''Department Programs and Activities Excluded from Executive Order 12372'' (50 FR 47034) advising that RUS loans and loan guarantees were not covered by Executive Order 12372.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. RUS has determined that this proposed rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this rule will be preempted; no retroactive effect will be given to this rule, and, in accordance with section 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912 (e)), administrative appeals procedures, if any are required, must be exhausted before an action against the Department or its agencies may be initiated.

Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Administrator of RUS has determined that this rule will not have significant impact on a substantial number of small entities. The RUS electric loan program provides loans and loan guarantees to borrowers at interest rates and terms that are more favorable than those generally available from the private sector. Small entities are not subjected to any requirements, which are not applied equally to large entities. RUS borrowers, as a result of obtaining federal financing, receive economic benefits that exceed any direct cost associated with RUS regulations and requirements.

Information Collection and Recordkeeping Requirements

This rule contains no additional information collection or recordkeeping requirements under OMB control number 0572–0032 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Unfunded Mandates

This proposed rule contains no Federal mandates (under the regulatory provision of title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act.

National Environmental Policy Act Certification

The Administrator of RUS has determined that this proposed rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Catalog of Federal Domestic Assistance

The program described by this proposed rule is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.850, Rural Electrification Loans and Loan Guarantees. This catalog is available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402–9325, telephone number (202) 512–1800.

Background

RUS is authorized to make loans and loan guarantees with a final maturity of up to 35 years. When determining the useful life of a facility to be financed, current regulations require that the useful life determination be consistent with the borrower's proposed depreciation rates for facilities. If the depreciation rates are deemed inappropriate by RUS, then the depreciation rates listed in RUS Bulletin 183–1 will apply. RUS Bulletin 183–1, last updated in 1977, provides the borrower depreciation rates by asset class, which is meant to be used by all borrowers across the country. The standard depreciation rates that are published in Bulletin 183–1 are presented as a range of rates to allow for the recognition of locational and situational differences.

Depreciation is the allocation of asset costs over the period that the asset provides a benefit. The system of allocation should correctly match cost with related revenue, while recognizing the declining service value of the asset. Both use and usefulness of the asset influence the rate of depreciation. Appropriate determination of depreciation for a particular asset should consider the past experience with similar assets, the asset's present condition and the factory's maintenance policy. Other considerations include technological and industry trends, and local environmental conditions.

In the electric utility industry depreciation is designed to allocate the costs of electric plant, including net salvage (cost of removal less salvage), over the estimated useful life of the plant. The depreciation rates, therefore, include components for estimated cost of removal and net salvage. In recent years net salvage has, in many cases, become a significant factor in depreciation rates. As a result, without knowing the net salvage components the depreciation rates cannot readily be converted to determine the estimated useful life of electric plant.

Because of the growing difficulty in determining the net salvage value and the resulting difficulty in accurately determining useful life, RUS is proposing to eliminate the requirement for a useful life determination based upon the depreciation rates as found in Bulletin 183–1. If the useful life being proposed by the borrower is not satisfactory to RUS, the depreciation rates listed in RUS Bulletin 183–1 will no longer be used in lieu there of. Instead, RUS proposes using an independent evaluation, the manufacturer's estimated useful-life or RUS experience with like-property as alternatives to an unsatisfactory proposal made by the borrower. RUS views this new back-stop approach to reviewing and approving the

determination of the useful life of a facility as a more appropriate method. The increased difficulties in establishing net salvage values and recent experience in using the fixed range of depreciation rates as found in Bulletin 183–1, dictates a more flexible approach.

The RUS is proposing this change to regulations as part of its ongoing effort to minimize administrative burden, streamline the loan process, and update regulations to reflect current requirements. This proposed change in regulations will provide greater latitude in establishing the useful life of a facility being financed but at the same time maintain RUS approval for making the determination.

List of Subjects in 7 CFR Part 1710

Electric power, Electric utilities, Loan programs—energy, Reporting and recordkeeping requirements, Rural areas.

For the reasons set forth in the preamble, chapter XVII of title 7 of the Code of Federal Regulations, is proposed to be amended as follows:

PART 1710—GENERAL AND PRE-LOAN POLICIES AND PROCEDURES COMMON TO INSURED AND GUARANTEED ELECTRIC LOANS

1. The authority citation for part 1710 continues to read as follows:

Authority: 7 U.S.C. 901 *et seq.*, 1921 *et seq.*, 6941 *et seq.*

Subpart C—Loan Purposes and Basic Policies

2. Amend § 1710.115 by revising paragraph (b) to read as follows:

§ 1710.115 Final maturity.

* * * * *

(b) Loans made or guaranteed by RUS for facilities owned by the borrower generally must be repaid with interest within a period, up to 35 years, that approximates the expected useful life of the facilities financed. The expected useful life shall be based on the weighted average of the useful lives that the borrower proposes for the facilities financed by the loan, provided that the proposed useful lives are deemed appropriate by RUS. RUS Form 740c, Cost Estimates and Loan Budget for Electric Borrowers, submitted as part of the loan application must include, as a note, either a statement certifying that at least 90 percent of the loan funds are for facilities that have a useful life of 33 years or longer, or a schedule showing the costs and useful life of those facilities with a useful life of less than 33 years. If the useful life determination proposed by the borrower is not deemed appropriate by RUS, RUS will base expected useful life on an independent evaluation, the manufacturer's estimated useful-life or RUS experience with like-property, as applicable. Final maturities for loans for the implementation of programs for demand side management and energy resource conservation and on and off grid renewable energy sources not owned by the borrower will be determined by RUS. Due to the uncertainty of predictions over an extended period of time, RUS may add up to 2 years to the composite average useful life of the facilities in order to determine final maturity.

* * * * *

Dated: March 27, 2002.

Blaine D. Stockton,

Acting Administrator, Rural Utilities Service.

[FR Doc. 02–8484 Filed 4–8–02; 8:45 am]

BILLING CODE 3410–15–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AE78

Small Business Size Standards; Testing Laboratories

AGENCY: Small Business Administration (SBA).

ACTION: Proposed rule.

SUMMARY: The Small Business Administration (SBA) is proposing to increase the size standard for the Testing Laboratories industry (North American Industry Classification System (NAICS) code 541380) to $10 million in average annual receipts. The current size standard for this industry is $6 million in average annual receipts. The proposed revision is being made to better define the size of businesses in this industry that SBA believes should be eligible for Federal small business assistance programs.

DATES: Comments must be submitted on or before June 10, 2002.

ADDRESSES: Send comments to Gary M. Jackson, Assistant Administrator for Size Standards, 409 3rd Street, SW, Mail Code 6530, Washington, DC 20416; or via email to SIZESTANDARDS@sba.gov. Upon request, SBA will make all public comments available.

FOR FURTHER INFORMATION CONTACT: Robert N. Ray, Office of Size Standards, (202) 205–6618.

SUPPLEMENTARY INFORMATION: The Small Business Administration (SBA) has received requests from Testing Laboratories to review its $6 million size standard. These firms believe that a size standard increase is warranted in light of the high level capacities and skills that Federal agencies have recently required among their vendors that specialize in environmental and radiochemical testing. They believe that the minimum government requirements may have raised the costs of doing business in this industry to the point that the pool of eligible small businesses in this activity has seriously declined. If this trend continues, it is argued, Federal agencies could be hampered in using government preference programs for small business. Below is a discussion of SBA's size standards methodology and the analysis leading to the proposal to increase the Testing Laboratories size standard to $10 million.

(Effective February 22, 2002, the Testing Laboratories size standard increased from $5 million to $6 million as part of an inflation adjustment to SBA's monetary size standards (see 67 FR 3041, dated January 23, 2002. This rule proposes a further increase to the size standard based on an analysis of the characteristics of businesses in the Testing Laboratories industry.)

Size Standards Methodology: Congress has granted SBA discretion to establish detailed size standards. SBA's Standard Operating Procedure (SOP) 90 01 3, ''Size Determination Program,'' available on SBA's web site at *http:/ www.sba.gov/library/soproom.html,* sets out four categories for establishing and evaluating size standards: (1) The structure of the industry and its various economic characteristics, (2) SBA program objectives and the impact of different size standards on these programs, (3) whether a size standard successfully excludes those businesses which are dominant in the industry, and (4) other factors if applicable. Other factors, including the impact on other agencies' programs, may come to the attention of SBA during the public comment period or from SBA's own research on the industry. No formula or weighting has been adopted so that the factors may be evaluated in the context of a specific industry. Below is a discussion of SBA's analysis of the economic characteristics of an industry, the impact of a size standard on SBA programs, and the evaluation of whether a firm at or below a size standard could be considered dominant in the industry under review.

Industry Analysis: The Small Business Act, 15 U.S.C. 632(a)(3), requires that size standards vary by industry to the extent necessary to reflect differing industry characteristics

(Section 3(a)(3)). SBA has in place two ''base or anchor size standards'' that apply to most industries. SBA established 500 employees as the anchor size standard for the manufacturing industries at SBA's inception in 1953, and shortly thereafter established a $1 million size standard for the nonmanufacturing industries. The receipts-based anchor size standard for the nonmanufacturing industries was periodically adjusted for inflation so that, currently, the anchor size standard for the nonmanufacturing industries is $6 million. Anchor size standards are presumed to be appropriate for an industry unless its characteristics indicate that larger firms have a much greater significance within that industry than for the ''typical industry.''

When evaluating a size standard, the characteristics of the specific industry under review are compared to the characteristics of a group of industries, referred to as a comparison group. A comparison group is a large number of industries grouped together to represent the typical industry. It can be comprised of all industries, all manufacturing industries, all industries with receipt-based size standards, or some other logical grouping. If the characteristics of a specific industry are similar to the average characteristics of the comparison group, then the anchor size standard is considered appropriate for the industry. If the specific industry's characteristics are significantly different from the characteristics of the comparison group, a size standard higher or, in rare cases, lower than the anchor size standard may be considered appropriate. The larger the differences between the specific industry's characteristics and the comparison group, the larger the difference between the appropriate industry size standard and the anchor size standard. Only when all or most of the industry characteristics are significantly smaller than the average characteristics of the comparison group, or other industry considerations strongly suggest the anchor size standard would be an unreasonably high size standard for the industry under review, will SBA adopt a size standard below the anchor size standard.

In 13 CFR 121.102 (a) and (b), evaluation factors are listed which are the primary factors describing the structural characteristics of an industry—average firm size, distribution of firms by size, start-up costs, and industry competition. The analysis also examines the possible impact of a size standard revision on SBA's programs as an evaluation factor. SBA generally considers these five factors to be the most important evaluation factors in establishing or revising a size standard for an industry. However, it will also consider and evaluate other information that it believes relevant to the decision on a size standard as the situation warrants for a particular industry. These can include the impact of a revision on other agencies' programs. Public comments submitted on proposed size standards are also an important source of additional information that SBA closely reviews before making a final decision on a size standard. Below is a brief description of each of the five evaluation factors.

1. Average firm size is simply total industry receipts (or number of employees) divided by the number of firms in the industry. If the average firm size of an industry is significantly higher than the average firm size of a comparison industry group, this fact would be viewed as supporting a size standard higher than the anchor size standard. Conversely, if the industry's average firm size is similar to or significantly lower than that of the comparison industry group, it would be a basis to adopt the anchor size standard or, in rare cases, a lower size standard.

2. The distribution of firms by size examines the proportion of industry receipts, employment or other economic activity accounted for by firms of different sizes in an industry. If the preponderance of an industry's economic activity is by smaller firms, this tends to support adopting the anchor size standard. The opposite is the case for an industry in which the distribution of firms indicates that economic activity is concentrated among the largest firms in an industry. In this rule, SBA is comparing the size of firm within an industry to the size of firm in the comparison group at which predetermined percentages of receipts are generated by firms smaller than a particular size firm. For example, for Testing Laboratories, 50% of total industry receipts are generated by firms of $9.3 million in receipts and less. This contrasts with the comparison group (composed of industries with the nonmanufacturing anchor size standard of $6 million) in which firms of $5.8 million or less in receipts generated 50% of total industry receipts. Viewed in isolation, this significantly higher figure for Testing Laboratories suggests that a higher size standard than the nonmanufacturing anchor size standard may be warranted. Other size distribution comparisons in the industry analysis include 40%, 60%, and 70%, as well as the 50% comparison discussed above.

3. Start-up costs affect a firm's initial size because entrants into an industry must have sufficient capital to start and maintain a viable business. To the extent that firms entering into an industry have greater financial requirements than firms in other industries, SBA is justified in considering a higher size standard. In lieu of direct data on start-up costs, SBA is using a special measure to assess the financial burden for entry-level firms. SBA is using nonpayroll costs per establishment as a proxy measure for start-up costs associated with capital investment requirements. This is derived by first calculating the percent of receipts in an industry that are either retained or expended on costs other than payroll costs. (The figure comprising the numerator of this percentage is mostly composed of capitalization costs, overhead costs, materials costs, and the costs of goods sold or inventoried.) This percentage is then applied to average establishment receipts to arrive at nonpayroll costs per establishment (an establishment is a business entity operating at a single location). An industry with a significantly higher level of nonpayroll costs per establishment than that of the comparison group is likely to have higher start-up costs that would tend to support a size standard higher than the anchor size standard. Conversely, if the industry showed a significantly lower nonpayroll costs per establishment when compared to the comparison group, the anchor size standard would be considered the appropriate size standard.

4. Industry competition is assessed by measuring the proportion or share of industry receipts obtained by firms that are among the largest firms in an industry. In this proposed rule, SBA compared the proportion of industry receipts generated by the four largest firms in the industry—generally referred to as the ''four-firm concentration ratio''—with the average four-firm concentration ratio for industries in the comparison groups. If a significant proportion of economic activity within the industry is concentrated among a few relatively large producers, SBA tends to set a size standard relatively higher than the anchor size standard to assist firms in a broader size range compete with firms that are larger and more dominant in the industry. In general, however, SBA does not consider this to be an important factor in assessing a size standard if the four-firm concentration ratio falls below 40% for an industry under review, while its

comparison groups also average less than 40%.

5. Competition for Federal procurements and SBA Financial Assistance. SBA also evaluates the possible impact of a size standard on its programs to determine whether small businesses defined under the existing size standard are receiving a reasonable level of assistance. This assessment most often focuses on the proportion or share of Federal contract dollars awarded to small businesses in the industry in question. In general, the lower the share of Federal contract dollars awarded to small businesses in an industry which receives significant Federal procurement revenues, the greater is the justification for a size standard higher than the existing one.

As another factor to evaluate the impact of a proposed size standard on SBA programs, the volume of guaranteed loans within an industry and the size of firms obtaining those loans is assessed to determine whether the current size standard may restrict the level of financial assistance to firms in that industry. If small businesses receive ample assistance through these programs, or if the financial assistance is provided mainly to small businesses much lower than the size standard, an increase to the size standard (especially, if it is already above the anchor size standard) may not be appropriate.

Evaluation of Industry Size Standard: The two tables below show the characteristics for the Testing Laboratories industry and for the comparison group. The primary comparison group is comprised of all industries with a $6 million receipts-based size standard (referred to as the nonmanufacturing anchor group). Since SBA's size standards analysis is assessing whether the Testing Laboratories size standard should be higher than the nonmanufacturing anchor size standard, this is the most logical set of industries to group together for the industry analysis. Data on a second comparison group is also shown. This group consists of all industries in NAICS Sector 54, Professional, Scientific, and Technical Services—the NAICS Sector of which Testing Laboratories is a part. The data on this comparison group provide an additional perspective on the size of firms in related industries and their industry structure. SBA examined economic data on these industries from a special tabulation of the 1997 Economic Census prepared under contract by the U.S. Bureau of the Census. SBA also examined Federal contract award data for fiscal years 1998–2000 from the U.S. General Services Administration's Federal Procurement Data Center.

Industry Structure Consideration: Table 1 below examines the size distribution of Testing Laboratories. For this factor, SBA is evaluating the size of firm that accounts for predetermined percentages of total industry receipts (40%, 50%, 60%, and 70%). The table shows firms up to a specific size that, along with smaller firms, account for a specific percentage of total industry receipts. For example, Testing Laboratories of $4.6 million or less in receipts obtained 40% of total industry receipts. Within the nonmanufacturing anchor group, firms of $3.2 million or less in receipts obtained 40% of total industry receipts in the average industry, while in NAICS sector 54, firms of $2.3 million or less in receipts obtained 40% of total industry receipts.

TABLE 1.—SIZE DISTRIBUTIONS OF FIRMS IN THE TESTING LABORATORIES INDUSTRY, NONMANUFACTURING ANCHOR GROUP, AND NAICS SECTOR 54

[Data in Thousands of Dollars]

Category	Size of firm at 40%	Size of firm at 50%	Size of firm at 60%	Size of firm at 70%
Testing Laboratories	$4,600	9,262	18,726	33,867
Nonmanufacturing Anchor Group	3,206	5,821	11,857	27,957
NAICS Sector 54	2,262	4,683	9,668	31,904

These data suggest that a size standard nearly double the $6 million size standard may be appropriate for the industry of Testing Laboratories. At the given coverage levels the size of firm for the Testing Laboratories industry is significantly larger than in the two comparison groups. The size of firms for the Testing Laboratories industry is more than 40% larger than in the Nonmanufacturing Anchor comparison group, and about twice as large as the average industry in NAICS Sector 54 for most of the distribution percentages.

Table 2 lists the other four evaluation factors for the Testing Laboratories industry and the comparison groups. These include comparisons of average firm size, the measurement of start-up costs as measured by nonpayroll receipts per establishment, and the four-firm concentration ratio.

TABLE 2.—INDUSTRY CHARACTERISTICS OF THE TESTING LABORATORIES INDUSTRY, NONMANUFACTURING ANCHOR GROUP, AND NAICS SECTOR 54

Category	Average firm size		Non payroll receipts per establishment (million $)	Four firm concentration ratio (in percent)
	Receipts (millions $)	Employees		
Testing Laboratories	1.56	19.9	0.68	12.1
Nonmanufacturing Anchor Group	0.95	10.6	0.56	14.4
NAICS Sector	54	0.77	7.7	0.45

For Testing Laboratories, its average firm size in receipts is one and one-half times larger than the average firm size in the Nonmanufacturing Anchor comparison group, and twice that of the NAICS Sector 54 industries. Moreover, its average firm size in employees is two to three times the average sizes of these two comparison groups. This factor is sufficiently higher than the comparison groups to support a size standard appreciably above or double the $6 million size standard. Its nonpayroll receipts per establishment ratio indicator, a measure of capital

requirements to enter an industry, is also somewhat higher than the anchor comparison group, and about one and one-half times the size of the NAICS Sector 54 group of industries. This factor indicates that a size standard slightly above the $6 million size standard may be appropriate. Its four-firm concentration ratio, however, is relatively low, indicating that the industry is not dominated by large businesses. This is the only industry structure parameter not pointing to the need for a higher size standard for Testing Laboratories.

SBA Program Considerations: SBA also reviews its size standards in relationship to its programs. Since SBA is reviewing the Testing Laboratories Industry's size standard because of concerns about the application of the size standard to Federal procurement, this proposed rule gives more consideration to the pattern of Federal contract awards than to the level of financial assistance to small businesses to assess whether its size standard should be revised. SBA provides a relatively small amount of financial assistance to Testing Laboratories. In fiscal year 2000, 66 loans totaling $21 million were guaranteed to Testing Laboratories. Most of these loans were to labs with less than $1 million in receipts. It's unlikely that an increase to the size standard will have much impact on the financial programs and, consequently, this factor is not part of the assessment of the size standard.

In the case of Federal procurement, the share of Federal contracts awarded to small Testing Laboratories supports an increase to the current size standard (see Table 3). Small Testing Laboratories received only 8.4% of the dollar value of Federal contracts awarded during fiscal years 1998 to 2000. While there are no NAICS procurement data available for the receipt-based size standards group, or for the 54 group, SBA does have data for total small business awards in which all industries are summed and combined. In fiscal years 1998–2000, 18.7% of the total value of all Federal prime contracts were awarded to small firms, a figure more than twice the share of small firms in the Testing Laboratories Industry. In addition, this share is disproportionally small when compared with the amount of total industry receipts generated by small Testing Laboratories. Although the Census Bureau data indicate that small Testing Laboratories account for more than 40% of industry receipts, they obtained only 8.4% of Federal contracts during fiscal years 1998–2000. These figures suggest that the Federal contract requirements are different from those of the private marketplace, favoring, in general, larger firms with greater experience and sophistication. These results strongly reinforce the industry structure factors in arguing for a higher size standard for Testing Laboratories.

TABLE 3.—SMALL BUSINESS PRIME CONTRACT AWARDS, FISCAL YEARS 1998–2000

[Data in thousands of dollars]

Category	FY 1998	FY 1999	FY 2000	Sum of three years
Total Awards	$182,255.7	$183,579.4	$203,533.9	$569,369.0
Small Business Awards	$33,746.7	$34,482.9	$38,260.3	$106,490.0
Percent to Small Business	18.5%	18.8%	18.8%	18.7%
Testing Laboratories Awards	$861.6	$628.0	$84.7	$1,574.3
Small Testing Laboratories Awards	$44.1	$45.3	$42.1	$131.7
Percent to Small Testing Laboratories	5.1%	7.2%	49.7%	8.4%

Note: Data for FY 2000 for Testing Laboratories are not representative of most years due to deobligations of $135 million from procurements initiated in previous years.

Overview: Based on the analysis of each evaluation factor, SBA is proposing a $10 million size standard. Four of the five evaluation factors clearly support a size standard ranging from slightly above to double the $6 million nonmanufacturing anchor size standard. The low amount of participation of small businesses in Federal government procurement, however, is of special concern and suggests, as the requestors had pointed out, that Federal contract requirements may indeed influence the size of Testing Laboratories that possesses the equipment and qualifications to perform on Federal analytical testing contracts. After considering all factors, SBA believes that a $10 million size standard is a reasonable size standard for the Testing Laboratories industry and will help small businesses in this industry to compete for Federal contracts without including businesses that are so large that they could harm the ability of much smaller-sized small businesses to compete successfully for Federal contracts.

Dominant in Field of Operation: Section 3(a) of the Small Business Act defines a small concern as one that is (1) independently owned and operated, (2) not dominant in its field of operation and (3) within detailed definitions or size standards established by the SBA Administrator. SBA considers as part of its evaluation of a size standard whether a business concern at or below a proposed size standard would be considered dominant in its field of operation. This assessment generally considers the market share of firms at the proposed or final size standard, or other factors that may show whether a firm can exercise a major controlling influence on a national basis in which significant numbers of business concerns are engaged.

SBA has determined that no firm at or below the proposed size standard for the Testing Laboratories industry would be of a sufficient size to dominate its field of operation. The largest firm at the proposed size standard level generates less than 0.16% of total industry receipts. This level of market share effectively precludes any ability for a firm at or below the proposed size standard to exert a controlling effect on this industry. *Alternative Size Standards:* SBA considered as an alternative size standard to the proposed $10 million, a more modest increase to $7.5 million, and a larger increase to $12.5 million. SBA, however, decided not to propose the more moderate increase of $7.5 million because it believes that the very low share of Federal procurements to small Testing Laboratories indicates the need for a higher size standard to include those Testing Laboratories that can meet and perform on many Federal analytical testing contracts. SBA also decided not to propose a larger increase to $12.5 million based on the fact that two of the five factors reviewed indicated a size standard at, or only slightly above, the

$6 million nonmanufacturing anchor size standard. SBA believes that the evaluation factors should be virtually unanimous for an increase of this magnitude. While the industry factors pointed to a higher size standard for this industry, they were not strong enough to support a size standard of $12.5 million—more than twice the present size standard. However, the factors did point to a size standard of $10 million. The three factors pointing to a $10 million size standard—the size distribution of firms, average firm size, and the Federal procurement share of small firms—are the factors that SBA believes are most important when analyzing a size standard. (The non-payroll receipts per establishment is only a proxy measure of capitalization, and the four firm concentration measure, generally, is so low outside of the manufacturing and utility industries that it usually has little effect on the analysis.) Thus, with three out of five factors pointing to a higher size standard, and the fact that these factors are more important than the other factors, SBA believes that a size standard of $10 million is warranted.

SBA welcomes public comments on its proposed size standard for the Testing Laboratories industry. Comments supporting an alternative to the proposal, including the option of retaining the size standard at $6 million discussed above, should explain why the alternative would be preferable to the proposed size standard.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

The Office of Management and Budget (OMB) has determined that this proposed rule constitutes a ''significant'' regulatory action under Executive Order 12866. SBA's regulatory analysis is set forth below.

Regulatory Impact Analysis

A. General Considerations

1. Is There a Need for the Regulatory Action?

SBA is chartered to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To effectively assist intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to the SBA Administrator the responsibility for establishing small business definitions. It also requires that small business definitions vary to reflect industry differences. SBA believes that an adjustment in the size standard of the Testing Laboratories industry is needed to better reflect the industrial structure of this industry.

2. Alternatives

There are no viable alternatives to establishing size standards to define a small business for Federal small business programs. The purpose of this rule is to better define the size of firms eligible for SBA assistance.

3 What is the baseline?

The baseline in this rule is the coverage of businesses whose size is at or below SBA's size standard of $6 million for this industry. A special tabulation of the 1997 Economic Census prepared for SBA reports that 3,762 firms active in this industry are defined as small out of 4,126 firms in the industry. These account for 91.2% of total firms in the industry. These firms generate $2.66 billion of the $6.44 billion produced in the industry. SBA estimates that 98.4% of all businesses in the U.S. are currently defined as small under the existing size standards and they account for 28.6% of industry sales.

B. Benefit Estimates

The most significant benefit to businesses obtaining small business status as a result of this rule is eligibility for Federal small business assistance programs. Under this rule, 120 additional firms will obtain small business status and become eligible for these programs. These include SBA's financial assistance programs and Federal procurement preference programs for small businesses, 8(a) firms, small disadvantaged businesses, small businesses located in Historically Underutilized Business Zones (HUBZone), women-owned small businesses, and veteran-owned and service disabled veteran-owned small businesses, as well as those awarded through full and open competition after application of the HUBZone or small disadvantaged business price evaluation preference or adjustment. Other Federal agencies use SBA size standards for a variety of regulatory and program purposes. SBA does not have information on each of these uses to evaluate the impact of size standards changes. However, in cases where SBA size standards are not appropriate, an agency may establish its own size standards with the approval of the SBA Administrator (see 13 CFR 121.801). Through the assistance of these programs, small businesses may benefit by becoming more knowledgeable, stable, and competitive businesses.

The benefits of a size standard increase to a more appropriate level would accrue to three groups. First, businesses that benefit by gaining small business status from the proposed size standards and use small business assistance programs. Second, growing small businesses that may exceed the current size standards in the near future and who will retain small business status from the proposed size standards. Third, Federal agencies that award contracts under procurement programs that require small business status.

Newly defined small businesses would benefit from the SBA's financial programs, in particular its 7(a) Guaranteed Loan Program and Certified Development Company (504) Program. SBA estimates that approximately $2.1 million in new Federal loan guarantees could be made to these newly defined small businesses. This represents 9.8% of the $21 million in loans that were guaranteed by the SBA under these two financial programs to firms in the Testing Laboratories industry in FY 2000. Because of the size of the loan guarantees, most loans are made to small businesses well below the size standard. Thus, increasing the size standard will likely result in only a small increase in small business guaranteed loans to businesses in this industry, and the $2.1 million estimated figure may overstate the actual impact.

The newly defined small businesses would also benefit from SBA's economic injury disaster loan program. Since this program is contingent upon the occurrence and severity of a disaster, no meaningful estimate of benefits can be projected.

SBA estimates that approximately $51 million per year of additional Federal prime contracts may be awarded to businesses becoming newly designated small businesses in the Testing Laboratories industry. This represents 9.8% of the $525 million that the Federal government awarded in the average year in this industry during fiscal years 1998–2000.

Federal agencies may benefit from the higher size standards if the newly defined and expanding small businesses compete for more set-aside procurements. The larger base of small businesses would likely increase competition and lower the prices on set-aside procurements. A large base of small businesses may create an incentive for Federal agencies to set aside more procurements, thus creating greater opportunities for all small businesses. Nonsmall businesses with

small business subcontracting goals may also benefit from a larger pool of small businesses by enabling them to better achieve their subcontracting goals at lower prices. No estimate of cost savings from these contracting decisions can be made since data are not available to directly measure price or competitive trends on Federal contracts.

C. Costs Estimates

To the extent that up to 120 additional firms could become active in Government programs, this may entail some additional administrative costs to the Federal government associated with additional bidders for Federal small business procurement programs, additional firms seeking SBA guaranteed lending programs, and additional firms eligible for enrollment in SBA's PRO-Net data base program. Among businesses in this group seeking SBA assistance, there will be some additional costs associated with compliance and verification of small business status and protests of small business status. These costs are likely to generate minimal incremental administrative costs since administrative mechanisms are currently in place to handle these administrative requirements.

The costs to the Federal government may be higher on some Federal contracts as a result of this rule. With greater numbers of businesses defined as small, Federal agencies may choose to set aside more contracts for competition among small businesses rather than using full and open competition. The movement from unrestricted to set aside is likely to result in competition among fewer bidders for a contract. Also, higher costs may result if additional full and open contracts are awarded to HUBZone and SDB businesses as a result of a price evaluation preference. The additional costs associated with fewer bidders, however, are likely to be minor since, as a matter of policy, procurements may be set aside for small businesses or under the 8(a), and HUBZone Programs only if awards are expected to be made at fair and reasonable prices.

D. Other Considerations Including Distributional Effects, Equity Considerations and Uncertainty

The proposed size standard may have distributional effects among large and small businesses. Although the actual outcome of the gains and loses among small and large businesses cannot be estimated with certainty, several trends are likely to emerge. First, a transfer of some Federal contracts to small businesses from large businesses. Large businesses may have fewer Federal contract opportunities as Federal agencies decide to set aside more Federal procurements for small businesses. Also, some Federal contracts may be awarded to HUBZone or small disadvantaged businesses instead of large businesses since those two categories of small businesses are eligible for price evaluation preferences for contracts competed on a full and open basis. Similarly, currently defined small businesses may obtain fewer Federal contacts due to the increased competition from more businesses defined as small. This transfer may be offset by a greater number of Federal procurements set aside for all small businesses. The potential transfer of contracts away from large and currently defined small businesses would be limited by the number of newly defined and expanding small businesses that were willing and able to sell to the Federal Government. The potential distributional impacts of these transfers cannot be estimated with any degree of precision since the data on the size of business receiving a Federal contract are limited to identifying small or other-than-small businesses.

SBA has determined that this proposed rule, if adopted, may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Immediately below is an initial regulatory flexibility analysis (IRFA) of this proposed rule addressing the following questions: (1) What is the need for and objective of the rule, (2) what is SBA's description and estimate of the number of small entities to which the rule will apply, (3) what is the projected reporting, record keeping, and other compliance requirements of the rule, and (4) what are the relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(1) What Is the Need for and Objective of the Rule?

SBA believes that this revision to the size standard for Testing Laboratories more appropriately defines the size of businesses in this industry that should be eligible for Federal small business assistance programs. A review of the latest available data supports a change to the current size standard.

(2) What Is SBA's Description and Estimate of the Number of Small Entities to Which the Rule Will Apply?

SBA estimates that 120 additional businesses out of 4,126 businesses in the industry would be considered small as a result of this rule, if adopted. The number of small businesses would increase from 3,762 firms to 3,882. These businesses would be eligible to seek available SBA assistance provided that they meet other program requirements. Businesses becoming newly eligible for SBA assistance as a result of this rule, if finalized, cumulatively generate $635 million in this industry. The amount of receipts by small firms would increase from $2.7 billion to $3.3 billion out of a total of $6.4 billion in receipts. The small business coverage in this industry would increase by 9.8% of total receipts. This figure of 9.8% is used to estimate the potential economic impacts of this rule as they relate to Federal programs that are discussed below.

Description of Potential Benefits of the Rule: The most significant benefit to businesses obtaining small business status as a result of this rule is their eligibility for Federal small business assistance programs. These include SBA's financial assistance programs and Federal procurement preference programs for small businesses, 8(a) firms, small disadvantaged businesses, and small businesses located in Historically Underutilized Business Zones (HUBZone).

SBA estimates that firms gaining small business status could potentially obtain additional Federal contracts worth $51 million per year under the small business set-aside program, the 8(a) and HUBZone programs or unrestricted contracts. This represents 9.8% of the $525 million that the Federal government awarded per year in this industry during fiscal years 1998–2000. The added competition for many of these procurements also would likely result in a lower price to the government for procurements set aside for small businesses, but SBA is not able to quantify this benefit.

Under SBA's 7(a) Guaranteed Loan Program and Certified Development Company (504) Program, SBA estimates that an additional $2.1 million in new Federal loan guarantees could be made to these newly defined small businesses. This represents 9.8% of the $21 million in loans that were guaranteed y SBA under these two financial programs for firms in the Testing Laboratories Industry in FY 2000. Because of the size of the loan guarantees, most loans are made to businesses well below the size standard. Thus, increasing the size standard will likely result in only a small increase in small business guaranteed loans to businesses in this industry, and the $2.1 million estimated figure may overstate the actual impact.

We view the additional amount of contract activity as the potential amount of transfer from non-small to newly designated small firms. This does not represent the creation of new contracting activity by the Federal government, merely a reallocation or transfer to different sized firms.

Description of Potential Costs of the Rule: The changes in size standards as they affect Federal procurement are not expected to add any significant costs to the government. As a matter of policy, procurements may be set aside for small business or under the 8(a) and HUBZone Programs only if awards are expected to be made at reasonable prices. Similarly, the rule should not result in any added costs associated with the 7(a) and 504 loan programs. The amount of lending authority SBA can make or guarantee is established by appropriation.

The competitive effects of size standard revisions differ from those normally associated with other regulations which typically burden smaller firms to a greater degree than larger firms in areas such as prices, costs, profits, growth, innovation and mergers. A change to a size standard is not anticipated to have any appreciable effect on any of these factors, although small businesses, 8(a) firms, or small disadvantaged businesses much smaller than the size standard for their industry may be less successful in competing for some Federal procurement opportunities due to the presence of larger, newly defined small businesses. On the other hand, with more larger small businesses competing for small business set-aside and 8(a) procurements, Federal agencies are likely to increase the overall number of contracting opportunities available under these programs, and this could result in greater opportunities for businesses much smaller than the size standard.

Under this rule, there will be 120 additional firms that are considered small and eligible for SBA preference programs. To the extent that these firms are active in Government programs, this will entail some additional administrative costs to the Federal government associated with additional bidders for SBA's procurement programs, additional firms seeking SBA guaranteed lending programs, and additional firms eligible for enrollment in SBA's Pro Net program. Among firms in this group seeking SBA assistance, there will be some additional costs associated with compliance and verification. These costs are likely to be small.

(3) What Is the Projected Reporting, Record Keeping, and Other Compliance Requirements of the Rule and an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirements?

A new size standard does not impose any additional reporting, record keeping or compliance requirements on small entities. Increasing size standards expands access to SBA programs that assist small businesses, but does not impose a regulatory burden as they neither regulate nor control business behavior.

(4) What Are the Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule?

This proposed rule overlaps other Federal rules that use SBA's size standards to define a small business. Under section 632(a)(2)(C) of the Small Business Act, unless specifically authorized by statute, Federal agencies must use SBA's size standards to define a small business. In 1995, SBA published in the **Federal Register** a list of statutory and regulatory size standards that identified the application of SBA's size standards as well as other size standards used by Federal agencies (60 FR 57988–57991, dated November 24, 1995). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

SBA cannot estimate the impact of a size standard change on each and every Federal program that uses its size standards. In cases where an SBA's size standard is not appropriate, the Small Business Act and SBA's regulations allow Federal agencies to develop different size standards with the approval of the SBA Administrator (13 CFR 121.902). For purposes of a regulatory flexibility analysis, agencies must consult with SBA's Office of Advocacy when developing different size standards for their programs.

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA certifies that this rule would not impose new reporting or record keeping requirements, other than those required of SBA. For purposes of Executive Order 13132, SBA certifies that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment. For purposes of Executive Order 12988, SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in that order.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Loan programs—business, Small businesses.

Accordingly, part 121 of 13 CFR is proposed to be amended as follows:

PART 121—[AMENDED]

1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632(a), 634(b)(6), 637(a), 644(c) and 662(5) and Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188.

2. In § 121.201, in the table ''Small Business Size Standards by NAICS Industry'', under the heading Subsector 541—Professional, Scientific and Technical Services, revise the entry for 541380 to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
* * * * * * *		
	Sector 54—Professional, Scientific and Technical Services Subsector 541—Professional, Scientific and Technical Services	
* * * * * * *		
541380	Testing Laboratories	$10.0

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	Description (N.E.C.=Not Elsewhere Classified)	Size standards in number of employees or millions of dollars
* * *	* * *	*

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Dated: January 8, 2002.

Hector V. Barreto,

Administrator.

[FR Doc. 02–8359 Filed 4–8–02; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF JUSTICE

28 CFR Part 89

[AG ORDER No. 2570–2002]

RIN 1110–AA01

National Stolen Passenger Motor Vehicle Information System Regulations

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: The United States Department of Justice (Department) is publishing a proposed rule to implement the National Stolen Passenger Motor Vehicle Information System (NSPMVIS or System) that will verify the theft status of salvage and junk motor vehicles and major parts marked with a Vehicle Identification Number (VIN) or a derivative of a VIN. Under specific conditions detailed in this proposed rule an insurance carrier selling comprehensive motor vehicle insurance coverage or a person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles must verify the theft status of salvage and junk motor vehicles or major parts. In addition, this proposed rule contains prescribed procedures under which an individual or entity, not engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles, intending to transfer a passenger motor vehicle or passenger motor vehicle part, may obtain information on whether the vehicle or part is listed in the System as stolen.

DATES: Comments must be submitted on or before June 10, 2002.

ADDRESSES: All comments concerning this proposed rule should be mailed to: Stephen A. Bucar, Supervisory Special Agent, Federal Bureau of Investigation, CJIS Division, Module C–3, 1000 Custer Hollow Road, Clarksburg, West Virginia, 26306.

FOR FURTHER INFORMATION CONTACT: Supervisory Special Agent Stephen A. Bucar, telephone number (304) 625–2751.

SUPPLEMENTARY INFORMATION: Section 609 of the Anti Car Theft Act of 1992, Public Law Number 102–519 (codified at 49 U.S.C. 33109), directed the Attorney General to establish a National Stolen Auto Part Information System (NSAPIS) to track and monitor stolen parts. Further legislation renamed the system as the National Stolen Passenger Motor Vehicle Information System. *See* Public Law 103–272 (1994).

What is the nature of the problem that needs to be addressed?

The total cost of motor vehicle theft in the United States in 1994 was $7.6 billion, according to the National Insurance Crime Bureau (NICB). This total compares to $3.2 billion in 1970 (1994 dollars), an increase of 134 percent. A 1995 NICB study shows that criminals in the 1990s were utilizing more sophisticated methods in selling and disguising stolen vehicles and vehicle parts compared to thieves in previous years. The NICB study revealed that not only were stolen vehicles less likely to be recovered in 1995 as compared to 1970, but the condition of recovered vehicles also deteriorated.

What was the congressional response to the theft problem?

In response to the continuing problem of motor vehicle theft in the United States, Congress passed the Anti Car Theft Act of 1992 (the ''Act''). Among other anti-theft measures, the Act mandates the establishment of a national computer system to verify the theft status of salvage and junk motor vehicles and covered major parts.

The Act affects salvage and junk motor vehicles and covered major parts. A salvage motor vehicle is a vehicle that has been damaged by collision, fire, flood, accident, trespass, or other incident to the extent that its fair salvage value plus the cost of repairing the vehicle for legal operation on roads or highways exceeds the fair market value of the vehicle prior to the incident causing the damage. A salvage vehicle may be rebuilt, retitled, and allowed to operate legally on the road. A junk motor vehicle is a vehicle that is non-repairable, incapable of operation on roads or highways, and has no value except as a source of parts or scrap. The definitions for salvage and junk motor vehicles include any individual state and federally recognized tribe's definition for a vehicle that is declared a total loss or economically impractical to repair. The only parts affected by the Act (''covered major parts'') are original major parts that are dismantled, recycled, salvaged, or otherwise removed from motor vehicles and that possess a parts marking label with the 17-character VIN or a derivative of the VIN.

The Act does not apply to the sale of new motor vehicles. Furthermore, the Act does not apply to the sale of manufacturer replacement parts or new after-market parts. These parts have unique labels that identify them as new replacement parts and are not required by the National Highway Traffic Safety Administration (NHTSA) to possess parts-marking labels with the 17-character VIN or a derivative of the VIN. For example, parts manufactured by parts manufacturers, that are distributed to replace or repair original parts, are not required to be inspected and checked against the NSPMVIS.

The Act allows for civil penalties of not more than $1,000 for each violation of the regulations implementing the Act to a maximum of $250,000 for a related series of violations. The Act also allows for enforcement of a civil penalty of not more than $100,000 a day for each violation related to chop shop activity. This applies to any person who knowingly owns, operates, maintains, or controls a chop shop, conducts operations in a chop shop, or transports a passenger motor vehicle or passenger motor vehicle part to or from a chop shop.

Regarding the NSPMVIS, the Act requires that the Attorney General of the United States, in consultation with the Secretary of Transportation:

(1) Establish and maintain an information system containing the

VIN of stolen passenger motor vehicles and the VIN or its derivative of stolen passenger motor vehicle parts;

(2) Prescribe by regulation procedures by which an individual or entity, not engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles, intending to transfer a passenger motor vehicle or passenger motor vehicle part may obtain information as to whether the vehicle or part is listed in the System as stolen;

(3) Prescribe by regulation procedures by which an insurance carrier selling comprehensive motor vehicle insurance coverage that obtains possession of and intends to transfer a junk motor vehicle or a salvage motor vehicle, can verify whether the vehicle is listed in the System as stolen; and

(4) Prescribe by regulation procedures by which a person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles can verify that a major passenger motor vehicle part has not been listed in the System as stolen.

The Act also directs that the parts marking program be expanded to cover all vehicles, with the exception of a limited number of lines for which waivers are granted, unless the Attorney General determines that parts marking does not substantially inhibit chop shop operations and vehicle theft.

What has the Department of Justice done to address the problem?

The Federal Bureau of Investigation (FBI), as directed by the Attorney General, has coordinated the policy and legislative efforts on the NSPMVIS since November 1993. Pursuant to 49 U.S.C. 33109(c), the Attorney General established the NSPMVIS Federal Advisory Committee (Committee) and charged it with providing recommendations and a final report to Congress and the Attorney General. The FBI conducted a pilot project and on January 31, 1996, published the ''Final Report on the National Stolen Passenger Motor Vehicle Information System (NSPMVIS) Pilot Project and National Implementation Study'' for the Attorney General and Congress. It also drafted immunity language providing limited civil immunity to system participants that was included in the Anti Car Theft Improvements Act of 1996. *See* Pub. L. No. 104–152 (1996). A formal Memorandum of Understanding (MOU) was developed between the FBI and the NICB in April 1997 establishing procedures for and limits on the appropriate use by the NICB of the FBI's National Crime Information Center (NCIC) stolen vehicle and stolen vehicle part data (the NCIC Vehicle File) by the NICB.

This proposed rule is being published to further the implementation of the NSPMVIS. It has a direct impact on the following groups: motor vehicle owners and consumers; motor vehicle parts dealers (including motor vehicle dismantlers, recyclers, repairers, and salvagers); the insurance industry; motor vehicle auctioneers and salvager pools (these groups often act as an agent of insurers to sell or transfer salvage or junk motor vehicles); motor vehicle manufacturers; and the law enforcement community. Each of these groups has interests in and concerns regarding a national stolen motor vehicle parts system and we encourage all of these organizations to submit any comments, concerns, or ideas regarding the overall motor vehicle theft problem or any aspect of this proposed rule.

What will be the role of the NSPMVIS?

The NSPMVIS will operate as a large data exchange system for the purposes of establishing and verifying the theft status of salvage or junk motor vehicles and covered major parts by permitting the comparison of VINS with stolen and stolen parts data previously entered into the System. Participants will include motor vehicle insurers, dismantlers, recyclers, repairers, and salvagers. This proposed rule does not impose an obligation to use the System nor does it assess penalties for failure to use the System against individuals and entities not engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles (such as the ordinary consumer who purchases, sells, or transfers motor vehicles and parts for his or her own personal use) who intend to transfer a passenger motor vehicle or part without verifying its theft status. However, if these individuals or entities wish to inquire of the System, this proposed rule does prescribe procedures under which they may do so.

What is the Federal Advisory Committee and what were its Recommendations?

In order to solicit recommendations for establishing the NSPMVIS from those industries and organizations that are directly impacted by the System, the Act established the NSPMVIS Federal Advisory Committee for which the FBI provided oversight. The Committee membership included representatives of the insurance, dismantling, recycling, repairing, and salvaging industries, the NHTSA, local law enforcement, and a consumer advocacy group.

The Committee convened on four separate occasions in the Washington, DC, area: November 18–19, 1993; April 19–20, 1994; June 14–15, 1994; and August 16–17, 1994. It developed a set of recommendations on the development of the stolen motor vehicles and parts information system.

The recommendations addressed System administration and design; the appointment of a System Administrator; law enforcement notification procedures should the System determine a part is stolen; and the documentation of inquiries in cases where no theft is indicated in the System. The Committee also recommended enactment of legislation providing a limited immunity clause for system participants. In addition, the Committee issued recommendations as to the level of security necessary to ensure the safety and reliability of the System and methods for ensuring the completeness, timeliness, and accuracy of the data entered and stored in the System. The Committee also proposed legislation for a uniform definition of salvage and junk motor vehicles. Furthermore, the Committee recommended how the theft status determination should occur and the methods for handling cases where the System cannot make a determination in a timely manner. Finally, the Committee recommended who should be responsible for (1) verifying whether covered major parts have been stolen, and (2) processing the checks and verifications of VINs through the System.

The Committee's recommendations were designed to provide the key development and implementation criteria to which Committee members believe the System needs to adhere in order to maximize its effectiveness. The Committee members drafted these recommendations after thoroughly considering all of the potential issues and effects of the System. The recommendations of the Committee, with some modifications and revisions based on the NSPMVIS pilot project and subsequent legal opinions, represent the core requirements of this proposed rule.

Through the FBI's Criminal Justice Information Services (CJIS) Advisory Policy Board process, the FBI initially recommended, in June 1993, that the NICB serve as the System Administrator of the NSPMVIS. The NSPMVIS Federal Advisory Committee included this recommendation in its Final Report published in November 1994. The Attorney General approved this recommendation in a memorandum to the FBI, dated January 18, 1995. In the

event that the NICB is not able to serve as the System Administrator, a successor will be recommended through the CJIS Advisory Process for the Attorney General to consider for approval.

The NICB was created through a 1992 merger of the National Automobile Theft Bureau (NATB) and the Insurance Crime Prevention Institute (ICPI). The NATB was involved primarily with the prevention of vehicle theft and the ICPI primarily handled suspicious or questionable property/casualty claims.

In order for the NICB to serve as the NSPMVIS System Administrator, it was necessary to create an on-line interface between the NCIC Vehicle File and the NICB. The CJIS Advisory Policy Board approved this interface and a ''mirror image'' system became operational in June 1994, providing the NICB with the capability to process VINs against the NCIC Vehicle File. The NICB already serves as a central repository of key vehicle theft data, including theft reports, export data, and titling information.

What Were the Results of the Pilot Project?

Following the completion of the work of the Committee and delivery of its final report in January 1995, the FBI and the NICB agreed to conduct a pilot project in order to test the concept and feasibility of the System. The pilot project began in March 1995 in Texas, and expanded to Illinois in July 1995. However, VINs from salvage motor vehicles and covered major parts were collected from all fifty states and checked against the NSPMVIS for the entire year. The theft rate during the pilot project for salvage motor vehicles and their covered major parts was .34 percent. This means that less than one-half of one percent of the salvage motor vehicles and covered major parts checked against the System were actually stolen.

There are several reasons for the low theft ratio, and they do not necessarily accurately indicate the potential effectiveness of the stolen parts information system. The primary reason for the low theft ratio is due to the inconsistency of the current parts marking regulations and the corresponding state laws for recording these VIN numbers. Most parts dealers throughout the country inventory a motor vehicle and its major parts based only on the master VIN of the motor vehicle. All parts removed from a specific motor vehicle were checked against our NCIC Vehicle File based on the master VIN of the vehicle. Thus, if there are no stolen vehicles in a given inventory, which is likely because it is rare for legitimate parts dealers to purchase a stolen vehicle, then there will not be any identifiable stolen parts in that inventory.

It is clear, however, that there are covered major parts in motor vehicles that possess VINs different from the master VIN of the vehicle. This proposed rule takes into account the necessity of a parts verification process that ensures that any covered major part with a VIN different from the master VIN is checked against the System based on its unique VIN and not the master VIN.

The low theft ratio on salvage motor vehicles and parts is also indicative of the type of businesses that currently report salvage data to the NICB. The companies reporting salvage to the NICB are organizations that have a direct interest in reducing or eliminating the market for stolen parts. Thus, one would not expect to discover a large volume of stolen parts from processing the inventories of these organizations against the NCIC Vehicle File.

It is important to note that the NSPMVIS pilot project consistently found ''bad VINs'' being reported to the NICB by the participants. ''Bad VINs'' are those that do not correspond to an actual 17 character VIN assigned by a manufacturer. Almost four percent of all VINs reported to the NICB during 1995 were ''bad VINs.'' The large number of ''bad VINs'' is due mainly to human error, including difficulty in reading the Mylar stickers that contain the VINs and misidentifying or transposing the numbers and letters during inventory or when they are reported to the NICB.

Following the completion of the pilot project, the FBI submitted to the Attorney General and Congress a report on the pilot along with a national implementation study. The study explained that the goal of the NSPMVIS is to reduce the market for stolen major component parts. Thus, processing the covered inventories of all insurers and parts dealers against the NSPMVIS is crucial to the overall success of the system. With the cooperation of major associations, such as the Automotive Recyclers Association, which estimates that it collects VIN data from approximately two-thirds to three-fourths of the parts industry, the NSPMVIS will be assured of receiving a high level of participation with a minimal impact on the affected businesses. Likewise, the NICB receives VIN data from approximately 60 percent of the insurance industry so that a high level of participation can also be assured from this industry by utilizing existing data transfer mechanisms. One of the goals of the System is to make the electronic transfer of data from insurers and parts dealers to the NICB as simple as possible for the participants.

However, there are also thousands of non-automated parts dealers around the country who must be included in the process. Industry experts suggest that as many as 80 percent of parts dealers throughout the country purchase fewer than 50 vehicles per month and would be considered small. It is the intention of the NSPMVIS and integral to the success of the System that the inventories of smaller dealers be included in the part verification process. However, since many of these small dealers do not have computerized inventories that can be easily forwarded to the NICB, telephonic and facsimile inquiries of the NSPMVIS will be allowed.

How Will the NSPMVIS Be Implemented?

At this time, it is expected that the NICB will serve as the NSPMVIS System Administrator. As envisioned by the FBI and the NICB, the NSPMVIS will operate as a large data exchange system. Participants will conduct NSPMVIS inspections and all VIN data will be transmitted to the NICB by an electronic tape, E-mail, electronic file transfer, fax, or telephone. After automatically creating a file that retains all incoming VINs, the date and time of the verification request, the identity of the system participant from which the request was made, and the name and other information regarding the individual seeking verification of stolen passenger motor vehicle parts through a system participant under the NSPMVIS, the System will perform its primary function: checking the VINs against the mirror image of the NCIC Vehicle File maintained at NICB Headquarters. As a result of this process, any resulting theft confirmations based on the VIN inquiry would be identified prior to any sale or transfer of the vehicle or its covered major parts to the consumer.

The NSPMVIS System Administrator will query the NCIC Vehicle File to determine whether there is an active theft record for any of the specific VINs. Depending on the result of the query, the System will either (1) simultaneously send a theft notice to law enforcement and the inquiring entity (system participant) when there is an active theft record for a VIN in NCIC; or, (2) automatically send a unique authorization number to the system participant when there is no NCIC theft record, allowing for the sale or transfer of the vehicle or part. In the case of a System theft confirmation, the following

message will be sent to the system participant attempting to sell or transfer the vehicle, or sell, transfer, or install the covered major parts:

The vehicle or part queried has been reported stolen and the sale or transfer of this vehicle or the sale, transfer, or installation of this part must be terminated. Law enforcement has been provided the details regarding this inquiry.

As with the file created from the incoming VINs, the NSPMVIS also automatically creates a results file, which retains all of the theft hits generated by the System, and a response file, which retains all of the authorizations generated by the System. Each of these files has a date and time stamp associated with each theft hit or authorization. The actual theft notices or authorization numbers are sent to the system participant by the same means of communication in which the original requests were received by the NSPMVIS. System participants are responsible for notifying purchasers or transferees of the authorization number in any written form they deem appropriate, but consistent with the notification requirements set out in this proposed rule.

If the NSPMVIS cannot verify the VIN in a ''timely manner,'' an interim authorization will be provided to the system participant. Any organization reporting ''bad VINs'' will be notified of the incorrect VINs and will be required to correct the VINs prior to receiving an authorization to sell or transfer the vehicle or sell, transfer, or install the part.

All information collected by the System Administrator as part of the verification request process under the NSPMVIS will be maintained by the System Administrator, as custodian for the FBI. The NCIC Privacy Act system of records notice will be modified to reflect the collection, maintenance, and use of this information. The records collected by the System Administrator will be provided to the FBI upon its request. In accord with the routine uses set forth in the NCIC Privacy Act system of records notice, the information collected by the System Administrator may be disclosed to criminal justice agencies to meet criminal justice objectives, and as otherwise provided for in routine uses.

What are NSPMVIS Inspections?

A. Background

The NSPMVIS Federal Advisory Committee concluded that—in order to meet the intent of the law and to reduce theft successfully—it would be desirable for all NSPMVIS participants (insurers, salvagers, dismantlers, recyclers, and repairers) to inspect salvage and junk motor vehicles for the purpose of collecting both the master VIN of the vehicle and the part numbers for any covered major parts that possess the VIN or a derivative of the VIN. Participants would then enter this data into the System to verify the theft status of both vehicles and of covered major parts. The inspecting of major parts and the verifying of part theft status by all participants would be desirable because most salvage and junk motor vehicles enter the stream of commerce through an insurer or self-insured entity.

The Anti Car Theft Act, however, does not require insurers to verify the theft report status of a vehicle's major parts and does not impose any requirements on self-insured entities. In the absence of any statutory direction on these points, the proposed rule does not require insurers or self-insured entities to inspect or report on covered major parts. Nevertheless, it was clear to the Committee that the effectiveness of the proposed rules in successfully reducing the incidence of car theft would be greatly enhanced if the requirement to report on covered major parts extended to insurers in the same way that it does to other NSPMVIS participants, salvagers, dismantlers, recyclers, and repairers. The Committee concluded that the insurance industry and self-insured entities that deal in salvage and junk motor vehicles should share responsibility for verifying the theft status of covered major parts. In light of these considerations, and the clear intent of the Act to reduce vehicle theft through a comprehensive reporting scheme, the Department requests comments and suggestions on a legislative amendment to the Act extending mandatory inspection and reporting of major covered parts to trade organizations, insurers, self-insured entities, and/or other interested parties.

B. Requirements

This proposed rule requires insurance carriers to inspect only for the master VIN on salvage and junk motor vehicles that they have obtained through any means. Following inspection, insurers must report the master VIN to the System to determine whether or not the vehicle has been reported stolen. Once the theft report status is verified, the insurers are required to provide the transferee with a uniform verification document in a form approved by the Attorney General. As previously explained, this proposed rule does not require such entities to inspect or verify the theft status of covered major parts.

This proposed rule also requires salvagers, dismantlers, recyclers, and repairers, prior to selling, transferring, or installing covered major parts marked with an identification number, to inspect those major parts that they have obtained by any means unless the theft report status of a vehicle from which those parts were derived had been previously verified by an insurance carrier who provided a uniform verification document in a form approved by the Attorney General (the aforementioned uniform verification document provided by an insurance carrier exempts covered major parts derived from that vehicle from the NSPMVIS verification). This proposed rule also requires such entities then to verify the theft report status of covered major parts by using the VINs of those parts or their derivative vehicles as a basis for comparison with reported stolen vehicle or covered major part VINs on file in the NSPMVIS. The inspection and verification requirements will ensure that covered major parts are inspected prior to the repair or dismantling of a vehicle.

C. Voluntary inspection and reporting

The Department encourages insurers to voluntarily conduct inspections of covered major parts and then to report to the NSPMVIS any specific parts inspected. The Department also encourages such entities voluntarily to report to the purchaser or transferee of the vehicle the identification number of specific parts the entity inspected and reported.

D. Marginal Costs

The Department acknowledges that the Anti Car Theft Act's inspection requirement imposes some costs on the entities affected. Insurance carriers selling comprehensive motor vehicle insurance already verify the VINs of junk or salvage motor vehicles of which they obtain possession as a part of normal business practices. Whether or not a claim is honored is dependent in some cases on verifying that the vehicle in question is in fact the insured vehicle. The cost imposed on insurance carriers by the Act amounts to the administrative costs of conducting the theft status verification with the NSPMVIS.

Persons engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles already conduct some form of vehicle inspection and inventorying for their own business purposes when adding, among other items, the covered major parts to their inventories. As a result of that business function, they ordinarily

already have the equipment necessary to perform the NSPMVIS inspection. The costs imposed on these entities amount to the administrative costs of logging the VIN or its derivative of the covered major parts and conducting the theft status verification with the NSPMVIS.

As a result, the Department believes that the additional, marginal costs for a NSPMVIS inspection to the affected entities should be minimal. These regulations require only those inspections mandated by statute and the reporting of relevant information that is either statutorily mandated or already in the custody of the affected entity. Further, this proposed rule suggests allowing participants to contract out the inspection process in order to relieve some of the burden of initial cash outlays that would be required if they do not presently possess the necessary equipment to conduct inspections and/or verifications.

The FBI already operates and maintains a national information system, the NCIC, which includes information concerning stolen vehicles and vehicle parts. Currently, only the law enforcement and criminal justice communities may enter records into, or query, the NCIC database. Many people have been critical of the NCIC's effectiveness and law enforcement's ability to reduce thefts of stolen vehicle parts. Their concerns stem from the lack of stolen motor vehicle part information entered into the NCIC database. In the past, this data was scarce, in part, because the inspected parts did not contain a unique numerical identifier. The FBI believes that entry of such information into the NCIC will increase with the advent of mandatory parts marking, thus enabling law enforcement to be more effective in conducting these types of stolen motor vehicle and motor vehicle parts investigations.

The Department requests comments and suggestions on modifications to this proposed rule that will further enhance flexibility in participating in the program and reduce participant costs, while still complying with the Act.

E. Program Effectiveness Issues

In order to accurately measure the reduction in the theft of motor vehicle major parts as a result of the NSPMVIS, the System will need to be fully operational and in place for a significant period of time, possibly one to two years, in order to allow for full compliance and cooperation by all participants, especially parts dealers and law enforcement.

The national implementation study also raised several issues that may prevent the successful implementation of the System. First, there is no provision in the Act for funding the NSPMVIS, system participants, or the states and federally recognized tribes for parts inspection, salvage reinspection, or law enforcement participation. In addition, there is no current funding for the operation of the System through either the FBI or the NICB. The NICB estimated that it will require $850,000 to administer the System in the initial year of operation and $400,000 in subsequent years. A second issue that might have an impact on the effectiveness of the System involves the lack of follow-up motor vehicle inspections to identify covered major parts and their VINs or the derivatives of their VINs. The Act specifies that insurance carriers need only verify the theft report status of a motor vehicle being transferred and provide that verification to the purchaser. If the vehicle is stolen, the transfer does not proceed; if the vehicle is not stolen, the purchaser can then rely on that verification to conduct additional transfers of either the vehicle itself or its major parts. Therefore, it is possible that an insurance carrier could unknowingly transfer a motor vehicle containing stolen parts and the transferee would, as a result, unknowingly possess and possibly transfer stolen parts contained within that vehicle. The fact that under certain circumstances the transfer of stolen items can occur as part of a regulated transaction designed to reduce such an occurrence undermines the credibility and effectiveness of the NSPMVIS.

F. Program Evaluation

The impact and effectiveness of the NSPMVIS as a tool for reducing auto theft is best assessed after the System has been in operation for a meaningful period of time. After a review of a timely evaluation of the NSPMVIS and additional information on the overall auto theft issue, the Attorney General will, as required by 49 U.S.C. 33103(d), undertake a ''Long Range Review of Effectiveness'' regarding the theft prevention standards that require marking of covered major parts installed on certain vehicle lines.

G. Supplementary Solutions

It is equally important for the law enforcement community to increase the entry of information concerning stolen major parts into NCIC in order to assemble a comprehensive database of stolen vehicle parts. Once the final major parts marking regulations are in effect, the FBI will forward information concerning the new standards to federal, state, and local law enforcement in order to educate those entities on how to identify the parts marking for missing major parts from a specific vehicle, as well as for recovered major parts found separate from the original vehicle. Once identified, those markings can be used to enter missing major parts into the NCIC, which provides the records that will populate the NSPMVIS, and to inquire as to the theft status of those recovered parts. Increasing the entry of stolen parts into the NCIC is an important goal that can be achieved quickly through a national cooperative effort directed at educating law enforcement.

H. Federally Recognized Tribes

The Department recognizes the fact that federally recognized tribes in some states are issuing motor vehicle registrations and titles. This proposed rule applies to any motor vehicle and its parts where the motor vehicle has been registered and titled in the jurisdiction of a federally recognized tribe. As a result, references to federally recognized tribes are included in the definitions section and other relevant parts of the proposed rule.

Procedural Matters:

Initial Regulatory Flexibility Analysis

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. This proposed rule was drafted in a way designed to minimize the impact that it has on small business while meeting the Act's objectives.

The FBI solicited recommendations for establishing the NSPMVIS from those industries and organizations that are directly impacted by the System. A Federal Advisory Committee was formed that consisted of representatives of the industries and entities most likely to be affected by the NSPMVIS. Members of this committee included representatives of the motor vehicle industry, the law enforcement community, and the insurance, dismantling, repair, recycling, and salvage industries. The Committee developed a set of recommendations on the development of the stolen parts and motor vehicle system that served as the basic guideline under which the NSPMVIS will be implemented. The burden of motor vehicle inspections cannot be shared fully among the

affected industries as initially recommended because, as previously discussed, the Act does not require the insurance industry to inspect a motor vehicle's major component parts.

The NSPMVIS applies to salvage and junk motor vehicles and those covered major parts that are labeled with the master VIN or a derivative of that number. The only parts affected by the System are original major parts that are dismantled, recycled, salvaged, or otherwise removed from motor vehicles and that possess a parts marking label with the 17-character VIN or a derivative of the VIN.

The NSPMVIS does not apply to the sale of new vehicles, manufacturer replacement parts, or new after-market parts. These parts have unique labels that identify them as new replacement parts and are not required by NHTSA to possess parts-marking labels. For example, parts manufactured by a parts manufacturer, that are distributed to replace or repair original parts, are not required to be inspected and checked against the NSPMVIS.

Based on information from the NICB, which we anticipate will serve as the NSPMVIS System Administrator, it is estimated that there are approximately 3,000 insurance companies nationwide that transfer nearly 2.5 million salvage and junk motor vehicles annually. The NICB estimates that currently 60 percent, or 1.4 million, of these salvage and junk vehicles contain major parts marked with the VIN that would ultimately be required to be inspected through the NSPMVIS. Furthermore, based on 1996 insurance data reported to the NICB, over 50 percent of these motor vehicles will originate from the ten largest insurance groups transferring salvage and junk motor vehicles. The FBI also estimates that there are about 135 motor vehicle salvage pools that auction 2.5 million salvage and junk motor vehicles annually. In addition, there are an estimated 10,000 motor vehicle recyclers nationwide handling approximately 8 million salvage and junk vehicles annually.

Because the entities presently providing salvage and recycling services are primarily small businesses, this proposed rule was developed and reviewed, where possible, with the needs and circumstances of small businesses specifically in mind. The Department has included a number of significant alternatives in this proposed rule that would accomplish the objectives of the Act and minimize any significant economic impact on small entities, such as allowing the use of contractors for parts inspections. It has also sought to avoid burdens on outside entities beyond those requirements needed to reduce the rate and number of motor vehicle and major motor vehicle part theft. Moreover, requirements have been drafted so as not to disrupt existing business practices. For example, inventories existing prior to the date of implementation are not required to be inspected, and covered major parts damaged to such an extent that the VIN markings are unreadable are also exempt from inspection. Therefore, we have determined under the RFA that this proposed rule would not have a significant economic impact on a substantial number of small entities.

The Department is not aware of any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

Executive Order 12866: Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1 (b). The Department has determined that this rule is a ''Significant Regulatory Action'' under Executive Order 12866, Regulatory Planning and Review, section 3 (f), and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132: Federalism

This proposed rule will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule does not have sufficient Federalism implications to warrant preparation of a Federalism summary impact statement.

Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3 (a) and 3 (b) of Executive Order 12988, Civil Justice Reform.

Unfunded Mandates Reform Act of 1995

The NICB estimates that approximately 1.5 to 3 million vehicles will be affected annually as a result of the NSPMVIS implementation. The cumulative cost per year of the System can be estimated to be only a small portion of the total cost of inspecting a vehicle. The FBI and the NICB have contacted a number of affected entities that estimate complete vehicle inspections to cost between $10.00 to $50.00 per vehicle. Since affected industries already conduct thorough vehicle inspections and inventorying, the additional NSPMVIS inspection represents only a small portion of the total cost estimate. In addition, equipment required to perform NSPMVIS inspections already exists; therefore, start-up costs are negligible. Thus, this proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

The FBI has solicited recommendations for establishing the NSPMVIS from those industries and organizations that are directly impacted by the System. A NSPMVIS Federal Advisory Committee was formed, composed of members of the motor vehicle industry and the law enforcement community. Committee members from insurance, repair, recycling, and salvage associations represented the interests of the small businesses that will be affected by the NSPMVIS. The Committee developed a set of recommendations on the development of the System, which will serve as the basic guideline under which the NSPMVIS will be implemented. This proposed rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804, and it will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. This proposed rule has been forwarded to the Small Business Administration for its review.

Paperwork Reduction Act

The Department has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the procedures of the Paperwork Reduction Act of 1995, Public Law No. 104–13, 109 Stat. 163. The proposed information collection is published to obtain comments from the public and affected agencies.

Public comments are encouraged and will be accepted until June 10, 2002. We request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to Stephen A. Bucar, Supervisory Special Agent, Federal Bureau of Investigation, CJIS Division, Module C–3, 1000 Custer Hollow Road, Clarksburg, WV 26306, (304) 625–2751.

Overview of This Information Collection:

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* NSPMVIS.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* No form. CJIS Division, FBI, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit (Motor vehicle insurers, dismantlers, recyclers, repairers, and salvagers). *Other:* assorted motor vehicle parts dealers. *Brief Abstract:* The Department of Justice is implementing the NSPMVIS, 49 U.S.C. 33109, by issuing regulations to establish a national system for verifying the theft status of salvage and junk (non-repairable) motor vehicles and major parts marked with a VIN or a derivative of that number. Under specific conditions detailed in the regulations, the following entities or persons must request such verification: an insurance carrier; a person lawfully selling or distributing vehicle parts in interstate commerce; or an individual or enterprise engaged in the business of repairing passenger motor vehicles.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 13,500 respondents at an average of one hour per week to respond.

(6) *An estimate of the annual total public burden (in hours) associated with the collection:* 702,000 total burden hours.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, 1331 Pennsylvania Avenue, Northwest, Suite 1220, Washington, DC 20530.

Plain Language

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. The Presidential memorandum of June 2, 1998, requires that new regulations be written in plain language. The Department of Justice invites your comments on how to make this proposed rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed rule clearly stated?

(2) Does the proposed rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Would the proposed rule be easier to understand if it was divided into more (or shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading, for example § 89.1 Purpose and scope.)

(5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding it? How could this description be more helpful in making the proposed rule easier to understand?

Please send any comments you have on the clarity of the proposed rule to the address specified in the **ADDRESSES** section.

List of Subjects in 28 CFR Part 89

Administrative practice and procedure, Crime, Law Enforcement, Motor Vehicles, and Organization and functions (Government agencies).

Accordingly, for the reasons set forth in the preamble and pursuant to 49 U.S.C. 33109, Title 28 of the Code of Federal Regulations is proposed to be amended by adding Part 89 to read as follows:

PART 89—NATIONAL STOLEN PASSENGER MOTOR VEHICLE INFORMATION SYSTEM

Sec.
89.1 Purpose and scope.
89.2 Definitions.
89.3 The System Administrator.
89.4 Participation in the National Stolen Passenger Motor Vehicle Information System.
89.5 Responsibilities of insurers.
89.6 Responsibilities of persons engaged in salvaging, dismantling, recycling, or repairing passenger motor vehicles.
89.7 Requesting information from the National Stolen Passenger Motor Vehicle Information System.
89.8 Authorizations and notifications.
89.9 Certification in lieu of a system response.
89.10 Circumstances in which a verification is not required.
89.11 Contracting out the inspection process.
89.12 Notification of law enforcement.
89.13 Limited immunity.

Authority: 49 U.S.C. 33109.

§ 89.1 Purpose and scope.

(a) This part establishes the National Stolen Passenger Motor Vehicle Information System (NSPMVIS or System), pursuant to 49 U.S.C. 33109, which requires the Attorney General to implement a national system to verify the theft status of salvage and junk motor vehicles and covered major parts.

(b) This part applies to salvage and junk motor vehicles and those covered major parts on passenger motor vehicle lines designated by the National Highway Traffic Safety Administration (NHTSA). The inspection requirement does not apply to:

(1) New vehicles;

(2) Manufacturer replacement parts;

(3) New after-market parts; or

(4) Motor vehicles or major parts entered into the inventory of a system participant prior to the effective date of the System.

§ 89.2 Definitions.

In this part,

After-market Part means a vehicle component part built and distributed by a parts manufacturer to replace or repair a vehicle's original parts.

Authorization Number means a unique number provided by the System Administrator to the system participant

that allows for the sale or transfer of the vehicle or covered major part.

Chop Shop means a building, lot, facility, or other structure or premise at which at least one person engages in receiving, concealing, destroying, disassembling, dismantling, reassembling, or storing a passenger motor vehicle or passenger motor vehicle part that has been unlawfully obtained:

(1) To alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, or remove the identity of the vehicle or part, including the vehicle identification number or a derivative of that number; and

(2) To distribute, sell, or dispose of the vehicle or part in interstate or foreign commerce.

Covered Major Part means a major part marked with a vehicle identification number or its derivative.

Derivative of a Vehicle Identification Number (VIN) means a matching portion of the vehicle identification number, generally the last eight characters of that number.

Inspection means locating the master Vehicle Identification Number of salvage and junk motor vehicles and/or the vehicle identification number or its derivative of any covered major parts and verifying the theft status of those vehicles or parts with the System.

Junk Motor Vehicle means a vehicle that is non-repairable. This term indicates a vehicle that is incapable of operation on roads or highways and has no value except as a source of parts or scrap. This definition includes any individual state and federally recognized tribe's definition for a vehicle that is declared a total loss or economically impractical to repair.

Major Part means the engine; transmission; right front fender; left front fender; hood; right front door; left front door; right rear door; left rear door; sliding or cargo door(s); front bumper; rear bumper; right rear quarter panel (passenger cars); left rear quarter panel (passenger cars); right-side assembly (Multipurpose Passenger Vehicles (MPVs); left-side assembly (MPVs); pickup box, and/or cargo box (Light-Duty Trucks); rear door(s) (both doors in case of double doors); decklid, tailgate, or hatchback (whichever is present); grille; the trunk floor pan; frame; and any other part of a passenger motor vehicle that the Secretary of Transportation by regulation specifies as comparable in design or function to any of the parts previously listed.

Manufacturer Replacement Part means a vehicle component part built and distributed by a motor vehicle manufacturer to replace or repair a vehicle's original part.

Manufacturer's Certificate of Origin means a document issued by the manufacturer of a vehicle that authenticates the vehicle's origin of manufacture and that is accepted by a state, federally recognized tribe, or country for titling application purposes.

New After-Market Part means a vehicle component part built and distributed by other than the manufacturer of the original vehicle but which is designed to replace or repair a vehicle's original part.

New Vehicle means any newly manufactured vehicle supported by a manufacturer's certificate of origin and that has not previously been titled in any state, federally recognized tribe, or country.

Salvage Motor Vehicle means a vehicle that has been damaged by collision, fire, flood, accident, trespass, or other incident to the extent that its fair salvage value plus the cost of repairing the vehicle for legal operation on roads or highways exceeds the fair market value of the vehicle prior to the incident causing the damage. A salvage vehicle may be rebuilt, retitled, and allowed to legally operate on the road. This definition includes any individual state or federally recognized tribe's definition for a vehicle that is declared a total loss or economically impractical to repair.

System means the National Stolen Passenger Motor Vehicle Information System.

System Administrator means an organization approved by the Attorney General to have custodial possession and provide system maintenance and operation of the System under Attorney General oversight through the Federal Bureau of Investigation.

System Participant means any person, business, or organization mandated to submit vehicle identification number information as outlined in this part.

Theft Confirmation means that the master VIN of salvage and junk motor vehicles and/or the vehicle identification number or its derivative of any major parts have been checked against the System and the System has provided a notice of an active report that the vehicle or major part has been reported as stolen and not recovered, and that, as a result, it may not be sold, transferred, or installed.

Vehicle Identification Number (VIN) means a unique identification number assigned to a passenger motor vehicle by a manufacturer in compliance with applicable regulations; the master VIN, which applies to the entire vehicle, is predominantly located in the upper left corner of the dashboard beneath the windshield.

Vehicle Line means the name that a manufacturer of motor vehicles applies to a group of motor vehicle models of the same make that have the same body or chassis, or otherwise are similar in construction or design. A ''line'' may, for example, include 2-door, 4-door, station wagon, and hatchback vehicles of the same make.

Verification means that the master VIN of salvage and junk motor vehicles and/or the vehicle identification number or its derivative of any major parts have been checked against the National Stolen Passenger Motor Vehicle Information System and the System Administrator has provided an authorization number to sell, transfer, or install the vehicle or major parts.

§ 89.3 The System Administrator.

The System Administrator is the entity designated by the Attorney General to have custodial possession and provide maintenance and operation of the System under Attorney General oversight through the Federal Bureau of Investigation.

§ 89.4 Participation in the National Stolen Passenger Motor Vehicle Information System.

The following individuals, businesses, or organizations, must participate in the System:

(a) Any insurance carrier selling comprehensive motor vehicle insurance that obtains possession of and transfers a junk or salvage motor vehicle; and,

(b) Any person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles.

§ 89.5 Responsibilities of insurers.

(a) Any insurance carrier selling comprehensive motor vehicle insurance that obtains possession of and transfers a junk or salvage motor vehicle is:

(1) Required to verify through the System whether the salvage or junk motor vehicle is reported as stolen and not recovered;

(2) Required to provide to the purchaser or transferee of the vehicle from the insurance carrier a written response identifying the master VIN and verifying that the vehicle has not been reported as stolen or, if reported as stolen, that the carrier has recovered the vehicle and has proper legal title to the vehicle;

(3) Encouraged to report to the System all major parts identified as missing from recovered salvage and junk motor vehicles, that an insurance carrier obtains possession of and transfers to a purchaser or transferee;

(4) Encouraged to report to the System the results of any specific major parts inspected; and,

(5) Encouraged to provide to the purchaser or transferee of the vehicle identification of the specific major parts that were inspected and reported to the System, and to advise the purchaser or transferee whether the parts were reported as stolen.

(b) Any insurance carrier selling comprehensive motor vehicle insurance who honors a request under § 89.7 must provide a written response pursuant to paragraph (b)(4) of that section verifying the theft status only of the vehicle or part. In addition to those requirements, the written form must also include the following notation as the first text at the top of the form: ''This System verification was voluntarily conducted upon request by a system participant and does not qualify for the provisions under 49 U.S.C. 33110(b)(2)(A) & (B) and 49 U.S.C. 33111(b)(2), which allow for the transfer of a motor vehicle following an inquiry of the System where the theft status of the vehicle has not been established.''

§ 89.6 Responsibilities of persons engaged in salvaging, dismantling, recycling, or repairing passenger motor vehicles.

(a) Any person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles may not knowingly sell in commerce or transfer or install a covered major part without:

(1) Verifying through the System that the major part has not been reported as stolen; and,

(2) Providing the purchaser or transferee with a written response identifying the VIN (or derivative of that number) of that major part and verifying that the major part has not been reported as stolen or, if reported as stolen in the System, that the participant has recovered that major part and has proper legal title to it; or,

(3) Providing the purchaser or transferee with a verification from an insurance carrier provided in accordance with 49 U.S.C. 33110, when the insurance carrier has verified with the System that the vehicle from which the major part was derived was not reported as stolen, or that the insurance carrier has not established whether that vehicle has been stolen.

(b) Any person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles who honors a request under § 89.7 must provide a written response pursuant to paragraph (b)(4) of that section. In addition to these requirements, the written form must also include the following notation as the first text at the top of the form: ''This System verification was voluntarily conducted upon request by a system participant and does not qualify for the provisions under 49 U.S.C. 33110(b)(2)(A) & (B) and 49 U.S.C. 33111(b)(2), which allow for the transfer of a motor vehicle following an inquiry of the System where the theft status of the vehicle has not been established.''

§ 89.7 Requesting information from the National Stolen Passenger Motor Vehicle Information System.

(a) An individual or entity who is neither an insurance carrier nor engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles, who intends to transfer a passenger motor vehicle or passenger motor vehicle major part, may request from an insurance carrier or a person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles that a verification with the System voluntarily be performed to determine whether the vehicle or major part is reported as stolen.

(b) Any system participant may, but is not required to, respond to such a request pursuant to this section provided the following procedures are followed:

(1) Any requestor of a System verification must appear in person.

(2) Prior to any verification with the System of the theft status of a motor vehicle or part, the system participant must confirm the identity of the requestor by checking two forms of identification to be provided by the requestor. One form of identification must be a photographic identification.

(3) Prior to any verification with the System of the theft status of a motor vehicle or part, the system participant must record the identity of the requestor including full name, date of birth, current telephone number, and current address. This information must be communicated in full to the System Administrator as part of the verification request.

(4) Any system participant, including insurance carriers selling comprehensive motor vehicle insurance, who honor requests under this section must provide a written response that conforms to the requirements contained in §§ 89.5 and 89.6 as determined by the character of the subject item to be verified with the System.

(c) The provisions established by 49 U.S.C. 33110(b)(2)(A) & (B) and 49 U.S.C. 33111(b)(2) do not apply to verifications conducted pursuant to this section.

§ 89.8 Authorizations and notifications.

(a) Any person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles must provide verification to whomever the participant transfers or sells any covered major part.

(b) Insurance carriers selling comprehensive motor vehicle insurance must provide verification to whomever they transfer or sell any salvage or junk motor vehicle.

(c) A system participant may provide the verification required by this part in any written format it chooses, provided the verification:

(1) Identifies the vehicle's VIN or the applicable major part's VIN or its derivative; and,

(2) In the case of an insurance carrier selling comprehensive motor vehicle insurance, states that the System was checked and that the subject motor vehicle has not been reported as stolen or, if reported as stolen, that the carrier has recovered the vehicle or major parts and has proper legal title to the vehicle or major parts; or,

(3) In the case of a person engaged in the business of salvaging, dismantling, recycling, or repairing passenger motor vehicles, states that the System was checked and that the major part has not been reported as stolen.

§ 89.9 Certification in lieu of a System response.

System participants may transfer a motor vehicle or major part in those instances where the System cannot provide a response within a timely manner. A ''timely manner'' is defined to be a response by the end of the next federal business day for any inquirer (system participant) who has made a ''reasonable effort'' to verify the status of a vehicle or a major part. A ''reasonable effort'' is defined as attempting to gain access to the System during normal business hours and providing the correct vehicle or major part information. In those instances where the System cannot provide a verification in a timely manner, the System Administrator must provide a certificate to the system participant, or a designated contracting agent, which permits the transfer of the vehicle or major part.

§ 89.10 Circumstances in which a verification is not required.

(a) The verification requirement does not apply to:

(1) The transfer of new vehicles;

(2) The transfer of manufacturer replacement parts;

(3) The transfer of new after-market parts;

(4) The subsequent transfer of a motor vehicle, the transferor of which has received, within the previous 180 days, a verification in accordance with 49 U.S.C. 33110 from an insurance carrier selling comprehensive motor vehicle insurance that the vehicle has not been reported as stolen;

(5) The subsequent transfer of a major part removed from a motor vehicle, the transferor of which has received, within the previous 180 days, a verification in accordance with 49 U.S.C. 33110 from an insurance carrier selling comprehensive motor vehicle insurance that the vehicle has not been stolen; or,

(6) The subsequent transfer of a motor vehicle or major part, the transferor of which has received a certificate pursuant to § 89.9 stating that the system participant has not been able to establish whether that vehicle or major part has been stolen.

(b) System participants may sell or transfer a motor vehicle or major part in those instances in which the motor vehicle or major parts are damaged to such an extent that the VIN markings are inaccessible. VIN markings are ''inaccessible'' if the system participant has conducted a thorough examination of the salvage or junk motor vehicle and covered major parts and has not been able to locate the VIN markings. In this instance, the seller or transferee of the motor vehicle or major part must report the inaccessibility to the System and provide, in lieu of the authorization, a System-generated certificate to the purchaser or transferee that the inspection could not be completed.

§ 89.11 Contracting out the inspection process.

System participants will be allowed to contract out the inspection process, but any system participant that contracts out inspections must still be identified to the purchaser or transferee by the contracted entity. If a system participant contracts out the inspection tasks, then the contracted entity must perform verifications for the motor vehicle and all covered major parts as would be required of the contracting system participant. In addition, any regulatory obligations imposed on the system participant by this part extend to the contracted entity, including those under § 89.7, and their adherence thereto by the contracted entity becomes the responsibility of the system participant.

§ 89.12 Notification of law enforcement.

(a) The System will provide automatic notification on stolen vehicle and major part theft confirmations to:

(1) A law enforcement agency having investigative jurisdiction over the locality in which the inquiring system participant is located; and

(2) The law enforcement agency originally reporting the vehicle or major part theft.

(b) If the system participant receives a theft notification message from the NSPMVIS, the transaction involving that motor vehicle or major part must be terminated, unless the system participant is an insurance carrier that has recovered the vehicle and has proper legal title to the vehicle.

(c) Additional notifications may be needed, as provided in the Privacy Act systems notice for the National Crime Information Center.

§ 89.13 Limited immunity.

Any person performing any activity under this part in good faith and with the reasonable belief that such activity was in accordance with this part shall be immune from any civil action respecting such activity that is seeking money damages or equitable relief in any court of the United States or a State.

Dated: April 3, 2002.

John Ashcroft,

Attorney General.

[FR Doc. 02–8522 Filed 4–8–02; 8:45 am]

BILLING CODE 4410–02–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 61, and 69

[CC Docket No. 96–128; FCC 02–39]

Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Communications Commission (Commission) seeks comment in the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 rulemaking docket to explore whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of correctional facilities, inmate calling service (ICS) providers, and inmates, and if not, whether and how the Commission might address those unmet needs.

DATES: Comments are due on or before May 24, 2002, and reply comments are due on or before June 24, 2002.

ADDRESSES: Federal Communications Commission, William F. Caton, Office of the Secretary, 445—12th Street SW, TW–A325, Washington, DC 20554. *See* **SUPPLEMENTARY INFORMATION** for information on additional instructions for filing paper copies.

FOR FURTHER INFORMATION CONTACT: Joi Roberson Nolen, Wireline Competition Bureau, 202–418–1537.

SUPPLEMENTARY INFORMATION: The Commission released the Order on Reconsideration in CC Docket No. 96–128. *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96–128, Order on Reconsideration, 11 FCC Rcd 21233 (1996), 61 FR 65341 (Dec. 12, 1996) (Order on Reconsideration) *aff'd in part and remanded in part, Illinois Pub. Tel. Ass'n* v. *FCC,* 117 F.3d 555 (D.C. Cir. 1997), *cert. denied sub nom., Virginia State Corp. Comm'n* v. *FCC,* 523 U.S. 1046 (1998). Subsequently, the Commission issued this Notice of Proposed Rulemaking (NPRM) to seek comment on issues related to the provision of inmate payphone service. Section 276 of the Communications Act directs the Commission to ''establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone. *See* 47 U.S.C. 276(b)(1)(A). The statute specifically includes the provision of inmate telephone service in correctional institutions within the definition of payphone service. *See* 47 U.S.C. 276(d). The Commission seeks comment generally on costs associated with the provision of inmate calling service (ICS). Specifically, the Commission seeks comment on the commissions demanded by correctional institutions, whether and how any states have addressed the relationship between these commissions and inmate calling rates, and on any factors unique to the provision of inmate calling services that affect the profitability of ICS operations. The Commission seeks cost and revenue data related to local collect calls made from confinement facilities, separate from data related to other services offered by payphone providers. The Commission seeks comment from states on the use of rate ceilings. The Commission seeks comment on alternatives to collect calling in the

inmate environment that might result in lower rates for inmate calls while continuing to satisfy security concerns. The Commission seeks comment on inmate calling service practices that may serve legitimate security needs but have the unintended, and perhaps unnecessary, effect of increasing the costs incurred by inmates and their families. Finally, the Commission seeks comment on any additional ways to reduce costs for inmate service providers (and, consequently, the costs of inmate calling).

A. Regulatory Flexibility Analysis and Paperwork Reduction Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

1. Need for, and Objectives of, the Proposed Rules

In this proceeding, the Commission seeks comment on the appropriate regulatory environment for Inmate Calling Service (ICS) providers. In choosing the appropriate regulatory environment we ask interested parties to address how the Commission can best achieve the goals set forth by Congress in section 276 of the Act.

2. Legal Basis

The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 4, 10, 201–202, 214, 276, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 160, 201–204, 214, 276, 303, and 403, section 706 of the Telecommunications Act of 1996, and sections 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200–1.1216, of the Commission's rules, 47 CFR 1.1, 1.48, 1.411, 1.412, 1.415, 1.419, and 1.1200–1.1216.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

4. Local Exchange Carriers

Neither the Commission nor the SBA has developed a definition specifically for small local exchange carriers. The closest applicable definitions for this type of carrier under SBA rules is for wired telecommunications carriers. The most reliable source of information regarding the number of LECs nationwide appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, there are 1,335 incumbent LECs. We estimate that 1,037 of those carriers are small, pursuant to the SBA's size standard.

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

Any proposal we may adopt pursuant this NPRM may decrease existing reporting, recordkeeping or other compliance requirements. As noted above, carriers are currently subject to a broad range of regulatory requirements that are generally intended to protect consumers from unjust and unreasonable rates, terms, and conditions and unreasonable discrimination in the provision of communications services. The Commission's dominant carrier regulation includes rate regulation and tariff filing requirements, and also requires supporting information, which in some cases includes detailed cost data, to be filed by dominant carriers with their tariff filings. Incumbent LECs are subject to rate level regulation in the provision of their interstate access services. The BOCs and GTE are subject to mandatory price cap regulation, and several other incumbent LECs have entered price caps on an elective basis, while smaller incumbent LECs are regulated under rate-of-return regulation. In addition, in markets where carriers may have the incentive and ability to leverage control over bottleneck facilities to disadvantage competitors in related markets, the Commission has developed various safeguards to neutralize that ability.

6. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

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

7. Overall Objective

The overall objective of this proceeding is to establish an appropriate regulatory framework for ICS providers pursuant to section 276 of the Act. The NPRM seeks comment on specific issues related to the provision of inmate payphone services, in particular, the costs associated with providing inmate calling services. The Commission intends through this NPRM and subsequent action, to reduce costs if possible.

8. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

None.

B. Filing Comments

Pursuant to sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments within 45 days after publication of this NPRM in the **Federal Register** and may file reply comments within 75 days after

publication of this NPRM in the **Federal Register**. All filings should refer to CC Docket No. 96–128. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. Comments filed through ECFS can be sent as an electronic file via the Internet to <*http://www.fcc.gov/e-file/ecfs.html*>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket number, which in this instance is CC Docket No. 96–128. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message: ''get form<your e-mail address.'' A sample form and directions will be sent in reply.

1. Parties that choose to file comments or reply comments by paper must file an original and four copies of each, and are hereby notified that effective December 18, 2001, the Commission's contractor, Vistronix, Inc., receives hand-delivered or messenger-delivered paper filings for the Commission's Secretary at a new location in downtown Washington, DC. The address is 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. This facility is the only location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. Accordingly, the Commission will no longer accept these filings at 9300 East Hampton Drive, Capitol Heights, MD 20743. In addition, this is a reminder that, effective October 18, 2001, the Commission discontinued receiving hand-delivered or messenger-delivered filings for the Secretary at its headquarters location at 445 12th Street, SW, Washington, DC 20554.

2. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail and Priority Mail), must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743. This location will be open 8:00 a.m. to 5:30 p.m. The USPS first-class mail, Express Mail, and Priority Mail should continue to be addressed to the Commission's headquarters at 445 12th Street, SW, Washington, DC 20554. The USPS mail addressed to the Commission's headquarters is delivered to our Capitol Heights facility for screening prior to delivery at the Commission.

3. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, at the filing window at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 96–128), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street SW, CY–B402, Washington, DC 20554.

4. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Qualex International, Portals II, 445 12th Street SW, CY–B402, Washington, DC 20554 (telephone 202–863–2893; facsimile 202–863–2898) or via e-mail at *qualexint@aol.com*.

5. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.48 and all other applicable sections of the Commission's rules. We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission.

C. Ex Parte Presentations

This matter shall be treated as a ''permit but disclose'' proceeding in accordance with the Commission's *ex parte* rules. *See* 47 CFR 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b). Alternate formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 voice, (202) 418–7365 TTY, or *bmillin@fcc.gov*. This NPRM can also be downloaded in Microsoft Word and ASCII formats at *http://www.fcc.gov/ccb/cpd*.

D. Ordering Clause

It is ordered that, pursuant to the authority contained in sections 1, 4(i)–4(j), 201, 226 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 201, 226, 276, this Notice of Proposed Rulemaking *is Adopted*.

List of Subjects

47 CFR Part 61

Access Charges, Communications common carriers, Telephone.

47 CFR Part 69

Communications common carriers, Telephone.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–8344 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 2

[WT Docket No. 00–32; FCC 02–47]

The 4.9 GHz Band Transferred from Federal Government Use

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on the establishment of licensing and service rules for the 4.9 GHz band. The comments will aid the Commission in defining eligibility to use the band and devising innovative licensing approaches to serve public safety. Furthermore, the Commission seeks comments that will help it to devise

methods to minimize the impact of interference on the 4.9 GHz band from adjacent band U.S Navy operations, as well as ensuring that the band is utilized in a manner that will not interfere with adjacent band radio astronomy operations. Finally, comments will aid the Commission with the implementation of technical standards for both fixed and mobile operations on the band. Our goal is to establish rules that will result in the most efficient and innovative use of the 4.9GHz band.

DATES: Written comments are due on or before July 8, 2002 and reply comments are due on or before August 7, 2002.

ADDRESSES: Commission's Acting Secretary, William F. Caton, Office of the Secretary, Federal Communications Commission, 445 12th St., SW., Washington, DC 20554. Filings can be sent first class by the U.S. Postal Service, by an overnight courier or hand and messenger-delivered. Hand and message-delivered paper filings must be delivered to 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. Overnight courier (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

FOR FURTHER INFORMATION CONTACT: Genevieve Augustin, Esq., *gaugusti@fcc.gov*, or Roberto Mussenden, Esq., *rmussend@fcc.gov*, Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, (202) 418–0680, or TTY (202) 418–7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Further Notice of Proposed Rule Making, FCC 02–47, adopted on February 14, 2002, and released on February 27, 2002. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

1. In our *Further Notice of Proposed Rulemaking (FNPRM)*, we seek comment on the establishment of licensing and service rules for the 4.9 GHz band. Further, we solicit comment on defining eligibility to use the band. We seek to develop a record on specific segmentation or channeling plans for use of the band. We also request comment on ways to minimize the impact of interference from adjacent band U.S. Navy operations on the 4.9 GHz band. Finally, we solicit suggestions on how to utilize the band in a manner that will not interfere with adjacent band radio astronomy operations.

A. Eligibility to Use the 4.9 GHz Band

2. The Commission seeks comment on the criteria to use to determine eligibility to operate equipment within the 4.9 GHz band. Specifically, the Commission seeks comment on whether to define eligibility to use the 4.9 GHz band pursuant to the definition of public safety contained in Section 337 of the Communications Act (Act), or pursuant to the definition of public safety contained in Section 309(j)(2) of the Act, or both. Further, the Commission seeks comment on allowing commercial use in support of public safety in this band, and whether commercial uses should be permitted on a secondary basis. Moreover, the Commission seeks comment on its tentative conclusion to allow Federal use of the spectrum, as well as whether it should require sharing agreements between public safety entities and Federal users as a prerequisite to Federal use.

B. Fixed and Mobile Use of the 4.9 GHz Band

3. We seek comment on the circumstances under which we should permit fixed operations in the 4.9 GHz band. We seek information on whether fixed applications on the band would consist of the traditional point-to-point microwave operations, more advanced point-to-multipoint services, or temporary fixed links. Furthermore, we specifically seek comment on whether any proposed fixed operations would interfere with the use of the emerging mobile technologies discussed herein. We solicit suggestions on a name for this new service, as well as comment on which section of our Rules is most appropriate for regulation of this new service.

C. Channel Plan

4. The Commission seeks comment on band plans for the 4.9 GHz spectrum. The Commission also seeks comment on whether it should require coordination of fixed and mobile services.

D. Licensing

5. The Commission seeks comment on the appropriate means of licensing the 4.9 GHz spectrum. The FNPRM explores a number of licensing options for mobile use, such as state licensing, blanket licensing or unlicensed operations, the use of regional planning committees or band managers.

E. Interference

6. The Commission seeks comment on its tentative conclusion that the low power operations contemplated for the band will not interfere with the Navy's Cooperative Engagement Capability (CEC) system, which operates on the band immediately below the 4.9 GHz band. The Commission also seeks comment on the Navy's plans for the CEC system in the band below the 4.9 GHz band and the impact that the CEC operations will have on provision of service in the 4.9 GHz band. Additionally the Commission seeks comment on the effect CEC operations would have on any segmentation or channelization plans adopted for this band, and what steps public safety licensees in the 4.9 GHz band could take to minimize the impact of CEC operations on their services.

F. Technical Standards for Mobile Equipment

7. The Commission seeks comment on whether to establish technical standards for mobile equipment operating in the 4.9 GHz band, and if so, what standards should be included in our Rules. The Commission also seeks comment on other means by which we can craft our Rules to permit operational flexibility while ensuring interoperability between different agencies. Further the Commission seeks comment on whether the setting of performance standards will delay the production of equipment that will be operated on this band, and if so, what we can do to prevent any such delays. The Commission also seeks comment on its analysis of the technologies envisioned by the current record.

G. Technical Rules for Fixed Operations in the 4.9 GHz Band

8. The Commission seeks comment on possible technical requirements for fixed operation on the band. The Commission also seeks comment on whether to make the emission mask requirements for fixed microwave services in the 4.9 GHz band consistent with the emission mask requirements for fixed microwave services.

II. Procedural Matters

A. Ex Parte Rules—Permit-But-Disclose Proceeding

9. This is a permit-but-disclose notice and comment rule making proceeding.

Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in our Rules.

B. Regulatory Flexibility Act

10. The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Accordingly, we have prepared an Initial Regulatory Flexibility Certification concerning the impact on small entities of the policies and rules proposed by this *FNPRM.* The Initial Regulatory Flexibility Certification is set forth below in Section III.

C. Paperwork Reduction Act

11. This *Notice* does not contain either a proposed or modified information collection.

D. Comment Dates

12. Pursuant to §§ 1.415 and 1.419 of our Rules, interested parties may file comments on or before July 8, 2002 and reply comments on or before August 7, 2002. Comments may be filed using the Commission's Electronic Filing System (ECFS) or by filing paper copies.

13. Comments filed through the ECFS can be sent as an electronic file via the Internet to <*http://www.fcc.gov/e-file/ecfs.html*>. Generally, only one copy of an electronic submission must be filed. However, if multiple docket or rulemaking numbers appear in the caption of this proceeding, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov*, and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

14. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Acting Secretary, William F. Caton, Office of the Secretary, Federal Communications Commission, 445 12th St., SW., Room TW–A325, Washington, DC 20554.

15. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Genevieve Augustin, Esq., Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, 445 12th St., SW., Room 3–A431, Washington, DC 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible format using Microsoft Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number in this case, WT Docket No. 00–32), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters should send diskette copies to the Commission's copy contractor, Qualex International, Inc., 445 12th St., SW., Room CY–B402, Washington, DC 20554.

III. Initial Regulatory Flexibility Analysis for Notice of Proposed Rule Making

16. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *FNPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *FNPRM* provided in paragraph 72 of the item. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

17. In this *FNPRM*, we solicit comment on: the establishment of licensing and service rules for the 4.9 GHz band; defining eligibility to use the band; segmentation or channeling plans for use of the band; ways to mitigate interference on the 4.9 GHz band from adjacent band U.S. Navy operations; and ways to utilize the band in a manner that will not interfere with adjacent band radio astronomy operations.

18. Our objectives for the Notice are to: (1) Set the framework for the establishment of a new public safety radio service in the 4.9 GHz band; (2) encourage flexible and efficient use of the 4.9 GHz spectrum; (3) encourage innovative applications in support of public safety; and (4) improve access to communications and state of the art first responder tools for entities engaged in public safety operations. The Commission also seeks to ensure a regulatory plan for the 4.9 GHz band that will allow for the efficient licensing and use of the band, and eliminate unnecessary regulatory burdens.

B. Legal Basis

19. The proposed action is authorized under sections 1, 4(i), 7, 10, 201, 202, 208, 214, 301, 303, 308, 309(j), and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 157, 160, 201, 202, 208, 214, 301, 303, 308, 309(j), 310.

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

20. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

21. Nationwide, as of 1992, there were approximately 275,801 small organizations. ''Small governmental jurisdiction'' generally means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.'' As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or ninety-six percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the

85,006 governmental entities, we estimate that 81,600 (ninety-one percent) are small entities.

22. The proposed radio service may affect users of public safety radio services, the extent of which is not defined in this proceeding. This service may also affect manufacturers of radio communications equipment. An analysis of the number of small businesses that may be affected follows. We also note that according to SBA data, there are approximately 4.44 million small businesses nationwide.

23. *Public Safety Radio Services and Governmental entities*. As a general matter, Public Safety Radio Services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services. Non-Federal governmental entities, as well as private businesses, are potential licensees for these services in this proceeding. Neither the Commission nor the SBA has developed a definition of small businesses directed specifically toward public service licensees. Therefore, the applicable definition of small business is the definition under the SBA rules applicable to Cellular and other Wireless Telecommunications. This provides that a small business is a radiotelephone company employing no more than 1,500 persons. According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all twelve of these firms were public safety licensees, nearly all would be small businesses under the SBA's definition, if independently owned and operated.

24. *Equipment Manufacturers*. We anticipate that at least six radio equipment manufacturers will be affected by our decisions in this proceeding. According to the Small Business Administration's regulations, a Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing businesses must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities. We do not have information that indicates how many of the six radio equipment manufacturers associated with this proceeding are among these 778 firms. Motorola and Ericsson, however, are major, nationwide radio equipment manufacturers, and thus, we conclude that they would not qualify as small businesses.

25. We invite comment on this analysis.

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

26. We note that in this FNPRM, we propose a variety of licensing approaches we could employ on this band, but formulate no tentative conclusions on this matter. Possible requirements under consideration in this Further Notice include: recordkeeping and reporting requirements, and/or third-party consultation, if state licensing is ultimately utilized; compliance with part 101 of our Rules, in the event that fixed operations are licensed on the 4.9 GHz band; compliance with part 90 of our Rules, if mobile operations are licensed individually; compliance with part 27 of our Rules, if 4.9 GHz band operations are licensed pursuant thereto; and compliance with part 15 of our Rules, in the event that mobile operations on the 4.9 GHz band are unlicensed. Applicants and licensees would possibly be required to follow current service rules for such approaches, if ultimately chosen.

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

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

28. The possible regulatory burdens we have described above, such as recordkeeping, recording, and filing requirements, if implemented, are necessary in order to ensure that the public safety operations benefit from the innovative new services described herein, in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. We seek comment on significant alternatives commenters believe should be adopted in this proceeding.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

None.

IV. Ordering Clauses

29. Pursuant to sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 403, this *Further Notice of Proposed Rule Making* is hereby adopted.

30. The Commission's Consumer and Government Affairs Bureau, Reference Information Center, shall send a copy of this *Notice of Proposed Rule Making*, including the Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–8483 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 02–749, MB Docket No. 02–75, RM–10151]

Digital Television Broadcast Service; Lynchburg, VA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by WSET, Inc., licensee of station WSET–TV, NTSC channel 13, Lynchburg, Virginia, requesting the substitution of DTV channel 34 for station WSET–TV assigned DTV channel 56. DTV Channel 34 can be allotted to Lynchburg, Virginia, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates (37–18–52 N. and 79–38–04 W.). As requested, we propose to allot DTV Channel 34 to Lynchburg with a power of 660 and a height above average terrain (HAAT) of 625 meters.

DATES: Comments must be filed on or before May 30, 2002, and reply comments on or before June 14, 2002.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–A325, Washington, DC

20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Thomas P. Van Wazer, Jennifer Tatel, Sidley, Austin, Brown & Wood, 1722 Eye Street, NW., Washington, DC 20006 (Counsel for WSET, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 02–75, adopted April 1, 2002, and released April 8, 2002. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via-e-mail *qualexint@aol.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte contacts.*

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO, TELEVISION BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Virginia is amended by removing DTV Channel 56 and adding DTV Channel 34 at Lynchburg.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 02–8497 Filed 4–8–02; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 67, No. 68
Tuesday, April 9, 2002

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Customer Service Comment Card

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the extension of information collection for the ''Customer Service Comment Card,'' a tool used to monitor customer satisfaction.

DATES: Comments must be received in writing on or before June 10, 2002 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Forest Service, USDA, ATTN: Director, Office of Communications, Mail Stop 1111, 1400 Independence Avenue, SW., Washington, DC 20250–1111.

Comments also may be submitted via facsimile to (202) 205–0885 or by e-mail to: *bhunter01.fs.fed.us.*

The public may inspect comments received at the Office of Communication, Customer Service Group, Yates Building, 2 CEN, 201 Fourteenth Street, SW., Washington DC during normal business hours. Visitors are encouraged to call ahead to (202) 205–0979 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Barbara Hunter, Office of Communication, (202) 205–0979 or *bhunter01@fs.fed.us* or Mary Ann Ball, Forest Service Information Collection Coordinator, at (703) 605–4572, or send an e-mail to *maryball@fs.fed.us*. Individuals who use telecommunication devices 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 Standard Time, Monday through Friday to reach Ms. Hunter or Ms. Ball.

SUPPLEMENTARY INFORMATION:

Description of Information Collection

Title: Customer Service Comment Card.

OMB Number: 0596–0146.

Expiration Date of Approval: April 28, 2002.

Type of Request: Extension with no revision.

Abstract: This information collection is necessary to monitor customer satisfaction with Forest Service customer services, information, procedures, and facilities and to provide a means to address customer complaints, suggestions, and compliments. This information collection complies with issuance of Executive Order 12862 on September 11, 1993, which directs Federal agencies to change the way they do business, to reform their management practices, to provide service to the public that matches or exceeds the best service available in the private sector, and to establish and implement customer service standards.

The Customer Service Card includes the following statements that are to be rated on a scale from 1 to 4, with 1 being ''Strongly Agree'' and 4 being ''Strongly Disagree.'' In addition, 5 indicates that the statement is ''Not Applicable.''

1. Service was prompt and courteous.
2. Information was what I needed.
2. Procedures were clear and simple.
3. Facilities were satisfactory and accessible.
4. Technology transfer/technical assistance was effective.

Customers can voluntarily mail the cards back to the Chief of the Forest Service in Washington, DC, or complete an online Comment Card form through the Internet. The data are gathered, evaluated, and included in ad hoc reports. Also, the printed Customer Service Comment Card and e-mail messages are forwarded to the appropriate Forest Service personnel in the respective field units where the customers were served so that any complaints and suggestions may be used to improve services and facilities. This gives Forest Service personnel an opportunity to respond to customers by phone, mail, or e-mail when considered necessary and appropriate if the customers indicate that they desire this by telling us how to reach them. Receiving positive comments reinforces the incentive of employees to make the Forest Service a customer-driven agency.

Estimate of Annual Burden: 4 minutes.

Type of Respondents: Respondents include anyone who visits or contacts one of the Forest Service offices, work sites, or visitor centers, either in person, by telephone or on the Internet. This includes individuals and groups of varying ages and abilities, U.S. citizens and citizens from other countries, who visit or plan to visit National Forest System lands, for recreation or education purposes; special interest groups; local residents; and individuals conducting business with the Forest Service including, but not limited to, grazing permittees, minerals, oil and gas permittees, land lessees, timber customers, other forest products customers, research scientists, special-use customers, educators, librarians, historians, writers, media contacts, moviemakers, law enforcement officers, fire fighters, representatives of other Federal, State, county, or local Government agencies, and foreign governments.

Estimated Annual Number of Respondents: 15,000.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,000 hours per year.

Comment is invited

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

Dated: March 7, 2002

Robert Lewis, Jr.,

Acting Chief, Forest Service.

[FR Doc. 02–8530 Filed 4–8–02; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

National Tree-Marking Paint Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The National Tree-Marking Paint Committee will meet in St. Louis, Missouri, on May 14–16, 2002. The purpose of the meeting is to discuss activities related to improvements in, concerns about, and the handling and use of tree-marking paint by personnel of the Forest Service and the Department of the Interior's Bureau of Land Management.

DATES: The meeting will be held May 14–16, 2002, from 8 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Marriott St. Louis Pavilion Downtown, One Broadway, St. Louis, Missouri. Persons who wish to file written comments before or after the meeting must send written comments to Bob Monk, Chairman, National Tree-marking Paint Committee, Forest Service, USDA, San Dimas Technology and Development Center, 444 East Bonita Avenue, San Dimas, California 91773, or electronically to *rmonk@fs.fed.us.*

FOR FURTHER INFORMATION: Bob Monk, Project Leader, San Dimas Technology and Develoment Center, Forest Service, USDA, (909) 599–1267, extension 267 or *rmonk@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The National Tree-Marking Paint Committee comprises representatives from the Forest Service national headquarters, each of the nine Forest Service Regions, the Forest Products Laboratory, the Forest Service San Dimas Technology and Development Center, and the Bureau of Land Management. The General Services Administration and the National Institute for Occupational Safety and Health are ad hoc members and provide technical advice to the committee.

A field trip will be held on May 14 and is designed to supplement information related to tree-marking paint. This trip is open to any member of the public participating in the public meeting on May 15–16. However, transportation is provided only for committee members.

The main session of the meeting, which is open to public attendance, will be held on May 15–16.

Closed Sessions

While certain segments of this meeting are open to the public, there will be two closed sessions during the meeting. The first closed session is planned for approximately 9 to 11 a.m. on May 15. This session is reserved for individual paint manufacturers to present products and information about tree-marking paint for consideration in future testing and use by the agency. Paint manufacturers also may provide comments on tree-marking paint specifications or other requirements. This portion of the meeting is open only to paint manufacturers, the Committee, and committee staff to ensure that trade secrets will not be disclosed to other paint manufacturers or to the public. Paint manufacturers wishing to make presentations to the Tree-Marking Paint Committee during the closed session should contact the Chairman at the telephone number listed under **FOR FURTHER INFORMATION.** The second closed session is planned for approximately 1 to 4 p.m. on May 16. This session is reserved for Federal Government employees only.

Any person with special access needs should contact the Chairman to make those accommodations. Space for individuals who are not members of the National Tree-Marking Paint Committee is limited and will be available to the public on a first-come, first-served basis.

Dated: March 28, 2002.

Tom L. Thompson,

Deputy Chief for National Forest System.

[FR Doc. 02–8529 Filed 4–8–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Announcement of Funding to Develop Essential Community Facilities in Rural Communities for Eligible Public Entities, Nonprofit Corporations, and Tribal Governments with Extreme High Unemployment and Severe Economic Depression

AGENCY: Rural Housing Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Housing Service (RHS) announces the availability of $19 million in national competitive grant funds to be administered in accordance with this Notice, 7 U.S.C. 1926(a)(20), and the Community Facilities grant program (7 CFR part 3570, subpart B) to develop essential community facilities in rural communities with extreme high unemployment and severe economic depression.

DATES: Applications may be submitted at any time until funds are exhausted. (*See* Allocation of Funds and Selection Process.)

ADDRESSES: Entities wishing to apply for assistance are encouraged to contact their local USDA Rural Development office for guidance on the intake and processing of preapplications. A listing of Rural Development State offices, addresses, telephone numbers, and a person to contact follows:

Note: Telephone numbers listed are not toll-free.

Alabama State Office

Suite 601, Sterling Centre, 4121 Carmichael Road Montgomery, AL 36106–3683, 334–279–3400, James B. Harris

Alaska State Office

800 W. Evergreen, Suite 201, Palmer, AK 99645–6539, 907–761–7705, Dean Stewart

Arizona State Office

Phoenix Corporate Center, 3003 North Central Avenue, Suite 900, Phoenix, AZ 85012–2906, 602–280–8700, Leonard Gradillas

Arkansas State Office

700 W. Capitol Avenue, Room 3416 Little Rock, AR 72201–3225, 501–301–3200, Jesse G. Sharp

California State Office

430 G Street, #4169, Davis, CA 95616–4169, 530–792–5800, Janice Waddell

Colorado State Office

655 Parfet Street, Room E100, Lakewood, CO 80215, 303–236–2801, Leroy Cruz

Delaware State Office*

4607 S. DuPont Highway, P.O. Box 400, Camden, DE 19934–9998, 302–697–4300, James E. Waters

Florida State Office**

4440 N.W. 25th Place, P.O. Box 147010, Gainesville, FL 32614–7010, 352–338–3400, Glenn W. Walden

Georgia State Office

Stephens Federal Building, 355 E. Hancock Avenue, Athens, GA 30601–2768, 706–546–2162, Jerry Thomas

Hawaii State Office

Room 311, Federal Building, 154 Waianuenue Avenue, Hilo, HI 96720, 808–933–8380, Thao Khamoui

Idaho State Office

9173 W. Barnes Drive, Suite A1, Boise, ID 83709, 208–378–5600, Dan Fraser

Illinois State Office

2118 Westpark Court, Suite A, Champaign, IL 61821, 217–403–6200, Gerald Townsend

Indiana State Office

5975 Lakeside Boulevard, Indianapolis, IN 46278, 317–290–3100, Gregg Delp

Iowa State Office

873 Federal Building, 210 Walnut Street, Des Moines, IA 50309, 515–284–4663, Dorman A. Otte

Kansas State Office

1303 SW First American Place, Suite 100, Topeka, KS 66604–0440, 785–271–2700, Gary Smith

Kentucky State Office

Suite 200, 771 Corporate Drive, Lexington, KY 40503, 859–224–7300, Vernon C. Brown

Louisiana State Office

3727 Government Street, Alexandria, LA 71302, 318–473–7920, Danny Magee

Maine State Office

967 Illinois Avenue, Suite 4, P.O. Box 405, Bangor, ME 04402–0405, 207–990–9106, Alan Daigle

Massachusetts State Office***

451 West Street, Amherst, MA 01002, 413–253–4300, Daniel Beaudette

Michigan State Office

3001 Coolidge Road, Suite 200, East Lansing, MI 48823, 517–324–5100, Philip H. Wolak

Minnesota State Office

410 AgriBank Building, 375 Jackson Street, St. Paul, MN 55101–1853, 651–602–7800, James Maras

Mississippi State Office

Federal Building, Suite 831, 100 W. Capitol, Jackson, MS 39269, 601–965–4316 Darnella Smith-Murray

Missouri State Office

601 Business Loop 70 West, Parkade Center, Suite 235, Columbia, MO 65203, 573–876–0976, D. Clark Thomas

Montana State Office

Unit 1, Suite B, P.O. Box 850, 900 Technology Boulevard, Bozeman, MT 59715, 406–585–2580, Deborah Chorlton

Nebraska State Office

Federal Building, Room 152, 100 Centennial Mall N, Lincoln, NE 68508, 402–437–5551, Denise Brosius-Meeks

Nevada State Office

1390 South Curry Street, Carson City, NV 89703–9910, 775–887–1222, Mike E. Holm

New Jersey State Office

Tarnsfield Plaza, Suite 22, 790 WoodLane Road, Mt. Holly, NJ 08060, 609–265–3600, Michael P. Kelsey

New Mexico State Office

6200 Jefferson Street NE, Room 255, Albuquerque, NM 87109, 505–761–4950, Clyde F. Hudson,

New York State Office

The Galleries of Syracuse 441 S. Salina Street, Suite 357, Syracuse, NY, 13202–2541, 315–477–6400, Gail Giannotta

North Carolina State Office

4405 Bland Road, Suite 260, Raleigh, NC 27609, 919–873–2000, Phyllis Godbold

North Dakota State Office

Federal Building, Room 208, 220 East Rosser, P.O. Box 1737, Bismarck, ND, 58502–1737, 701–530–2037, Donald Warren

Ohio State Office

Federal Building, Room 507, 200 North High Street, Columbus, OH, 43215–2418, 614–255–2400, David Douglas

Oklahoma State Office

100 USDA, Suite 108, Stillwater, OK 74074–2654, 405–742–1000, Rock W. Davis

Oregon State Office,

101 SW Main, Suite 1410, Portland, OR 97204–3222, 503–414–3300, Jerry W. Sheridan

Pennsylvania State Office

One Credit Union Place, Suite 330, Harrisburg, PA 17110–2996, 717–237–2299, Gary Rothrock

Puerto Rico State Office

IBM Building, Suite 601, 654 Munos Rivera Avenue, Hato Rey, PR, 00918–6106, 787–766–5095, Pedro Gomez

South Carolina State Office

Strom Thurmond Federal Building, 835 Assembly Street, Room 1007, Columbia, SC 29102, 803–765–5163, Larry Floyd

South Dakota State Office

Federal Building, Room 210, 200 Fourth Street SW., Huron, SD 57350, 605–352–1100, Roger Hazuka

Tennessee State Office

Suite 300, 3322 West End Avenue, Nashville, TN 37203–1084, 615–783–1300, Keith Head

Texas State Office

Federal Building, Suite 102, 101 South Main, Temple, TX 76501, 254–742–9700, Eugene G. Pavlat

Utah State Office

Wallace F. Bennett Federal Building, 125 S. State Street, Rm. 4311, P.O. Box 11350, Salt Lake City, UT 84147–0350, 801–524–4320, Bonnie Carrig

Vermont State Office ****

City Center, 3rd Floor, 89 Main Street, Montpelier, VT 05602, 802–828–1600, Rhonda Shippee

Virginia State Office

Culpeper Building, Suite 238, 1606 Santa Rosa Road, Richmond, VA 23229, 804–287–1550, Carrie Schmidt

Washington State Office

1835 Black Lake Blvd. SW., Suite B, Olympia, WA 98512–5715, 360–704–7740, Sandi Boughton

West Virginia State Office

Federal Building, 75 High Street, Room 320, Morgantown, WV 26505–7500, 304–284–4860, Dianne Crysler

Wisconsin State Office

4949 Kirschling Court, Stevens Point, WI 54481, 715–345–7600, Mark Brodziski,

Wyoming State Office

100 East B, Federal Building, Room 1005, P.O. Box 820, Casper, WY 82602, 307–261–6300, Charles Huff

* The Delaware State Office also administers the Maryland program.

** The Florida State Office also administers the Virgin Island program.

*** The Massachusetts State Office also administers the Rhode Island and Connecticut programs.

**** The Vermont State Office also administers the New Hampshire program.

FOR FURTHER INFORMATION CONTACT: Joseph Ben-Israel, Community Programs, RHS, USDA, STOP 0787,

1400 Independence Ave. SW., Washington, DC 20250–0787, Telephone (202) 720–1490, Facsimile (202) 690–0471, E-mail: *jbenisra@rdmail.rural.usda.gov.*

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The reporting requirements contained in this notice have been approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 0575–0173 in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Authorizing Legislation and Regulations

This program is authorized under section 306(a) of the Consolidated Farm and Rural Development Act. RHS will administer these funds using the same regulations that govern its Community Facilities grant program. Program administration, eligibility, processing, and servicing requirements that govern the Community Facilities grant program may be found under 7 CFR part 3570, subpart B.

Background

Under the FY 2002 appropriation, Congress appropriated $19 million for a Community Facilities grant program for rural communities with extreme unemployment and severe economic depression, hereafter referred to as the Economic Impact Initiative. These funds are in addition to the Community Facilities grant program's regular allocation of competitive grant funds. The Community Facilities grant program, authorized by Congress in 1996, is used in conjunction with the existing direct and guaranteed loan programs for the development of essential community facilities for public use in rural areas. Funding is intended to complement rather than compete with other credit sources. Grants are made available to public entities, such as municipalities, counties, and special-service districts, as well as to eligible nonprofit corporations and tribal governments. Grants are targeted to communities with the smallest populations and lowest incomes. Communities with lower population and income levels receive a greater percentage of the Federal contribution, between 15 to 75 percent of the cost of developing the facility.

Additional Eligibility Requirements

In addition to those requirements contained in 7 CFR part 3570, subpart B, the essential community facility must be located in a rural community where the ''not employed rate'' is greater than 19.5 percent as mandated by 7 U.S.C. 1926(a)(20)(B).

Definition of Not Employed Rate

This is the percentage of individuals over the age of 18 who reside within the community and who are ready, willing, and able to be employed but are unable to find employment, as determined by the Department of Labor of the State in which the community is located.

Applicant Eligibility for Local Dial-Up Internet Access

The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002 expanded eligibility for the Economic Impact Initiative to provide local dial-up Internet access or broadband service where it does not currently exist. Under this provision, the Agency may make grants to State agencies for use by regulatory commissions in States with rural communities without local dial-up Internet access or local broadband service. The State Agencies will establish a competitive, technologically neutral grant program to telecommunications carriers or cable operators that establish common carrier facilities and services that, in the commission's determination, will result in the long-term availability of affordable broadband services that are used for high speed Internet access for these communities.

Allocation of Funds

All Economic Impact Initiative funds will remain in the National Office reserve for funding consideration for FY 2002. Project selections will be on a national competitive basis. There will be two windows of opportunity to compete for grant funding. It is anticipated, the first round of funding selections will be made after May 10, 2002. The second round will be held after August 23, 2002.

Selection Process

Once a determination has been made by the State Office that an applicant is eligible, the preapplication is evaluated competitively and points awarded as specified in the project selection priorities contained in 7 CFR part 3570, subpart B. The State Director or designee will then forward the request to the National Office to compete for funding consideration. Projects will then be rated, ranked, and selections made in order of priority. Each proposal will be judged on its own merit. Unless withdrawn by the applicant, projects not selected for funding consideration for the first round of funding selections will remain eligible to compete for the next round of funding.

To be considered for the first window, all preapplications along with supporting documentation satisfactory to the Agency must be received by the Rural Development State or designated field office by close of business May 3, 2002. To be considered for the second window, all preapplications must be received by the Rural Development State or designated field office by close of business August 16, 2002.

Notice of Invitation To Submit Complete Application

All preapplications selected for funding consideration will be notified by the State or field office by issuing Form AD–622, ''Notice of Preapplication Review Action.'' At that time, the proposed recipient will be invited to submit a complete application, along with instructions related to the agreed upon award amount, and asked to schedule an application conference to discuss items needed for formal application and to further clarify issues related to the project.

Final Approval and Funding Process

Final approval is subject to the availability of funds; the submission by the applicant of a formal, complete application and related materials that meet the program requirements and responsibilities of the grantee (contained in 7 CFR part 3570, subpart B); the letter of conditions; and the grant agreement. Those preapplications that do not have sufficient priority necessary to receive funding consideration for FY 2002 will be notified, in writing, by the Agency's State or designated field office.

Dated: April 3, 2002.

Arthur A. Garcia,

Administrator, Rural Housing Service.

[FR Doc. 02–8527 Filed 4–8–02; 8:45 am]

BILLING CODE 3410–XV–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the District of Columbia, Maryland and Virginia Advisory Committees

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights that a meeting of the District of Columbia, Maryland and Virginia Advisory Committees to the Commission will convene at 9:30 a.m. and recess at 6 p.m. on April 24, 2002; will reconvene at 9:30 a.m. and adjourn at 6 p.m. on April 25, 2002, at the Mason District Government Center,

6507 Columbia Pike, Annandale, Virginia 22003. The subcommittees, also known as the Inter-SAC Committee, will hold a community forum on civil rights focusing on civil rights concerns of Arab, Muslim, Sikh and South Asian communities in the Washington metropolitan area in the aftermath of 9/11 tragedies.

Persons desiring additional information, or planning a presentation to the Committee, should contact Ki-Taek Chun, Director of the Eastern Regional Office, 202–376–7533 (TDD 202–376–8116). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, April 2, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–8466 Filed 4–8–02; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Iowa Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Iowa Advisory Committee to the Commission will convene at 10 a.m. and adjourn at 12 p.m. on May 1, 2002, at the Holiday Inn Airport, 611 Fleur Drive, Des Moines, Iowa 50321. The purpose of the meeting is to plan future activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Melvin L. Jenkins, Director of the Central Regional Office, 913–551–1400 (TDD 913–551–1414). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, April 3, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–8467 Filed 4–8–02; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Minnesota Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Minnesota Advisory Committee to the Commission will be held from 9 a.m. to 6 p.m. on Wednesday, April 24, 2002, and from 9 a.m. to 2 p.m. on Thursday, April 25, 2002, at the Embassy Suites Hotel, 425 S. 7th Street, 5th Floor, Universal Room, Minneapolis, Minnesota 55415. The purpose of the meeting is to gather information on the Minneapolis-St. Paul news media coverage of minority communities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Constance M. Davis, Director of the Midwestern Regional Office, 312–353–8311 (TDD 312–353–8362). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, March 29, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–8468 Filed 4–8–02; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Utah Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Utah Advisory Committee to the Commission will convene at 5:30 p.m. and adjourn at 8 p.m. on Tuesday, April 23, 2002, at the Horizonte School, 1234 S. Main Street, Salt Lake City, UT 84101. The purpose of the meeting is to hold new member orientation and discuss current projects and civil rights issues in the state.

Persons desiring additional information, or planning a presentation to the Committee, should contact, John Dulles, Director of the Rocky Mountain Regional Office, 303–866–1040 (TDD 303–866–1049). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, March 29, 2002.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 02–8469 Filed 4–8–02; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for emergency clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Export Administration (BXA).

Title: BXA Program Questionnaire.

Form Number: None.

OMB Approval Number: None.

Type of Review: Emergency.

Burden Hours: 667.

Number of Respondents: 4,000.

Average Time Per Response: 10 minutes.

Needs and Uses: This questionnaire will be used by participants at the Update West conference, visitors to BXA's web site, and perhaps by attendees at future BXA conferences. The responses to these questions provide useful and practical information that BXA can use to determine that it is providing a quality program and gives BXA information useful to making recommended improvements. It also shows attendees that BXA cares about their experience and values their viewpoint.

Affected Public: Individuals, business or other for-profit organizations.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Madeleine Clayton, Departmental Paperwork Clearance Officer, (202) 482–3129, Department of Commerce, Room 6608, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 5 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: April 4, 2002.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 02–8550 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1217]

Approval for Expansion of Subzone 124D LOOP LLC/LOCAP LLC (Crude Oil Pipeline and Storage System) LaFourche and St. James Parishes

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the South Louisiana Port Commission, grantee of FTZ 124, has requested authority on behalf of LOOP LLC/LOCAP LLC (LOOP), to include an additional site (Site 1, Parcel E) within Subzone 124D at the LOOP crude oil pipeline and storage system (FTZ Docket 24–2001, filed 6–14–01);

Whereas, notice inviting public comment has been given in the **Federal Register** (66 FR 33947, 6/26/01);

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to include an additional site within Subzone 124D at the crude oil pipeline and storage system of LOOP LLC/LOCAP LLC, is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 29th day of March 2002.

Faryar Shirzad,

Assistant Secretary for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 02–8563 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1219]

Approval for Extension of Authority of Board Order 745; Foreign-Trade Subzone 59A; Kawasaki Motors Manufacturing Corp., U.S.A. (Multi-Axis Industrial Robots); Lincoln, Nebraska

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, Board Order 745 (60 FR 30517, 6–9–95) granted authority on behalf of Kawasaki Motors Manufacturing Corp., U.S.A. (KMM) to manufacture multi-axis industrial robots with six or more axes of motion under FTZ procedures for a limited time period (expires April 1, 2002), subject to extension;

Whereas, KMM, operator of Subzone 59A, has requested authority to extend its manufacturing authority for multi-axis industrial robots on a permanent basis;

Whereas, notice inviting public comment was given in the **Federal Register** (64 FR 25477, 5–12–99);

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the request would be in the public interest;

Now therefore, the Board hereby approves the request subject to the FTZ Act and the Board's regulations, including Section 400.28, and subject to the restriction that the scope of authority is limited to the manufacture of multi-axis industrial robots having six or more axes of motion.

Signed at Washington, DC, this 29th day of March, 2002.

Faryar Shirzad,

Assistant Secretary of Commerce, for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 02–8565 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1220]

Approval for Expanded Manufacturing Authority and Subzone Expansion (Motorcycles, Personal Watercraft, All-Terrain Vehicles, Utility Work Trucks, Industrial Robots); Foreign-Trade Subzone 59A; Kawasaki Motors Manufacturing Corp., U.S.A.; Lincoln, Nebraska

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Lincoln Foreign Trade Zone, Inc., grantee of Foreign-Trade Zone 59, has requested authority on behalf of Kawasaki Motors Manufacturing, U.S.A. (Inc.) (KMM), operator of FTZ 59A, at the KMM motor vehicle and industrial automation products manufacturing facility in Lincoln, Nebraska, to expand the scope of FTZ authority to include new manufacturing capacity under FTZ procedures and requesting authority to expand the boundaries of Subzone 59A (FTZ Doc. 33–99, filed 6–25–99);

Whereas, notice inviting public comment was given in the **Federal Register** (64 FR 37496, 7–12–99);

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

Now therefore, the Board hereby approves the request, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 29th day of March, 2002.

Faryar Shirzad,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 02–8566 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1214]

Expansion of Foreign-Trade Zone 110, Albuquerque, NM

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the City of Albuquerque, New Mexico, grantee of Foreign-Trade Zone 110, submitted an application to the Board for authority to expand and relocate FTZ 110 from its current location in Albuquerque, to a site (62 acres) at the 2,300-acre Albuquerque International Sunport airport complex, within the Albuquerque Customs port of entry area (FTZ Docket 28–2001; filed 6/28/01);

Whereas, notice inviting public comment was given in the **Federal Register** (66 FR 35593, 7/6/01) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 110 is approved, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 29th day of March 2002.

Faryar Shirzad,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 02–8561 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1215]

Grant of Authority for Subzone Status; E.I. Dupont De Nemours and Company, Inc. (Chemicals Products), Circleville, OH

Pursuant to its authority under the Foreign-Trade Zones Act, of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for ''* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Rickenbacker Port Authority, grantee of Foreign-Trade Zone 138, has made application to the Board for authority to establish special-purpose subzone status at the chemical products manufacturing and warehousing facilities of E.I. duPont de Nemours and Company, Inc., located in Circleville, Ohio (FTZ Docket 17–2001, filed 4/23/01);

Whereas, notice inviting public comment was given in the **Federal Register** (66 FR 21739, 5/1/01); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status at the chemicals products manufacturing and warehousing facilities of E.I. duPont de Nemours and Company, Inc., located in Circleville, Ohio (Subzone 138F), at the location described in the application, and subject to the FTZ Act and the Board's regulations, including § 400.28.

Signed at Washington, DC, this 29th day of March 2002.

Faryar Shirzad,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 02–8562 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1218]

Grant of Authority for Subzone Status; Schering-Plough Products, L.L.C. Manufacturing Plant (Pharmaceutical Products), Las Piedras, PR

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for '' * * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs ports of entry;

Whereas, the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved; and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Puerto Rico Industrial Development Corporation, grantee of Foreign-Trade Zone 7, has made application to the Board for authority to establish special-purpose subzone status at the pharmaceutical product manufacturing plant of Schering-Plough Products, L.L.C., located in Las Piedras, Puerto Rico (FTZ Docket 4–2002, filed January 10, 2002);

Whereas, notice inviting public comment has been given in the **Federal Register** (67 FR 2401, 1/17/02); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status at the pharmaceutical product manufacturing plant of Schering-Plough Products, L.L.C., located in Las Piedras, Puerto Rico, (Subzone 7G), at the location described in the application, subject to the FTZ Act and the Board's regulations, including § 400.28.

Signed at Washington, DC, this 29th day of March 2002.

Faryar Shirzad,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 02–8564 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1213]

Expansion of Foreign-Trade Zone 39, Dallas/Fort Worth, TX

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Dallas/Fort Worth International Airport Board, grantee of Foreign-Trade Zone 39, submitted an application to the Board for authority to expand FTZ 39 to include two new sites at the Meacham Airport complex (Site 5) in Fort Worth, and at the Redbird Airport complex (Site 6) in Dallas, within the Dallas/Fort Worth Customs port of entry area (FTZ Docket 26–2001; filed 6/20/01);

Whereas, notice inviting public comment was given in the **Federal Register** (66 FR 34150, 6/27/01) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 39 is approved, subject to the Act and the

Board's regulations, including Section 400.28, and further subject to the Board's standard 2,000-acre activation limit for the overall zone project.

Signed at Washington, DC, this 29th day of March 2002.

Faryar Shirzad,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

[FR Doc. 02–8560 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 020325068–2068–01]

RIN 0648–ZB17

Request for Proposals for FY 2002—NOAA Educational Partnership Program With Minority Serving Institutions: Environmental Entrepreneurship Program

AGENCY: Office of Oceanic and Atmospheric Research (OAR), National Oceanic and Atmospheric Administration (NOAA). Commerce.

ACTION: Notice of request for proposals.

SUMMARY: The Office of Oceanic and Atmospheric Research (OAR) in the National Oceanic and Atmospheric Administration (NOAA), United States Department of Commerce is soliciting proposals for the NOAA Educational Partnership Program with Minority Serving Institutions (EPP/MSI): Environmental Entrepreneurship Program. The goal of the program is to strengthen the capacity of Minority Serving Institutions to foster student careers, entrepreneurship opportunities and advanced academic study in NOAA related sciences.

In Fiscal Year 2002, NOAA plans to make available a total of $3,000,000 to support the EPP/MSI Environmental Entrepreneurship Program. The program will provide funds on a competitive basis to support projects at eligible Minority Serving Institutions, for up to three years duration, in the following two categories:

(1) Program Development and Enhancement—approximately six grants or cooperative agreements, each up to $250,000 total for up to three years, to support the development and enhancement of outreach, education, applied research and training programs that will strengthen MSIs and their partners capacity to foster student careers, entrepreneurship opportunities and advanced academic study in NOAA related sciences.

(2) Environmental Demonstration Projects—approximately six grants or cooperative agreements, each up to $300,000 total for up to three years to support the engagement of MSI faculties and students in field demonstration projects focused on applying environmentally sound methods and technologies to address NOAA related environmental issues.

DATES: A Letter of Intent to aid NOAA in planning the review of proposals is requested by April 30, 2002 but is not required. Proposals must be received by 5:00 p.m. (Eastern Daylight Savings Time) on May 30, 2002 (See Section VI. Instructions for Application: Timetable).

ADDRESSES: Proposals should be submitted to: Jewel M. Griffin-Linzey, EPP/MSI Environmental Entrepreneurship Program, National Oceanic and Atmospheric Administration, Room 11877, SSMC3 (R/SG), 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Jewel M. Griffin-Linzey, NOAA EPP/MSI: Entrepreneurship Program, National Oceanic and Atmospheric Administration, SSMC3 (R/SG), 1315 East-West Highway, Silver Spring, MD 20910. Tel. (301) 713–1495; e-mail: *jewel.griffin-linzey@noaa.gov*

SUPPLEMENTARY INFORMATION:

I. Program Authority

Authority: 15 U.S.C. 1540, 49 U.S.C. 44720, 33 U.S.C. 883a and 883d, 33 U.S.C. 1442, 16 U.S.C. 1854(e), 16 U.S.C. 661, 16 U.S.C. 753(a), 16 U.S.C. 1451 et seq., 16 U.S.C. 1431, and Executive Orders 12876, 12900 and 13021. Catalog of Federal Assistance Number: 11.481—Educational Partnership Program with Minority Serving Institutions.

II. Program Description

Background

NOAA provides science, technology, and services to describe and predict changes in the Earth's environment, and conserve and manage wisely the Nation's coastal and marine resources to ensure sustainable economic opportunities. The agency has made a commitment to expand and strengthen its partnerships with Minority Serving Institutions that will serve as a catalyst to meet its principal goals of environmental stewardship, assessment, and prediction. In accordance with NOAA's overall mission, and with the policy of NOAA and the U.S. Department of Commerce to foster environmental education, research and economic sustainability, the purposes of the NOAA EPP/MSI Environmental Entrepreneurship Program are to support:

1. Educational Opportunities. To prepare students with the necessary academic training, technical skills and experiences that will enable them to pursue careers, entrepreneurship opportunities and advanced academic study in environmental fields related to NOAA's mission.

2. Capacity Building. To develop or enhance the capacity of environmental related academic programs at MSIs in order to ensure they are effective pipelines through which students and faculty can gain the necessary experience to make environmentally and economically sound decisions.

3. Partnerships. To facilitate or strengthen MSI partnerships, where appropriate, with NOAA programs and facilities, community colleges and universities, industry, governments (state, local, commonwealth, territorial and tribal), and organizations (public, nonprofit, or private) that foster cooperative education and training activities for students and faculties.

4. Community Economic Development. To support MSIs and partners in preparing students with the necessary knowledge, skills, tools and technology that may be applied outside the classroom to ensure environmentally sustainable and economically viable local communities. The goal is to foster environmental entrepreneurship opportunities that empower students to become stewards of natural resources and the environment and to transfer knowledge gained to address environmental problems of importance in their local communities.

Rationale

The recruitment of minorities, particularly underrepresented minorities, in the fields of science and engineering, lags behind expectations. According to the most recent data compiled by the National Science Foundation (NFS), ''Women, Minorities and Persons with Disabilities in Science and Engineering: 2000,'' the percentage of minority scientists and engineers in the workforce ranges from 0.3 percent for American Indians to about 3.0 percent each for African-Americans and Hispanics. The quality and nature of academic experiences at each point of the educational pipeline are crucial to bringing more minorities into environmental science and engineering fields. Bachelors, Masters and Doctoral degrees are the underpinnings of environmental science career achievement and employment. At both the undergraduate and graduate levels,

Hispanics, African Americans, and Native Americans complete fewer degrees, relative to their demographic composition in the population, than majority ethnic groups. At the Bachelors level, NSF data show that African Americans received about 7.4 percent of the Bachelors degrees in science and engineering in 1996, Hispanics received 6.4 percent, and American Indians/Alaskan Natives receive 0.6 percent. At the Master's level, African Americans receive about 5.0 percent of the science and engineering degrees, Hispanics about 4.0 percent, and American Indians 0.4 percent. In FY 1998, MSIs received only 5.8 percent of Department of Commerce grants to institutions of higher education.

NOAA EPP/MSI Environmental Entrepreneurship Program

The goal of the NOAA EPP/MSI Environmental Entrepreneurship Program is to strengthen the capacity of Minority Serving Institutions to foster student careers, entrepreneurship opportunities, and advanced academic study in NOAA-related sciences.

Proposals should be firmly grounded in ''environmental fields'' related to NOAA's mission. The term ''environmental fields'' is defined as those environmental, natural sciences (i.e., biology, earth sciences), physical and social sciences (i.e., economics, anthropology, geography, and history), engineering, professional and technical fields that are relevant to NOAA's mission which is to ''describe and predict changes in the Earth's environment, and conserve and manage wisely the Nation's coastal and marine resources.'' (See *http://www.noaa.gov/*)

Proposals should identify mechanisms to be employed that enhance MSIs capacity to foster student opportunities, interest in, and pursuit of careers, entrepreneurship and advanced study in NOAA-related sciences.

Proposals will be accepted that address one of the following categories:

(1) Program Development and Enhancement—approximately six grants or cooperative agreements, each up to $250,000 total for up to three years to support the development and enhancement of effective outreach, education, applied research and training programs at eligible MSIs directly related to NOAA's mission. Developing and enhancing outreach, education, applied research and training capabilities at MSIs is intended to expand opportunities for students to develop the technical skills, training, and experiences needed to pursue careers, entrepreneurship opportunities and advanced academic study in NOAA-related environmental fields. Activities funded under this element may include, but are not limited to: atmospheric, environmental and oceanic science courses and curriculum enhancement; practical learning experiences for students such as, hands-on training and applied research; and other activities designed to foster student careers, entrepreneurship opportunities and advanced academic study related to NOAA's mission.

(2) Environmental Demonstration Projects—approximately six grants or cooperative agreements, each up to $300,000 total for up to three years, to support the engagement of MSI faculty and students in demonstration projects that apply environmentally sound methods and technologies to address NOAA related environmental issues. Field demonstration projects should encourage partnerships that enable students to address challenging environmental issues such as, enhancing and restoring coastal and estuarine habitats, preventing marine pollution, reducing coastal hazards, assessing marine protected areas, protecting coral reefs, reducing the spread of invasive species, restoring fisheries and fisheries habitat, developing and expanding aquaculture, planning community waterfront revitalization, mitigating and assessing impacts of weather and climate variability, improving the prediction of weather and climate phenomena, or employing remotely sensed data and information systems to support environmental monitoring and prediction. The intent is to involve students in collaborative field projects that will empower them to pursue careers, entrepreneurship opportunities and advanced academic study, and promote environmental sustainability and economic viability in their local communities. Projects should (where appropriate) involve students with academic training across the broad array of environmental fields needed to implement field projects. Engaging students in applied research to understand the nature and extent of environmental degradation within communities and to test and monitor methods for preventing, controlling, and reducing the degradation of natural environments is encouraged.

Partnerships

For proposals submitted in the Program, applicants should build on existing expertise of academic and applied research programs, as appropriate. Innovative approaches to issues are sought that take maximum advantage of the synergies, strong linkages and collaborations with partners such as other universities, community colleges, research institutions, industry, government and nongovernmental agencies, and other organizations (public, nonprofit, or private). Partnerships should facilitate the entry of MSI students into careers such as, entrepreneurs, scientists, resource managers, and community leaders in environmental fields related to NOAA's mission. While partnerships are encouraged, where appropriate. There is no requirement for a partner or a requirement for the applicant to provide matching funds. NOAA retains the right to allocate funds differently than indicated above if the number of proposals received is not balanced across these two categories, or the proposal quality does not warrant the stated allocation. In such cases, funds may be shifted between the two funding categories.

Proposals

Proposals must be submitted by an eligible MSI (see Section III. Eligibility) and are expected to have a rigorous work plan, a strong rationale, and clearly identified and achievable goals. Proposals should emphasize innovative approaches to encouraging, preparing, and graduating MSI students trained in environmental fields and related professional career fields. Projects should strive for multiple-year participation by students and include effective use of role models and mentors. A plan for evaluating the outcome of the project should be included.

III. Eligibility

Minority Serving Institutions eligible to submit proposals include institutions of higher education identified by the Department of Education as:

(i) Historically black Colleges and Universities,

(ii) Hispanic-Serving Institutions,

(iii) Tribal Colleges and Universities,

on the most recent ''2001 United States Department of Education Accredited Post-Secondary Minority Institutions'' list: *http://www.ed.gov/offices/ocr/minorityinst.pdf*

IV. Evaluation Criteria

The evaluation criteria for proposals submitted for support under the NOAA EPP/MSI Environmental Entrepreneurship Program are weighted as follows:

(1) *Technical and Educational Merit (40 percent):* The degree to which the activity will advance or transfer knowledge and understanding of environmental fields, education, or

professional fields as they relate to NOAA's mission; the qualifications of the applicant (individual or team) to conduct the project, including the ability to involve individuals from the MSI's student population successfully in the project; the degree to which the activity explores creative and original concepts; the overall design and organization of the planned activity; the strength of the proposed partnerships, if any, to help meet the goals of the project; and the sufficiency of resources for the plan of work.

(2) *Impact of Proposed Project (60 percent):* The contributions the project will make to enhancing the capability of the MSI to bring education, applied research and hands-on training opportunities to its student and faculty populations in the environmental and professional fields related to NOAA's mission; the benefit accruing to a faculty member and the institution from participation in the NOAA EPP/MSI: Environmental Entrepreneurship Program; the degree to which the proposed activity develops mechanisms that will broaden and sustain the capacity of MSIs to prepare students in NOAA related environmental fields; the extent to which the proposed activity will enhance and improve outreach, education, training, and applied research at MSIs; and the adequacy of the plan for evaluating the outcome of the project. For environmental demonstration projects, the degree to which the project is expected to prevent, control, and reduce degradation to habitats will be considered.

V. Selection Procedures

An independent peer review panel comprised of a broad representation of experts in the science and MSI academic community will conduct the review of the proposals. The panel members will rank proposals in accordance with the above evaluation criteria (Section IV). The panel members will provide individual evaluations on proposals, but there will be no consensus recommendation. The panel rankings and evaluations will be considered by NOAA may also consider programmatic or geographic balance and budget availability in the final selection of proposals, hence, awards may not necessarily be made to the panel's highest-scored proposal. Unsuccessful applications will be notified and provided with feedback that can assist applicants develop improved proposals in the future. Successful applications may be asked to modify objectives, work plans, budget levels, or project duration prior to final approval of an appropriate type of financial assistance award. The award will be a grant (e.g., whereby no substantial involvement is anticipated between DOC and the recipient during the project performance) or cooperative agreement award that requires substantial involvement (e.g., collaboration, participation, or intervention by DOC in the management of the project).

VI. Instructions for Application

Timetable

April 30, 2002—Letters of Intent: To aid NOAA in planning the review of proposals, potential Principal Investigators are strongly encouraged to submit an optional Letter of Intent by April 30, 2002. Letters of Intent should be e-mailed (no attachments) to *jewel.griffin-linzey@noaa.gov.* Information contained should include a brief description of the scope of the work, the parties involved, and an estimated budget. The Letters of Intent should not exceed one page.

May 30, 2002—Proposals are due no later than 5 p.m. (Eastern Daylight Savings Time), May 30, 2002. (See Section VII. How to submit for further details.)

June 2002—Successful applicants can expect to be notified by the end of June 2002. Successful applicants may be asked to provide revised narratives and/or budgets that would be due before the end of June 2002.

October 1, 2002—Funds will be awarded through a grant or cooperative agreement with an expected start date of October 1, 2002.

Proposed Guidelines

All proposals should be typewritten on 8½ x 11 paper with at least a 10-point font and may not exceed 20 pages. Tables and visual materials, including charts, graphs, maps, photographs and other pictorial presentations are included in the page limitation; literature citations are not included in the page limitation. All information needed for review of the proposal should be included in the main text; no appendices are permitted. The following information should be included:

(1) *Signed title page:* The title page should be signed by the Principal Investigator and the institutional representative and should clearly identify the program area being addressed by starting the project title with ''NOAA EPP/MSI: Environmental Entrepreneurship Program'' followed by either ''Program Development and Enhancement'' or ''Environmental Demonstration Project,'' depending upon the particular type of financial assistance award for which you are applying. The Principal Investigator and institutional representative should be identified by full name, title, organization, telephone number, e-mail and mailing address. The total amount of Federal funds being requested should be listed for each budget period.

(2) *Abstract:* It is critical that the abstract accurately describe the essential elements of the project being proposed. The abstract should include: 1. *Title:* Use the exact title as it appears in the rest of the application. 2. *Investigators:* List the names and affiliations of each investigator who will significantly contribute to the project. Start with the Principal Investigator. 3. Funding request for each year of the project as well as total funding requested. 4. *Project Period:* Start and completion dates. Proposals should request a start date of October 1, 2002. 5. *Objectives, Methodology, and Rationale:* This should include a concise statement of the objectives of the project, the scientific or educational methodology to be used, and the rationale for the work proposed.

(3) *Project Description*

(a) Introduction/Background/Justification: What is the problem or opportunity being addressed and what is its scientific, technical, educational, or socioeconomic importance to the region or nation?

(b) Technical Plan: What are the goals, objectives, and anticipated approach of the proposed project? While a detailed work plan is not expected, the proposal should present evidence that there has been thoughtful consideration of the approach to the problem under study. If a partner is involved, what capabilities does the partner possess that will benefit the project, faculty member and students?

(c) Output/Anticipated Benefits: What measures will be used to evaluate the outcome of the proposed project? Upon completion of the project, what are the anticipated benefits to the MSI, its students, and the environmental community?

(d) Literature Cited: Should be included here, but does not count against the page limit.

(4) *Budget and Budget Justification:* Form SF424A Budget Information Non-Construction Programs and budget justification narrative are required. There should be an annual budget for each year of the project as well as a cumulative budget for the entire project. Subcontracts should have a separate budget. Each annual budget should include a separate budget justification page that itemizes all budget items in sufficient detail to enable reviewers to

evaluate the appropriateness of the funding requested. (Please see the NOAA budget guidelines at *http://www.rdc.noaa.gov/~grants/BUDGTGUD.PDF*).

(5) *Current and Pending Support:* Applicants must provide information on all their current and pending Federal support for ongoing projects and proposal, including potential subsequent funding in the case of continuing grants. The proposed project and all other projects or activities using Federal assistance and requiring a portion of time of the principal investigator or other senior personnel should be included. The relationship between the proposed project and these other projects should be described, and the number of person-months per year to be devoted to the projects must be stated.

(6) *Vitae* (two pages maximum per investigator).

(7) *Letters of commitment from partnering organizations (if applicable).* Letters of commitment from partners must be included as an attachment to the application. The letters from partnering organizations should describe their commitment, identify key participants, and state briefly their role in the project.

(8) *Standard Application Forms:* Proposals submitted in response to this solicitation must be complete and submitted in accordance with instructions in the standard NOAA Grants Application package. Applicants may obtain all required application forms through the NOAA internet site *http:/www.rdc.noaa.gov/~grants/pdf* or from Ms. Arlene Simpson Porter, NOAA Grants Management Division, (301) 713–0962 ext. 152, *Arlene.S.Porter@noaa.gov.*

(a) *Standard Form 424,* Application for Federal Assistance;SF424A Budget Information Non-Construction Programs; SF424B Assurances Non-Construction, (Rev 4–88). Please note that both the Principal Investigator and an administrative contract should be identified in Section 5 of the SF424 or Section 10, applications should enter ''11.481'' for the CFDA Number and ''NOAA Educational Partnership Program with Minority Serving Institutions'' for the title. The Form must contain the original signature of an authorized representative of the applying institution.

(b) *Primary Applicant Certifications.* All primary applicants must submit a completed Form CD–511, ''Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying,''and the following explanations are hereby provided:

(i) *Non-Procurement Debarment and Suspension.* Prospective participants (as defined at 15 CFR Part 26, Section 105) are subject to 15 CFR Part 26, ''Non-Procurement Debarment and Suspension'' and the related section of the certification form prescribed above applies;

(ii) *Drug-Free Workplace.* Grantees (as defined at 15 CFR Part 26, Section 605) are subject to 15 CFR Part 26, Subpart F, ''Government-wide Requirements for Drug-Free Workplace (Grants)'' and the related section of the certification form prescribed above applies;

(iii) *Anti-Lobbying.* Persons (as defined at 15 CFR Part 28, Section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, ''Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions,'' and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than $100,000, and loans and loan guarantees for more than $150,000; and

(iv) *Anti-Lobbying Disclosures.* Any applicant that has paid or will pay for lobbying using any funds must submit an SF–LLL, ''Disclosure of Lobbying Activities,'' as required under 15 CFR Part 28, Appendix B.

(c) *Lower Tier Certifications.* Recipients shall require applicants/bidders for sub grants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, ''Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions and Lobbying'' and disclosure form, SF–LLL, ''Disclosure of Lobbying Activities.'' ORM CD–512 is intended for the use of recipients and should not be transmitted to the Department of Commerce (DOC). SF–LLL submitted by any tier recipient or sub recipient should be submitted to DOC in accordance with the instructions contained in the award document.

VII. How To Submit

Only three copies of the Federally required forms are needed. Although investigators are not required to submit more than three copies of the proposal, the normal review process utilizes 12 copies. If investigators wish all reviewers to receive color, unusually sized (other than 8.5 × 11″), or otherwise unusual materials submitted as part of the proposal, they should submit sufficient proposal copies for the full process.

Proposals must be received by 5 p.m. (Eastern Daylight Savings Time) on May 30, 2002. The address to send proposals to is: Jewel M. Griffin-Linzey, NOAA EPP/MSI: Environmental Entrepreneurship Program, National Oceanic and Atmospheric Administration, Room 11837, SSMC3 (R/SG), 1315 East-West Highway, Silver Spring, MD 20910. Facsimile transmissions and electronic mail submission of proposals will not be accepted.

VIII. Other Requirements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreement contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917) are applicable to this solicitation. However, please note that the Department of Commerce will not implement the requirements of Executive Order 13202 (66 FR 49921), pursuant to guidance issued by the Office of Management and Budget in light of a court opinion which found that the Executive Order was not legally authorized. See *Building and Construction Trades Department* v. *Allbaugh,* 172 F. Supp. 2d 138 (D.D.C. 2001). This decision is currently on appeal. When the case has been finally resolved, the Department will provide further information on implementation of Executive Order 13202.

For awards receiving funding for the collection or production of geospatial data (e.g., GIS data layers), the recipient will comply to the maximum extent practicable with E.O. 12906, Coordinating Geographic Data Acquisition and Access, The National Spatial Data Infrastructure, 59 Fed., Reg. 17671 (April 11, 1994). The award recipient shall document all new geospatial data collected or produced using the standard development by the Federal Geographic Data Center, and make that standardized documentation electronically accessible. The standard can be found at the following Internet website: *(http://www.fgdc.gov/standards/standards/html).*

Classification

Prior notice and an opportunity for public comments are not required by the Administrative Procedure Act or any other law for this notice concerning grants, benefits, and contracts, 5 USC 553 (a)(2). Therefore, this rule is not subject to the analytical requirements of the Regulatory Flexibility Act, 5 USC 601 *et. seq.*

This action has been determined to be not significant for purposes of E.O. 12866.

This notice contains collection of information requirements subject to the Paperwork Reduction Act. Standard Forms 424, 424A, 424B and SF–LLL have been approved by OMB under the respective control numbers 0348–0043, 0348–0044, 0348–0040, and 0348–0046. Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Dated: April 4, 2002.

Louisa Koch,

Deputy Assistant Administrator, NOAA Research.

[FR Doc. 02–8554 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–KD–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 040402A]

New England Fishery Management Council; Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Advisory Panel and Plan Development Team (PDT) in April, 2002. Recommendations from the Committee will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Thursday, April 25, 2002, at 10:00 a.m.

ADDRESSES: The meeting will be held at the Sheraton Inn Providence Airport, 1850 Post Road, Warwick, RI 02886; telephone: 401–738–4000.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council 978–465–0492. Requests for special accommodations should be addressed to the New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950.

SUPPLEMENTARY INFORMATION: The Advisory Panel will meet with the PDT to review and discuss the Draft Amendment 10 alternatives and impact analyses. The Advisory Panel meeting will begin by selecting a chair and vice-chair, followed by the joint meeting with the PDT. The Council will hold a follow-up meeting after a few weeks for the Advisory Panel to develop recommendations for preferred and non-preferred alternatives.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: April 4, 2002.

Richard W. Surdi,

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

[FR Doc. 02–8555 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 040402B]

New England Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Recreational Advisory Panel, Monkfish Oversight and Groundfish Oversight Committees in April 2002, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from these groups will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meetings will be held between April 26, 2002, and April 30, 2002. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meetings will be held in Peabody, MA and Newport News, VA. See **SUPPLEMENTARY INFORMATION** for specific locations.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council, 978–465–0492. Requests for special accommodations should be addressed to the New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

SUPPLEMENTARY INFORMATION:

Meeting Dates, Times, Locations, and Agendas

Friday, April 26, 2002, at 9:30 a.m.—Recreational Advisory Panel Meeting

Location: Holiday Inn, One Newbury Street, Route 1, Peabody, MA 01960; telephone: 978–535–4600.

This will be the first meeting of the Recreational Fishing Advisory Panel. After selecting a chair, panel members will review the role of Council advisors. They will then develop recommendations for the Council with respect to the general strategy and overall policy issues facing recreational (including party/charter) fishermen in fisheries managed by the New England Fishery Management Council. The Panel will also discuss the ongoing development of Amendment 13 to the Northeast Multispecies Fishery Management Plan (FMP), and may develop preliminary recommendations for recreational management measures. They will consider these suggested measures and will develop a recommendation that will be reviewed by the Council at a later date. After Council approval, the measures will be analyzed and included in a Draft Supplemental Environmental Impact Statement.

Monday, April 29, 2002, at 10 a.m. and Tuesday, April 30, 2002, at 8:30 a.m.—Monkfish Oversight Committee Meeting.

Location: Omni Newport News Hotel, 1000 Omni Boulevard, Newport News, VA 23606; telephone: 757–873–6664.

The Committee will continue to develop its recommendations to the New England and Mid-Atlantic Councils for management alternatives to be analyzed in the Amendment 2 Draft Supplemental Environmental Impact Statement. Alternatives designed to achieve the approved goals and objectives include, but are not limited to: permit qualification criteria for vessels fishing south of 38N; management program for a deepwater directed fishery in the southern fisheries

management area; separation of monkfish days-at-sea (DAS) from multispecies and sea scallop DAS programs, including counting of monkfish DAS as 24–hour days; measures to minimize impacts of the fishery on endangered sea turtles; measures to minimize bycatch in directed in non-directed fisheries including mesh size and other gear requirements; an exemption program for vessels fishing for monkfish outside of the EEZ (in the Northwest Atlantic Fisheries Organization Regulated Area); alternative areas for essential fish habitat (EFH) designation and measures to minimize impacts of the fishery on EFH; measures to improve data collection and research on monkfish, including mechanisms for funding cooperative research programs.

Tuesday, April 30, 2002, at 9:30 a.m.—Groundfish Oversight Committee Meeting

Location: Holiday Inn, One Newbury Street, Route 1, Peabody, MA 01960; telephone: 978–535–4600.

The Committee will continue development of Amendment 13 to the Northeast Multispecies FMP. Amendment 13 will end overfishing and establish rebuilding schedules for overfished stocks. At a meeting on February 27, 2002, the New England Council decided to develop groundfish management measures for five broad areas and one user group: Inshore Gulf of Maine, offshore Gulf of Maine, eastern Georges Bank, western Georges Bank, Southern New England/Mid Atlantic, and recreational/charter/party. This meeting will focus on recreational (including party/charter) fishing for groundfish in the Northeast Region of the National Marine Fisheries Service. Interested parties will be consulted to identify management measures that will achieve specific biological, economic, and social objectives identified by the Council. Such measures may include, but are not limited to, trip or bag limits, changes to the minimum sizes, year-round or seasonal closed areas, or gear changes. The Committee will consider these suggested measures and will develop a recommendation that will be reviewed by the Council at a later date. After Council approval, the measures will be analyzed and included in a Draft Supplemental Environmental Impact Statement.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation orother auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting dates.

Dated: April 4, 2002.

Richard W. Surdi,

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

[FR Doc. 02–8556 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

RIN 0651–AB34

Proposed Plan for an Electronic Public Search Facility

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice of public hearing and request for comments on the proposed plan for an electronic public search facility.

SUMMARY: The United States Patent and Trademark Office (USPTO) is proposing a plan to eliminate the paper patent and trademark registration collections from its public search facilities and to transition to electronic patent and trademark information collections. The USPTO has determined that paper patent and trademark registration collections are no longer needed for public reference because of the availability of mature and reliable electronic search systems in its public search facilities. The USPTO is seeking public comment on issues related to this proposed plan. The USPTO is also seeking input on whether any governmental entity or non-profit organization is interested in acquiring the paper patent and trademark registration collections to be removed from the USPTO's public search facilities.

DATES: A public hearing will be held on May 16, 2002, starting at 9:30 a.m. and ending no later than 5 p.m. Those wishing to speak must request an opportunity to do so no later than April 30, 2002. Speakers should provide a written copy of their remarks for inclusion in the record.

To be ensured of consideration, written comments must be received on or before May 16, 2002.

Any interested governmental entity or non-profit organization should contact the USPTO on or before May 24, 2002, to indicate a desire to acquire the paper patent and trademark registration collections to be removed from the USPTO's public search facilities.

ADDRESSES: The public hearing will be held in the Patent Theater located on the second floor of Crystal Park 2, Room 200, 2121 Crystal Drive, Arlington, VA. Any request to speak at the public hearing must be submitted by electronic mail message over the Internet to *paper-removal@uspto.gov* or by facsimile to (703) 308–7792, marked to the attention of Ronald Hack, Deputy Chief Information Officer for Information Technology Services. Comments should be sent by electronic mail message over the Internet addressed to: *paper-removal@uspto.gov.* Comments may also be submitted by mail addressed to: Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Washington, D.C. 20231, marked to the attention of Ronald Hack, Deputy Chief Information Officer for Information Technology Services, or by facsimile to (703) 308–7792. Although comments may be submitted by mail or facsimile, the USPTO prefers to receive comments by electronic mail message over the Internet. The USPTO also prefers that the comments be submitted as machine-readable submissions provided as unformatted text (e.g., ASCII or plain text), or as formatted text in Microsoft Word (Macintosh, DOS or Windows versions) or WordPerfect (Macintosh, DOS or Windows versions) format. If submitted by mail, machine-readable submissions may be provided on a 3 1/2-inch floppy disk formatted for use in either a Macintosh or MSDOS-based computer, and must be accompanied by a paper copy.

Any governmental entity or non-profit organization interested in acquiring the paper patent and trademark registration collections to be removed from the USPTO's public search facilities should contact Ronald Hack, Deputy Chief Information Officer for Information Technology Services by facsimile marked ''ATTN PAPER COLLECTIONS'' at (703) 308–7792.

FOR FURTHER INFORMATION CONTACT: Ronald Hack by telephone at (703) 305–9095, by facsimile at (703) 308–7792, by electronic mail at *ronald.hack@uspto.gov;* to Martha

Sneed by telephone at (703) 308–5558, by facsimile at (703) 306–2662, by electronic mail at *martha.sneed@uspto.gov;* or by mail addressed to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Washington, DC 20231, marked to the attention of Ronald Hack, Deputy Chief Information Officer for Information Technology Services.

SUPPLEMENTARY INFORMATION: The USPTO proposes a transition to electronic patent and trademark information collections in its on-campus public search facilities in Crystal City, Arlington, Virginia, by eliminating the classified paper patents and trademark registrations from the Patent Search Room located in Crystal Plaza 3/4, 2021 South Clark Place, and the Trademark Search Library located in the South Tower Building, 2900 Crystal Drive. The USPTO has determined that these collections are no longer needed for public reference because of the availability of mature and reliable replacement in-house electronic search systems in its public search facilities. The USPTO has devoted significant resources to the successful development of electronic search systems now widely used throughout the USPTO public search facilities. They provide equivalent functionality to the paper files and superior storage, maintenance and efficiency features. The paper classified files are incomplete by nature of the format. There may be missing or misfiled documents, potentially impacting search results which rely only on the paper classified files. Replacement of paper collections provides the USPTO the ability to migrate away from reliance on paper-based resources in its public search facilities and focus its limited resources on increased support of the electronic resources.

I. Introduction

Section 41(i)(1) of Title 35, United States Code (U.S.C.), requires the USPTO to maintain for use by the public collections of United States patents, foreign patent documents, and United States trademark registrations arranged to permit search for and retrieval of information. *See* 35 U.S.C. 41(i)(1). Section 4804(d)(1) of the American Inventors Protection Act of 1999 (AIPA) amended 35 U.S.C. 41(i)(1) to allow the USPTO to maintain an electronic collection of these documents, in place of the former requirement in 35 U.S.C. 41(i)(1) that the USPTO maintain a collection of these documents in paper or microfilm. *See* Public Law 106–113, 113 Stat. 1501, 1501A–589 (1999). Section 4804(d)(2) of the AIPA, however, provides that the USPTO shall not:

> cease to maintain, for use by the public, paper or microform collections of United States patents, foreign patent documents, and United States trademark registrations, except pursuant to notice and opportunity for public comment and except that the Director shall first submit a report to the Committees on the Judiciary of the Senate and the House of Representatives detailing such plan, including a description of the mechanisms in place to ensure the integrity of such collections and the data contained therein, as well as to ensure prompt public access to the most current available information, and certifying that the implementation of such plan will not negatively impact the public.

See Public Law 106–113, 113 Stat. at 1501A–590.

Section 41(i)(2) of Title 35, U.S.C., also provides that:

> The Director shall provide for the full deployment of the automated search systems of the Patent and Trademark Office so that such systems are available for use by the public, and shall assure full access by the public to, and dissemination of, patent and trademark information, using a variety of automated methods, including electronic bulletin boards and remote access by users to mass storage and retrieval systems.

The USPTO has been actively engaged in a program to automate access to U.S. patents and to U.S. trademark registrations for a number of years. The first automated search systems were publicly deployed in 1985 for U.S. trademarks and 1989 for U.S. patents and have been upgraded and enhanced to the extent that they now meet or surpass the U.S. paper collections in completeness and timeliness of newly added material, and provide equivalent or better functionality in search strategy. Patent examiners and trademark examining attorneys have used these systems daily since their inception. As a result, the USPTO has had feedback on the operation of these systems and knows that the systems perform to the task and are user friendly. A selected inventory of publicly available USPTO searchable databases is included in the Appendix.

These replacement electronic search systems now provide the USPTO the ability to migrate away from reliance on paper-based resources in its public search facilities and focus its limited resources on increased support of the electronic resources. The use of electronic systems has increased by public searchers to such a degree that the number of workstations in the public search facilities have increased from 33 in 1999 to 122 in 2002 to meet significantly higher demand. In fiscal year 2001, online system hours used by the public in USPTO's public search facilities totaled 90,990 hours, an increase of 36,357 hours over the previous fiscal year.

Therefore, consistent with the AIPA, this is the USPTO's proposed plan for an electronic public search facility. To accomplish a transition to electronic resources, the USPTO proposes to remove the two paper collections of search files currently available in the USPTO on-campus public search facilities. One collection consists of U.S. patent copies arranged by technology in accordance with the U.S. Patent Classification System. The other collection consists of U.S. trademark registration copies arranged by components specific to the registration.

II. Background

The Public Search Facilities of the USPTO serve as the on-campus facilities for the public to access United States patent and trademark information collections, and obtain training on and assistance with using these collections. All industrialized countries provide similar facilities or functionality at or through their respective national intellectual property offices. At the USPTO Public Search Facilities, patent and trademark information is provided to the public in a number of formats including the online examiner search systems, paper search files in classified and numeric sets, and multiple formats of source documents and additional data made available for a wide variety of research purposes. The public search facilities for patents and trademarks are physically separate.

The Patent Search Facilities consist of the Patent Search Room (PSR) where there are multiple formats of patent data including paper files and automated systems; the Patent Search and Image Retrieval Facility (PSIRF), which is a center for all electronic patent search and retrieval activities; and the Patent Assignment Search Room (PASR), which contains microfilm of ownership deed assignment, card files and automated search systems. The Patent Search Facilities provide public users access to classified paper files, numeric microfilm files, CD–ROM search collections, assignment systems, and the examiners' automated search systems, Examiner Automated Search Tool (EAST) and Web-based Examiner Search Tool (WEST). Numbers of public users in these facilities have been tracked since October 1999. Highest concurrent use in the Patent Search Facilities occurs at approximately 2 p.m. each day with 135 users. Online statistics show a

daily high of 256 unique users in the PSR and PSIRF combined.

The Trademark Search Library (TMSL) provides public user access to paper classified and numeric files as well as the automated search systems used by examining attorneys: X-Search, the USPTO's administrative database for tracking trademark applications and registrations, the Trademark Recording and Monitoring system (TRAM), and finally, the system that retains copies of all incoming applications, Trademark Information Capture and Retrieval System (TICRS). Data collections are maintained in several formats including paper, automated, microfilm, and CD–ROM. The trademark assignment of ownership collection is also available in the TMSL. There are approximately 35 public users daily in the TMSL.

The USPTO Public Search Facilities serve users who are highly skilled professional searchers conducting searches for law firms, business entities, and individuals. There is also a steady stream of new customers who use the facilities for a very limited time and for purposes of a fairly narrow scope. There are approximately 300 new users every month. Although paper files have been available throughout the deployment of our electronic search systems, use of electronic search systems has increased beyond our expectations. We have responded by adding extra workstations to ensure ready availability of the electronic search systems for all users.

The ability to conduct a complete patent or trademark search depends as much on the capability of the searcher as it does on the availability and completeness of the data. Expert searchers are not limited to residing in the Washington, DC area; nor are they limited to using the resources available in the USPTO on-campus search facilities. Electronic patent and trademark searching is also not a new phenomenon. Commercial online databases first appeared in the early 1970's. The USPTO has over 16 years of experience in providing online access to the public for its searchable databases. These 16 years have seen tremendous change and significant improvement in the systems available from the USPTO.

It should also be mentioned that the AIPA amended 35 U.S.C. 122 to provide for the publication of pending patent applications, with certain exceptions, promptly after the expiration of a period of eighteen months from the earliest filing date for which a benefit is sought (''eighteen-month publication''). *See Changes to Implement Eighteen-Month Publication of Patent Applications*, 65 FR 57023, 57024 (Sept. 20, 2000), 1239 *Off. Gaz. Pat. Office* 63, 64 (Oct. 10, 2000) (final rule). The Office has been publishing patent applications (''patent application publications'') electronically under the eighteen-month publication provisions of the AIPA since March of 2001. The Office does not maintain paper copy collections of these patent application publications in either the Public Search Room or the examiners' search rooms. The Office expects that, due to their earlier publication date, these patent application publications will over time replace patents as the primary prior art and technology dissemination document. *See Changes to Implement Eighteen-Month Publication of Patent Applications*, 65 FR at 57042, 1239 *Off. Gaz. Pat. Office* at 79 (response to comment 27). Thus, a complete prior art search must include a search of relevant patent application publications. Therefore, for the prior art search to be complete, any person conducting a prior art search must conduct an electronic search of these patent application publications.

The USPTO has invested, and continues to invest, a substantial portion of its appropriation in the maintenance of patent and trademark electronic databases and the development and enhancement of software search vehicles. As a result, trademark examining attorneys rely solely on electronic records for examining and approving marks for Federal registration. Additionally, in view of patent examiners' increasing reliance on automated searching, the USPTO began phased elimination of paper copies of U.S. patents from examiner search files beginning in October 2001. It is anticipated that by the time the agency completes its relocation and consolidation at the Carlyle campus in Alexandria, Virginia, in 2005, a substantial portion of the patent examiner paper search files will have been eliminated.

The USPTO's current planning approach to the dissemination of patent and trademark information is to continue enhancing its electronic databases that capture the content of patents and trademarks, and to continue to support the USPTO Web site, the network of 87 Patent and Trademark Depository Libraries, and the sale of its data products.

III. Proposed Plan for an Electronic Public Search Facility

A. Status of Replacement Electronic Search Systems

The U.S. patent image database contains the complete printed patent of all patents granted from 1790 to date, including bibliographic information, specifications, drawings and claims. Extensive efforts over a number of years have been undertaken to ensure that this database is as complete as possible. As patents issue each week on Tuesday, this database is updated the same day with that week's issue of patents. The U.S. patent image database is available in the public search facilities through the WEST and EAST search systems, and at no cost for search time. Both offer the ability to mimic the search through paper classified files by allowing users to retrieve patents by technology in accordance with the U.S. Patent Classification System. It provides a quick flip rate through the documents, the same way that one would conduct a search through a stack of paper patents. But unlike the paper file, the patent image database remains complete at all times and available to multiple users simultaneously.

The primary search tool used for trademark searches called X-Search, includes a reproduction of the mark, as well as other information, from every pending application and active registration. It also includes the mark, and other information, from any abandoned application, or any canceled or expired registration, unless the application was abandoned or the registration was expired or canceled before March 1, 1983. The database also includes the marks protected under Article 6ter of the Paris Convention for the Protection of Industrial Property. This database can be searched using a variety of approaches, e.g., by mark, by owner name, by filing date, etc. The database is updated daily, with new information concerning pending and registered trademarks. It surpasses the completeness and timeliness of the paper classified trademark registrations because, among other things, the paper document must be printed from the same system that uploads the data to the trademark database. Then the paper copies must be marked for filing, and then filed. This additional processing needed to maintain the paper classified trademark registration collection makes it a less timely collection, and therefore, less accurate to search. In addition, pending applications that abandoned after 1983 and before 1990 have been purged from the paper files but remain available in the electronic files. This makes the electronic search systems more comprehensive in scope.

The electronic systems that would replace the paper collections in the search facilities were developed specifically for use by USPTO examiners using a well-defined and long established process that guides and controls the development and

implementation of information technology initiatives. The USPTO, in making these systems available in the public search facilities, recognized that there might be different requirements for public access. The USPTO makes an effort to obtain public user requirements from internal and external sources, although enhancements required to achieve improved examiner productivity have priority. Enhancements to systems are announced in the search facilities and are often available for demonstration to the public prior to deployment. USPTO electronic search systems are well supported in the event of unscheduled downtime. Service goals for the public as well as the examining corps are in place and supported by USPTO management. Each step taken to correct an unscheduled interruption in service is documented, shared widely internally, and tracked for completion. Redundant formats of source documents are readily available in the public search facilities in microfilm, CD–ROM, DVD–ROM, and numerically arranged bound paper format, in the event of system downtime. Searchers may also utilize resources on the USPTO Web site.

Like paper files, errors can occur in electronic search systems. However, mechanisms are in place for tracking, reporting and fixing errors that are made as a result of internal processes. The paper classified files are incomplete by nature of the format. There may be missing or misfiled documents, potentially impacting search results which rely only on the paper classified files.

The USPTO follows the regulations and requirements of Federal agency records management, and the agency provides for effective controls over the maintenance of its records, in all media, paper and electronic, in accordance with 44 U.S.C. 3102. The agency has established effective controls for electronic information. Controls are in place throughout the life cycle of any information system that contains and provides access to computerized Federal records and nonrecord information. The USPTO is committed to ensuring the integrity of data when changes in media and format occur.

B. Paper Records Identified for Removal

The USPTO proposes to remove the following paper collections of patents and trademark registrations, located on USPTO premises in Arlington, Virginia, at the earliest time permitted by law. The descriptions and associated dispositions of these two collections are cited from the Comprehensive Records Schedule maintained by the agency as a records management requirement of National Archives and Records Administration (NARA).

1. *Patent Classified Search Files* (Patent Search Room, Crystal Plaza 3/4, Lobby Level-Room 1A01, 2021 South Clark Place)

Copies of printed domestic patents. Domestic patents are arranged first by group and then by subgroup. These copies are used to facilitate public patent searches by class and subclass.

Disposition

Nonrecord: Destroy when no longer needed for public reference.

2. *Registered Trademarks* (Trademark Search Library, South Tower Building, Room 2B30, 2900 Crystal Drive) Trademarks registered by the USPTO for national and international business, government, membership, and service organizations. Records consist of individual sheets by registration number cross-filed in the appropriate design categories and in the following groups: words, international registrations, art of manufacturing, and color marks. Includes foreign marks submitted under the Paris Convention by the WIPO and government agencies which entered their logos and weapons names into the search files under Executive Order 11628, FR vol.36, No. 203, Oct. 20, 1971. Covers records from 1870 to the present for paper copies. Used as the public reference copy.

Disposition

Nonrecord: Destroy when no longer needed for public reference.

The USPTO has determined that these collections are no longer needed for public reference because of the availability of mature and reliable replacement in-house electronic search systems in its public search facilities already described.

C. Public Comment

The USPTO undertook, as required by AIPA, a period of public comment on issues related to the removal of paper. *See Notice of Request for Comments on Development of a Plan to Remove the Patent and Trademark Classified Paper Files From the Public Search Facilities,* 66 FR 45012 (Aug. 27, 2001), 1250 *Off. Gaz. Pat. Office* 137 (Sept. 25, 2001). The original deadline for comment was September 29, 2001. The notice was subsequently reopened for comment on October 4, 2001, with a second deadline of October 29, 2001. A total of 49 responses were received. Both the original notice and all responses are available for viewing on the USPTO Web site at *www.uspto.gov.*

The USPTO received a number of comments that did not pertain to the paper removal plan. They included comments regarding patent text searching, foreign patent documents, non-patent literature, and questions that appear to be requests for information under the Freedom of Information Act, and are therefore not germane to the issue.

The notice particularly solicited input on the following items:

a. Measures required to ensure the integrity of electronic records.

b. Comparable functionality for searching and retrieving information from electronic records.

c. Reclassification of the patent electronic file.

d. Paper disposition.

D. Timetable for Removal of Paper Collections

The USPTO proposes to begin the removal of paper classified U.S. trademark registrations and U.S. patents at the earliest time permitted by law. It is anticipated that one collection would be completely removed before the removal of the other collection begins although no determination has yet been made about which of the two identified collections would be removed first. All paper identified for removal would be removed by the time the new electronic search facility opens in the USPTO's consolidated facility on the Carlyle site in Alexandria, Virginia, which is currently under construction. The space for the electronic search facility is expected to be available in the fall of 2004. The removal of paper would be handled in such a manner as to cause as little inconvenience and disruption to public users as possible.

E. Interim Steps

The USPTO, working with guidance from NARA, proposes to seek a governmental entity or non-profit organization to accept the two paper collections and assume the responsibility for their update and maintenance. Failing interest, the USPTO would seek opportunities for sale of the collections.

- At the time the USPTO begins seeking a governmental entity or non-profit organization to accept the two paper collections, the USPTO will stop adding any more weekly patent issues or trademark registrations to the collections. In addition, the USPTO would also begin moving certain paper collections from the public search facility for storage pending their transfer, sale, or destruction.

• The USPTO would continue to add workstations for the public to search databases as demand increases.

• The USPTO would continue to offer public training in all of its electronic search systems for varying levels of expertise.

• The USPTO would continue to offer specialized reference services tailored to the particular needs of novice users in patent and trademark searching.

• The USPTO would continue its efforts to comply with ergonomic design standards for computer workstations.

• The USPTO would continue to advise the public in the search facilities about progress regarding paper removal through a series of posted public notices, similar to public notices that have been posted in the past regarding equipment, systems and other issues impacting the public.

The USPTO would continue to refine its planned electronic public search facility for the new space in Alexandria to reflect ongoing developments in public use of the current facilities such as reducing wait times for system access and designing sufficient work and table spaces to maximize terminal use.

F. Final Status

At the completion of the removal of the two identified paper collections, the USPTO would consolidate its patent and trademark public search facilities into one consolidated electronic public search facility with the full complement of well-supported electronic search systems, trained staff, and ergonomic workstations.

Fees to access USPTO electronic search systems were temporarily suspended in the USPTO public search facilities beginning October 1, 1999. These fees would be permanently waived at the time of the disposal of the classified paper files so that access to all USPTO electronic search systems in the public search facilities would be free.

Charges for printing hard copies would remain in place.

Numeric sets of U.S. patents and U.S. trademark registrations would continue to be maintained in combinations of various formats including paper, microfilm, CD–ROM and DVD–ROM.

IV. Conclusion

The USPTO is mandated to operate in a cost-effective manner, and to continue moving toward an online environment for service delivery to its customers. The USPTO has devoted significant resources to the successful development of electronic search systems. These systems are now widely used throughout the USPTO public search facilities. They provide equivalent functionality to the paper files and superior storage, maintenance and efficiency features. The USPTO proposes to eliminate the classified paper patents and trademark registrations from the Trademark Search Library located in the South Tower Building, 2900 Crystal Drive, and the Patent Search Room located in the Crystal Plaza 3/4, 2021 South Clark Place. Elimination of these paper files is consistent with the USPTO's goals, strategic information technology plans, and the agency's operational practices.

V. Issues for Public Comment

A. To Present Written Comments

The USPTO wants to obtain comments and suggestions on the proposed plan for an electronic public search facility. Interested members of the public are invited to present oral or written comments on any issues they believe relevant to the proposed plan. The USPTO reserves the right to limit the number of public comments presented if necessary due to time constraints at the hearing, but will accept and consider all written comments submitted. In your response, please include the following:

• name and affiliation of the individual responding;

• clear identification of the matter being addressed;

• an indication of whether comments offered represent views of the respondent's organization or are the respondent's personal views; and

• if applicable, information on the respondent's organization, including the type of organization (e.g., business, trade group, university, non-profit organization).

B. To Request an Opportunity To Speak at the Hearing

Persons interested in speaking should send their request by electronic mail message over the Internet *to: paper-removal@uspto.gov.* Requests to speak should include:

• name and affiliation of the individual requesting the opportunity to speak;

• the organization represented by the respondent;

• contact information (address, telephone, e-mail);

• information on the specific focus or interest of the respondent or the respondent's organization.

Speakers should provide a written copy of their remarks for inclusion in the record.

VI. Interest in Acquiring the Paper Patent and Trademark Collections To Be Removed From the USPTO's Public Search Facilities

Any donation of the paper patent or trademark registration collections must comply with the NARA regulations for the donation of temporary records which are set out in 36 CFR 1228.60. For example, the donee must be a governmental entity or non-profit organization and must agree not to sell the patent or trademark registration collections except as wastepaper, the donation must be made without cost to the United States Government, and NARA must provide written approval of the donation. Thus, even if there is interest by a governmental entity or non-profit organization in acquiring the patent or trademark registration collections removed from the USPTO's public search facilities, the USPTO may still dispose of these collections as wastepaper if the USPTO cannot donate them to the governmental entity or non-profit organization in a cost-effective manner or if the USPTO cannot obtain written approval for the donation by NARA in a timely manner. Finally, as the USPTO will not be conducting a file integrity review of the patent or trademark registration collections as they are being removed from the public search facilities, the USPTO cannot assure that the patent or trademark registration collections being removed the public search facilities are complete.

Dated: April 3, 2002.

James E. Rogan,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

Appendix; Selected USPTO Electronic Databases and Search Tools Made Publicly Available

In the Public Search Facilities:

• Public EAST & WEST Systems: the full text of over 2.5 million U.S. patents issued since January 1971; the full images of over 6.5 million U.S. patents issued since 1790 and over 14.5 foreign patents; English translations of 5.1 million Japanese patent abstracts; and English translations of 3.1 million European patent abstracts.

• X-Search System: text and image of over 2.7 million trademark applications and registrations (including active, canceled, expired, and abandoned).

• Cassis2: A suite of optical disc products providing access to patent and trademark search tools, patent classification data, and selected bibliographic data.

• USAPat: Facsimile Images of United States Patents on DVD-ROM and CD-ROM

• USAMark: Facsimile Images of United States Trademark Registrations on CD-ROM

On the USPTO Web site:

- Trademark Electronic Search System (TESS): searchable database including the full text and clipped images of all registered trademarks;
- U.S. patents issued from 1790 through 1975—searchable by patent number and current U.S. patent classification;
- U.S. patents issued from 1976 to the most recent issue week—searchable by full-text fields that now include current U.S. classification data;
- Published applications; and
- Patent and trademark manuals and search tools.

[FR Doc. 02–8544 Filed 4–8–02; 8:45 am]

BILLING CODE 3510–16–P

COMMODITY FUTURES TRADING COMMISSION

Technology Advisory Committee Meeting

This is to give notice, pursuant to Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, 10(a) that the Commodity Futures Trading Commission's Technology Advisory Committee will conduct a public meeting on Wednesday, April 24, 2002. The meeting will take place in the first floor hearing room (Room 1000) of the Commission's Washington, DC, headquarters, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581 from 1 to 4:30 p.m. The purpose of the meeting is to discuss technology-related issues in the financial services and commodity markets.

The agenda will consist of the following:

I. Introduction
II. Cyber Security
III. Developments in Clearing
IV. Final Subcommittee Reports:
A. Standardization
B. Market Access
V. Other Business

The meeting is open to the public. The Chairman of the Advisory Committee, Commissioner Thomas J. Erickson, 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 file a written statement with the Advisory Committee should mail a copy of the statement to the attention of: The Technology Advisory Committee, c/o Commissioner Thomas J. Erickson, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, before the meeting. Members of the public who wish to make oral statements should inform Commissioner Erickson in writing at the foregoing address at least three business days before the meeting. Reasonable provision will be made, if time permits, for an oral presentation of no more than five minutes each in duration.

For further information concerning this meeting, please contact Natalie A. Markman or William Penner at 202–418–5060.

Issued by the Commission in Washington, DC, on April 3, 2002.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 02–8543 Filed 4–8–02; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Advisory Panel To Assess the Capabilities for Domestic Response to Terrorist Attacks Involving Weapons of Mass Destruction

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for the next meeting of the Panel to Assess the Capabilities for Domestic Response to Terrorist Attacks Involving Weapons of Mass Destruction. Notice of this meeting is require under the Federal Advisory Committee Act, (Pub. L. 92–463). Last minute meeting arrangements were not finalized until April 4, so this announcement must be made less than 15 days before the meeting will take place. Several members of the public who had attended past meetings have already been notified of this upcoming meeting.

DATES: April 11 and 12, 2002.

ADDRESSES: U.S. House of Representatives Budget Committee Hearing Room 210 Cannon, 1st Street and Independence Ave., SE., Washington, DC 20515.

FOR FURTHER INFORMATION CONTACT: RAND provides information about this Panel on its Web site at *http://www.rand.org/organization/nsrd/terrpanel*; it can also be reached at (703) 413–1100 extension 5321.

SUPPLEMENTARY INFORMATION:

Proposed Schedule and Agenda

Panel to Assess the Capabilities for Domestic Response to Terrorist Attacks Involving Weapons of Mass Destruction will meet from 9 a.m. until 5:30 p.m. on April 11, 2002 and from 9 a.m. until 12:30 p.m. on April 12, 2002. Time will be allowed for public comments by individuals or organizations at the end the meeting on April 12.

Public comment presentations will be limited to two minutes each and must be provided in writing prior to the meeting. Mail written presentations and requests to register to attend the open public session to: Nancy Rizor, RAND, 1200 South Hayes Street, Arlington, VA 22202–5050.

Public seating for this meeting is limited, and is available on a first-come, first-served basis.

Dated: April 5, 2002.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–8614 Filed 4–5–02; 3:16 pm]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary; Meeting of the Defense Finance and Accounting Service Board of Advisors

AGENCY: Office of the Under Secretary of Defense (Comptroller), Department of Defense.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for the second meeting of the Defense Finance and Accounting Service (DFAS) Board of Advisors. The Deputy Secretary of Defense chartered the Board on October 4, 2000, to provide advice and recommendations to the Secretary of Defense and Deputy Secretary of Defense regarding the mission of DFAS as it transforms its financial management operations, processes, and systems. The meeting will be open to the public. Notice of this meeting is required under the Federal Advisory Committee Act.

DATES: Wednesday, May 8, 2002.

ADDRESSES: Sheraton Crystal City, Ballroom A, 1800 Jefferson Davis Highway, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Contact Beverly A. Lemon, Corporate Planning, DFAS, Crystal Mall 3 (room 206), 1931 Jefferson Davis Highway, Arlington, VA 22240. Telephone (703) 607–5084.

SUPPLEMENTARY INFORMATION:

Proposed Schedule and Agenda

The Defense Finance and Accounting Service Board of Advisors will meet in open session from 2 p.m. to 4 p.m. on May 8, 2002. The meeting will include status of action items from the October 31, 2001, Board of Advisors meeting, status of the DFAS Corporate Balanced Scorecard, and the DFAS Transformation Plan.

Public seating is limited, and is available on a first-come first-served basis.

Dated: April 2, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–8473 Filed 4–8–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Office of the Secretary; Meeting of the Advisory Council on Dependents' Education

AGENCY: Department of Defense.

ACTION: Open meeting notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Appendix 2 of title 5, United States Code, Public Law 92–463, notice is hereby given that a meeting of the Advisory Council on Dependents' Education (ACDE) is scheduled to be held.

The purpose of the ACDE is to recommend to the Director, Department of Defense Education Activity (DoDEA), general policies for the operation of the Department of Defense Dependents Schools (DoDDS); to provide the Director with information about effective educational programs and practices that should be considered by DoDDS; and to perform other tasks as may be required by the Secretary of Defense. The meeting emphases will be on ACDE/North Central Association (NCA) team visits, pilot, and NCA DoDEA-wide school reports.

DATES: May 3, 2002, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Ramada Hotel Wiesbaden, Abraham Lincoln Strasse 17, Wiesbaden, 65189, Germany.

FOR FURTHER INFORMATION CONTACT: Ms. Marsha Jacobson, at 703–696–4235, extension 1990.

Dated: April 2, 2002.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 02–8472 Filed 4–8–02; 8:45 am]

BILLING CODE 5001–08–M

DEPARTMENT OF DEFENSE

Department of the Air Force

Headquarters United States Air Force Scientific Advisory Board

AGENCY: Department of the Air Force, DoD.

ACTION: Notice of meeting; correction.

SUMMARY: The Air Force published a notice of meeting of the Scientific Advisory Board in the **Federal Register** of March 20, 2002. The meeting date has changed.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Ripperger, Air Force Scientific Advisory Board Secretariat, 1180 Air Force Pentagon, Rm 5D982, Washington, DC 20330–1180 (703) 697–4811.

Correction

In the **Federal Register** of March 20, 2002, 67 FR 12978, second column, the dates should be changed from April 1, 2002 to read May 2–3, 2002. Also in the same notice, the addresses caption should be changed to read: Building 880, Room A49, Kirtland Air Force Base, NM.

Pamela D. Fitzgerald,

Air Force Federal Register Liaison Officer.

[FR Doc. 02–8539 Filed 4–8–02; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–301–045]

ANR Pipeline Company; Notice of Negotiated Rate Filing

April 3, 2002.

Take notice that on March 28, 2002, ANR Pipeline Company (ANR), tendered for filing one Firm Storage Service Agreement and a description of the essential conditions involved in agreeing to a Negotiated Rate Arrangement. ANR requests that the Commission approve the Negotiated Rate Arrangement to be effective on April 1, 2002.

ANR states that the filed Negotiated Rate Arrangement reflects a negotiated rate between ANR and Dynegy Marketing and Trade for transportation service, under one Storage Service agreement for a period to be effective beginning April 1, 2002, until June 30, 2007.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8507 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–383–039]

Dominion Transmission, Inc.; Notice of Compliance Filing

April 3, 2002.

Take notice that on March 28, 2002, Dominion Transmission, Inc. (DTI) submitted the following tariff sheet disclosing a negotiated rate transaction:

Second Revised Sheet No. 1402

DTI states that the tariff sheet relates to a negotiated rate transaction between DTI and Rochester Gas and Electric Corporation (RG&E). The transaction provides RG&E with firm transportation service and conforms to the forms of service agreement contained in DTI's tariff. The term of the agreement is for a primary term of April 1, 2002, through March 31, 2003, and from year to year thereafter. DTI requests an effective date of April 1, 2002 for Second Revised Sheet No. 1402.

DTI states that copies of its filing have been served upon DTI's customers, interested state commissions and on all persons on the official service list compiled by the Secretary of the Commission for this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section

154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8506 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–218–000]

East Tennessee Natural Gas Company; Notice of Annual Cashout Report

April 3, 2002.

Take notice that on March 29, 2002, East Tennessee Natural Gas Company (East Tennessee) tendered for filing its annual cashout report for the November 2000 through October 2001 period in accordance with Rate Schedules LMS–MA and LMS–PA.

East Tennessee states that report reflects a net loss from cashouts of $2,361,019 for the November 2000 through October 2001 reporting period. In accordance with its Rate Schedules LMS–MA and LMS–PA, East Tennessee will roll this loss forward into its next annual cashout report.

East Tennessee states that copies of the filing were mailed to all affected customers of East Tennessee and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before April 10, 2002. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8512 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–340–003]

Gulf South Pipeline Company, LP; Notice of Compliance Filing

April 3, 2002.

Take notice that on March 28, 2002, Gulf South Pipeline Company, LP (Gulf South) tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, the tariff sheets listed on Attachment A to the filing, to become effective May 1, 2002.

Gulf South states that these sheets implement Gulf South's changes in compliance with Order No. 637 which were not subject to modification in the Commissions March 14, 2002 Order in this docket.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8508 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–122–001]

Kinder Morgan Interstate Gas Transmission LLC; Notice of Compliance Filing

April 3, 2002.

Take notice that on March 29, 2002, Kinder Morgan Interstate Gas Transmission LLC (KMIGT) tendered for filing its compliance filing to respond to certain requests for information addressed in the Commission's March 13 Order in this proceeding.

KMIGT states that it has served copies of this filing upon all parties to this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8509 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP02–124–000]

National Fuel Supply Corporation; Notice of Application

April 3, 2002.

On March 25, 2002, National Fuel Supply Corporation (National Fuel), 10 Lafayette Square, Buffalo, New York 14203, filed an application in Docket No. CP02–124–000 pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Federal Energy Regulatory Commission's (Commission) Regulations for amendment of its certificate of public convenience and necessity to authorize a revised storage field area for its Beech Hill Storage Field (Beech Hill) in Allegany County, New York, all as more fully set forth in the application on file with the Commission and open to public inspection. This filing may be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket #'' and follow the instructions (call (202)208–2222 for assistance).

Any questions regarding this application should be directed to David W. Reits, Assistant General Counsel for National Fuel, 10 Lafayette Square, Buffalo, New York 14203, or call at (716) 857–7949

Specifically, National Fuel requests Commission authorization to extend Beech Hill's pool boundary in the area southwest of the field. National Fuel also proposes a corresponding extension of the Beech Hill buffer zone. These changes will add 799 acres to the map are of Beach Hill, inclusive of the buffer zone addition. National Fuel states that newer seismic data and analysis of reprocessed older seismic data support the extension of Beech Hill.

National Fuel's application also seeks authorization to add approximately 2,115 acres of the state Line Field, located to the southwest of Beech Hill, to the Beech Hill map area (this additional acreage will be designated as the Beech Hill Annex). National Fuel states that the Oriskany formation within the Beech Hill Annex is in communication with Beech Hill and that gas stored in Beech Hill has migrated into the Beech Hill Annex area. It is further indicated that if the State Line Field is jointly developed for storage operation by National Fuel, Dominion Transmission, Inc., and Tennessee Gas Pipeline Company, as the companies contemplate, National Fuel would seek further authorization to amend the map area of the Beech Hill Storage Field to restore the Beech Hill Annex to the State Line Field. At such time, the pressure of the Oriskany formation in the State Line Field would be raised, limiting or eliminating the migration of gas from Been Hill.

National Fuel also seeks temporary authorization to withdraw gas from two wells within the proposed Beech Hill Annex pending permanent authorization.

According to National Fuel, the pending application does not seek to change either the capacity or deliverability of the storage field, nor are there any new facilities associated with the application.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before April24, 2002, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project. This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the applicant, on other pipelines in the area, and on landowners and communities. For example, the Commission considers the extent to which the applicant may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying certificate will be issued.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8503 Filed ?–??–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–217–000]

Panhandle Eastern Pipe Line Company; Notice of Proposed Changes in FERC Gas Tariff

April 3, 2002.

Take notice that on March 29, 2002, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the tariff sheets listed on Appendix A attached to the filing to become effective May 1, 2002.

Panhandle states that this filing is made in accordance with Section 25 (Flow Through of Cash-Out Revenues and Penalties In Excess of Costs) of the General Terms and Conditions (GT&C) in Panhandle's FERC Gas Tariff, First Revised Volume No. 1. The revised tariff sheets filed herewith reflect there will be no Section 25 adjustment in effect for the period May 1, 2002 through April 30, 2003.

Panhandle further states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8511 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–216–000]

Reliant Energy Gas Transmission Company; Notice of Crediting Report

April 3, 2002.

Take notice that on March 28, 2002, Reliant Energy Gas Transmission Company (REGT) tendered for filing its Annual Revenue Crediting Filing pursuant to its FERC Gas Tariff, Fifth Revised Volume No. 1, Section 5.7(c)(ii)(2)B (Imbalance Cash Out), Section 23.2(b)(iv) (IT, SBS and PHS Revenue Crediting) and Section 23.7 (IT Revenue Credit).

REGT states that its filing addresses the period from February 1, 2001 through January 31, 2002. The IT and FT Cash Balancing Revenue Credits and the IT Revenue Credit for the period reflected in this filing are zero. Since REGT's current tariff sheets already reflect zero Cash Balancing and IT Revenue Credits, no tariff revisions are necessary.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before April 10, 2002. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8510 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT02–13–000]

Tennessee Gas Pipeline Company; Notice of Tariff Filing

April 3, 2002.

Take notice that on March 28, 2002, Tennessee Gas Pipeline Company (Tennessee), tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, Fourth Revised Sheet No. 402, with an effective date of May 1, 2002.

Tennessee states that the revised tariff sheet is being filed to reconcile a potential conflict between the General Terms and Conditions (GT&C) of its FERC Gas Tariff and its *pro forma* storage agreement under Rate Schedule FS, by removing the March 31 termination date requirement for Rate Schedule FS agreements from Article XXVIII Section 2(b) of its GT&C. Tennessee further states that the proposed changes will enable Tennessee to offer its customers the contracting flexibility they have requested.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. *See*, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8505 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP02–125–000]

Texas Gas Transmission Corporation; Notice of Application

April 3, 2002.

Take notice that on March 27, 2002, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP02–125–000, for: (1) An application pursuant to section 7(b) of the Natural Gas Act (NGA) for authorization to abandon by sale to ATP Oil & Gas Corporation (ATP) certain supply lateral facilities extending from West Cameron Area Block 237 to West Cameron Area Block 250, offshore Louisiana and (2) a request for jurisdictional determination that, upon approval of the abandonment by sale, such facilities will be gathering facilities, and ATP's ownership and operation of the subject supply lateral facilities will be exempt from Commission jurisdiction under the NGA, all as more fully set forth in the application which is on file with the Commission and open to public inspection. Copies of this filing are on file with the Commission and are available for public inspection. This filing may be viewed on the web at http://www.ferc.gov using the ''RIMS'' link, select ''Docket #'' from the RIMS Menu and follow the instructions (call (202) 208–2222 for assistance).

Texas Gas states that it has entered into an agreement with ATP whereby Texas Gas will, upon Commission approval, transfer by sale to ATP certain supply lateral facilities consisting of approximately 4.436 miles of 12-inch diameter pipeline, measurement facilities, and various valves and equipment, located in West Cameron Area Block 237 and terminating in West Cameron Area Block 250, offshore Louisiana.

Texas Gas indicates that the proposed abandonment will permit Texas Gas to divest itself of a supply lateral, which is remote from, and not integrated with, its mainline transmission system, and which was constructed to support its former merchant function. Texas Gas avers that it no longer requires the subject supply lateral to access gas supplies, and that these facilities are not integral to Texas Gas' current role as an open-access transporter. Texas Gas asserts that abandonment of the subject facilities will enable Texas Gas to streamline its transmission operations by eliminating certain operating costs associated with maintaining facilities that are not part of Texas Gas' contiguous system.

Texas Gas states that the transfer of the subject supply lateral facilities will not adversely affect any of their current customers. Texas Gas declares that there are no firm transportation commitments involving utilization of those facilities. Texas Gas avers that after the transfer, ATP indicates that it will provide non-jurisdictional service on a non-discriminatory basis. Texas Gas asserts that availability of service through these facilities will not be impaired as a result of Texas Gas' transfer of these facilities to ATP.

Texas Gas states that ATP will pay Texas Gas the sum of $100 for Texas Gas' interest (100%) in the facilities. Texas Gas indicates that in recognition of the costs associated with any future retirement of these facilities by ATP, an agreement provides for Texas Gas to pay ATP actual and reasonable costs associated with retirement up to $100,000.

Any questions regarding this application should be directed to David N. Roberts, Manager of Certificates and Tariffs, Texas Gas Transmission Corporation, P.O. Box 20008, Owensboro, Kentucky 42304, at (270) 688–6712.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before April 24, 2002, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project. This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the applicant, on other pipelines in the area, and on landowners and communities. For example, the Commission considers the extent to which the applicant may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a

final Commission order approving or denying a certificate will be issued.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8504 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–504–003, et al.]

Dayton Power and Light Company, et al.; Electric Rate and Corporate Regulation Filings

April 3, 2002.

Take notice that the following filings have been made with the Commission. Any comments should be submitted in accordance with Standard Paragraph E at the end of this notice.

1. Dayton Power and Light Company

[Docket No. ER02–504–003]

Take notice that on March 28, 2002, Dayton Power and Light (DP&L) tendered for filing an amendment to a service agreement between The Dayton Power and Light Company (DP&L) and DP&L Energy Services in the above captioned docket.

Comment Date: April 18, 2002.

2. New York Independent System Operator, Inc.

[Docket No. ER02–638–001]

Take notice that on March 29, 2002, the New York System Operator, Inc. (NYISO) filed revisions to its Open Access Transmission Tariff and Services Tariff pursuant to the Commission's February 26, 2002 order. The purpose of this filing is to eliminate tariff provisions pertaining to the NYISO's three proposed pre-scheduling enhancements which the February 26 Order rejected without prejudice. The NYISO has requested an effective date of April 11, 2002, for the compliance filing.

The NYISO has mailed a copy of this compliance filing to all persons that have filed interconnection applications or executed Service Agreements under the NYISO Open Access Transmission Tariff, to the New York State Public Service Commission, and to the electric utility regulatory agencies in New Jersey and Pennsylvania. The NYISO has also mailed a copy to each person designated on the official service list maintained by the Commission for the above-captioned proceeding.

Comment Date: April 19, 2002.

3. Entergy Power Ventures, L.P.

[Docket No. ER02–862–001]

Take notice that on March 29, 2002, Entergy Power Ventures, L.P., tendered for filing with the Federal Energy Regulatory Commission (Commission) revised tariff sheets pursuant to a Commission order issued on March 19, 2002.

Copies of this filing have been served on the Arkansas Public Service Commission, Mississippi Public Service Commission, Louisiana Public Service Commission, Texas Public Utility Commission, and the Council of the City of New Orleans.

Comment Date: April 19, 2002.

4. California Independent System Operator Corporation

[Docket No. ER02–1403–000]

Take notice that on March 29, 2002, the California Independent System Operator Corporation, (ISO) tendered for filing with the Federal Energy Regulatory Commission (Commission) a Participating Generator Agreement between the ISO and El Dorado Irrigation District for acceptance by the Commission.

The ISO states that this filing has been served on El Dorado Irrigation District and the California Public Utilities Commission. The ISO is requesting waiver of the 60-day notice requirement to allow the Participating Generator Agreement to be made effective March 19, 2002.

Comment Date: April 19, 2002.

5. California Independent System Operator Corporation

[Docket No. ER02–1404–000]

Take notice that on March 29, 2002, the California Independent System Operator Corporation, (ISO) tendered for filing with the Federal Energy Regulatory Commission (Commission) a Participating Generator Agreement between the ISO and El Dorado Irrigation District for acceptance by the Commission.

The ISO states that this filing has been served on El Dorado Irrigation District and the California Public Utilities Commission. The ISO is requesting waiver of the 60-day notice requirement to allow the Participating Generator Agreement to be made effective March 19, 2002.

Comment Date: April 19, 2002.

6. Northeast Utilities Service Company

[Docket No. ER02–1405–000]

Take notice that on March 29, 2002, Northeast Utilities Service Company (NUSCO), on behalf of The Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, and Select Energy, Inc., submitted pursuant to Section 205 of the Federal Power Act and Part 35 of the Federal Energy Regulatory Commission's (Commission) regulations, rate schedule changes for sales of electricity to the City of Chicopee, Massachusetts (Chicopee).

NUSCO states that a copy of this filing has been mailed to Chicopee and the regulatory commission for the Commonwealth of Massachusetts. NUSCO requests that the rate schedule changes become effective on March 31, 2002.

Comment Date: April 19, 2002.

7. Acadia Power Partners, LLC

[Docket No. ER02–1406–000]

Take notice that on March 29, 2002, Acadia Power Partners, LLC (the Applicant) tendered for filing, under section 205 of the Federal Power Act (FPA), a request for authorization to make wholesale sales of electric energy, capacity, replacement reserves, and ancillary services at market-based rates, to reassign transmission capacity, and to resell firm transmission rights. Applicant proposes to own and operate a nominal 1100-megawatt electric generation facility located in Louisiana. Applicant also submitted for filing two power purchase agreements for which it requests privileged treatment.

Comment Date: April 19, 2002.

8. Entergy Services, Inc.

[Docket No. ER02–1407–000]

Take notice that on March 29, 2002, Entergy Services, Inc., (Entergy) on behalf of Entergy Arkansas, Inc., tendered for filing a Long-Term Market Rate Sales Agreement between Entergy Arkansas, Inc. and East Texas Electric Cooperative, Inc. under Entergy Services, Inc.''s Rate Schedule SP.

Entergy requests an effective date of March 1, 2002.

Comment Date: April 19, 2002.

9. Entergy Services, Inc.

[Docket No. ER02–1408–000]

Take notice that on March 29, 2002, Entergy Services, Inc., on behalf of Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc., (collectively, the Entergy Operating Companies) tendered for filing a Non-Firm Point-To-Point Transmission Service Agreement and a Short-Term Firm Point-To-Point Transmission Service Agreement both between Entergy Services, Inc., as agent for the Entergy Operating Companies, and TECO EnergySource, Inc.

Comment Date: April 19, 2002.

10. American Electric Power Service Corporation

[Docket No. ER02–1409–000]

Take notice that on March 29, 2002, the American Electric Power Service Corporation (AEPSC), tendered for filing Firm and Non-Firm Point-to-Point Transmission (PTP) Service Agreements and Long-Term Firm PTP Service Agreement Specifications for North Carolina Electric Membership Corporation (NCEMC). These agreements are pursuant to the AEP Companies' Open Access Transmission Service Tariff that has been designated as the Operating Companies of the American Electric Power System FERC Electric Tariff Second Revised Volume No. 6.

AEPSC requests waiver of notice to permit the Service Agreements to be made effective on and after March 1, 2002. A copy of the filing was served upon the Parties and the state utility regulatory commissions of Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

Comment Date: April 19, 2002.

11. West Texas Utilities Company

[Docket No. ER02–1410–000]

Take notice that on March 29, 2002, West Texas Utilities Company (WTU) submitted for filing ERCOT Regional Transmission Service Agreements with Brazos Electric Power Cooperative, Inc., Big Country Electric Cooperative, Inc., Coleman County Electric Cooperative, Inc., Concho Valley Electric Cooperative, Inc., Lighthouse Electric Cooperative, Inc., Pedernales Electric Cooperative, Inc., Rio Grande Electric Cooperative, Inc., Southwest Texas Electric Cooperative, Inc. and Taylor Electric Cooperative, Inc. and Network Integration Transmission Service Agreements with Golden Spread Electric Cooperative, Inc. and Lighthouse Electric Cooperative, Inc. to reflect the inclusion of customer specific directly assigned distribution charges.

WTU seeks an effective date of April 1, 2002 and, accordingly, seeks waiver of the Commission's notice requirements. WTU served a copy of the filing on each of the affected customers and the Public Utilities Commission of Texas.

Comment Date: April 18, 2002.

12. MNS Wind Company LLC

[Docket No. ER02–1411–000]

Take notice that on March 28, 2002, MNS Wind Company LLC (MNS) petitioned the Federal Energy Regulatory Commission (Commission) for authority to sell electricity at market-based rates under Section 205(a) of the Federal Power Act, for the granting of certain blanket approvals and for the waiver of certain Commission regulations. MNS is a limited liability company that proposes to engage in the wholesale sale of electric power in the state of Nevada.

Comment Date: April 18, 2002.

13. NRG Rockford II LLC

[Docket No. ER02–1412–000]

Take notice that on March 28, 2002, NRG Rockford II LLC, a limited liability corporation organized under the laws of the State of Illinois, filed under section 205 of the Federal Power Act, a request that the Federal Energy Regulatory Commission (Commission) (1) accept for filing a proposed market-based FERC Rate Schedule and Service Agreement thereunder; (2) grant blanket authority to make market-based wholesale sales of capacity and energy under its FERC Rate Schedule; (3) grant authority to sell ancillary services at market-based rates; and (4) grant such waivers and blanket authorizations as the Commission has granted in the past to other nonfranchised entities with market-based rate authority.

Comment Date: April 18, 2002.

14. Columbus Southern Power Company

[Docket No. ER02–1413–000]

Take notice that on March 28, 2002, Columbus Southern Power Company (CSP), tendered for filing with the Federal Energy Regulatory Commission's (Commission) Notice of Cancellation for Service Agreement No. 2 under FERC Electric Tariff, Fifth Revised Volume No. 1 (Service Agreement No. 2), which became effective on October 1, 1984.

CSP states that the City of Jackson, Ohio (Jackson), the only customer served by CSP under Service Agreement No. 2, provided written notification of Jackson's election to terminate Service Agreement No. 2, and that CSP and Jackson have agreed that Service Agreement No. 2 and service to Jackson under CSP's cost-based rates would terminate March 31, 2002.

Since no service is to be provided by CSP under Service Agreement No. 2 after March 31, 2002, CSP requests, for good cause shown, in accordance with Section 35.15 of the Commission's Regulations, that its Notice of Cancellation be made effective as of April 1, 2002.

CSP further states that copies of its filing have been served upon the Public Utilities Commission of Ohio and Jackson.

Comment Date: April 18, 2002.

15. American Electric Power Service Corporation

[Docket No. ER02–1414–000]

Take notice that on March 28, 2002 American Electric Power Service Corporation tendered for filing three (3) Service Agreements which include a Service Agreement for a new customer and two replacement Service Agreements for existing customers under the AEP Companies' Power Sales Tariffs. The Power Sales Tariffs were accepted for filing effective October 10, 1997 and have been designated AEP Operating Companies' FERC Electric Tariff Original Volume No. 5 (Wholesale Tariff of the AEP Operating Companies) and FERC Electric Tariff Original Volume No. 8, effective January 8, 1998 in Docket No. ER98–542–000 (Market-Based Rate Power Sales Tariff of the CSW Operating Companies). AEPSC respectfully requests waiver of notice to permit the attached Service Agreements to be made effective on or prior to March 1, 2002.

A copy of the filing was served upon the Parties and the State Utility Regulatory Commissions of Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

Comment Date: April 18, 2002.

16. American Transmission Systems, Inc.

[Docket No. ER02–1415–000]

Take notice that on March 28, 2002, American Transmission Systems, Inc., filed a Service Agreement to provide Non-Firm Point-to-Point Transmission Service for UBS AG, London Branch, the Transmission Customer. Services are being provided under the American Transmission Systems, Inc. Open Access Transmission tariff submitted for filing by the Federal Energy Regulatory Commission (Commission) in Docket No. ER99–2647–000. The proposed effective date under the Service Agreement is March 27, 2002 for the above mentioned Service Agreement in this filing.

Comment Date: April 18, 2002.

17. American Transmission Systems, Inc.

[Docket No. ER02–1416–000]

Take notice that on March 28, 2002, American Transmission Systems, Inc., filed a Service Agreement to provide Firm Point-to-Point Transmission Service for UBS AG, London Branch, the Transmission Customer. Services are

being provided under the American Transmission Systems, Inc. Open Access Transmission tariff submitted for filing by the Federal Energy Regulatory Commission (Commission) in Docket No. ER99–2647–000. The proposed effective date under the Service Agreement is March 27, 2002 for the above mentioned Service Agreement in this filing.

Comment Date: April 18, 2002.

18. Virginia Electric and Power Company

[Docket No. ER02–1417–000]

Take notice that on March 27, 2002, Virginia Electric and Power Company (Dominion Virginia Power or the Company) tendered for filing the following Service Agreement for Firm Point-to-Point Transmission Service by Virginia Electric and Power Company to Progress Ventures Inc. designated as Service Agreement No. 353 under the Company's FERC Electric Tariff, Second Revised Volume No. 5.

Service Agreement for Non-Firm Point-to-Point Transmission Service by Virginia Electric and Power Company to Progress Ventures Inc. designated as Service Agreement No. 354 under the Company's FERC Electric Tariff, Second Revised Volume No. 5.

The foregoing Service Agreements are tendered for filing under the Open Access Transmission Tariff to Eligible Purchasers effective June 7, 2000. Under the tendered Service Agreements, Dominion Virginia Power will provide point-to-point service to Progress Ventures Inc. under the rates, terms and conditions of the Open Access Transmission Tariff.

Dominion Virginia Power requests an effective date of March 20, 2002, as requested by the customer. Copies of the filing were served upon Progress Ventures Inc., the Virginia State Corporation Commission, and the North Carolina Utilities Commission.

Comment Date: April 18, 2002.

19. South Carolina Electric & Gas Company

[Docket No. ER02–1418–000]

Take notice that on March 28, 2002, South Carolina Electric & Gas Company (SCE&G) filed a Network Integration Transmission Service Agreement and a Network Operating Agreement between SCE&G Electric Transmission and SCE&G Merchant Function (Agreement), under which SCE&G Merchant Function will take transmission service pursuant to SCE&G Electric Transmission's Open Access Transmission Service Tariff in order to provide the transmission service necessary to allow SCE&G to provide power and energy to the City of Greenwood, South Carolina (Greenwood) pursuant to an agreement with Greenwood under SCE&G's Negotiated Market Sales Tariff. SCE&G has requested an effective date for this Agreement of March 1, 2002.

SCE&G states that a copy of the filing has been served on SCE&G Merchant Function, Greenwood and the South Carolina Public Service Commission.

Comment Date: April 18, 2002.

20. South Carolina Electric & Gas Company

[Docket No. ER02–1419–000]

Take notice that on March 28, 2002 South Carolina Electric & Gas Company (SCE&G) filed a Full Requirements Firm Power Service Agreement (Agreement) between SCE&G the City of Greenwood, South Carolina (Greenwood), under which SCE&G will provide full requirements firm power service pursuant to SCE&G's Network Market Sales Tariff.

SCE&G has requested an effective date for this Agreement of March 1, 2002.SCE&G states that a copy of the filing has been served on Greenwood and the South Carolina Public Service Commission.

Comment Date: April 18, 2002.

Standard Paragraph

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8502 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL01–105–001, et al.]

The New Power Company, et al.; Electric Rate and Corporate Regulation Filings

March 29, 2002.

Take notice that the following filings have been made with the Commission. Any comments should be submitted in accordance with Standard Paragraph E at the end of this notice.

1. The New Power Company v. PJM Interconnection, L.L.C.

[Docket No. EL01–105–001]

Take notice that on March 26, 2002, PJM Interconnection, L.L.C. (PJM) tendered for filing with the Federal Energy Regulatory Commission (Commission), pursuant to the Commission's February 27, 2002 ''Order Denying Complaint,'' revisions to the PJM Open Access Transmission Tariff (PJM Tariff), Schedule M, to implement requirements that the PJM Market Monitoring Unit notify the Commission of significant market problems that may require investigation, a change in the PJM Tariff or market rules, or action by the Commission and/or state commissions.

Copies of this filing have been served on all PJM Members and the state electric regulatory commission in the PJM region.

Comment Date: April 16, 2002.

2. New York Independent System Operator, Inc.

[Docket Nos. ER01–3155–002, ER01–1385–010 and EL01–45–009]

Take notice that on March 20, 2002, the New York Independent System Operator, Inc. (NYISO) filed with the Federal Energy Regulatory Commission (Commission) revisions to its Market Administration and Control Area Services Tariff in order to comply with the Commission's November 27, 2001 Order issued in above-referenced proceedings.

On March 26, 2002, NYISO filed two corrected pages to its Compliance Filing regarding Comprehensive Market Mitigation Measures and Request for

Interim Extension of Existing Automated Mitigation Procedure.

The NYISO has served copies of these filings to all parties that have executed Service Agreements under the NYISO's Open-Access Transmission Tariff or Services Tariff, to the New York State Public Service Commission, the electric utility regulatory agencies in New Jersey and Pennsylvania and on the services lists in the above-referenced dockets.

Comment Date: April 16, 2002.

3. Pacific Gas and Electric Company

[Docket No. ER02–847–001]

Take notice that on March 27, 2002, Pacific Gas and Electric Company (PG&E) filed rate sheets with appropriate rate schedule and sheet designations in compliance with Order No. 614 and the March 20, 2002 Letter Order issued by the Director, Division of Tariffs and Rates—West accepting PG&E's true-up rates for the years 1998, 1999, and 2000, and rate schedule designations for PG&E First Revised Rate Schedule FERC No. 79, in the above-referenced docket.

Copies of this filing have been served upon the Western Area Power Administration and the California Public Utilities Commission.

Comment Date: April 17, 2002.

3. PSI Energy, Inc.

[Docket No. ER02–591–002]

Take notice that on March 27, 2002, PSI Energy, Inc. (PSI), tendered for filing with the Federal Energy Regulatory Commission (Commission) its Transmission and Local Facilities Agreement (Agreement) including Exhibits and the 2000 Reconciliation Summaries between PSI, Indiana Municipal Power Agency and Wabash Valley Power Association, Inc. The Agreement has been designated as PSI's Rate Schedule FERC No. 253.

Comment Date: April 17, 2002.

4. PSI Energy, Inc.

[Docket No. ER02–591–002]

Take notice that on March 27, 2002, PSI Energy, Inc. (PSI), tendered for filing with the Federal Energy Regulatory Commission (Commission) its Transmission and Local Facilities Agreement (Agreement) including Exhibits and the 2000 Reconciliation Summaries between PSI, Indiana Municipal Power agency and Wabash Valley Power Association, Inc. The Agreement has been designated as PSI's Rate Schedule FERC No. 253.

Comment Date: April 17, 2002.

5. Central Maine Power Company

[Docket No. ER02–1393–000]

Take notice that on March 27, 2002, Central Maine Power Company (CMP) filed a revised ''Service Agreement For Local Network Transmission Service For Retail Customers'' (LNS Agreement) which describes the terms and conditions of delivery service being provided by CMP and being taken by Calpine Construction Finance Company, L.P. (Calpine) in connection with its generating facility in Westbrook, Maine.

Comment Date: April 17, 2002.

6. Michigan Electric Transmission Company

[Docket No. ER02–1394–000]

Take notice that on March 27, 2002, Michigan Electric Transmission Company (Michigan Transco) tendered for filing A Notice of Cancellation of Transmission Service Agreements between Michigan Transco and Nordic Electric, LLC (Service Agreement No. 12 under the International Transmission Company/Michigan Transco's Joint FERC Electric Tariff No. 1) and between Michigan Transco and DTE Energy Marketing (Service Agreement No. 1 under the International Transmission Company/Michigan Transco's Joint FERC Electric Tariff No. 1), effective December 31, 2001.

Copies of this filing have been served on DTE Energy Marketing and Nordic Electric, LLC.

Comment Date: April 17, 2002.

7. Rochester Gas and Electric Corporation

[Docket No. ES02–27–000]

Take notice that on March 27, 2002, Rochester Gas and Electric Corporation submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to issue short-term securities in the aggregate amount of $200 million pursuant to (1) a $30 million promissory note with the Chase Manhattan Bank, N.A. backed by a Security and Loan Agreement, and (2) various promissory notes issued under lines of credit with various banks.

Comment Date: April 19, 2002.

Standard Paragraph

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. 02–8501 Filed 4–8–02; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7169–2]

Agency Information Collection Activities: Proposed Collection; Comment Request; Commuter Choice Leadership Initiative

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit the following proposed Information Collection Request (ICR) to the Office of Management and Budget (OMB): Information Collection Activities Associated With the Commuter Choice Leadership Initiative (CCLI). Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before June 10, 2002.

ADDRESSES: Commuter Choice Leadership Initiative, U.S. EPA—Mail Code 6406J, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

Interested parties may obtain a copy of the ICR by writing to the above address or sending an email to *commuterchoice@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Gwen Couts, 202–564–9347.

SUPPLEMENTARY INFORMATION: *Affected entities:* Entities potentially affected by

this action are those that join the voluntary Commuter Choice Leadership Initiative. No other entities are affected.

Title: Information Collection Activities Associated With the Commuter Choice Leadership Initiative; EPA ICR No. 2053.01

Abstract: EPA and the U.S. Department of Transportation (DOT) are launching the Commuter Choice Leadership Initiative (CCLI), a voluntary program for employer-provided commuter benefits in which employers that meet or exceed a national standard of excellence are recognized by EPA. Employers voluntarily sign an Agreement with EPA committing themselves to taking certain actions that will result in reducing the number of single-occupancy vehicles being driven to the workplace, thereby reducing vehicle emissions. Data collection is required for two reasons: to make certain that participating employers are meeting the terms of the agreement and to evaluate the effectiveness of the program. Respondents can be from any kind of employer. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Burden Statement: Total annual burden is estimated at 46,189 hours plus non-labor costs of $493. 41,759 of these hours are projected to come from private entities with the remainder from state and local governments. The projected number of respondents is 400 per year, with fewer in the first year and more in the third. Burden represents once annually reporting estimated to incur a burden of 115 hours per respondent. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: March 19, 2002.

Robert E. Larson,

Division Director, Transportation and Regional Programs Division.

[FR Doc. 02–8534 Filed 4–8–02; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7169–3]

Agency Information Collection Activities: Proposed Collection; Comment Request; Disinfectants/Disinfection Byproducts, Chemical and Radionuclides Rules: Lead and Copper Rule Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit the following continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB): Disinfectants/Disinfection Byproducts, Chemical and Radionuclides Rules: Lead and Copper Rule Amendment, EPA ICR No. 1896.03, OMB Control No. 2040–0204 which expires September 30, 2002. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before June 10, 2002.

ADDRESSES: To obtain a copy of the draft Disinfectants/Disinfection Byproducts, Chemical, and Radionuclides Rules: Lead and Copper Rule Amendment ICR without charge, please contact the Safe Drinking Water Hotline (800–426–4791). Hours of operation are 9:00 a.m. to 5:30 p.m. (ET), Monday–Friday, excluding Federal holidays. People interested in getting information or making comments about the Disinfectants/Disinfection Byproducts, Chemical, and Radionuclides Rules: Lead and Copper Rule Amendment ICR should direct inquiries or comments to the Office of Ground Water and Drinking Water, Drinking Water Protection Branch, Mail Code 4606M, 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: Lisa Christ at (202)564–8354, fax (202) 564–3755, *e-mail:christ.lisa@epa.gov.*

SUPPLEMENTARY INFORMATION: *Affected entities:* Entities potentially affected by this action are Public Water Systems, primacy agents including regulators in the States, Puerto Rico, the U.S. Trust Territories; Indian Tribes and Alaska Native Villages, and in some instances, U. S. EPA Regional Administrators and staff.

Title: Disinfectants/Disinfection Byproducts, Chemical and Radionuclides Rules: Lead and Copper Rule Amendment, EPA ICR No. 1896.03, OMB Control No. 2040–0204 which expires September 30, 2002.

Abstract: The Disinfectants/Disinfection Byproducts, Chemical, and Radionuclides Rules ICR is the result of a consolidation of activities covered in the 1998 Stage 1 DBPR ICR, some rules and activities covered in the 1993 PWSS ICR and activities and rules previously covered in other Office of Ground Water Drinking Water (OGWDW) standalone ICRs. As part of the consolidation effort, the Disinfectants/Disinfection, Chemical, and Radionuclides Rules ICR will be amended to include burden and costs associated with the Lead and Copper Rule. The National Primary Drinking Water Regulations (NPDWRs) for Lead and Copper (The Lead and Copper Rule or LCR), promulgated by EPA in 1991, is a regulatory program mandated by the Safe Drinking Water Act (SDWA). The LCR's goal is to reduce the levels of lead and copper at the tap to as close to the maximum contaminant level goals of 0 parts per billion (ppb) of lead and 1.3 ppb of copper as possible. To accomplish this, the LCR requires community and non-transient non-community water systems to conduct periodic moitoring, optimize corrosion control and, under specified conditions, install source water treatment, conduct public education, and/or replace lead service lines in the distribution system.

In January 2000, EPA published the Lead and Copper Rule Minor Revisions (LCRMR) which eliminated unnecessary requirements, streamlined and reduced reporting burden, and promoted

consistent national implementation. The LCRMR do not affect the lead or copper rule maximum contaminant level goals, action levels, or the basic regulatory requirements.

Monitoring, reporting and record keeping are required at both the system and State levels under the National Primary Drinking Water Regulations (NPDWRs). EPA has chosen to require the least frequent collection that remains consistent with overall public health preservation objectives. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Burden Statement: The estimated annual burden hours for the LCR amendment to the Disinfectants/Disinfection Byproducts, Chemical, and Radionuclides Rules ICR are 2,431,728 hours. The estimated average burden hours per response is 0.3 hours. The estimated average number of responses per respondent is 2.1. The estimated number of likely respondents annually is 76,001. The estimated annual cost is $14 million which represents O&M costs only.The estimated annual burden hours and costs for the LCR amendment will be additive to the current OMB inventory for the The Disinfectants/Disinfection Byproducts, Chemical, and Radionuclides Rules ICR. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: April 2, 2002.

Evelyn Washington,

Acting Director, Office of Ground Water Drinking Water.

[FR Doc. 02–8535 Filed 4–8–02; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 3, 2002.

A. Federal Reserve Bank of Kansas City (Susan Zubradt, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198–0001:

1. First York Ban Corp., York, Nebraska; to increase its ownership from 20.13 percent to 21.88 percent, of the voting shares of NebraskaLand Financial Services, Inc., York, Nebraska, and thereby acquire additional voting shares of NebraskaLand National Bank, North Platte, Nebraska.

Board of Governors of the Federal Reserve System, April 4, 2002.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 02–8542 Filed 4–8–02; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 012 3060]

Kryton Coatings International, Inc., et al.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 1, 2002.

ADDRESSES: Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments filed in electronic form should be directed to: *consentagreement@ftc.gov* as prescribed below.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome or Joni Lupovitz, Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC. 20580, (202) 326–2889 or 326–3743.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and Section 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30)

days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for April 3, 2002), on the World Wide Web, at ''http://www.ftc.gov/os/2002/04/index.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If a comment contains nonpublic information, it must be filed in paper form, and the first page of the document must be clearly labeled ''confidential.'' Comments that do not contain any nonpublic information may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to email messages directed to the following email box: *consentagreement@ftc.gov*. Such comments will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement for entry of a proposed consent order from Kryton Coatings International, Inc. and Procraft, Inc. (''respondents''). The agreement would settle a proposed complaint by the Federal Trade Commission that respondents engaged in unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns advertising representations made about ''Multi-Gard'' (also known as Liquid Siding, Liquid Vinyl, or Multi-Gard R–20), a residential coating product. The proposed administrative complaint alleges that respondents violated the FTC Act by disseminating ads that made unsubstantiated performance claims about Multi-Gard. The proposed complaint further alleges that respondents represented that Multi-Gard: (1) Provides insulation equivalent to seven inches of fiberglass batting; (2) provides an insulation value of R–20; (3) reduces energy loss, energy costs or utility bills by up to 40%; and (4) performs the same insulation function as the ultra-thin ceramic technology on the space shuttle. The proposed complaint alleges that respondents represented that they had a reasonable basis for these claims. The proposed compliant further alleges that, although the use of Multi-Gard and caulking (which is provided as part of the application service for Multi-Gard) may seal air leaks and cracks in buildings and, as a result, may reduce energy costs in some cases, respondents did not posses and rely upon a reasonable basis that substantiated their claims.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I of the order prohibits respondents from making any representation about the benefits, performance or efficacy of any Liquid Siding, Multi-Gard, Multi-Gard R–20, Liquid Vinyl, or any other liquid siding or coating product, including: that such product reduces energy loss, energy costs, energy consumption, or utility bills; any R-value associated with such product; or such product's insulation qualities as compared to any other materials, including insulation materials, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Part IV requires respondents to notify Multi-Gard distributors and wholesalers about this action and send them a copy of the consent order. The form of the notice is provided in Attachment A to the order. The remainder of the proposed order contains provisions regarding record-keeping, distribution of the order, notification of changes in corporate status, the filing of a compliance report, and termination of the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and the proposed order or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 02–8492 Filed 4–8–02; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Notice of Hearing: Reconsideration of Disapproval of Arizona State Plan Amendment 01–013.

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of hearing.

SUMMARY: This notice announces an administrative hearing on May 17, 2002, at 10 a.m., Conference Rooms 615A & 615B; 75 Hawthorne Street; San Francisco, California 94105–3901 to reconsider our decision to disapprove Arizona State Plan Amendment (SPA) 01–013.

CLOSING DATE: Requests to participate in the hearing as a party must be received by the presiding officer by (April 24, 2002).

FOR FURTHER INFORMATION CONTACT: Kathleen Scully-Hayes, Presiding Officer, CMS, C1–09–13, 7500 Security Boulevard, Baltimore, Maryland 21244, Telephone: (410) 786–2055.

SUPPLEMENTARY INFORMATION: This notice announces an administrative hearing to reconsider our decision to disapprove Arizona's State Plan Amendment (SPA) 01–013.

Arizona submitted SPA 01–013, on October 21, 2001. The issue is whether the state can provide retroactive payments to June 4, 1997, for school-based providers for services to children eligible under the Individuals with Disabilities Education Act. For the reasons stated below, the Center for Medicare & Medicaid Services (CMS) was unable to approve this amendment.

Standard appropriations language authorizes the Secretary to make payments only ''for any quarter with respect to a state plan amendment in effect during such quarter, if submitted in or prior to such quarter and approved in that or any subsequent quarter.'' Under this language, the Secretary is not authorized to make payments for a quarter based on a SPA submitted in a later quarter.

This statutory provision is implented by regulations at 42 CFR 430.20 (b)(1) and (2). The regulation precludes CMS from approving an effective date prior to

the first day of the quarter in which a plan amendment is submitted, if the plan amendment provides for expanded Medicaid coverage or increased Medicaid payment for covered services. This plan amendment would expand coverage because the plan did not otherwise provide payment for services provided by school-based providers prior to July 1, 2000. Since this SPA would expand coverage, it could not be approved with an effective date of June 4, 1997, since that is prior to the first day of the quarter in which the SPA was submitted.

Section 1116 of the Social Security Act (the Act) and 42 CFR part 430 establish Department procedures that provide an administrative hearing for reconsideration of a disapproval of a state plan or plan amendment. The CMS is required to publish a copy of the notice to a state Medicaid agency that informs the agency of the time and place of the hearing and the issues to be considered. If we subsequently notify the agency of additional issues that will be considered at the hearing, we will also publish that notice.

Any individual or group that wants to participate in the hearing as a party must petition the presiding officer within 15 days after publication of this notice, in accordance with the requirements contained at 42 CFR 430.76(b)(2). Any interested person or organization that wants to participate as amicus curiae must petition the presiding officer before the hearing begins in accordance with the requirements contained at 42 CFR 430.76(c). If the hearing is later rescheduled, the presiding officer will notify all participants.

The notice to Arizona announcing an administrative hearing to reconsider the disapproval of its SPA reads as follows:

Ms. Phyllis Biedess, Director, Arizona Health Care Cost Containment System, 801 E. Jefferson, Phoenix, Arizona 85034.

Dear Ms. Biedess: I am responding to your request for reconsideration of the decision to disapprove Arizona State Plan Amendment (SPA) 01–013.

Arizona submitted SPA 01–013 on October 21, 2001. The issue is whether the state can provide retroactive payments to June 4, 1997, for school-based providers of services to children eligible under the Individuals with Disabilities Education Act. For the reasons stated below, the Center for Medicare & Medicaid Services (CMS) was unable to approve this amendment.

Standard appropriations language authorizes the Secretary to make payments only ''for any quarter with respect to a state plan amendment in effect during such quarter, if submitted in or prior to such quarter and approved in that or any subsequent quarter.'' Under this language, the Secretary is not authorized to make payments for a quarter based on a SPA submitted in a later quarter.

This statutory provision is implemented by regulations at 42 CFR 430.20 (b)(1) and (2). The regulation precludes CMS from approving an effective date prior to the first day of the quarter in which a plan amendment is submitted, if the plan amendment provides for expanded Medicaid coverage or increased Medicaid payment for covered services. This plan amendment would expand coverage because the plan did not otherwise provide payment for services provided by school-based providers prior to July 1, 2000. Since this SPA would expand coverage, it could not be approved with an effective date of June 4, 1997, since that is prior to the first day of the quarter in which the SPA was submitted.

Therefore, based on the reasoning set forth above, and after consultation with the Secretary as required under 42 CFR 430.15(c)(2), CMS disapproved Arizona SPA 01–013. I am scheduling a hearing on your request for reconsideration to be held May 17, 2002, at 10:00 a.m., Conference Rooms 615A & 615B; 75 Hawthorne Street; San Francisco, California 94105–3901. If this date is not acceptable, we would be glad to set another date that is mutually agreeable to the parties. The hearing will be governed by the procedures prescribed at 42 CFR, part 430.

I am designating Ms. Kathleen Scully-Hayes as the presiding officer. If these arrangements present any problems, please contact the presiding officer. In order to facilitate any communication which may be necessary between the parties to the hearing, please notify the presiding officer to indicate acceptability of the hearing date that has been scheduled and provide names of the individuals who will represent the State at the hearing. The presiding officer may be reached at (410) 786–2055.

Sincerely,
Thomas A. Scully

Section 1116 of the Social Security Act (42 U.S.C. 1316); 42 CFR 430.18.

(Catalog of Federal Domestic Assistance Program No. 13.714, Medicaid Assistance Program)

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 02–8471 Filed 4–8–02; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Request for Applications Under the Office of Community Services' Fiscal Year 2002; Job Opportunities for Low-Income Individuals (JOLI) Program; Correction and Clarification; Program Announcement No. OCS–2002–06

AGENCY: Office of Community Services, ACF, DHHS.

ACTION: Clarification and correction.

SUMMARY: This document clarifies and corrects the notice that was published in the **Federal Register** on Thursday, February 21, 2002, Part II (67 FR 8074). It clarifies the notice by explaining that Faith-Based organizations are eligible to apply, and corrects the notice by changing the due date of applications.

FOR FURTHER INFORMATION CONTACT: Aleatha E. Slade at (202) 401–5317, Thelma M. Woodland at (202) 401–5294, or the OCS Operation Center at 1–800–281–9519 for referral to the appropriate contact person in OCS for programmatic questions or send an e-mail to *OCS@lcgnet.com.*

Clarification

In the **Federal Register** issue of February 21, 2002 (67 FR 8074), page 8075, third column, Program Objectives and Requirement, Section ''A. Eligible Applicants'', after the end of the first paragraph, ''* * * of such Code.'', add the following:

Faith-Based organizations that are exempt from taxation under 501(1) of the Internal Revenue Code of 1986 by reason of paragraph (3) or (4) of section 501(c) of such Code are also eligible to apply for funds under this program announcement.

Correction

In the **Federal Register** issue of February 21, 2002 (67 FR 8074), on page 8074, first column, under ''Dates,'' end of first sentence that reads, ''before April 22, 2002.'', please correct to read: ''before May 22, 2002. In view of the above clarification of Faith-Based organizations, the deadline is being extended an additional thirty (30) days through May 22, 2002.''

Dated: April 1, 2002.

Clarence Carter,

Director, Office of Community Services.

[FR Doc. 02–8541 Filed 4–8–02; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 02N–0101]

International Drug Scheduling; Convention on Psychotropic Substances; Single Convention on Narcotic Drugs; Amfepramone (diethylpropion); Amineptine; Buprenorphine; *Delta*–9–tetrahydrocannabinol (dronabinol); Tramadol

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting interested persons to submit comments concerning abuse potential, actual abuse, medical usefulness, trafficking, and impact of scheduling changes on availability for medical use of five drug substances. These comments will be considered in preparing a response from the United States to the World Health Organization (WHO) regarding the abuse liability and diversion of these drugs. WHO will use this information to consider whether to recommend that certain international restrictions be placed on these drugs. This notice requesting comments is required by the Controlled Substances Act (CSA).

DATES: Submit written or electronic comments by May 9, 2002.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–09305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to http://www.fda.gov/dockets/ecomments.

FOR FURTHER INFORMATION CONTACT: James R. Hunter, Center for Drug Evaluation and Research (HFD–9), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1999, e-mail: hunterj@cder.FDA.gov.

SUPPLEMENTARY INFORMATION: The United States is a party to the 1971 Convention on Psychotropic Substances. Article 2 of the Convention on Psychotropic Substances provides that if a party to the convention or WHO has information about a substance, which in its opinion may require international control or change in such control, it shall so notify the Secretary General of the United Nations and provide the Secretary General of the United Nations with information in support of its opinion.

The CSA (21 U.S.C. 811 *et seq.*) (Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970) provides that when WHO notifies the United States under Article 2 of the Convention on Psychotropic Substances that it has information that may justify adding a drug or other substances to one of the schedules of the convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State must transmit the notice to the Secretary of Health and Human Services (the Secretary of HHS). The Secretary of HHS must then publish the notice in the Federal Register and provide opportunity for interested persons to submit comments that will be considered by HHS in its preparation of the scientific and medical evaluations of the drug or substance.

I. WHO Notification

The Secretary of HHS received the following notices from WHO:

Ref: C.L.4.2002

WHO QUESTIONNAIRE FOR COLLECTION OF INFORMATION FOR REVIEW OF DEPENDENCE–PRODUCING PSYCHOACTIVE SUBSTANCES

The Director-General of the World Health Organization presents her compliments and has the pleasure of informing Member States that the Thirty-third Expert Committee on Drug Dependence (ECDD) will meet from 17 to 20 September 2002 to review the following substances:

1. Amfepramone (International Nonproprietary Name (INN))[1]
2. Amineptine (INN)
3. Buprenorphine (INN)
4. *Delta*–9–tetrahydrocannabinol[2]
5. Tramadol (INN)

One of the essential elements of the established review procedure is for the Secretariat to collect relevant information from Member States to prepare a Critical Review document for submission to the Expert Committee on Drug Dependence. The World Health Organization invites Member States to collaborate, as in the past, in this process by providing pertinent information mentioned in the attached questionnaire concerning the substances listed above.

Further clarification on any of the above items can be obtained from Quality Assurance and Safety: Medicines (QSM), Essential Drugs and Medicines Policy (EDM), WHO, Geneva, to which replies should be sent not later than 17 May 2002.

GENEVA, 7 February 2002

1. AMFEPRAMONE (INN)

1. LEGITIMATE USE OF THE SUBSTANCE

1.1 Is the substance currently registered as a medical product? (Yes/No)

Please indicate trade name(s), dosage form(s) with strength(s) and indication(s):

1.2 Is there other legitimate use of the substance? (No/Yes, it is used for _____.)

1.3 How is the substance supplied? (Imported/Manufactured in the country)

2. ABUSE OF THE SUBSTANCE

2.1 Is the substance abused or misused in your country? (Yes/No/No information)

2.2 If yes, is the abuse increasing? (Yes/No/No information)

2.3 Any information on the extent of public health or social problems associated with the abuse of the substance (statistics on cases of overdose deaths, dependence, etc.)?

3. ILLICIT ACTIVITIES INVOLVING THE SUBSTANCE

3.1 Any information on the nature and extent of illicit activities involving the substance (clandestine manufacture, smuggling, diversion, seizure, etc.)?

4. IMPACT OF TRANSFER TO A HIGHER SCHEDULE

4.1 If amfepramone is transferred to Schedule III of the Convention on Psychotropic Substances, do you think that its availability for medical use will be reduced? (Yes/No/No opinion)

4.2 If yes, would the reduction adversely affect the provision of medical care? (Yes/No/No opinion)

Please elaborate:

2. AMINEPTINE (INN)

1. LEGITIMATE USE OF THE SUBSTANCE

1.1 Is the substance currently registered as a medical product? (Yes/No)

Please indicate trade name(s), dosage form(s) with strength(s) and indication(s):

1.2 Is there other legitimate use of the substance? (No/Yes, it is used for _____.)

1.3 How is the substance supplied? (Imported/Manufactured in the country)

2. ABUSE OF THE SUBSTANCE

2.1 Is the substance abused or misused in your country? (Yes/No/No information)

2.2 If yes, any information on the extent of abuse?

2.3 Any information on the extent of public health or social problems associated with the abuse of the substance (statistics on cases of overdose deaths, dependence, etc.)?

3. ILLICIT ACTIVITIES INVOLVING THE SUBSTANCE

3.1 Any information on the nature and extent of illicit activities involving the substance (clandestine manufacture, smuggling, diversion, seizure, etc.)?

4. IMPACT OF SCHEDULING

4.1 If amineptine is placed under international control, do you think that its availability for medical use will be reduced? (Yes/No/No opinion)

4.2 If yes, would the reduction adversely affect the provision of medical care? (Yes/No/No opinion)

Please elaborate:

3. BUPRENORPHINE (INN)

1. LEGITIMATE USE OF THE SUBSTANCE

1.1 Is the substance currently registered as a medical product? (Yes/No)

Please indicate trade name(s), dosage form(s) with strength(s) and indication(s):

1.2 Is there other legitimate use of the substance? (No/Yes, it is used for _____.)

1.3 How is the substance supplied? (Imported/Manufactured in the country)

2. ABUSE OF THE SUBSTANCE

2.1 Is the substance abused or misused in your country? (Yes/No/No information)

[1] If the reply to the questionnaire provides sufficient information for a critical review.

[2] Including dronabinol (INN).

2.2 If yes, is the abuse increasing? (Yes/No/No information)

2.3 Any information on the extent of public health or social problems associated with the abuse of the substance (statistics on cases of overdose deaths, dependence, etc.)?

3. ILLICIT ACTIVITIES INVOLVING THE SUBSTANCE

3.1 Any information on the nature and extent of illicit activities involving the substance (clandestine manufacture, smuggling, diversion, seizure, etc.)?

4. IMPACT OF TRANSFER TO SCHEDULE I/II OF THE SINGLE CONVENTION ON NARCOTIC DRUGS, 1961, ON MEDICAL AVAILABILITY

4.1 If buprenorphine is transferred from Schedule III of the Convention on Psychotropic Substances to either Schedule I or II of the Single Convention on Narcotic Drugs, do you think that its availability for medical use will be reduced? (Yes/No/No opinion)

4.2 If yes, would the reduction adversely affect the provision of medical care? (Yes/No/No opinion)

Please elaborate:

4. *DELTA*–9–TETRAHYDROCANNABINOL[3]

1. LEGITIMATE USE OF THE SUBSTANCE

1.1 Is the substance currently registered as a medical product? (Yes/No)

Please indicate trade name(s), dosage form(s) with strength(s) and indication(s):

1.2 If the answer to 1.1 is no, is there other legitimate use of the substance? (Yes/No)

If yes, please describe the purpose of use.

1.3 If there is legitimate use of the substance, how is the substance supplied? (Imported/Manufactured in the country)

2. ABUSE OF THE SUBSTANCE

2.1 Is the substance abused or misused in your country? (Yes/No)

2.2 If yes, any information on the extent of abuse?

2.3 Any information on the extent of public health or social problems associated with the abuse of the substance (statistics on cases of overdose deaths, dependence, etc.)?

3. ILLICIT ACTIVITIES INVOLVING THE SUBSTANCE

3.1 Any information on the nature and extent of illicit activities involving the substance (clandestine manufacture, smuggling, diversion, seizure, etc.)?

5. TRAMADOL (INN)

1. LEGITIMATE USE OF THE SUBSTANCE

1.1 Is the substance currently registered as a medical product? (Yes/No)

Please indicate trade name(s), dosage form(s) with strength(s) and indication(s):

2. ABUSE OF THE SUBSTANCE

2.1 Is the substance abused or misused in your country? (Yes/No/No information)

2.2 If yes, any information on the extent of abuse?

2.3 Any information on the extent of public health or social problems associated with the abuse of the substance (statistics on cases of overdose deaths, dependence, etc.)?

3. ILLICIT ACTIVITIES INVOLVING THE SUBSTANCE

3.1 Any information on the nature and extent of illicit activities involving the substance (clandestine manufacture, smuggling, diversion, seizure, etc.)?

4. IMPACT OF SCHEDULING

4.1 If tramadol is placed under international control, do you think that its availability for medical use will be reduced? (Yes/No/No opinion)

4.2 If yes, would the reduction adversely affect the provision of medical care? (Yes/No/No opinion)

Please elaborate:

II. Background

Amfepramone, also known in the United States as diethylpropion, is classified as an anorexiant with pharmacological effects similar to the amphetamines. It is marketed in the United States for short term (8 to 12 weeks) use, in conjunction with a regimen of weight reduction based on caloric restriction, in patients with obesity and who have not responded to an appropriate weight reducing regimen (diet or exercise) alone. It is controlled domestically in Schedule IV of the CSA and internationally in Schedule IV of the Psychotropic Convention.

Amineptine is classified as a tricyclic antidepressant. It is not marketed in the United States. It has been marketed in other countries for the treatment of major depressive disorders and has also been studied for its potential use in the treatment of amphetamine withdrawal. In 1999, amineptine products were voluntarily removed from the market in France and Portugal due to risks of misuse and addiction. It is not controlled in the United States under the CSA or internationally under the Psychotropic Convention or the Single Convention on Narcotic Drugs.

Buprenorphine is a semisynthetic opium derivative with partial mu-opioid receptor agonist activity. In the United States buprenorphine is currently only available as a parenteral product and is marketed for the relief of moderate to severe pain. Buprenorphine is also marketed for the treatment of pain in several other countries in both sublingual and parenteral dosage forms. A high-dose formulation of buprenorphine is also marketed in other countries for use in the treatment of opiate dependence. It is currently controlled domestically in Schedule V of the CSA as a narcotic and is controlled internationally in Schedule III of the Psychotropic Convention. In the **Federal Register** of March 21, 2002 (67 FR 13114), the Drug Enforcement Administration published a proposed rule to increase the regulatory controls placed on buprenorphine by rescheduling buprenorphine from a Schedule V narcotic to a Schedule III narcotic.

Delta–9–tetrahydrocannabinol (*delta*–9–THC), the active component of marijuana, is currently controlled in Schedule I of the CSA. Synthetic *delta*–9–THC, or dronabinol, is the active component of the drug product Marinol, which is marketed in the United States as an antiemetic in the setting of cancer chemotherapy and for treatment of AIDS wasting syndrome. Dronabinol in sesame oil and encapsulated in an FDA-approved product is controlled in Schedule III of the CSA. Marinol is the only product that meets this definition. Dronabinol (which is the synthetic equivalent of the natural active component of marijuana, *delta*–9–THC) in any other form is controlled in Schedule I of the CSA. The drug substance dronabinol is controlled internationally in Schedule II of the Psychotropic Convention.

Tramadol is a centrally acting synthetic analgesic. At least two complementary mechanisms of action appear applicable: binding of parent and metabolite to mu-opioid receptors and weak inhibition of the reuptake of norepinephrine and serotonin. It is marketed in the United States for the treatment of moderate to moderately severe pain. Cases of abuse and dependence of tramadol have been reported. It is not controlled in the United States under the CSA or controlled internationally under the Psychotropic Convention or the Single Convention on Narcotic Drugs.

III. Opportunity to Submit Domestic Information

As required by section 201(d)(2)(A) of the CSA (21 U.S.C. 811(d)(2)(A)), FDA, on behalf of the Department of Health and Human Services (DHHS), invites interested persons to submit comments regarding the five named drugs. Any comments received will be considered by DHHS when it prepares a scientific and medical evaluation of these drugs. DHHS will forward a scientific and medical evaluation of these drugs to WHO, through the Secretary of State, for WHO's consideration in deciding whether to recommend international control/decontrol of any of these drugs. Such control could limit, among other things, the manufacture and distribution (import/export) of these drugs and could impose certain recordkeeping requirements on them.

DHHS will not now make any recommendations to WHO regarding whether any of these drugs should be subjected to international controls. Instead, DHHS will defer such consideration until WHO has made official recommendations to the Commission on Narcotic Drugs, which

[3] Including dronabinol (INN)

are expected to be made in late 2002. Any DHHS position regarding international control of these drugs will be preceded by another Federal Register notice soliciting public comments as required by section 201(d)(2)(B) of the CSA.

IV. Comments

Interested persons may submit to the Dockets Management Branch (address above) written or electronic comments regarding the drugs by May 9, 2002. This abbreviated comment period is necessary to allow sufficient time to prepare and submit the domestic information package by the deadline imposed by WHO. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: March 29, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–8493 Filed 4–8–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Anthrax Vaccines: Efficacy Testing and Surrogate Markers of Immunity; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA), Center for Biologics Evaluation and Research (CBER), in cooperation with the Department of Defense (DoD), is announcing the following public workshop: ''Anthrax Vaccines: Efficacy Testing and Surrogate Markers of Immunity.'' The workshop will discuss possible strategies for the efficacy testing of investigational anthrax vaccines.

Date and Time: The public workshop will be held on April 23, 2002, from 8 a.m. to 5 p.m.

Location: The public workshop will be held at the Jay P. Sanford Auditorium on the campus of the Uniformed Services University of Health Sciences (USUHS), 4301 Jones Bridge Rd., Bethesda, MD 20814.

Contact: Kerry Davis, Science Applications International Corp. (SAIC), 5340 Spectrum Dr., suite N, Frederick, MD 21703, 301–619–7078, FAX 301–698–6188, e-mail: kerry.davis@det.amedd.army.mil.

Registration: Preregistration is required and must be completed by April 12, 2002. Contact Kerry Davis (see ''*Contact*'' for address) for information about registration, including registration fees. Seating is limited.

If you need special accommodations due to a disability, please contact Kerry Davis at least 7 days in advance of the meeting.

Transcripts: You may request public workshop transcripts in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–16, Rockville, MD 20857. The transcripts will be available approximately 15 working days after the meeting at the cost of 10 cents per page. The public workshop transcript will also be available on the Internet at http://www.fda.gov/cber/minutes/workshop-min.htm

SUPPLEMENTARY INFORMATION: CBER, in cooperation with DoD, is holding a public workshop entitled ''Anthrax Vaccines: Efficacy Testing and Surrogate Markers of Immunity.'' The workshop will discuss: (1) Pathogenesis of *Bacillus anthracis*, (2) animal models of anthrax, (3) immunogenicity data available from human clinical trials of anthrax vaccines, and (4) identification of surrogate markers and possible strategies. The workshop's goal is to expedite the development of anthrax vaccines by providing additional information about efficacy testing of these vaccines.

Dated: March 29, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–8463 Filed 4–8–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 02N–0037]

Public Informational Meeting on Antimicrobial Resistance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing the following meeting: ''Public Informational Meeting on Antimicrobial Resistance.'' The purpose of this public meeting is to provide the general public the opportunity to hear speakers from the agency, industry, and others to provide information on the issue of antimicrobial resistance so the public can fully participate in the public dialogue about the issue. Attendees will be invited to ask questions during the meeting.

Date and Time: The meeting will be held on April 26, 2002, from 9:30 a.m. to 4:30 p.m. Walk-in registration will begin at 9 a.m. You may submit written or electronic comments at any time, but in order for your comments to be included with others in conjunction with this meeting, please submit comments no later than 180 days after the meeting. Please include the Docket No. 02N–0037 on your comments.

Addresses: The meeting will be held at the Capital Hilton Hotel, Congressional Room, 1001 16th St. (16th and K Sts.), Washington, DC, 202–393–1000. Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to http://www.fda.gov/dockets/ecomments. Comments should be identified with the full title and the Docket No. 02N–0037 on your comments.

For General Information Contact: Vash Klein, Center for Veterinary Medicine (CVM) (HFV–12), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, e-mail: cvmmeet@cvm.fda.gov.

For Information About Registration Contact: Ben Horsley, The Shipley Group, at 888–270–2157, FAX 888–270–2158.

Registration: Registration is required. There is no registration fee for the meeting. Limited space is available, and early registration is encouraged. Information about the meeting and the registration form are available on the Internet at www.fda.gov/cvm, click on Antimicrobial Resistance, then scroll down to PUBLIC MEETINGS, April 26, 2002 — *Consumer Meeting on Antimicrobial Resistance*. Please mail or fax the registration form to: FDA/CVM Enrollments —The Shipley Group, Inc., 1584 South 500 West, suite 201, Woods Cross, UT 84087; Ben Horsley at 888–270–2157 or 801– 298–7800, FAX 888–270–2158 or 801–298–7820. Additional information about the meeting and the agenda will be available on the Internet (www.fda.gov/cvm) before the meeting.

Oral Presentations: Please submit requests for oral presentations by April 22, 2002, to FDA/CVM, Attn: Consumer Meeting, Docket No. 02N–0037, 7500 Standish Pl., (HFV–12), rm. 3503,

Rockville, MD 20855. All presentations may be provided on Powerpoint (disk or CD, or e-mailed in advance to cvmmeet@cvm.fda.gov). No zip disks, slide presentations, or overheads can be accommodated.

If you need special accommodations due to a disability, please contact Vash Klein at least 7 days in advance.

Dated: April 4, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–8567 Filed 4–5–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 02D–0096]

Draft ''Guidance for Industry: Use of Nucleic Acid Tests on Pooled and Individual Samples From Donors of Whole Blood and Blood Components for Transfusion to Adequately and Appropriately Reduce the Risk of Transmission of HIV–1 and HCV;'' Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled ''Guidance for Industry: Use of Nucleic Acid Tests on Pooled and Individual Samples From Donors of Whole Blood and Blood Components for Transfusion to Adequately and Appropriately Reduce the Risk of Transmission of HIV–1 and HCV'' dated March 2002. The draft guidance document would inform all establishments that manufacture Whole Blood that FDA has licensed a nucleic acid test (NAT) to identify human immunodeficiency virus type 1 (HIV–1) and hepatitis C virus (HCV) in Whole Blood donations. The draft document recommends that manufacturers implement licensed HIV–1 and HCV NAT within 6 months of issuance of a final guidance and notify FDA of such implementation by specified procedures.

DATES: Submit written or electronic comments on the draft guidance to ensure their adequate consideration in preparation of the final document by July 8, 2002. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The document may also be obtained by mail by calling the CBER Voice Information System at 1–800–835–4709 or 301–827–1800, or by fax by calling the FAX Information System at 1–888–CBER–FAX or 301–827–3844. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance.

Submit written comments on the document to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to http://www.fda.gov/dockets/ecomments.

FOR FURTHER INFORMATION CONTACT: Nathaniel L. Geary, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Guidance for Industry: Use of Nucleic Acid Tests on Pooled and Individual Samples From Donors of Whole Blood and Blood Components for Transfusion to Adequately and Appropriately Reduce the Risk of Transmission of HIV–1 and HCV,'' dated March 2002. FDA's final rule (66 FR 31146, June 11, 2001) entitled ''Requirements for Testing Human Blood Donors for Evidence of Infection Due to Communicable Disease Agents'' became effective on December 10, 2001. Under 21 CFR 610.40(b), manufacturers ''must perform one or more such [screening] tests as necessary to reduce adequately and appropriately the risk of transmission of communicable disease'' (66 FR 31146 at 31162). In the preamble to the final rule, we said that the standard for adequate and appropriate testing will change as FDA approves new testing technology. We explained that, ''* * * we intend to regularly issue guidance describing those tests that we believe would adequately and appropriately reduce the risk of transmission of communicable disease agents'' (66 FR 31146 at 31149).

The availability of NAT to identify HIV–1 and HCV will change the testing protocol for adequately and appropriately reducing the risk of transmission of those diseases. The draft document recommends that manufacturers implement HIV–1 and HCV nucleic acid testing within 6 months of issuance of a final guidance. The draft guidance specifies how you should notify FDA of such implementation as required under 21 CFR 601.12.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). This draft guidance document represents the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirement of the applicable statutes and regulations. As with other guidance documents, FDA does not intend this document to be all-inclusive and cautions that not all information may be applicable to all situations. The document is intended to provide information and does not set forth requirements.

II. Comments

This draft document is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit to the Dockets Management Branch (see **ADDRESSES**) written or electronic comments regarding this draft guidance document. Submit written or electronic comments to ensure adequate consideration in preparation of the final document by July 8, 2002. Two copies of any written comments are to be submitted, except individuals may submit one copy. Comments should be identified with the docket number found in the brackets in the heading of this document. A copy of the document and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at http://www.fda.gov/cber/guidelines.htm or http://www/fda.gov/ohrms/dockets/default.htm.

Dated: March 29, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–8464 Filed 4–8–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 02D–0094]

Draft Guidance for Industry on IND Exemptions for Studies of Lawfully Marketed Cancer Drug or Biological Products; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''IND Exemptions for Studies of Lawfully Marketed Cancer Drug or Biological Products.'' This guidance clarifies FDA's policy on exemption from investigational new drug (IND) application requirements for studies of marketed cancer drug or biological products. This guidance is intended to decrease the burden to investigators and regulators of submitting unnecessary IND applications.

DATES: Submit written or electronic comments on the draft guidance by June 10, 2002. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Drug Information Branch (HFD–210), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, http://www.fda.gov/cder/guidance/index.htm, or the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, http://www.fda.gov/cber/guidelines.htm. Send one self-addressed adhesive label to assist the office in processing your requests. The document may also be obtained by mail by calling the CBER Voice Information System at 1–800–835–4709 or 301–827–1800, or by calling the Fax Information System at 1–888–CBER–FAX or 301–827–3844. Submit written or electronic comments on the draft guidance to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to http://www.fda.gov/dockets/ecomments. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Grant A. Williams, Center for Drug Evaluation and Research (HFD–150), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–5740, or Patricia Keegan, Center for Biologics Evaluation and Research (HFM–573), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–5093.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''IND Exemptions for Studies of Lawfully Marketed Cancer Drug or Biological Drug Products.'' Exemption of certain studies of marketed drugs from IND regulation is allowed under 21 CFR 312.2(b)(1). Investigations that involve a route of administration or dosage level or use in a patient population or other factor that significantly increases the risks (or decreases the acceptability of the risks) associated with the use of the drug product are not exempt. This guidance discusses the risk/benefit determination in the practice of oncology, the pertinent regulations relating to exemption of INDs, FDA's policy for determining exemption status, and specific examples of studies generally considered exempt.

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on IND exemptions for studies of lawfully marketed cancer drug or biological products. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Dockets Management Branch (address above) written or electronic comments on the draft guidance. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at either http://www.fda.gov/cder/guidance/index.htm or http://www.fda.gov/cber/guidelines.htm or http://www.fda.gov/ohrms/dockets/default.htm.

Dated: March 29, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–8462 Filed 4–8–02; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Fiscal Year 2002 Competitive Application Cycle for the Nursing Education Loan Repayment Program 93.908

AGENCY: Health Resources and Services Administration.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) announces that applications will be accepted for the Nursing Education Loan Repayment Program (NELRP) for Fiscal Year 2002.

Authorizing Legislation: These applications are solicited under section 846 of the Public Health Service (PHS) Act, as amended, which authorizes loan repayment, in the amount of 30 percent of the outstanding principal and interest on nursing education loans for each of the first two years of full-time nursing service completed in an eligible health facility, and 25 percent for a third year of service completed.

Eligible Applicants: An individual is eligible to apply for NELRP if the individual: (1) Has received a baccalaureate or associate degree in nursing, a diploma in nursing, or a graduate degree in nursing; (2) has obtained one or more nursing student loans authorized under section 835(a) of the PHS Act, as amended, or any other educational loan for nurse training costs; (3) enters into an agreement to serve as a full-time registered or advanced practice nurse for a period of not less than two years in an eligible health facility; and (4) is a U.S. citizen, U.S. national, or a permanent legal resident of the United States.

An ''eligible health facility'' is defined as: (1) An Indian Health Service health center; (2) a Native Hawaiian health center; (3) a public hospital (operated by a State, county, or local government); (4) a health center funded under section 330 of the PHS Act (including community, migrant, homeless, and public housing centers); (5) a rural

health clinic under Section 1861(aa)(2) of the Social Security Act; or (6) a public or nonprofit private health facility determined by the Secretary to have a critical shortage of nurses.

For Fiscal Year 2002, the Secretary has defined health facilities with a critical shortage of nurses as any public or nonprofit private health facility: (1) On the NELRP's Fiscal Year 2002 list of facilities with a critical shortage of nurses; (2) located in a county on the NELRP's Fiscal Year 2002 list of counties with a shortage of nurses; (3) located in a currently designated whole county health professional shortage area (HPSA) or (4) classified as one of the following regardless of its location: a public health department, nursing home or rehabilitation center.

Funding Preference: A funding preference is defined as the funding of a specific category or group of approved applicants ahead of other categories or groups of applicants. The following preferences apply to the NELRP applicants:

A. As provided in section 846(e) of the PHS Act, as amended, first preference will be given to qualified applicants with the greatest financial need who agree to serve in eligible health facilities located in a county on the NELRP's Fiscal Year 2002 list of counties with a shortage of nurses.

Applicants whose total qualifying loans are 40% or greater of their annualized salary will meet the greatest financial need requirement of the funding preference.

B. Remaining funds will be awarded in the following order: (1) To qualified applicants who are employed at an eligible health facility located in a county with a shortage of nurses regardless of the applicant's financial need; (2) to qualified applicants employed at an eligible health facility not located in a county with a shortage of nurses who demonstrate greatest financial need; and (3) other qualified applicants who are serving in States that received few or no new NELRP participants.

Estimated Amount of Available Funds: Up to $8,000,000 will be available in Fiscal Year 2002 for this program.

Estimated Number of Awards: It is estimated that 445 Loan Repayment Contracts will be awarded in Fiscal Year 2002 for this program.

Application Requests, Availability, Dates and Addresses: Applicants may register online at *http://bhpr.hrsa.gov/nursing* for application guidance and/or lists of eligible health facilities, nurse shortage counties, and HPSAs by following the instructions on the Web page. Instructions for submitting applications electronically will also be available on the Web. Application guidance will be available for downloading via the Web on April 9, 2002. Applicants who register online will automatically be sent information regarding the application guidance and/or lists of eligible health facilities, nurse shortage counties, and HPSAs. Applicants may also request a hard copy of the application materials and/or lists of eligible health facilities, nurse shortage counties, and HPSAs by calling (866) 813–3753.

In order to be considered, applications for loan repayment must be submitted to the Division of Nursing (NELRP), Bureau of Health Professions, HRSA, Room 9–36, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Applications must be postmarked by June 14, 2002. Applications postmarked after the deadline date or sent to any address other than the Rockville, Maryland address may be returned to the applicant and not processed.

FOR FURTHER INFORMATION CONTACT: Ms. Jacqueline Brown, e-mail at *jbrown1@hrsa.gov*; Ms. Leola Bennett, e-mail at *lbennett@hrsa.gov*; or Ms. Robin Ingram, e-mail at *ringram@hrsa.gov*, Division of Nursing, Bureau of Health Professions, HRSA, Room 9–36, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Central telephone is (301) 443–3232. Fax number is (301)443–0791.

Paperwork Reduction Act: The Application for Nursing Education Loan Repayment Program has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The OMB clearance number is 0915–0140.

The program is not subject to the provision of Executive Order 12372, Intergovernmental Review of Federal Programs (as implemented through 45 CFR part 100). This program is also not subject to the Public Health Systems Reporting Requirements.

Dated: March 29, 2002.

Elizabeth M. Duke,

Administrator.

[FR Doc. 02–8496 Filed 4–8–02; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Refugee Resettlement Program: Proposed Notice of Allocations to States of FY 2002 Funds for Refugee Social Services

AGENCY: Office of Refugee Resettlement (ORR), ACF, HHS.

ACTION: Proposed notice of allocations to States of FY 2002 funds for refugee social services.

SUMMARY: This notice establishes the proposed allocations to States of FY 2002 funds for social services under the Refugee Resettlement Program (RRP). In the final notice, amounts could be adjusted slightly based on final adjustments in FY 2001 arrivals in some States.

DATES: Comments on this notice must be received by May 9, 2002.

ADDRESSES: Address written comments, in duplicate, to: Barbara R. Chesnik, Office of Refugee Resettlement, Administration for Children and Families, 370 L'Enfant Promenade, SW., Washington, DC 20447. Due to delays in mail delivery to Federal offices, a copy of comments should also be faxed to: (202) 401–5487.

FOR FURTHER INFORMATION CONTACT: Barbara R. Chesnik, Division of Refugee Self-Sufficiency, telephone: (202) 401–4558, e-mail: *bchesnik@acf.dhhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Amounts For Allocation

The Office of Refugee Resettlement (ORR) has available $158,600,000 in FY 2002 refugee social service funds as part of the FY 2002 appropriation for the Department of Health and Human Services (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107–116).

The FY 2002 House Appropriations Committee Report (H.R. Rept. No. 107–229) reads as follows with respect to social services funds:

> The bill provides $158,621,000 for social services, $15,000,000 more than the fiscal year 2001 appropriation and the budget request. Funds are distributed by formula as well as through the discretionary grant making process for special projects. The bill includes $15,000,000 to increase educational support to schools with a significant proportion of refugee children, consistent with previous support to schools heavily impacted by large concentration of refugees.
>
> The Committee agrees that $19,000,000 is available for assistance to serve communities affected by the Cuban and Haitian entrants

and refugees whose arrivals in recent years have increased. The Committee has set aside $26,000,000 for increased support to communities with large concentrations of refugees whose cultural differences make assimilation especially difficult justifying a more intense level and longer duration of Federal assistance. Finally, the Committee has set aside $14,000,000 to address the needs of refugees and communities impacted by recent changes in Federal assistance programs relating to welfare reform. The Committee urges ORR to assist refugees at risk of losing, or who have lost, benefits including SSI, TANF and Medicaid, in obtaining citizenship.

The FY 2002 Conference Report on Appropriations (H.R. Conf. 107–342) reads as follows concerning social services:

The conference agreement appropriates $460,203,000, instead of $460,224,000 as proposed by the House and $445,224,000 proposed by the Senate. Within this amount, for Social Services, the agreement provides $158,600,000 instead of $156,621,000 as proposed by the House and $143,621,000 as proposed by the Senate.

The conferees specify that funds for section 414 of the Immigration and Nationality Act shall be available for three fiscal years, as proposed by the House.

The conference agreement includes $15,000,000 that is to be used under social services to increase educational support to schools with a significant proportion of refugee children, consistent with language contained in the House report.

The agreement also includes $19,000,000 for increased support to communities with large concentrations of refugees whose cultural differences make assimilation especially difficult justifying a more intense level and longer duration of Federal assistance, consistent with language contained in the House report.

ORR proposes to use the $158,600,000 appropriated for FY 2002 social services as follows:

- $71,910,000 will be allocated under the 3-year population formula, as set forth in this notice for the purpose of providing employment services and other needed services to refugees.
- $12,690,000 will be awarded as new and continuation social service discretionary grants under new and prior year competitive grant announcements issued separately from this notice.
- $19,000,000 will be awarded to serve communities most heavily affected by recent Cuban and Haitian entrant and refugee arrivals. These funds will be awarded through continuation awards under a separate prior year announcement.
- $26,000,000 will be awarded through discretionary grants for communities with large concentrations of refugees whose cultural differences make assimilation especially difficult justifying a more intense level and longer duration of Federal assistance. A combination of new and continuation awards will be made through new and prior year separate announcements.
- $14,000,000 will be awarded to address the needs of refugees and communities impacted by recent changes in Federal assistance programs relating to welfare reform. Awards will be made through a separate announcement.
- $15,000,000 will be awarded to increase educational support to schools with a significant proportion of refugee children, consistent with previous support to schools heavily impacted by large concentrations of refugees. New awards will be made through a separate announcement.

Refugee Social Service Funds

The population figures for the formula social services allocation include refugees, Cuban/Haitian entrants, and Amerasians from Vietnam. (A State must, however, have an approved State plan for the Cuban/Haitian Entrant Program or indicate in its refugee program State plan that Cuban/Haitian entrants will be served in order to use funds on behalf of entrants as well as refugees.)

The Director is proposing to allocate $71,910,000 to States on the basis of each State's proportion of the national population of refugees who had been in the U.S. three years or less as of October 1, 2001 (including a floor amount for States which have small refugee populations).

The use of the 3-year population base in the allocation formula is required by section 412(c)(1)(B) of the Immigration and Nationality Act (INA) which states that the ''funds available for a fiscal year for grants and contracts [for social services] . . . shall be allocated among the States based on the total number of refugees (including children and adults) who arrived in the United States not more than 36 months before the beginning of such fiscal year and who are actually residing in each State (taking into account secondary migration) as of the beginning of the fiscal year.''

As established in the FY 1991 social services notice published in the **Federal Register** of August 29, 1991, section I, ''Allocation Amounts'' (56 FR 42745), a variable floor amount for States which have small refugee populations is calculated as follows: If the application of the regular allocation formula yields less than $100,000, then—

(1) a base amount of $75,000 is provided for a State with a population of 50 or fewer refugees who have been in the U.S. 3 years or less; and

(2) for a State with more than 50 refugees who have been in the U.S. 3 years or less: (a) A floor has been calculated consisting of $50,000 plus the regular per capita allocation for refugees above 50 up to a total of $100,000 (in other words, the maximum under the floor formula is $100,000); (b) if this calculation has yielded less than $75,000, a base amount of $75,000 is provided for the State.

Population To Be Served and Allowable Services

Eligibility for refugee social services includes persons who meet all requirements of 45 CFR 400.43 (as amended by 65 FR 15409 (March 22,2000). In addition, persons granted asylum are eligible for refugee benefits and services from the date that asylum was granted (See ORR State Letter No. 00–12, effective June 15, 2000). Victims of a severe form of trafficking who have received a certification or eligibility letter from ORR are eligible from the date on the certification letter (See ORR State letter No. 01–13, May 3, 2001).

Services to refugees must be provided in accordance with the rules of 45 CFR part 400 subpart I—Refugee Social Services. Although the allocation formula is based on the 3-year refugee population, States may provide services to refugees who have been in the country up to 60 months (5 years), with the exception of referral and interpreter services and citizenship and naturalization preparation services for which there is no time limitation (45 CFR 400 152(b)). On December 5, 2001, however, the Director of ORR issued a blanket waiver of the time-in-country limit for services (ORR State Letter 01–31). This waiver, in effect until September 30, 2002, was issued to assist States in providing services to refugees following the events of September 11, 2001 and the subsequent cessation of refugee arrivals during most of the first quarter, FY 2002.

Allowable social services are those indicated in 45 CFR 400.154 and 400.155. Additional services not included in these sections which the State may wish to provide must be submitted to and approved by the Director of ORR (§ 400.155(h)).

Service Priorities

Priorities for provision of services are specified in 45 CFR 400.147. In order for refugees to move quickly off Temporary Assistance for Needy Families (TANF), States should, to the extent possible, ensure that all newly arriving refugees receive refugee-specific services designed to address the employment barriers that refugees typically face.

We encourage States to re-examine the range of services they currently offer to refugees. Those States that have had success in helping refugees achieve early employment may find it to be a good time to expand beyond provision of basic employment services and

address the broader needs that refugees have in order to enhance their ability to maintain financial security and to successfully integrate into the community. Other States may need to reassess the delivery of employment services in light of local economic conditions and develop new strategies to better serve the currently arriving refugee groups.

States should also be aware that ORR will make social services formula funds available to pay for social services which are provided to refugees who participate in Wilson/Fish projects. Section 412(e)(7)(A) of the INA provides that:

> The Secretary [of HHS] shall develop and implement alternative projects for refugees who have been in the United States less than thirty-six months, under which refugees are provided interim support, medical services, support [social] services, and case management, as needed, in a manner that encourages self-sufficiency, reduces welfare dependency, and fosters greater coordination among the resettlement agencies and service providers.

This provision is generally known as the Wilson/Fish Amendment. The Department has already issued a separate notice in the **Federal Register** with respect to applications for such projects (64 FR 19793 (April 22, 1999)).

II. (Reserved for Discussion of Comments in Final Notice)

III. Allocation Formulas

Of the funds available for FY 2002 for social services, $71,910,000 is proposed to be allocated to States in accordance with the formula specified in A. below.

A. A State's allowable formula allocation is calculated as follows:

1. The total amount of funds determined by the Director to be available for this purpose; divided by—

2. The total number of refugees, Cuban/Haitian entrants, and Amerasians from Vietnam who arrived in the United States not more than 3 years prior to the beginning of the fiscal year for which the funds are appropriated, as shown by the ORR Refugee Data System. The resulting per capita amount is multiplied by—

3. The number of persons in item 2, above, in the State as of October 1, 2001, adjusted for estimated secondary migration.

The calculation above yields the formula allocation for each State. Minimum allocations for small States are taken into account.

IV. Basis of Population Estimates

The population estimates for the proposed allocation of funds in FY 2002 for the formula social service allocation are based on data on refugee arrivals from the ORR Refugee Data System, adjusted as of October 1, 2001, for estimated secondary migration. The data base includes refugees of all nationalities, Amerasians from Vietnam, Cuban and Haitian entrants.

For fiscal year 2002, ORR's formula social service allocations for the States are based on the numbers of refugees, Amerasians, and entrants in the ORR data base. The numbers are based upon the arrivals during the preceding three fiscal years: 1999, 2000, and 2001.

The estimates of secondary migration are based on data submitted by all participating States on Form ORR–11 on secondary migrants who have resided in the U.S. for 36 months or less, as of September 30, 2001. The total migration reported by each State is summed, yielding in- and out-migration figures and a net migration figure for each State. The net migration figure is applied to the State's total arrival figure, resulting in a revised population estimate.

Estimates are developed separately for refugees and entrants and then combined into a total estimated 3-year refugee/entrant population for each State. Eligible Amerasians are included in the refugee figures. Havana parolees (HP's) are enumerated in a separate column in Table 1, below, because they are tabulated separately from other entrants. Havana parolee arrivals for all States are based on actual data.

Table 1, below, shows the estimated 3-year populations, as of October 1, 2001, of refugees (col. 1), entrants (col. 2), Havana parolees (col. 3); total refugee/entrant population, (col. 4); the proposed formula amounts which the population estimates yield, (col. 5); and the proposed total allocation (col. 6).

If a State does not agree with ORR's population estimate and wishes ORR to reconsider its numbers, it should submit written evidence to ORR, including a list of refugees identified by name, alien number, date of birth, and date of arrival. Listing of refugees who are not identified by their alien number will not be considered. Such evidence should be submitted separately from comments on the proposed allocation formula no later than 30 days from the date of publication of this notice and should be sent via overnight mail to: Loren Bussert, Division of Refugee Self-/Sufficiency, Office of Refugee Resettlement, 370 L'Enfant Promenade, SW., Washington, DC 20447, Telephone: (202) 401–4732, or as an Excel spreadsheet or other compatible spreadsheet format as an e-mail attachment to: *lbussert@acf.dhhs.gov*

States which have served asylees during the past year also may submit the following information in order to have their population estimate adjusted to include those asylees whose asylum was granted within the 36 months period ending September 30, 2001: (1) Alien number, (2) date of birth; and (3) the date asylum was granted.

States which have served victims of a severe form of trafficking during the past year may submit the following information in order to have their population estimate adjusted to include these trafficking victims: (1) Alien number, if available; (2) date of birth; (3) certification letter number and, (4) date on certification letter.

Please submit the above data on asylees and trafficking victims served on separate Excel spreadsheets as an e-mail attachment within 30 days of the publication date of this announcement to: *lbussert@acf.dhhs.gov*

V. Proposed Allocation Amounts

Funding subsequent to the publication of this notice will be contingent upon the submittal and approval of a State annual services plan that is developed on the basis of a local consultative process, as required by 45 CFR 400.11(b)(2) in the ORR regulations.

The following amounts are for allocation for refugee social services in FY 2002:

TABLE 1.—ESTIMATED THREE-YEAR REFUGEE/ENTRANT/PAROLEE POPULATIONS OF STATES PARTICIPATING IN THE REFUGEE PROGRAM AND PROPOSED SOCIAL SERVICE FORMULA AMOUNT AND ALLOCATION FOR FY 2002

State	Refugees [1]	Entrants	Havana parolees [2]	Total population	Proposed formula amount	Proposed allocation
Alabama	386	5	35	426	$106,915	$106,915
Alaska [3]	115	0	0	115	28,862	75,000
Arizona	7,201	404	2	7,607	1,909,160	1,909,160
Arkansas	41	9	4	54	13,553	75,000

TABLE 1.—ESTIMATED THREE-YEAR REFUGEE/ENTRANT/PAROLEE POPULATIONS OF STATES PARTICIPATING IN THE REFUGEE PROGRAM AND PROPOSED SOCIAL SERVICE FORMULA AMOUNT AND ALLOCATION FOR FY 2002—Continued

State	Refugees [1]	Entrants	Havana parolees [2]	Total population	Proposed formula amount	Proposed allocation
California	29,077	74	238	29,389	7,375,880	7,375,880
Colorado [3]	3,265	4	4	3,273	821,438	821,438
Connecticut	3,075	30	34	3,139	787,808	787,808
Delaware	128	15	0	143	35,889	75,000
Dist. of Columbia	384	4	8	396	99,386	100,000
Florida	13,412	15,246	32,725	61,383	15,405,547	15,405,547
Georgia	10,348	35	110	10,493	2,633,472	2,633,472
Hawaii	(3)	0	0	(3)	(753)	75,000
Idaho [3]	2,796	1	3	2,800	702,728	702,728
Illinois	9,436	15	102	9,553	2,397,556	2,397,556
Indiana	1,713	6	11	1,730	434,185	434,185
Iowa	3,869	0	2	3,871	971,521	971,521
Kansas	614	5	4	623	156,357	156,357
Kentucky [3]	3,403	1,088	8	4,499	1,129,133	1,129,133
Louisiana	1,209	127	44	1,380	346,344	346,344
Maine	1,109	0	0	1,109	278,330	278,330
Maryland	3,734	12	20	3,766	945,169	945,169
Massachusetts [3]	5,921	160	38	6,119	1,535,711	1,535,711
Michigan	8,258	863	31	9,152	2,296,916	2,296,916
Minnesota	13,653	6	8	13,667	3,430,064	3,430,064
Mississippi	25	3	6	34	8,533	75,000
Missouri	7,775	12	24	7,811	1,960,359	1,960,359
Montana	1	0	4	5	1,255	75,000
Nebraska	1,750	2	5	1,757	440,962	440,962
Nevada [3]	1,164	752	53	1,969	494,168	494,168
New Hampshire	1,724	0	0	1,724	432,679	432,679
New Jersey	4,537	352	758	5,647	1,417,251	1,417,251
New Mexico	458	319	2	779	195,509	195,509
New York	21,394	1,149	195	22,738	5,706,650	5,706,650
North Carolina	3,419	21	46	3,486	874,896	874,896
North Dakota [3]	1,269	0	0	1,269	318,486	318,486
Ohio	4,301	6	8	4,315	1,082,953	1,082,953
Oklahoma	407	0	5	412	103,401	103,401
Oregon	3,780	489	4	4,273	1,072,413	1,072,413
Pennsylvania	7,970	241	47	8,258	2,072,545	2,072,545
Rhode Island	781	2	7	790	198,270	198,270
South Carolina	216	1	20	237	59,481	96,932
South Dakota [3]	1,286	0	0	1,286	322,753	322,753
Tennessee	2,995	8	38	3,041	763,212	763,212
Texas	12,147	852	115	13,114	3,291,275	3,291,275
Utah	3,179	2	2	3,183	798,851	798,851
Vermont	884	0	0	884	221,861	221,861
Virginia	5,344	92	29	5,465	1,371,574	1,371,574
Washington	15,387	0	14	15,401	3,865,253	3,865,253
West Virginia	18	0	0	18	4,518	75,000
Wisconsin	2,057	5	4	2,066	518,513	518,513
Wyoming [4]	.....	.....	.....	.....	.....	.....
Total	227,412	22,417	34,817	284,646	$71,438,792	$71,910,000

[1] IncludesAmerasian immigrants. Adjusted for secondary migration.
[2] For all years, Havana Parolee arrivals for all States are based on actual data.
[3] The allocations for Alaska, Colorado, Idaho, Kentucky, Massachusetts, Nevada, North Dakota, South Dakota, and for San Diego County, California are expected to be awarded to Wilson/Fish projects.
[4] Wyoming no longer participates in the Refugee Program.

VI. Paperwork Reduction Act

This notice does not create any reporting or recordkeeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance No. 93.566 Refugee Assistance—State Administered Programs)

Dated: March 26, 2002.

Nguyen Van Hanh,

Director, Office of Refugee Resettlement.

[FR Doc. 02–8540 Filed 4–8–02; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with section 3506(c)(2)(A) of the Paperwork

Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Evaluation of the CSAP Underage Drinking Prevention Public Education Campaign—New—SAMHSA's Center for Substance Abuse Prevention (CSAP) is launching the Underage Drinking Prevention Public Education Campaign, which is a public education campaign designed to educate 9–13 year old children about the harms of alcohol use and to support parents as they monitor and participate in their children's activities. The ultimate goal of the initiative is to reduce underage drinking among young people. Elements of the campaign include media messages (such as public service announcements on television and radio) and education of children and their adult caregivers through materials and community events.

To determine the likely effectiveness of the campaign, CSAP is planning to conduct an evaluation. The evaluation will determine whether the campaign can produce measurable change in communities that receive training and technical assistance on implementing the campaign, plus funds to customize materials for those communities. The evaluation will assess change in knowledge and attitudes among those exposed to the campaign. Four treatment and four comparison communities will be selected for study. Data for the evaluation will be collected through a baseline and follow-up telephone survey of adult-child dyads. The estimated annual burden hours are as follows:

Data collection instrument	Number of respondents	Responses per respondent	Hours per response	Total annual burden (hrs.)
Baseline telephone survey of random sample of adult-child dyads	3,200	1	0.3	960
Follow-up telephone survey of random sample of adult-child dyads	3,200	1	0.3	960
Total	6,400			1,920

Send comments to Nancy Pearce, SAMHSA Reports Clearance Officer, Room 16–105, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: April 3, 2002.

Richard Kopanda,

Executive Officer, SAMHSA.

[FR Doc. 02–8490 Filed 4–8–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2002 Funding Opportunities

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of funding availability.

SUMMARY: The Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Substance Abuse Treatment (CSAT) announces the availability of FY 2002 funds for grants for the following activity. This notice is not a complete description of the activity; potential applicants must obtain a copy of the Guidance for Applicants (GFA), including Part I, American Indian/Alaskan Native and Rural Community Planning Program, and Part II, General Policies and Procedures Applicable to all SAMHSA Applications for Discretionary Grants and Cooperative Agreements, before preparing and submitting an application.

Activity	Application deadline	Est. funds FY 2002	Est. No. of awards	Project period
Grants Program for American Indian/Alaska Native and Rural Community Planning Program.	June 19, 2002	$1,500,000	6	18 months

The actual amount available for the award may vary, depending on unanticipated program requirements and the number and quality of applications received. FY 2002 funds for the activity discussed in this announcement were appropriated by the Congress under Public Law No. 106–310. SAMHSA's policies and procedures for peer review and Advisory Council review of grant and cooperative agreement applications were published in the **Federal Register** (Vol. 58, No. 126) on July 2, 1993.

General Instructions: Applicants must use application form PHS 5161–1 (Rev. 7/00). The application kit contains the two-part application materials (complete programmatic guidance and instructions for preparing and submitting applications), the PHS 5161–1 which includes Standard Form 424 (Face Page), and other documentation and forms. Application kits may be obtained from:

National Clearinghouse for Alcohol and Drug Information (NCADI), P.O. Box 2345, Rockville, MD 20847–2345, Telephone: 1–800–729–6686.

The PHS 5161–1 application form and the full text of the activity are also available electronically via SAMHSA's World Wide Web Home Page: *http://www.samhsa.gov*.

When requesting an application kit, the applicant must specify the particular activity for which detailed information is desired. All information necessary to

apply, including where to submit applications and application deadline instructions, are included in the application kit.

Purpose: The Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Substance Abuse Treatment (CSAT) announces the availability of Fiscal Year 2002 funds for grants to support community-based planning, resulting in the development of a local substance abuse treatment system plan, for American Indian and Alaskan Native (AI/AN) and rural communities.

Eligibility: Eligible applicants are public and domestic private non-profit entities such as community based organizations, Tribes, Tribal governments, or other tribal authorities, colleges and universities (including Tribal colleges and universities), faith-based organizations, provider and consumer groups and health care organizations. Applicants must propose to serve Rural Communities or American Indian or Alaska Native communities (including urban tribal communities). In compliance with the legislative authority for this program (Sec. 509 of the Public Health Service Act), for-profit organizations are not eligible.

Availability of Funds: Approximately $1,500,000 will be available to fund approximately 6 grants. Applicants may request up to but not more that $250,000 in total project costs (direct and indirect) for the entire project period.

Period of Support: Grants will be awarded for a project period of up to 18 months.

Criteria for Review and Funding: General Review Criteria: Competing applications requesting funding under this activity will be reviewed for technical merit in accordance with established PHS/SAMHSA peer review procedures. Review criteria that will be used by the peer review groups are specified in the application guidance material.

Award Criteria for Scored Applications: Applications will be considered for funding on the basis of their overall technical merit as determined through the peer review group and the appropriate National Advisory Council review process. Availability of funds will also be an award criteria. Additional award criteria specific to the programmatic activity may be included in the application guidance materials.

Catalog of Federal Domestic Assistance Number: 93.243.

Program Contact: For questions concerning program issues, contact:

Maria Burns, CSAT/SAMHSA, Rockwall II, Suite 740, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–7611, E-Mail: *mburns@samhsa.gov*.

For questions regarding grants management issues, contact:

Steve Hudak, Division of Grants Management, OPS/SAMHSA, Rockwall II, 6th floor, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–9666, E-Mail: *shudak@samhsa.gov*

Public Health System Reporting Requirements: The Public Health System Impact Statement (PHSIS) is intended to keep State and local health officials apprised of proposed health services grant and cooperative agreement applications submitted by community-based nongovernmental organizations within their jurisdictions.

Community-based nongovernmental service providers who are not transmitting their applications through the State must submit a PHSIS to the head(s) of the appropriate State and local health agencies in the area(s) to be affected not later than the pertinent receipt date for applications. This PHSIS consists of the following information:

a. A copy of the face page of the application (Standard form 424).

b. A summary of the project (PHSIS), not to exceed one page, which provides:

(1) A description of the population to be served.

(2) A summary of the services to be provided.

(3) A description of the coordination planned with the appropriate State or local health agencies.

State and local governments and Indian Tribal Authority applicants are not subject to the Public Health System Reporting Requirements. Application guidance materials will specify if a particular FY 2002 activity is subject to the Public Health System Reporting Requirements.

PHS Non-use of Tobacco Policy Statement: The PHS strongly encourages all grant and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of a facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

Executive Order 12372: Applications submitted in response to the FY 2002 activity listed above are subject to the intergovernmental review requirements of Executive Order 12372, as implemented through DHHS regulations at 45 CFR Part 100. E.O. 12372 sets up a system for State and local government review of applications for Federal financial assistance. Applicants (other than Federally recognized Indian tribal governments) should contact the State's Single Point of Contact (SPOC) as early as possible to alert them to the prospective application(s) and to receive any necessary instructions on the State's review process. For proposed projects serving more than one State, the applicant is advised to contact the SPOC of each affected State. A current listing of SPOCs is included in the application guidance materials. The SPOC should send any State review process recommendations directly to:

Division of Extramural Activities, Policy, and Review, Substance Abuse and Mental Health Services Administration, Parklawn Building, Room 17–89, 5600 Fishers Lane, Rockville, Maryland 20857.

The due date for State review process recommendations is no later than 60 days after the specified deadline date for the receipt of applications. SAMHSA does not guarantee to accommodate or explain SPOC comments that are received after the 60-day cut-off.

Dated: April 3, 2002.

Richard Kopanda,

Executive Officer, SAMHSA.

[FR Doc. 02–8494 Filed 4–8–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Funding Opportunities Notice for the Community Action Grants for Service System Change, May 10, 2002 Application Date

AGENCY: Center for Mental Health Services (CMHS), Substance Abuse and Mental Health Services Administration (SAMHSA), DHHS.

ACTION: Modification/Clarification of a notice of funding availability regarding the Substance Abuse and Mental Health Services Administration, Center for Mental Health Services, Community Action Grants for Service System Change.

SUMMARY: This notice is to inform the public that the SAMHSA/CMHS announcement No. PA00–003, Community Action Grants for Service

System Change (Short Title: Community Action Grants) will have only one application receipt date on May 10, 2002. Awards will be made in September 2002. Consistent with SAMHSA policy for all grants and applications, scored applications that are not funded in September 2002 will be held for consideration for one year, should funding become available in FY 2003. Sponsors of exemplary practices who are considering applying for a grant through the standing announcement for one of the subsequent receipt dates should note that the President's FY03 Budget proposes no funds for new awards during FY03. Should Community Action Grant funding become available, a new announcement will be published. Check the **Federal Register** and/or the SAMHSA Web site for notice of the announcement at *http://www.samhsa.gov/.*

Community Action Grants for Service Systems Change support the adoption and implementation of exemplary practices related to the delivery and organization of services for children with serious emotional disturbance or adults with serious mental illness, and those with co-occurring disorders. Awards range from a minimum of $50,000 to a maximum of $150,000 in total costs.

Program Contact: For questions concerning program issues, contact: David Morrissette, DSW, Community Support Program, Suite 11C–22, 5600 Fishers Lane, Rockville, MD 20857, 301–443–3653, Fax 301–443–0541, E-mail: *dmorriss@samhsa.gov.*

Dated: April 2, 2002.

Chuck Novak,

Acting Executive Officer, SAMHSA.

[FR Doc. 02–8393 Filed 4–8–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2002 Funding Opportunities

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of funding availability.

SUMMARY: The Substance Abuse and Mental Health Services Administration (SAMHSA) Center for Substance Abuse Treatment (CSAT) announces the availability of FY 2002 funds for grants for the following activity. This notice is not a complete description of the activity; potential applicants must obtain a copy of the Guidance for Applicants (GFA), including Part I, Development of Comprehensive Drug/Alcohol and Mental Health Treatment Systems for Persons Who Are Homeless, and Part II, General Policies and Procedures Applicable to all SAMHSA Applications for Discretionary Grants and Cooperative Agreements, before preparing and submitting an application.

Activity	Application deadline	Est. funds FY 2002	Est. No. of awards	Project period years
Grants Program to Develop, Comprehensive Drug/Alcohol and, Mental Health Treatment Systems for, Persons Who Are Homeless.	June 19, 2002	$9,000,000	15–17	3

The actual amount available for the award may vary, depending on unanticipated program requirements and the number and quality of applications received. FY 2002 funds for the activity discussed in this announcement were appropriated by the Congress under Public Law No. 106–310. SAMHSA's policies and procedures for peer review and Advisory Council review of grant and cooperative agreement applications were published in the **Federal Register** (Vol. 58, No. 126) on July 2, 1993.

General Instructions: Applicants must use application form PHS 5161–1 (Rev. 7/00). The application kit contains the two-part application materials (complete programmatic guidance and instructions for preparing and submitting applications), the PHS 5161–1 which includes Standard Form 424 (Face Page), and other documentation and forms. Application kits may be obtained from:

National Clearinghouse for Alcohol and Drug Information (NCADI),
P.O. Box 2345,
Rockville, MD 20847–2345,
Telephone: 1–800–729–6686.

The PHS 5161–1 application form and the full text of the activity are also available electronically via SAMHSA's World Wide Web Home Page: *http://www.samhsa.gov.*

When requesting an application kit, the applicant must specify the particular activity for which detailed information is desired. All information necessary to apply, including where to submit applications and application deadline instructions, are included in the application kit.

Purpose: The Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Substance Abuse Treatment (CSAT) announces the availability of fiscal year 2002 funds for grants to enable communities to expand and strengthen their treatment services for homeless individuals with substance abuse disorders, mental illness, or with co-occurring substance abuse disorders and mental illness.

Eligibility: Pursuant to Section 506 of the Public Health Service Act, eligible entities are community-based public and private nonprofit entities. Community-based public entities are those public entities located in the community and would include tribal and local governments that provide community-based services. Private nonprofit entities include community-based and faith-based organizations. States are not eligible to apply. The applicant agency and all direct providers of substance abuse and mental health services involved in the proposed system must be in compliance with all local, city, county and/or State requirements for licensing, accreditation, or certification. The applicant, if a direct provider of substance abuse treatment or mental health services, and any direct providers of substance abuse treatment or mental health services involved in the proposed system, must have been providing treatment services for a minimum of two years prior to the date of the application. If the applicant is not a direct provider of substance abuse treatment or mental health services, the applicant must document a commitment from a substance abuse treatment or mental health provider to participate in the proposed project.

Availability of Funds: Approximately $9.0 million will be available to fund 15 to 17 grants. The average award is expected to range from $450,000 to $600,000 per year in total costs (direct and indirect). Annual awards will be made subject to continued availability of funds and progress achieved by the grantee.

Period of Support: Grants will be awarded for a period of up to 3 years.

Criteria for Review and Funding

General Review Criteria: Competing applications requesting funding under this activity will be reviewed for technical merit in accordance with established PHS/SAMHSA peer review procedures. Review criteria that will be used by the peer review groups are specified in the application guidance material.

Award Criteria for Scored Applications: Applications will be considered for funding on the basis of their overall technical merit as determined through the peer review group and the appropriate National Advisory Council review process. Availability of funds will also be an award criteria. Additional award criteria specific to the programmatic activity may be included in the application guidance materials.

Catalog of Federal Domestic Assistance Number: 93.243.

Program Contact: For questions concerning program issues, contact:

Joanne C. Gampel, M.A., CSAT/SAMHSA, Rockwall II, 7th Floor, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–7945, E-Mail: *jgampel@samhsa.gov.*

For questions regarding grants management issues, contact:

Steve Hudak, Division of Grants Management, OPS/SAMHSA, Rockwall II, 6th floor, 5600 Fishers Lane, Rockville, MD 20857, (301) 443–9666, E-Mail: *shudak@samhsa.gov.*

Public Health System Reporting Requirements: The Public Health System Impact Statement (PHSIS) is intended to keep State and local health officials apprised of proposed health services grant and cooperative agreement applications submitted by community-based nongovernmental organizations within their jurisdictions.

Community-based nongovernmental service providers who are not transmitting their applications through the State must submit a PHSIS to the head(s) of the appropriate State and local health agencies in the area(s) to be affected not later than the pertinent receipt date for applications. This PHSIS consists of the following information:

a. A copy of the face page of the application (Standard form 424).

b. A summary of the project (PHSIS), not to exceed one page, which provides:

(1) A description of the population to be served.

(2) A summary of the services to be provided.

(3) A description of the coordination planned with the appropriate State or local health agencies.

State and local governments and Indian Tribal Authority applicants are not subject to the Public Health System Reporting Requirements. Application guidance materials will specify if a particular FY 2002 activity is subject to the Public Health System Reporting Requirements.

PHS Non-use of Tobacco Policy Statement: The PHS strongly encourages all grant and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of a facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

Executive Order 12372: Applications submitted in response to the FY 2002 activity listed above are subject to the intergovernmental review requirements of Executive Order 12372, as implemented through DHHS regulations at 45 CFR Part 100. E.O. 12372 sets up a system for State and local government review of applications for Federal financial assistance. Applicants (other than Federally recognized Indian tribal governments) should contact the State's Single Point of Contact (SPOC) as early as possible to alert them to the prospective application(s) and to receive any necessary instructions on the State's review process. For proposed projects serving more than one State, the applicant is advised to contact the SPOC of each affected State. A current listing of SPOCs is included in the application guidance materials. The SPOC should send any State review process recommendations directly to: Division of Extramural Activities, Policy, and Review, Substance Abuse and Mental Health Services Administration, Parklawn Building, Room 17–89, 5600 Fishers Lane, Rockville, Maryland 20857.

The due date for State review process recommendations is no later than 60 days after the specified deadline date for the receipt of applications. SAMHSA does not guarantee to accommodate or explain SPOC comments that are received after the 60-day cut-off.

Dated: April 3, 2002.

Richard Kopanda,

Executive Officer, SAMHSA.

[FR Doc. 02–8495 Filed 4–8–02; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4739–N–10

Notice of Proposed Information Collection: Comment Request; Section 248 Single Family Mortgage Insurance on Indian Reservations and Other Restricted Lands

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* June 10, 2002.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Wayne Eddins, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., L'Enfant Plaza Building, Room 8001, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Director, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is

necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Section 248 Single Family Mortgage Insurance on Indian Reservations and Other Restricted Lands.

OMB Control Number, if applicable: 2502–0340.

Description of the need for the information and proposed use: Verification of mortgage security and certification of eviction procedures by Indian tribes are needed by HUD to satisfy requirements for single-family mortgage insurance and for use in the event of foreclosure.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total hours needed to prepare the information collection is 610, the number of respondents is 1,220 generating 1,220 responses annually, the frequency of response is on occasion, and the time needed per response is 30 minutes.

Status of the proposed information collection: Reinstatement, without change, of a previously approved collection for which approval has expired.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: March 28, 2002.

Sean Cassidy,

General Deputy Assistant Secretary for Housing.

[FR Doc. 02–8478 Filed 4–8–02; 8:45 am]

BILLING CODE 4210–27–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4733–N–02]

Notice of Proposed Information Collection: Comment Request, Consolidated Planning

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of proposed information collection for public comments.

SUMMARY: The proposed information collection requirements for Consolidated Planning for Community Planning and Development (CPD) programs described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* June 10, 2002.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Shelia Jones, Reports Liaison Oficer, Department of Housing and Urban Development, 451 7th Street, SW., Room 7232, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Salvatore Sclafani, Policy Division, Room 7154, Washington, DC 20410, 202–708–0614, ext. 4364 (this is not a toll-free number) for copies of the proposed forms and other available documents:

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35 as amended). As required under 5 CFR 1320.8(d)(1), HUD and OMB are seeking comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information submission of responses.

Title of Proposal: Consolidated Plan.

Description of the Need for the Information and Proposed Uses: The information is needed to provide HUD with preliminary assessment as to the statutory and regulatory eligibility of proposed grantee projects. A secondary need is informing citizens of intended uses for program funds.

Agency Form Numbers (if applicable): The Department's collection of this information is in compliance with statutory provisions of the Cranston-Gonzalez National Affordable Housing Act of 1990 that requires the participating jurisdictions submit a Comprehensive Housing Affordability Strategy (Section 216(5)), the 1974 Housing and Community Development Act, as amended, that requires states and localities to submit a Community Development Plan (Section 104(b)(4) and Section 104(b)(m) and statutory provisions of these Acts that require states and localities to submit applications for these formula grant programs.

Members of the Affected Public: State and local governments participating in the Community Development Block Grant Program (CDBG), the HOME Investment Partnerships (HOME) program, the Emergency Shelter Grants (ESG) program, or the Housing Opportunities with AIDS/HIV (HOPWA) program.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response and hours of response: Since the original approval of the Consolidated Planning paperwork reduction estimate in 1995 (OMB Control Number 2506–0117), additional localities have qualified for assistance under the Community Development Block Grant (CDBG) program, thus increasing the overall burden calculation. Additionally, this submission includes paperwork estimates associated with narrative information required by the Consolidated Annual Performance and Evaluation Report. Reporting on annual performance was not included in the original Consolidated Plan paperwork estimate that was submitted to OMB. There have been several major regulatory changes made to existing CDBG regulations and those for the HOME Investment Partnerships (HOME) program which have resulted in a slight increase in overall burden hour calculations. Each of these regulatory changes have been submitted for comment in the National Register and to OMB independently.

The revised paperwork estimates are as follows:

Task	Number of respondents	Frequency of response	Total U.S. burden hours
Consolidated Plan:			
Localities	1,000	1	332,025
States	50	1	48,900
Performance Report:			
Localities	1,000	1	150,000
States	50	1	12,000
Abreviated Strategy	100		7,000
Total			549,925

Status of the proposed information collection: Reinstatement, with minor changes of a previously approved collection for which approval is near expiration and the request for OMB approval's for three years. The current OMB approval expires June 30, 2002.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 2, 2002.

Donna M. Abbenante,

Assistant Secretary for Community Planning and Development.

[FR Doc. 02–8479 Filed 4–8–02; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Endangered Species Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt.

SUMMARY: We announce our receipt of applications to conduct certain activities pertaining to scientific research and enhancement of survival of endangered species.

DATES: Written comments on these requests for permits must be received May 9, 2002.

ADDRESSES: Written data or comments should be submitted to the Assistant Regional Director-Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486; telephone 303–236–7400, facsimile 303–236–0027.

FOR FURTHER INFORMATION CONTACT: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 20 days of the date of publication of this notice to the address above; telephone 303–236–7400.

SUPPLEMENTARY INFORMATION: The following applicants have requested renewal of scientific research and enhancement of survival permits to conduct certain activities with endangered species pursuant to Section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)

Applicant: ERO Resources Corporation, Denver, Colorado, TE–043060.

The applicant requests a permit amendment to add surveys for Southwestern willow flycatchers (*Empidonax traillii extimus*) in conjunction with recovery activities throughout the species' range for the purpose of enhancing its survival and recovery.

Applicant: Dr. Todd Crowl, Utah State University, Logan, Utah, TE–049748.

The applicant requests a renewed permit to take Bonytail chub (*Gila elegans*), Colorado pikeminnow (*Ptychocheilus lucius*), June sucker (*Chasmistes liorus*), and Razorback sucker (*Xyrauchen texanus*) in conjunction with recovery activities throughout the species' range for the purpose of enhancing their survival and recovery.

Applicant: Omaha's Henry Doorly Zoo, Omaha, Nebraska, TE–053961.

The above applicants request permits to possess black-footed ferrets (*Mustela nigripes*), Desert tortoise (*Gopherus agassizii*), gray wolf (*Canis lupus*), grizzly bear (*Urus arctos horribilis*), and Wyoming toad (*Bufo hemiophrys baxteri*) for public display and propagation in conjunction with recovery activities for the purpose of enhancing their survival and recovery.

Applicant: The Nature Conservancy, Hayden, Colorado, TE–054217.

The applicant requests a permit to possess Colorado pikeminnow (*Ptychocheilus lucius*), bonytail (*Gila elegans*), humpback chub (*Gila cypha*), and razorback sucker (*Xyrauchen texanus*) for public display and education in conjunction with recovery activities for the purpose of enhancing their survival and recovery.

Applicants: Savage and Savage, Louisville, Colorado, TE–051718; TRC Mariah Associates, Inc., Laramie, Wyoming, TE–052582; Natural Resource Options, Inc., Bozeman, Montana, TE–052583.

The above applicants request renewed permits to survey for Southwestern willow flycatchers (*Empidonax traillii extimus*) in conjunction with recovery activities throughout the species' range for the purpose of enhancing its survival and recovery.

Applicants: Dakota Zoo, Bismarck , North Dakota, TE–051815; Louisville Zoo, Louisville, Kentucky, TE–051826; Phoenix Zoo, Phoenix, Arizona, TE–051832; Toronto Zoo, Ontario, Canada, TE–051841; Elmwood Park Zoo, Norristown, Pennsylvania, TE–053485; Lee Richardson Zoo, Garden City, Kansas, TE–051825; Fort Worth Zoo, Fort Worth, Texas, TE–051819.

The above applicants request permits to possess black-footed ferrets (*Mustela nigripes*) for public display and propagation in conjunction with recovery activities for the purpose of enhancing their survival and recovery.

Applicant: Wildlife Conservation Society, Central Park Zoo, New York, New York, TE–051847; Toledo Zoological Gardens, Toledo, Ohio, TE–052627.

The above applicants request permits to possess Wyoming toads (*Bufo hemiophrys baxteri*) for public display and propagation in conjunction with recovery activities for the purpose of enhancing their survival and recovery.

Correction

In the **Federal Register** of January 10, 2002, (67 FR 1365), FR Doc. 02–603, in the second column, the list of species requested by Trent Miller should read as follows:

Permit No. TE–047252

Applicant: Trent Miller, SWCA, Inc., Environmental Consultants, Westminster Colorado.

The applicant requests a renewed permit to survey for black-footed ferrets (*Mustela nigripes*), and Southwestern willow flycatcher (*Empidonax traillii extimus*) in conjunction with recovery activities throughout the species' range for the purpose of enhancing their survival and recovery.

Dated: March 20, 2002.

John A. Blankenship,

Acting Regional Director, Denver, Colorado.

[FR Doc. 02–8227 Filed 4–8–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF INTERIOR

Fish and Wildlife Service

Notice of Availability of the Draft Revised Recovery Plan for the Gila Trout (*Oncorhynchus gilae*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of the draft Revised Recovery Plan for the Gila trout (*Oncorhynchus gilae*). The Gila trout is endemic to mountain streams in the Gila, San Francisco, Agua Fria, and Verde river drainages in New Mexico and Arizona. The Service solicits review and comment from the public on this draft plan.

DATES: The comment period for this proposal closes on June 10, 2002. Comments on the draft revised recovery plan must be received by the closing date.

ADDRESSES: Persons wishing to review the draft Recovery Plan can obtain a copy from the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, New Mexico, 87113. If you wish to comment, you may submit your comments and materials concerning this draft revised recovery plan to the Field Supervisor at the address above.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, New Mexico Ecological Services Field Office, at the above address; telephone 505/346–2525, facsimile 505/346–2542.

SUPPLEMENTARY INFORMATION:

Background

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the Service's endangered species program. To help guide the recovery effort, the Service is working to prepare Recovery Plans for most of the listed species native to the United States. Recovery Plans describe actions considered necessary for conservation of species, establish criteria for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*) requires the development of Recovery Plans for listed species unless such a Plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during Recovery Plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised Recovery Plan. The Service and other Federal agencies will also take these comments into account in the course of implementing Recovery Plans.

The document submitted for review is the draft revised recovery plan for the Gila trout. The species was listed as endangered on March 11, 1967, under the Federal Endangered Species Preservation Act of 1966. Federal status of the fish as endangered was continued under the Endangered Species Act of 1973.

The threats facing the survival and recovery of this species are the competition and hybridization with non-native trout species (*e.g.*, *Oncorhynchus mykiss*), forest management practices, grazing management, severe drought, catastrophic wildfires, and floods. This draft Recovery Plan, when finalized, will supercede the Recovery Plan finalized for the species in 1993. The draft Recovery Plan includes new scientific information about the species gathered since 1993 and provides objectives and actions needed to downlist then delist the species. Recovery activities designed to achieve these objectives include establishing additional populations of Gila trout; protecting existing populations and habitat; continuing to obtain information needed to address conservation issues; and continuing to provide information and coordinating recovery of this species.

The draft Recovery Plan is being submitted for technical and agency review. After consideration of comments received during the review period, the Recovery Plan will be submitted for final approval.

Public Comments Solicited

The Service solicits written comments on the Recovery Plan described. All comments received by the date specified above will be considered prior to approval of the Recovery Plan.

Authority: The authority for this action is Section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: March 21, 2002.

Pat Langley,

Acting Regional Director.

[FR Doc. 02–8381 Filed 4–8–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for Issuance of Incidental Take Permits to Gulf Highlands LLC and Fort Morgan Paradise Joint Venture on Privately Owned Lands in Alabama

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

We, the U.S. Fish and Wildlife Service (Service), announce our intent to issue incidental take permits to Gulf Highlands LLC and Fort Morgan Paradise Joint Venture (Applicants) for residential development in Alabama, pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The authorized take would be incidental to otherwise lawful activities, including construction of residential condominiums, commercial facilities, and recreational amenities on adjoining tracts of land owned by the Applicants. The proposed action includes implementation of the Habitat Conservation Plan (HCP) jointly developed by the Applicants, as required by Section 10(a)(2)(B) of the Act, to minimize and mitigate for incidental take of the Federally-listed, endangered Alabama beach mouse (*Peromyscus polionotus ammobates*)(ABM), the endangered Kemp's ridley sea turtle (*Lepidochelys kempii*), the threatened green sea turtle (*Chelonia mydas*), and the threatened loggerhead sea turtle (*Caretta caretta*). The subject permits would authorize take of ABM and the three sea turtles along 2,844 linear feet of coastal dune habitat fronting the Gulf of Mexico in Baldwin County, Alabama.

We published a notice in the **Federal Register** (66 FR 54020) on October 25, 2001 and again on December 28, 2001 (66 FR 67290) that these applications had been filed with the Service. At that time, we had not determined whether the proposed issuance of the permits would comprise a major Federal action. Following completion of our environmental review and consideration of public comments received, the Service has now determined that issuance of the incidental take permits would not be a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended (NEPA). The Service has prepared a Finding of No Significant Impact (FONSI) based on the EA and public comment. This notice is provided pursuant to Section 10 of the Act.

We have evaluated the issuance of section 10(a)(1)(B) permits under section 7 of the Act by conducting an intra-Service section 7 consultation. We have determined that issuance of the permits will not jeopardize the continued existence of the affected species. We have presented this determination in the biological opinion prepared in our analysis of the incidental take permit applications.

We have evaluated whether the proposed permits would meet the issuance criteria established by section 10(a)(2)(B) of the Act. We have determined, and outlined in our Set of Findings, that the incidental take permit applications meet these criteria for issuance.

Copies of the FONSI, biological opinion, and Set of Findings have been forwarded to those people and groups who commented in response to our previous public notices. Copies of these documents are also available to those who have not commented on these applications before (see **ADDRESSES** below). Final permit issuance will occur no sooner than April 19, 2002.

ADDRESSES: Persons wishing to receive the application, HCP, EA, FONSI, biological opinion, and set of findings may obtain an electronic copy on compact disk by writing, telephoning, or e-mailing the Service's Southeast Regional Office, Atlanta, Georgia (see **CONTACTS** below). Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), Ecological Services Field Office, 1208–B Main Street, Daphne, Alabama 36526, or Bon Secour National Wildlife Refuge, 12295 State Highway 180, Gulf Shores, Alabama 35603. Please reference permit numbers TE007985–0 and TE031307–0 in requests for the documents discussed herein.

FOR FURTHER INFORMATION CONTACT: Mr. David Dell, Regional HCP Coordinator, (see **ADDRESSES** above), telephone: 404/679–7313, facsimile: 404/679–7081, e-mail: david_dell@fws.gov; or Ms. Celeste South, Fish and Wildlife Biologist, Daphne Field Office, Alabama (see **ADDRESSES** above), telephone: 251/441–5181.

Dated: March 29, 2002.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. 02–8491 Filed 4–8–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–060–1020–PG]

Central Montana Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Lewistown Field Office, Interior.

ACTION: Notice of meeting.

SUMMARY: The Central Montana Resource Advisory Council will meet May 1 and 2, 2002, at the Stage Stop Inn, in Choteau, Montana.

The May 1st, 2002, meeting will begin at 1 p.m. with a 30-minute public comment period. The council will then hear briefings and consider reports from council members and BLM staff concerning BLM's core team structure for preparing a resource management plan; council subgroup recommendations; energy developments along the Rocky Mountain front; an energy policy update; and the Macum Environmental Assessment update. This meeting is scheduled to adjourn at 5 p.m.

The May 2nd, 2002, meeting will begin at 8 a.m. with a 30-minute public comment period. The group will then consider field manager issues; rights-of-ways and easements across public lands; budget information; an update concerning ferry crossings on the Upper Missouri River; the draft sage grouse conservation plan; and the potential impact of swift fox management. The council will then move into several administrative topics (meeting critique, travel vouchers, next meeting location-topics-logistics-etc.). This meeting is scheduled to adjourn at 3:30 p.m.

DATES: May 1 and 2, 2002.

Location: Stage Stop Inn, Choteau, Montana.

FOR FURTHER INFORMATION CONTACT: Malta Field Manager, Malta Field Office, 501 South 2nd Street East, Malta, Montana 59538.

SUPPLEMENTARY INFORMATION: These meetings are open to the public and there will be a public comment period at the beginning of each meeting; as detailed above.

David L. Mari,

Field Manager.

[FR Doc. 02–8238 Filed 4–8–02; 8:45 am]

BILLING CODE 4310–$$–P

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meeting; Notice

Agency Holding the Meeting: Mississippi River Commission.

Time and Date: Begin at 1:30 p.m. and adjourn by 4:00 p.m., April 23, 2002.

Place: Mississippi River Commission Headquarters Building, 1400 Walnut Street, Vicksburg, MS.

Status: Open to the public for observation but not for participation.

Matter To Be Considered: The Commission will consider the Morganza, Louisiana, to the Gulf of Mexico Hurricane Protection Project Final Feasibility Report and Final Environmental Impact Statement.

Contact Person for More Information: Mr. Stephen Gambrell, telephone 601–634–5766.

Thomas A. Holden Jr.,

Colonel, Corps of Engineers, Secretary, Mississippi River Commission.

[FR Doc. 02–8656 Filed 4–5–02; 12:34 pm]

BILLING CODE 3710–GX–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (02–048)]

Debt Collection Improvement Act of 1996: Administrative Wage Garnishment

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of withdrawal.

SUMMARY: The National Aeronautics and Space Administration (NASA) has previously issued a Notice concerning administrative wage garnishment under the Debt Collection Improvement Act of 1996, in the **Federal Register** on March 7, 2002, (67 FR 10447). NASA

withdraws that Notice and will be adopting new regulations in rulemaking.

DATES: Effective: April 9, 2002.

ADDRESSES: NASA Headquarters, Code BFZ, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Melvin Denwiddie, (202) 358–0983.

Stephen J. Varholy,

Deputy Chief Financial Officer.

[FR Doc. 02–8487 Filed 4–8–02; 8:45 am]

BILLING CODE 7510–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting Notice

DATE: Weeks of April 8, 15, 22, 29, May 6, 13, 2002.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of April 8, 2002

Friday, April 12, 2002

9:25 a.m. Affirmation Session (Public Meeting) (if needed)

Week of April 15, 2002—Tentative

There are no meetings scheduled for the Week of April 15, 2002.

Week of April 22, 2002—Tentative

There are no meetings scheduled for the Week of April 22, 2002.

Week of April 29, 2002—Tentative

Tuesday, April 30, 2002

9:30 a.m. Discussion of Intergovernmental Issues (Closed—Ex. 9)

Wednesday, May 1, 2002

8:55 a.m. Affirmation Session (Public Meeting) (if needed)

9 a.m. Briefing on Results of Agency Action Review Meeting—Reactors (Public Meeting) (Contact: Robert Pascarelli, 301–415–1245)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

Week of May 6, 2002—Tentative

There are no meetings scheduled for the Week of May 6, 2002.

Week of May 13, 2002—Tentative

Thursday, May 16, 2002

9:25 a.m. Affirmation Session (Public Meeting) (if needed)

9:30 a.m. Meeting with World Association of Nuclear Operators (WANO) (Public Meeting)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

2 p.m. Discussion of Intragovernmental Issues (Closed—Ex. 9)

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: David Louis Gamberoni (301) 415–1651.

ADDITIONAL INFORMATION: By a vote of 5–0 on April 2 and 3, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Affirmation of (a) Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility); Duke Cogema Stone & Webster's Petition for Interlocutory Review, (b) International Uranium (USA) Corp. White Mesa Uranium Mill Appeal of LBP–02–06 (MLA–11), and c) Private Fuel Storage (Independent Spent Fuel Storage Installation) Docket No. 72–22–ISFSI; Order responding to Utah's Suggestion of Lack of Jurisdiction' and Petition for Rulemaking under the Nuclear Waste Policy Act'' be held on April 3, and on less than one week's notice to the public.

The NRC Commission Meeting Schedule can be found on the internet at: *www.nrc.gov/what-we-do/policy-making/schedule.html.*

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: April 14, 2002.

David Louis Gamberoni,

Technical Coordinator, Office of the Secretary.

[FR Doc. 02–8611 Filed 4–5–02; 10:19 am]

BILLING CODE 7590–01–M

POSTAL RATE COMMISSION

Briefing on OCA Study

AGENCY: Postal Rate Commission.

ACTION: Notice of briefing.

SUMMARY: The Commission's Office of the Consumer Advocate (OCA) will present a briefing on Tuesday, April 9, 2002, beginning at 11 a.m., in the Postal Rate Commission's hearing room. The briefing will address the OCA's recent report on the quality of services the Postal Service provides to the public. The briefing is open to the public. The report is posted on the Commission's Web site (*www.prc.gov*). It can be accessed by selecting ''Consumer Advocate'' in the banner and selecting ''OCA Papers'' in the left-hand frame.

DATES: April 9, 2002.

ADDRESSES: Postal Rate Commission (hearing room), 1333 H Street NW., Washington, DC 20268–0001, suite 300.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, general counsel, Postal Rate Commission, 202–789–6820.

Steven W. Williams,

Secretary.

[FR Doc. 02–8489 Filed 4–8–02; 8:45 am]

BILLING CODE 7710–FW–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45685; File No. SR–NASD–2001–86]

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Fees for Nasdaq Index Information

April 3, 2002.

On December 4, 2001, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend NASD Rule 7030 (Special Options) to increase the monthly fee charged to market data vendors for non-core, real-time information about Nasdaq indexes. Nasdaq established the fee in 1992 at $500 per month. The proposed rule change would raise the fee to $2,000 per month.

The proposed rule change was published for notice and comment in the **Federal Register** on March 1, 2002.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* Securities Exchange Act Release No. 45472 (February 22, 2002), 67 FR 9489.

association[4] and, in particular, the requirements of Sections 15A(b)(5)[5] and (6)[6] of the Act. Section 15A(b)(5) requires the equitable allocation of reasonable fees and charges among members and other users of facilities operated or controlled by a national securities association. Section 15A(b)(6) requires rules that foster cooperation and coordination with persons engaged in facilitating transactions in securities and that are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The Commission received no comments on the proposed fee increase. The Commission believes that the fee is reasonable, given Nasdaq's representations regarding the 1,800% growth of Nasdaq trading volume, the increase in processing demands, and the increase in the subscriber audience since the fee's inception. The Commission believes that increasing the fee from $500 per month to $2,000 per month should not impede the widespread availability of the index information on a non-discriminatory basis.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR-NASD–2001–86) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–8485 Filed 4–8–02; 8:45 am]

BILLING CODE 8010–01–P

[4] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78o-3(b)(5).

[6] 15 U.S.C. 78o-3(b)(6).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45684; File No. SR–NYSE–2001–45]

Self-Regulatory Organizations; Notice of Filing and Order Granting Partial Accelerated Approval of Proposed Rule Change, Amendment No. 1, and Amendment No. 2 Thereto by the New York Stock Exchange, Inc. Instituting a Pilot Program Relating to Amendments to the Initial Listing Standards and Allocation Policy for Closed-End Management Investment Companies Registered Under the Investment Company Act of 1940

April 2, 2002.

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 October 29, 2001, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On March 14, 2002, the NYSE filed Amendment No. 1 to the proposed rule change with the Commission.[3] On April 1, 2002, the NYSE filed Amendment No. 2 to the proposed rule change with the Commission.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and grant accelerated approval to the portion of the proposal instituting a pilot program relating to the listing eligibility criteria and allocation policy for closed-end management investment companies registered under the Investment Company Act of 1940 (''pilot'').

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE proposes to implement a three-month pilot in respect of the following proposed rule change, as amended, while the Commission considers permanent approval of the proposal. The Exchange is proposing to amend Section 102.04 of the Exchange's Listed Company Manual (''Manual'') regarding listing standards for closed-end management investment companies registered under the Investment Company Act of 1940 (hereinafter referred to as ''funds'' or ''closed-end funds''). The Exchange is proposing to apply to all individual closed-end funds that desire to list on the Exchange the $60 million public market value test currently used for funds applying in connection with their initial public offering.[5] In addition, the Exchange is proposing a standard under which a group of funds meeting certain specified requirements can be listed concurrently by a single ''fund family,'' even if the group includes one or more funds with less than $60 million in public market value. Finally the Exchange is proposing to amend its Allocation Policy and Procedures (''Allocation Policy'') with respect to the specialist allocation of funds listed in such a fund family group.

The text of the proposed rule change is available at the NYSE 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 NYSE included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated March 12, 2002 (''Amendment No. 1''). In Amendment No. 1, the Exchange, in part, substituted the phrase ''investment management company'' for ''fund family,'' provided a basis for the fund family standards, clarified the basis for establishing a fund group and the change in terminology in the listing standards from ''net assets'' to ''market value of publicly-held shares,'' made conforming changes to the rule text, and further clarified its allocation policy for a group of closed-end funds.

[4] *See* letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated April 1, 2002 (''Amendment No. 2'') (replacing Form 19b–4 in its entirety). In Amendment No. 2, the Exchange, in part, requested a three-month pilot, as well as permanent approval of the proposed rule change, substituted the phrase ''fund family'' for ''investment management company,'' defined the term ''fund family,'' clarified that each fund in the group is individually subject to the Exchange's continuing listing criteria, made conforming changes to its rule text, and requested accelerated approval of the pilot.

[5] The language in the current Manual Section 102.04, which the NYSE is proposing to replace, requires that a newly organized fund have $60 million in ''net assets.'' The NYSE proposes to use the term ''market value of publicly held shares,'' but represents that there is no substantive change involved in this different terminology. In the case of any IPO, whether of a business company or a fund, the Exchange has always looked at whether the offering has raised $60 million, and that is what the Exchange will continue to do under the amended rule. Similarly, with a transfer the Exchange has always looked at the aggregate market value of publicly held shares, and that is what the Exchange will continue to do under the amended rule. *See* Amendment No. 1, *supra* note 3.

the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange represents that currently there are over 380 closed-end funds listed on the Exchange. The Exchange asserts that many of these funds represent multiple listings from a family of funds such as Nuveen, Morgan Stanley, Van Kampen or Merrill Lynch.[6] The Exchange represents that funds are often offered, issued, and listed in groups, such as state municipal bond funds. It is the Exchange's understanding that the fund families prefer to list all funds in a group on the same market, but can encounter difficulties when one or more of a group falls below the size required by the Exchange. As the Exchange explored a specific standard for group listings of closed-end funds, it determined that it made sense not only for groups of newly formed funds but for groups of existing funds as well. This, in turn, prompted the Exchange to re-examine its current policy of applying a different set of standards to funds with three or more years of operating history. Presently, such funds must meet the financial standards applicable to regular operating companies (earnings, cash flow, *etc.*), in contrast to newly formed funds, which may be listed based only on raising at least $60 million. The Exchange has determined that this distinction between existing and newly formed funds no longer serves any desired business or other purpose, and so is appropriate for elimination. Accordingly, the Exchange is proposing to apply a $60 million public market value test to all funds seeking to list, regardless of whether they are newly formed funds, or existing funds transferring from another market.

In addition, the Exchange is proposing to apply the following original listing standards to a group of closed-end funds listed concurrently by a single fund family. By meeting the following criteria, the funds in the group[7] could all be listed even if one or more of the group did not satisfy the $60 million test:

- Total group market value of publicly held shares (offering proceeds, in the case of newly formed funds) must equal in the aggregate at least $200 million;
- Each group must average a minimum of $45 million in market value of publicly held shares (proceeds) per fund; and
- No single fund in the group can have a market value of publicly held shares (proceeds) less than $30 million.

As discussed above, this group standard will apply regardless of whether the group consists of newly formed or existing funds, or a combination thereof.[8] The Exchange has determined that the foregoing standards achieve a balance between maintaining the Exchange's standards at an appropriate level, and providing some additional flexibility to fund families that desire to concurrently list a group of closed-end funds on the same Exchange.[9]

The Exchange is also proposing to amend its Allocation Policy[10] to provide that the Allocation Committee should generally allocate to one specialist unit all the closed-end funds in a family group listed under the group criteria discussed above. The Exchange believes that economies of scale and more effective utilization of resources may be realized through the allocation of a group of what are likely to be less actively traded securities to one specialist unit, rather than to have the individual funds within the group allocated to a number of units. In certain situations, however, the Allocation Committee would be permitted to allocate funds within a group to more than one unit. Such situations could include, for example, instances where the number of funds in the group, the types of funds, or the relative values of the funds suggest to the Allocation Committee that allocation to more than one specialist unit would be appropriate.

The Exchange first notes that the normal Allocation Policy apply to closed-end funds being listed on the Exchange just as they apply to any other business corporation being listed. Therefore, the amendment being proposed hereby is altering the Allocation Policy in only the discreet manner specified. The Exchange represents that all the other aspects of the Allocation Policy, including the method by which the listed company is permitted to pick from a panel of specialists put together by the Allocation Committee, will apply.[11]

The Exchange also has stated that the allocation of a family group to a single specialist is to be the norm when listing fund families. The Exchange represents that closed-end funds are often less actively traded than regular listed companies, and the fact that a family group will include one or more funds on the smaller end of the spectrum suggests that those members of the group may trade even less actively than the average closed-end fund. As a result, it will usually be most appropriate to have the entire group allocated to the same specialist, so that it has the chance to trade both the larger and the smaller funds in the group. However, the Allocation Policy recognizes that there are situations where the Allocation Committee may conclude that allocation to more than one specialist unit is preferable. The Exchange asserts that it is impossible to predict all the circumstances in which this might arise, which is why the Allocation Committee is being provided with the discretion to react to situations as they occur. However, one set of circumstances that might prompt the Allocation Committee to allocate to more than one specialist is if a particularly large family group is presented with possibly several funds in the various size categories. The Exchange asserts that it could be considered overly burdensome to ask one unit to take on the entire group at one time, and it could be very possible to divide the group into two or perhaps even more tranches for allocation purposes, while still serving the goal of fairness and efficiency that has prompted the family group approach described herein.[12]

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is

[6] The Exchange represents that a "fund family" (as the term is used herein) consists of funds with a common investment adviser or having investment advisers which are all affiliates of one another. *See* Amendment No. 2, *supra* note 4.

[7] The Exchange represents that the composition of the group will be determined in each case by the investment adviser bringing the group listing to the Exchange. *See* Amendment No. 1, *supra* note 3.

[8] *See* Amendment No. 2, *supra* note 4.

[9] *See* Amendment Nos. 1 and 2, *supra* notes 3 and 4. Once a group of closed-end funds is listed under the proposed standards, each fund in the group will be individually subject to the Exchange's continued listing criteria applicable to funds specified in Section 802.01B of the Manual.

[10] The intent of the Exchange's Allocation Policy is (1) to ensure that the allocation process is based on fairness and consistency and that all specialist units have a fair opportunity for allocations based on established criteria and procedures; (2) to provide an incentive for ongoing enhancement of performance by specialist units; (3) to provide the best possible match between specialist unit and security; and (4) to contribute to the strength of the specialist system.

[11] *See* Amendment No. 1, *supra* note 3.

[12] *Id.*

consistent with section 6(b) of the Act,[13] in general, and furthers the objectives of Section 6(b)(5),[14] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received any written comments with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested that the Commission find good cause pursuant to section 19(b)(2) of the Act,[15] for approving the establishment of the pilot for a three-month period ending on July 5, 2002 (or until such earlier time as the Commission grants the Exchange's request for permanent approval of the pilot), prior to the 30th day after the date of publication of notice thereof in the **Federal Register**. The Exchange represents that accelerated approval will enable the Exchange to accommodate the timetable of listing fund families on the Exchange.[16]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal offices of the NYSE. All submissions should refer to File No. SR–NYSE–2001–45 and should be submitted by April 30, 2002.

V. Commission Findings and Order Granting Partial Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, relating to the establishment of the pilot is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission believes the proposal is consistent with the requirements under section 6(b)(5) of the Act[17] that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public.[18] The Commission believes that the proposed pilot strikes a reasonable balance between the Exchange's obligation to protect investors and their confidence in the market and the Exchange's obligation to perfect the mechanism of a free and open market by listing funds, including fund families, on the Exchange.

The Commission finds good cause for approving the pilot prior to the 30th day after publication in the **Federal Register**. The NYSE has represented that it desires to promptly implement the proposed rule change based on business considerations[19] and that accelerated approval will enable the Exchange to accommodate its timetable for listing fund families.[20] The Commission believes that accelerated approval will permit the Exchange to continue listing funds and accommodate the desire of fund families to list groups of closed-end funds on one marketplace, while allowing the Commission adequate time to consider the Exchange's proposal for permanent approval of the pilot.[21] Accordingly, the Commission finds it appropriate and consistent with sections 6(b)(5) and 19(b)(2) of the Act[22] for partially approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[23] the proposed rule change, as amended, (File No. SR–NYSE–2001–45) is approved on a pilot basis until July 5, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–8514 Filed 4–8–02; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45680; File No. SR–PCX–2002–16]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Changes to the PCX's Schedule of Fees and Charges for Exchange Services

April 2, 2002.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 20, 2002, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78s(b)(2).

[16] *See* Amendment No. 2, *supra* note 4.

[17] 15 U.S.C. 78f(b)(5).

[18] In approving this pilot, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[19] Telephone conversation between James F. Duffy, Senior Vice President, Elena Daly, Assistant General Counsel, NYSE; and Sonia A. Patton, Special Counsel, and Frank N. Genco, Attorney, Division, Commission, on April 02, 2002.

[20] *See* Amendment No. 2, *supra* note 4.

[21] Approval of the three-month pilot period should not be interpreted as suggesting that the Commission is predisposed to approving the proposal on a permanent basis.

[22] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the PCX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify its ''Schedule of Fees and Charges for Exchange Services'' for services it will offer to ETP Holders [3] and Sponsored Participants [4] that use the new electronic trading facility of the Exchange and its wholly-owned subsidiary PCX Equities, Inc. (''PCXE''), called the Archipelago Exchange (''ArcaEx''). The Exchange also proposes to waive certain application processing and monthly fees relating to Equity Trading Permits (''ETPs'').

Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

SCHEDULE OF FEES AND CHARGES FOR EXCHANGE SERVICES

* * * * *

ARCHIPELAGO EXCHANGE: TRADE RELATED CHARGES

EXCHANGE TRANSACTIONS

ETP Holders and Sponsored Participants [5]

Round Lots: $0.003 per share (applicable to inbound orders executed against orders residing in the Book, and orders routed away and executed by another market center or participant)

Odd Lots: $0.03 per share (applicable to any inbound odd-lot orders executed against orders residing in the Book, and orders routed away and executed by another market center or participant)

ARCHIPELAGO EXCHANGE: ETP FEES AND CHARGES

Monthly ETP Fee: $2,000 (Waived)
ETP Application Fees—
Initial Processing Fee: $350 (Waived)
Investigation Fee: $100 fee per applicant for registration as ETP Holder (includes any control person listed on Schedule A of Form BD) or Market Maker Authorized Trader. Fee is also applicable to each Authorized Trader and its designated supervisor associated with an ETP Holder for which PCX is DEA.
Fingerprinting Fee: $30 fee per applicant for registration as ETP Holder (includes any control person listed on Schedule A of Form BD) or Market Maker Authorized Trader. Fee is also applicable to each Authorized Trader and its designated supervisor associated with an ETP Holder for which PCX is DEA.

ARCHIPELAGO EXCHANGE: MARKET MAKER FEES AND CHARGES

Market Maker Transaction Credits—
Round Lots: $0.001 per share (credit) (applicable to Q orders executed against other participants' orders)
Odd Lots: $0.02 per share (credit) (applicable to any market maker that executes against an odd-lot order in the Odd Lot Tracking Order Process, as defined in PCXE Rule 7.31(g))

ARCHIPELAGO EXCHANGE: OTHER FEES AND CHARGES

Primary Connectivity
Charge (includes one router and one circuit): $0
Regulatory Fees—
FOCUS Filing Fee: $25 annual filing fee for ETP Holders for which the PCX is the Designated Examining Authority
Registration Fee: $50 annual fee for new applications, maintenance, or transfer of registration status for each Registered Representative and each Registered Options Principal (fee collected by NASD). Fee will not apply to an ETP Holder if such broker-dealer holds a regular PCX membership.
DEA Fee: $2,000 monthly fee per firm $250 annual fee per trader $75 one-time registration fee per trader
Application for Approved
Status Despite Grounds for Statutory
Qualification: $250 fee per application

* * * * *

PCX GENERAL *OPTIONS* MEMBERSHIP FEES

MEMBERSHIP APPLICATION FEES: $350 initial fee (nonrefundable) $100 renewal fee, within six months of termination

INITIAL MEMBERSHIP FEE: 5% of the average price of the last three membership sales, with a minimum of $1,000 and a maximum of $4,000

DUES $750: per month per membership

OPTIONS ORIENTATION AND TEST FEE: $1,000

[EQUITIES TEST FEE]: [$50 per test]

TRANSFER OF MEMBERSHIP: $250 for permanent intra-firm or inter-firm transfer $100 for temporary intra-firm transfer (period less than 30 days) $50 for one-day intra-firm transfer

PURCHASE OF ADDITIONAL MEMBERSHIP: $200 per seat purchase

SALE OF MEMBERSHIP LEASE AGREEMENTS: $200 per seat sale

Existing Member: $350 per agreement

Reactivation of Terminated Member: $350 if within 12 months; if over 12 months, see INITIAL MEMBERSHIP FEE

ASAP® MEMBERSHIP FEE (Automated System Access Privilege): $4,000 per year (non-refundable)

[PCX CONSTITUTION AND RULES]: [$12 for members]

[(soft cover)]: [$20 for nonmembers]

REGULATORY FEES—

Focus Filing Fee: $25 annual filing fee for member organizations for which the Exchange is the Designated Examining Authority

Registration Fee: $45 annual fee for new applications, maintenance, or transfer of registration status for each Registered Representative and each Registered Options Principal (collected by the NASD)

DEA Fee: [6] $2,000 monthly fee per firm $250 annual fee per trader $75 one-time registration fee per trader

APPLICATION FOR APPROVED STATUS DESPITE GROUNDS FOR STATUTORY DISQUALIFICATION: $250 fee per application

* * * * *

[PCX EQUITIES: TRADE-RELATED CHARGES]

[EXCHANGE TRANSACTIONS]

[Cumulative Billable Shares Per Month]

[First 4 million shares: $0.31 per 100 shares]
[Next 10 million shares: $0.17 per 100 shares]
[Next 8 million shares: $0.09 per 100 shares]
[Over 22 million shares: $0.05 per 100 shares]

[3] *See* PCXE Rule 1.1(n) (defining ''ETP Holder'').

[4] A ''Sponsored Participant'' means ''a person which has entered into a sponsorship arrangement with a Sponsoring ETP Holder pursuant to [PCXE] Rule 7.29.'' *See* PCXE Rule 1.1(tt).

[5] *These transaction fees do not apply to: (1) Directed Orders, regardless of account type, that are matched within the Directed Order Process; (2) Directed Orders for the account of a retail public customer that are executed partially or in their entirety via the Directed Order, Display Order, Working Order, and Tracking Order processes (however, any unfilled or residual portion of a retail customer's order that is routed away and executed by another market center or participant will incur this transaction fee); (3) orders executed in the Opening Auction and the Market Order Auction; (4) Cross Orders; (5) commitments received through ITS; and (6) participants in the Nasdaq UTP Plan that transmit orders via telephone.*

[6] These fees will apply to member organizations for which the Exchange is the Designated Examining Authority. Member organizations that can demonstrate that at least 25% of their income, as reflected on the most recently submitted FOCUS Report, was derived from on-floor activities will be exempt from these charges.

[All trades capped at 20,000 shares.]

[OFFBOARD TRADE RECORDING AND COMPARISON]

[$0.05 per 100 shares for each side of individual stock, warrant, or rights for offboard trades submitted for comparison (comparison charges are capped at 20,000 shares per trade side; minimum of $0.05, maximum of $10).]

[$0.03 per $1,000 bond face value for each side of individual bond trade submitted for comparison (minimum of $0.03, maximum of $3).]

[AMEX-LISTED ISSUES]: [Trades in AMEX-listed equity issues are not subject to transaction or comparison charges.]

[PCX EQUITIES: FLOOR AND SPECIALIST FEES]

[ETP FEE]: [$2,000 per month]

[SPECIALIST AND FLOOR BROKER FEE]: [$2,000 per month]

[EQUITY ASAP HOLDER FEE]: [$4,000 per year]

[FLOOR PRIVILEGE FEE]: [$165 per month for each registered floor member and registered clerk]

[SPECIALIST FACILITY FEE]: [$300 per month service fee per post]

[SPECIALIST SYSTEMS FEE]: [$1,550 per month per post]

[WORKSTATION FEES]

[Specialists]: [First workstation (three PCs) included in Specialist Systems Fee]

[Brokers]: [$175 per month]

[Additional PCs]: [$175 per month per PC (plus additional wire service charges)]

[MARKET DATA FEE]

[Specialists]: [$400 per month per post for base services, plus wire service charges]

[Brokers]: [$200 per month per broker for base services, plus wire services charges]

[SUPPLEMENTAL SPECIALIST POST FEE]: [$6,750 per month per consolidated post]

[ALTERNATE SPECIALIST FEES]

[$200 initial registration fee]

$100 initial fee for each issue traded]

[$50 ongoing monthly fee for each issue traded]

[$5 transaction charge per outgoing offboard order (charge for outgoing orders offset by cumulative credit for non ITS alternate specialist executions)]

[FLOOR BROKER BOOTHS]

[$125 per month for small booth]

[$250 per month for large booth]

[$375 per month for area booth]

[INTERMARKET TRADING SYSTEM (ITS)]

[$0.005 per share on net outgoing specialist principal ITS trades, excluding preopening responses (charge for outgoing trades offset by cumulative credit for incoming trades)]

[CARD ACCESS FEE]

[$40 per month for member firm employees needing access to the equities floor, but who do not pay a floor privilege fee]

[$100 replacement fee]

[TELEPHONES]

[$60 per month per 32-button phone]

[(Los Angeles only)]

[$45 per month per 16-button phone]

[$9 per month per line]

[$1 per month per appearance]

[WIRE SERVICES]: [Pass-through fees]

[PACIFIC CLEARING CORPORATION]

[Post Cashiering]: [$2,150 per month]

[Post Clearing]: [$2,350 per month]

[PCC Symbol Fee]: [$175 per symbol per month charged to non-specialist symbols with trade comparison activity]

[Special Processing Fee]: [$20 per balance order for dually traded, NSCC/DTC-ineligible items (specialists only)]

* * * * *

PCX [EQUITIES AND] OPTIONS: REPORT FEES

[EQUITIES REPORTS]

[Transaction Blotter Report]

[No fee for first copy]

[$30 per month for each additional copy]

[Security Ledger Report]

[No fee for first copy]

[$30 per month for each additional copy]

[Trade Activity Data Extract]: [$150 per month per clearing symbol]

[Security Ledger Data Extract]: [$150 per month plus $250 initial set-up fee]

[MIS Reports (various)]: [$50 per month plus development and set-up costs]

OPTIONS REPORTS

Standard Report Package: $55 per month per symbol, plus $0.0055 per contract, to a maximum of $550 per month

User Activity Extracts (Batch): $0.0075 per trade plus development and set-up costs

Online Data Extract: $500 per month

SPECIALIZED REPORT, PRINTING AND PROCESSING: Development and production costs

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The PCX proposes to modify its fee schedule to reflect the variety of services it proposes to offer to ETP Holders and Sponsored Participants (collectively ''Users'') that access ArcaEx. The amended fee schedule will include transaction fees and charges for a variety of other services, including the installation and maintenance of certain equipment. PCX also proposes to adopt a transaction credit for registered Market Makers who enhance liquidity by entering Q Orders [7] that interact against other Users' orders on ArcaEx. In addition, the PCX represents that, because it is PCXE's intent to operate the ArcaEx facility in place of the PCXE's traditional floor trading environment, it proposes to eliminate all of the current fees and charges related to floor trading of equity securities on the Exchange. The proposed changes to the Exchange's ''Schedule of Fees and Charges for Exchange Services'' are discussed below.

a. Background

On October 25, 2001, the Commission approved a proposed rule change by the PCX to establish ArcaEx, a new electronic trading facility of PCXE.[8] ArcaEx is an electronic securities trading facility for use by ETP Holders and their customers. ArcaEx will provide automatic order execution capabilities in securities listed or traded on the PCXE, and will operate in place

[7] Q Orders are limit orders that are submitted to ArcaEx by a Market Maker in those securities in which the Market Maker is registered to trade. *See* PCXE Rule 7.31(k).

[8] *See* Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (File No. SR–PCX–00–25) (order approving the ArcaEx as the equities trading facility of PCXE).

of PCXE's traditional floor trading environment. PCX and PCXE will be responsible for all regulatory functions related to the facility, and Archipelago Exchange, L.L.C. (''Archipelago''), a subsidiary of Archipelago Holdings, L.L.C., will be responsible for the business of the facility to the extent that these activities are not inconsistent with the regulatory and oversight functions of PCX and PCXE.

b. Proposed Fees

The Exchange proposes to modify its fees applicable to its equities business by adopting transaction fees and other charges relating to the ArcaEx facility. The proposed fees will be divided into four principal categories. The first category will relate to transaction fees. The second category will include certain administrative fees in connection with the ETP application process. The third category will cover fees, charges, and credits applicable to registered Market Makers. The fourth category will include all other fees, charges, and credits. The items in these categories are discussed separately below.

i. Transaction Fees

(A) General

The Exchange proposes to charge all Users a transaction fee of $0.003 per share for orders that take liquidity from the ArcaEx Book [9] and for orders that are routed away to another market center or participant.[10] In other words, any order entered by a User that executes against an order residing in the Book, or any unfilled or residual portion of an order that is routed away and executed by another market center or participant, will incur this transaction fee. The Exchange represents that this proposed fee structure will have the effect of attracting resting limit orders into the Book, which will help promote liquidity, transparency, and, in turn, price discovery. The Exchange notes that this proposed transaction fee will not apply to: (1) Directed Orders, regardless of account type, that are matched within the Directed Order Process; [11] (2) Directed Orders for the account of a retail public customer that are executed partially or in their entirety via the other order processes; [12] (3) orders executed in the Opening Auction and the Market Order Auction; [13] (4) Cross Orders; [14] (5) commitments received through the Intermarket Trading System; and (6) participants in the Nasdaq/National Market System/ Unlisted Trading Privileges Plan that transmit orders via telephone.[15]

(B) Odd and Mixed Lots

The Exchange proposes to charge a fee of $0.03 per share for executed orders that are initially entered as odd lot orders (this includes the odd lot portion of a mixed lot). This charge will not apply to odd lot orders that were created as a result of a partial fill of a round lot order.

ii. ETP Fees and Charges

The PCX, initially, proposes not to charge an ETP application fee or a monthly ETP fee. The PCX, however, proposes to assess a $100 fee for the required background check and a $30 fingerprinting fee per applicant for registration as an ETP Holder (including any control person listed on Schedule A of Form BD) or Market Maker Authorized Trader.[16] The Exchange represents that the background check and fingerprinting fees will also apply to each Authorized Trader [17] (including any person that is responsible for supervising such Authorized Trader) that is associated with an ETP Holder for which the PCX is the Designated Examining Authority (''DEA''). The Exchange represents that these fees are intended to recover the Exchange's administrative expenses in connection with the ETP application process.

iii. Market Maker Transaction Credits

Under the proposed fee structure, registered Market Makers will receive a credit of $0.001 per share for any Q Orders they have entered that are executed against Users' orders. In addition, $0.02 per share will be credited to any Market Maker that executes against an odd lot order in the Odd Lot Tracking Order Process.[18] The Exchange represents that these credits are intended to provide an incentive to firms to become Market Makers and to build liquidity in the ArcaEx Book, which will foster price competition and order interaction.

iv. Other Fees and Charges

(A) User Connectivity Fees

The Exchange represents that Archipelago will be responsible for User connectivity to ArcaEx. This will include initiating contracts, trading connections, and User set-up. Only those Users that have been approved by PCXE are authorized to enter into transactions on ArcaEx. There will be no charge for the primary connection and router to the ArcaEx trading facility; however, redundant or additional connections will incur a charge. Those Users who wish to obtain additional connections to the facility will have to pay the actual charges incurred by Archipelago or the service provider retained for the work being performed.

(B) Regulatory Fees

PCX proposes to adopt the following regulatory fees: (1) a $25 annual FOCUS filing fee for ETP Holders for which the Exchange is the DEA; (2) a $50 annual fee to all registered representatives and registered options principals for maintenance, new applications, or transfer of registration status; [19] (3) DEA

[9] ArcaEx will maintain an electronic file of orders, called the ArcaEx Book, through which orders will be displayed and matched. The ArcaEx Book will be divided into four components, called processes—the Directed Order Process, the Display Order Process, the Working Order Process, and the Tracking Order Process. *See* PCXE Rules 7.36 and 7.37, for a detailed description of these order execution processes.

[10] The fifth step of the ArcaEx execution algorithm involves routing orders away to other market centers or market participants. This will occur if there are no opportunities to match an order within ArcaEx, or to access the best price available in the market. Routing is available only to those ETP Holders who have entered into a Routing Agreement. *See* PCXE Rule 7.37(d).

[11] The Directed Order Process is the first step in the ArcaEx execution algorithm. Through this process, Users may direct an order to a Market Maker with whom they have a relationship and the Market Maker may execute the order. To access this process, the User must submit a Directed Order, which is a market or limit order to buy or sell that has been directed to the a particular market maker by the User. *See* PCXE Rule 7.37(a) (description of ''Directed Order Process'').

[12] If a retail public customer order has not been executed in its entirety after progressing through the Directed Order, Display Order, Working Order, and Tracking Order Processes, the remaining portion of such order, if eligible, will be routed to another market center or participant. Any executed portion of that order will be subject to the proposed transaction fee.

[13] *See* PCXE Rules 7.35(b) and (c) for a detailed description of the Opening Auction and the Market Order Auction, respectively.

[14] A Cross Order is defined as a two-sided order with instructions to match the identified buy-side with the identified sell-side at a specified price (the cross price), subject to price improvement requirements. *See* PCXE Rule 7.31(s).

[15] *See* Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Exchange-Listed Nasdaq/National Market System Securities Traded on Exchanges on an Unlisted Trading Privilege Basis, Section IX (''Market Access''), Securities Exchange Act Release No. 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001).

[16] *See* PCXE Rule 1.1(v) (defining ''Market Maker Authorized Trader'').

[17] *See* PCXE Rule 1.1(g) (defining ''Authorized Trader'').

[18] The Tracking Order Process is the fourth step of the ArcaEx execution algorithm. If the unfilled marketable order (or portion of an order) that enters the Tracking Order Process is an odd lot, such order will be executed against a market maker that is registered as an Odd Lot Dealer. *See* PCXE Rules 7.31(g) and 7.37(c).

[19] The Exchange represents that, to avoid duplicative billing, the annual fee charged to all registered representatives and options principals

Continued

fees for trading firms and their traders;[20] and (4) a $250 fee per application for approved status despite grounds for statutory disqualification. The PCX represents that these fees are consistent with the PCX's current fee structure, and are intended to offset costs related to regulatory oversight and enforcement.

c. Applicability of Existing PCXE Fees

In addition to the new proposed fees set forth above, the PCX proposes to delete from its current fee structure the following fees, which relate primarily to floor trading and specialists or are otherwise inapplicable to the new trading environment: (1) Transaction and comparison charges (including fees that are paid by specialists firms to the Pacific Clearing Corporation for providing trade settlement and processing services); (2) systems and communication equipment related charges (including booth fees and market data services provided by third party vendors to ETP Firms through the PCXE on a pass through basis); and (3) charges for various trade information and clearing reports that are produced by PCXE for ETP Firms.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[21] in general, and Section 6(b)(4) of the Act,[22] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

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 foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) [23] of the Act and subparagraph (f)(2) of Rule 19b–4 [24] thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[25]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–2002–16 and should be submitted by April 30, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 02–8486 Filed 4–8–02; 8:45 am]

BILLING CODE 8010–01–P

will not apply to an ETP Holder if such broker-dealer holds a regular PCX membership.

[20] The DEA fees include a $2,000 monthly fee per firm, a $250 annual fee per trader, and a $75 one-time registration fee per trader.

Under the current PCX fee schedule, an exemption from these DEA fees will be granted to any member operating from the PCX trading floor that has demonstrated that at least 25% of its income (as reflected on the most recently submitted FOCUS Report) was derived from on-floor activities. This exemption has not been included in the proposed fee schedule for ArcaEx because it is inapplicable to the new trading environment. The PCX indicated that it intends to retain this exemption for options. A technical correction was made to the proposed rule text to indicate the retention of this exemption under the ''PCX General Options Membership Fees.'' Telephone conversation between Peter D. Bloom, Regulatory Policy, PCX, and Sapna C. Patel, Attorney, Division of Market Regulation, Commission, on April 1, 2002.

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(4).

[23] 15 U.S.C. 78s(b)(3)(A)(ii).

[24] 17 CFR 240.19b–4(f)(2).

[25] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on March 20, 2002, the date the PCX filed the proposed rule change. *See* 15 U.S.C. 78s(b)(3)(C).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45681; File No. SR-PHLX–2002–19]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Increasing the Amount of the Late Charge Imposed Pursuant to Exchange Rule 50

April 2, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 15, 2002, 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, II, and III below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend the amount of the late charge that is imposed by the Phlx as set forth in Phlx Rule 50. Currently, the late charge is set at a rate of 1 percent simple interest for each thirty-day period or fraction thereof, calculated on a daily basis, during which accounts payable to the Exchange remain outstanding at least thirty-one days. The Exchange proposes to increase the amount of the late charge from 1 percent to 1.5 percent. All other provisions relating to the Exchange's late charge as specified in Rule 50 would remain the same.

The text of the proposed rule change is available at the Office of the Secretary, the Phlx, and the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to increase the amount of the late charge imposed by the Exchange from 1 percent to 1.5 percent in order to encourage members to pay, on a timely basis, monies due and owed the Exchange, which, in turn, should deter the practice of late payments.

The Exchange notes that the proposed fee change will be effective with respect to all account receivable balances that are due to Phlx on or after April 1, 2002. Thus, delinquent balances due in March at a rate of 1 percent will be charged a rate of 1.5 percent effective April 1, 2002.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act [3] in general, and furthers the objectives of section 6(b)(4) of the Act [4] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among the Exchange's members who do not make timely payments to the Exchange. The Exchange also believes that the higher interest rate should encourage prompt payment of monies due and owed the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change establishes or changes a due, fee, or charge imposed by the Exchange, it has become effective upon filing pursuant to section 19(b)(3)(A) of the Act,[5] and Rule 19b–4(f)(2) [6] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–2002–19 and should be submitted by April 30, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–8515 Filed 4–8–02; 8:45 am]

BILLING CODE 8010–01–P

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(2).

[7] 17 CFR 240.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3402]

State of Texas; Disaster Loan Areas

Bexar County and the contiguous counties of Atascosa, Bandera, Comal, Guadalupe, Kendall, Medina and Wilson in the State of Texas constitute a disaster area as a result of damages caused by severe storms and flooding that occurred on March 19, 2002. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on May 31, 2002, and for economic injury until the close of business on January 2, 2003, at the address listed below or other locally announced locations:

U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Ft. Worth, TX 76155.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	6.625
Homeowners without credit available elsewhere	3.312
Businesses with credit available elsewhere	7.000
Businesses and non-profit organizations without credit available elsewhere	3.500
Others (including non-profit organizations) with credit available elsewhere	6.375
For Economic Injury: Businesses and small agricultural cooperatives without credit available elsewhere	3.500

The numbers assigned to this disaster are 340211 for physical damage and 9P0300 for economic injury.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: April 1, 2002.

Hector V. Barreto,

Administrator.

[FR Doc. 02–8460 Filed 4–8–02; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Notice of Action Subject to Intergovernmental Review Under Executive Order 12372

AGENCY: Small Business Administration.

ACTION: Notice of Action Subject to Intergovernmental Review Under Executive Order 12372.

SUMMARY: The Small Business Administration (SBA) is notifying the public that it intends to grant the pending applications of 22 existing Small Business Development Centers (SBDCs) for refunding on October 1, 2002, subject to the availability of funds.

Four states do not participate in the Executive Order 12372 process; therefore, their addresses are not included. A short description of the SBDC program follows in the supplementary information below.

The SBA is publishing this notice at least 120 days before the expected refunding date. The SBDCs and their mailing addresses are listed below in the address section. A copy of this notice also is being furnished to the respective State single points of contact designated under the Executive Order. Each SBDC application must be consistent with any area-wide small business assistance plan adopted by a State-authorized agency.

DATES: A State single point of contact and other interested State or local entities may submit written comments regarding an SBDC refunding within 30 days from the date of publication of this notice to the SBDC.

ADDRESSES:

Addresses of Relevant SBDC State Directors

Mr. Robert McKinley, Region Director, Univ. of Texas at San Antonio, 1222 North Main Street, San Antonio, TX 78212, (210) 458–2450

Mr. Conley Salyer, State Director, West Virginia Development Office 950 Kanawha Boulevard, East, Charleston, WV 25301, (304) 558–2960

Mr. Dennis Gruell, State Director, University of Connecticut, 2100 Hillside Road, U Box 1094, Storrs, CT 06269–1094, (860) 486–4135

Mr. Clinton Tymes, State Director, University of Delaware, One Innovation Way, Suite 301, Newark, DE 19711, (302) 831–2747

Mr. Michael Young, Region Director, University of Houston, 2302 Fannin, Suite 200, Houston, TX 77002, (713) 752–8425

Ms. Becky Naugle, State Director, University of Kentucky, 225 Gatton College of Business Economics, Lexington, KY 40506–0034, (859) 257–7668

Ms. Liz Klimback, Region Director, Dallas Community College, 1402 Corinth Street, Dallas, TX 75212, (214) 860–5835

Ms. Rene Sprow, State Director, Univ. of Maryland @ College Park, 7100 Baltimore Avenue, Suite 401, Baltimore, MD 20742–1815, (301) 403–8300

Mr. Craig Bean, Region Director, Texas Tech University, 2579 South Loop 289, Suite 114, Lubbock, TX 79423–1637, (806) 745–3973

Ms. Diane Wolverton, State Director, University of Wyoming, P.O. 3922, Laramie, WY 82071, (307) 766–3505

Mr. Max Summers, State Director, University of Missouri, Suite 300, University Place, Columbia, MO 65211 (573) 882–0344

Mr. Ronald Manning, State Director, Iowa State University, 137 Lynn Avenue, Ames, IA 50010, (515) 292–6351

Mr. James L. King, State Director, State University of New York, SUNY Plaza, S–523, Albany, NY 12246, (518) 443–5398

Ms. Holly Schick State Director, State Director, Ohio Department of Development, 77 South High Street, Columbus, OH 43226–1001, (614) 466–2711

Mr. Donald L. Kelpinski, State Director, Vermont Technical College, P.O. Box 188, Randolph Center, VT 05061–0188, (802) 728–9101

Mr. Warren Bush, SBDC Director, University of the Virgin Islands, 8000 Nisky Center, Suite 720, St. Thomas, US VI 00802–5804, (340) 776–3206

Ms. Carmen Marti, SBDC Director, Inter American University, Ponce de Leon Avenue, #416, Edificio Union Plaza, Suite 7-A, Hato Rey, PR 00918, (787) 763–6811

FOR FURTHER INFORMATION CONTACT: Johnnie L. Albertson, Associate Administrator for SBDCs, U.S. Small Business Administration, 409 Third Street, SW, Suite 4600, Washington, DC 20416.

SUPPLEMENTARY INFORMATION:

Description of the SBDC Program

A partnership exists between SBA and an SBDC. SBDCs offer training, counseling and other business development assistance to small businesses. Each SBDC provides services under a negotiated Cooperative Agreement with SBA, the general management and oversight of SBA, and a state plan initially approved by the Governor. Non-Federal funds must match Federal funds. An SBDC must operate according to law, the Cooperative Agreement, SBA's regulations, the annual Program Announcement, and program guidance.

Program Objectives

The SBDC program uses Federal funds to leverage the resources of states, academic institutions and the private sector to:

(a) strengthen the small business community;

(b) increase economic growth;

(c) assist more small businesses; and

(d) broaden the delivery system to more small businesses.

SBDC Program Organization

The lead SBDC operates a statewide or regional network of SBDC service centers. An SBDC must have a full-time Director. SBDCs must use at least 80 percent of the Federal funds to provide services to small businesses. SBDCs use volunteers and other low cost resources as much as possible.

SBDC Services

An SBDC must have a full range of business development and technical assistance services in its area of operations, depending upon local needs, SBA priorities and SBDC program objectives. Services include training and counseling to existing and prospective small business owners in management, marketing, finance, operations, planning, taxes, and any other general or technical area of assistance that supports small business growth.

The SBA district office and the SBDC must agree upon the specific mix of services. They should give particular attention to SBA's priority and special emphasis groups, including veterans, women, exporters, the disabled, and minorities.

SBDC Program Requirements

An SBDC must meet programmatic and financial requirements imposed by statute, regulations or its Cooperative Agreement. The SBDC must:

(a) locate service centers so that they are as accessible as possible to small businesses;

(b) open all service centers at least 40 hours per week, or during the normal business hours of its state or academic Host Organization, throughout the year;

(c) develop working relationships with financial institutions, the investment community, professional associations, private consultants and small business groups; and

(d) maintain lists of private consultants at each service center.

Dated: April 2, 2002.

Johnnie L. Albertson,

Associate Administrator for Small Business Development Centers.

[FR Doc. 02–8461 Filed 4–8–02; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Public Federal Regulatory Enforcement Fairness Roundtable; Region III Regulatory Fairness Board

The Small Business Administration Region III Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Roundtable on Wednesday, April 17,

2002 at 1 p.m. at the Mezzanine, 405 Capitol Street, Charleston, West Virginia, to provide small business owners and representatives of trade associations with an opportunity to share information concerning the federal regulatory enforcement and compliance environment.

Anyone wishing to attend or to make a presentation must contact Stephen M. Glass in writing or by fax, in order to be put on the agenda. Stephen M. Glass, District Counsel for the U.S. Small Business Administration, West Virginia District Office, 320 West Pike Street, Suite 330, Clarksburg, WV 26301, phone 1 (800) 767–8052 press 8 for West Virginia and then ext. 229, fax (304) 623–0023, e-mail: *stephen.glass@sba.gov.*

For more information, see our Web site at *www.sba.gov/ombudsman.*

Dated: March 29, 2002.

Michael L. Barrera,

National Ombudsman.

[FR Doc. 02–8458 Filed 4–8–02; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Public Federal Regulatory Enforcement Fairness Hearing; Region VII Regulatory Fairness Board

The Small Business Administration Region VII Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Monday, April 29, 2002 at 12:30 p.m. at the Wichita Area Chamber of Commerce, 350 W. Douglas, Wichita, Kansas 67202–2970, to receive comments and testimony from small business owners, small government entities, and small non-profit organizations concerning the regulatory enforcement and compliance actions taken by federal agencies.

Anyone wishing to attend or to make a presentation must contact Edgar Poindexter in writing or by fax, in order to be put on the agenda. Edgar Poindexter, U.S. Small Business Administration, Wichita District Office, 271 West Third Street North, Suite 2500, Wichita, KS 67202–1212, phone (316) 269–6631, fax (316) 269–6618, e-mail: *edgar.poindexter@sba.gov*

For more information, see our Web site at *www.sba.gov/ombudsman.*

Dated: March 29, 2002.

Michael L. Barrera,

National Ombudsman.

[FR Doc. 02–8459 Filed 4–8–02; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. OST–01–10380]

Hazardous Materials: Knowledge Required for Civil Penalty Enforcement Proceedings

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of public meeting and invitation to comment.

SUMMARY: Interested parties are invited to submit comments for consideration by DOT in developing additional guidance as to when a reasonable person offering, accepting or transporting a hazardous material in commerce would be deemed to have knowledge of facts giving rise to a violation of Federal hazardous material transportation law or the Hazardous Materials Regulations.

DATES: *Public meeting.* The public meeting will be held on June 19, 2002, from 9 a.m. to 4 p.m. The meeting will end before 4:00 p.m. if all topics have been addressed and all participants heard.

Comments. Written comments must be received by July 19, 2002.

ADDRESSES: *Public meeting.* The public meeting will be held in Room 2201 of the U.S. Department of Transportation headquarters building (Nassif Building), 400 Seventh Street, SW, Washington, DC 20590–0001. Any person desiring to attend the public meeting must notify LCDR Thomas Sherman by telephone or e-mail (see **FOR FURTHER INFORMATION CONTACT** below) no later than June 5, 2002, in order to facilitate entry to the Nassif Building. It is recommended attendees arrive early to facilitate new enhanced building security procedures. Each person should indicate which of the four topics described at the end of this notice that he or she wishes to discuss.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact LCDR Sherman as soon as possible.

Comments. You must address comments to the Dockets Management System, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW, Washington, DC 20590–0001. You must identify the docket number (OST–01–10380) and submit two copies of your comments. If you want to confirm that we received your comments, include a self-addressed, stamped postcard.

You may also submit comments by e-mail by accessing the DOT Dockets Management System website at: *http://dms.dot.gov.* Click on ''Help,'' ''DMS Web Help,'' or ''DMS Frequently Asked Questions'' to obtain instructions for filing a document electronically.

The Dockets Management System is located on the Plaza Level of the Nassif Building at the above address. You may review public dockets there between the hours of 9:00 a.m. and 5:00 p.m., Monday through Friday, except public holidays. You may also review comments on-line at the DOT Dockets Management System website at: *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: LCDR Thomas Sherman, Intermodal Hazardous Materials Programs, Office of the Associate Deputy Secretary, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, DC 20009. Telephone: 202–366–5846; Fax: 202–366–0263; or E-mail (preferred): Tom.Sherman@ost.dot.gov.

SUPPLEMENTARY INFORMATION:

Federal hazardous material transportation law provides that DOT may assess a civil penalty against a person that ''knowingly violates'' that law or the HMR. 49 U.S.C. 5123(a)(1). The same section of the law also states that

> A person acts knowingly when—
> (A) the person has actual knowledge of the facts giving rise to the violation; or
> (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

This statutory definition of ''knowingly'' was added in the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA), Public Law 101–615, section 12, 104 Stat. 3259 (Nov. 16, 1990), to ''cover violations that are committed *negligently*'' and to ''negate any inference that the term only encompasses actions based on actual knowledge or reckless actions.'' H. Report No. 101–444, Part 1, Committee on Energy and Commerce, p. 47 (Apr. 3, 1990) (emphasis in original).[1]

[1] In its regulations, the Research and Special Programs Administration (RSPA) had implemented the ''knowingly'' standard for assessment of a civil penalty in the original Hazardous Material Transportation Act, Pub. L. 93–633, section 110, 88 Stat. 2160 (Jan. 3, 1975), and defined ''knowingly'' to mean that a person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally.

Former 49 CFR 107.299, added 48 FR 2653 (Jan. 20, 1983), revised 56 FR 8624 (Feb. 28, 1991), moved to 49 CFR 107.3 (Definitions), 61 FR 21094 (May 9, 1996). When RSPA revised § 107.299 in 1991 to define ''knowingly'' consistent with the language adopted in HMTUSA, it noted that

Continued

In a letter to the Secretary of Transportation, Federal Express Corporation asked DOT to develop further guidance on what constitutes ''constructive knowledge'' that a carrier is deemed to have of the presence of hazardous materials when the carrier accepts a shipment for transportation. Federal Express stated that carriers lack ''essential criteria defining constructive knowledge of undeclared hazardous materials, that would allow the carriers to design and implement a viable system for training their employees, and for identifying and reporting discrepancies, without being subjected to second-guessing after a shipment has been transported.''

In its letter, Federal Express referred to a formal interpretation published in the **Federal Register** on June 4, 1998. 63 FR 30411. In that interpretation, which was coordinated among all the DOT agencies to which enforcement authority has been delegated,[2] RSPA's Chief Counsel stated that:

> a carrier knowingly violates the HMR when the carrier accepts or transports a hazardous material with actual or constructive knowledge that a package contains a hazardous material which has not been packaged, marked, labeled, and described on a shipping paper as required by the HMR. This means that a carrier may not ignore readily apparent facts that indicate that either (1) a shipment declared to contain a hazardous material is not properly packaged, marked, labeled, placarded, or described on a shipping paper, or (2) a shipment actually contains a hazardous material governed by the HMR despite the fact that it is not marked, labeled, placarded, or described on a shipping paper as containing a hazardous material.
>
> * * * * *
>
> In the case of an undeclared or hidden shipment, all relevant facts must be considered to determine whether or not a reasonable person acting in the circumstances and exercising reasonable care would realize the presence of hazardous materials. In an enforcement proceeding, this is always a question of fact, to be determined by the fact-finder. Because innumerable fact patterns may exist, it is not practicable to set forth a list of specific criteria to govern whether or not the carrier has sufficient constructive knowledge of the presence of hazardous materials within an undeclared or hidden shipment to find a knowing violation of the HMR.
>
> Information concerning the contents of suspicious packages must be pursued to determine whether hazardous materials have been improperly offered. A carrier's employees who accept packages for transportation must be trained to recognize a ''suspicious package,'' as part of their function-specific training as specified in 49 CFR 172.704(a)(2), because the legal standard remains the knowledge that a reasonable person acting in the circumstances and exercising reasonable care would have.[3]

63 FR at 30412.

In an interim response to Federal Express's attorney, the Secretary of Transportation advised that DOT's Director, Intermodal Hazardous Materials Programs (IHMP), located within the Office of the Associate Deputy Secretary and Director, Office of Intermodalism,[4] would be the focal point in developing possible guidance on ''constructive knowledge.'' In conjunction with FAA (TSA), FMCSA, FRA, RSPA, and USCG, the Director of IHMP invites interested parties to attend a public meeting and to comment at that meeting or separately in writing on the indicia or readily apparent facts that would indicate the potential presence of hazardous materials to a reasonable person and the actions that a reasonable person should take in response to those indicia or readily apparent facts.

Logical topics for discussion at the public meeting and in written comments include:

1. The responsibilities of an offeror of a hazardous material to properly classify the material, package the material, mark and label packagings, outside containers, and overpacks, describe the material on a shipping paper, and provide placards to a carrier.

2. The responsibilities of a carrier when it accepts any shipment to review documentation that accompanies the shipment and inspect the packagings, outside containers, or overpacks to determine (a) whether a hazardous material is present, and (b) when a hazardous material is present, whether it is properly packaged, marked, labeled, placarded, and described on a shipping paper.

3. When a reasonable person should have constructive knowledge of the potential presence of a hazardous material based on information that is readily apparent from: (a) Documentation that accompanies a shipment, (b) markings, labels, or placards on packagings, outside containers, or overpacks, and (c) the condition of the packagings, outside containers, or overpacks themselves.

4. Methods used to train personnel who prepare materials for shipment or accept shipments for transportation to recognize the potential presence of a hazardous material based on information that is readily apparent, including the use of checklists such as those required by Section 7;1.3 of the Technical Instructions for the Transport of Dangerous Goods of the International Civil Aviation Organization (ICAO).

Oral comments at the public meeting and separate written comments are not limited to the above topics and may include any suggestions for developing additional guidance as to when a reasonable person would be deemed to have constructive knowledge of the potential presence of hazardous material and the manner in which that material is classified, packaged, marked, labeled, placarded, and described on a shipping paper. A facilitator will chair the meeting to ensure that all topics are covered and persons heard. No formal transcript of this meeting is planned, but the meeting will be tape recorded for later use by DOT in its decision-making process.

Issued in Washington, DC on April 3, 2002.

Jackie A. Goff,

Director, Intermodal Hazardous Materials Programs, Office of the Associate Deputy Secretary.

[FR Doc. 02–8521 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–62–P

''Congress effectively adopted the Department's historic interpretation of the term 'knowingly.' '' 56 FR 8620.

[2] The Secretary of Transportation has delegated to five agencies within DOT the authority to bring civil penalty enforcement cases and assess civil penalties for violations of Federal hazardous material transportation law or the HMR: United States Coast Guard (USCG), Transportation Security Administration (TSA), Federal Railroad Administration (FRA), RSPA, Federal Motor Carrier Safety Administration (FMCSA). 1.46(u), 1.47(j)(1), 1.49(s)(1), 1.53(b)(1), 1.73(d)(1).

[3] In its June 14, 1996 Advisory Guidance; Offering, Accepting, and Transporting Hazardous Materials, 61 FR 30444, 30446, RSPA urged persons ''who engage in day-to-day transportation activities [to] make a concerted effort to ensure their own compliance, as well as that of others from whom they receive shipments'' and reminded them to: (1) ''Know Your Customer,'' (2) ''Know the Packaging,'' (3) ''Know/Verify the Proper Hazardous Material Description,'' (4) ''Visually Inspect Shipments,'' (5) ''Advise Your Customer of Possible Discrepancies,'' and (6) ''Report Violations.''

[4] The Secretary of Transportation has delegated to the Associate Deputy Secretary and Director, Office of Intermodalism, the authority under Federal hazardous material transportation law to act as the focal point for review of hazardous materials policies, monitor departmental hazardous materials activities, and address regulatory and programmatic cross-modal issues related to hazardous materials as warranted. 49 CFR 1.74.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–99–5748 (OMCS–99–5748), FMCSA–99–5473 (OMCS–99–5473), FMCSA–99–6156 (OMCS–99–6156), and FMCSA–99–6480]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemption; request for comments.

SUMMARY: This notice announces FMCSA's decision to renew the exemptions from the vision requirement in 49 CFR 391.41(b)(10) for 19 individuals.

DATES: This decision is effective April 14, 2002. Comments from interested persons should be submitted by May 9, 2002.

ADDRESSES: You can mail or deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. You can also submit comments as well as see the submissions of other commenters at *http://dms.dot.gov.* Please include the docket numbers that appear in the heading of this document. You can examine and copy this document and all comments received at the same Internet address or at the Dockets Management Facility from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you want to know that we received your comments, please include a self-addressed, stamped postcard or include a copy of the acknowledgement page that appears after you submit comments electronically.

FOR FURTHER INFORMATION CONTACT: For information about the vision exemptions in this notice, Ms. Sandra Zywokarte, Office of Bus and Truck Standards and Operations, (202) 366–2987; for information about legal issues related to this notice, Mr. Joseph Solomey, Office of the Chief Counsel, (202) 366–1374, FMCSA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may see all comments online through the Document Management System (DMS) at: *http://dmses.dot.gov/submit.*

Background

Nineteen individuals have requested renewal of their exemptions from the vision requirement in 49 CFR 391.41(b)(10) which applies to drivers of commercial motor vehicles (CMVs) in interstate commerce. They are Mark K. Cheely, James D. Davis, James F. Durham, Glenn E. Gee, Robert N. Heaton, Laurent G. Jacques, Alfred G. Jeffus, Michael W. Jones, Jon G. Lima, Earl E. Martin, Clifford E. Masink, Robert W. Nicks, Richard W. O'Neill, Tommy L. Ray, Jr., Andrew W. Schollett, Melvin B. Shumaker, Sammy D. Steinsultz, Edward J. Sullivan, and Steven L. Valley. Under 49 U.S.C. 31315 and 31136(e), FMCSA may renew an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' Accordingly, FMCSA has evaluated the 19 petitions for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

On April 14, 2000, the agency published a notice of final disposition announcing its decision to exempt 34 individuals, including 10 of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (65 FR 20251). The qualifications, experience, and medical condition of each applicant were stated and discussed in detail at 64 FR 68195 (December 6, 1999). Two comments were received, and their contents were carefully considered by the agency in reaching its final decision to grant the petitions (65 FR 20251). On January 3, 2000, the agency published a notice of final disposition announcing its decision to exempt 40 individuals, including 5 of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (65 FR 159). The qualifications, experience, and medical condition of each applicant were stated and discussed in detail at 64 FR 54948 (October 8, 1999). Two comments were received, and their contents were carefully considered by the agency in reaching its final decision to grant the petitions (65 FR 159). On December 13, 1999, the agency published a notice of final disposition announcing its decision to exempt one of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (64 FR 69586). The qualifications, experience, and medical condition of the applicant were stated and discussed in detail at 64 FR 27025 (May 18, 1999). Two comments were received, and their contents were carefully considered by the agency in reaching its final decision to grant the petition (64 FR 69586). On November 30, 1999, the agency published a notice of final disposition announcing its decision to exempt 33 individuals, including 3 of these applicants for renewal, from the vision requirement in 49 CFR 391.41(b)(10) (64 FR 66962). The qualifications, experience, and medical condition of each applicant were stated and discussed in detail at 64 FR 40404 (July 26, 1999). Three comments were received, and their contents were carefully considered by the agency in reaching its final decision to grant the petitions (64 FR 66962). The agency determined that exempting the individuals from 49 CFR 391.41(b)(10) was likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption as long as the vision in each applicant's better eye continued to meet the standard specified in 49 CFR 391.41(b)(10). As a condition of the exemption, therefore, the agency imposed requirements on the individuals similar to the grandfathering provisions in 49 CFR 391.64(b) applied to drivers who participated in the agency's former vision waiver program.

These requirements are as follows: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that vision in the better eye meets the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than 2 years from its approval date and may be renewed upon application for additional 2-year periods. In accordance with 49 U.S.C. 31315 and 31136(e), each of the 19 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 20251; 64 FR 68195; 65 FR 159; 64 FR 54948; 64 FR 69586; 64 FR 27025; 64 FR 66962; 64 FR 40404), and each has requested timely renewal of the exemption. These 19 applicants have submitted evidence showing that the vision in their better eye continues to meet the standard specified at 49 CFR 391.41(b)(10), and that the vision impairment is stable. In addition, a review of their records of safety while driving with their respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to

continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption for each renewal applicant.

Discussion of Comments

The Advocates for Highway and Auto Safety (AHAS) expresses continued opposition to FMCSA's procedures for renewing exemptions from the vision requirement in 49 CFR 391.41(b)(10). Specifically, AHAS objects to the agency's extension of the exemptions without any opportunity for public comment prior to the decision to renew and reliance on a summary statement of evidence to make its decision to extend the exemption of each driver.

The issues raised by AHAS were addressed at length in 66 FR 17994 (April 4, 2001). We will not address these points again here, but refer interested parties to that earlier discussion.

Conclusion

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA extends the exemptions from the vision requirement in 49 CFR 391.41(b)(10) granted to Mark K. Cheely, James D. Davis, James F. Durham, Glenn E. Gee, Robert N. Heaton, Laurent G. Jacques, Alfred G. Jeffus, Michael W. Jones, Jon G. Lima, Earl E. Martin, Clifford E. Masink, Robert W. Nicks, Richard W. O'Neill, Tommy L. Ray, Jr., Andrew W. Schollett, Melvin B. Shumaker, Sammy D. Steinsultz, Edward J. Sullivan, and Steven L. Valley, subject to the following conditions: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e).

Request for Comments

FMCSA has evaluated the qualifications and driving performance of the 19 applicants here and extends their exemptions based on the evidence introduced. The agency will review any comments received concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31315 and 31136(e). While comments of this nature will be entertained at any time, FMCSA requests that interested parties with information concerning the safety records of these drivers submit comments by May 9, 2002. All comments will be considered and will be available for examination in the docket room at the above address. FMCSA will also continue to file in the docket relevant information which becomes available. Interested persons should continue to examine the docket for new material.

Issued on: April 4, 2002.

Brian M. McLaughlin,

Associate Administrator for Policy and Program Development.

[FR Doc. 02–8553 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

North American Bus Industries; Notice of Granted Buy America Waivers

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of granted Buy America waivers.

SUMMARY: FTA granted North American Bus Industries (NABI) two Buy America waivers on March 19, 2002. The first waiver allows NABI to assemble its CompoBus outside the United States and the second allows it to count the composite chassis/frame as domestic for purposes of calculating the domestic component content of the vehicle. The final assembly waiver is predicated on public interest and the component waiver on the non-availability of the item domestically. Both of these waivers will apply to procurements for which solicitations are issued within two years of the date of the letter, March 19, 2002, and to two contracts signed prior to the date of the letter, as noted below. This notice shall insure that the public is aware of these waivers.

FOR FURTHER INFORMATION CONTACT: Meghan G. Ludtke, FTA Office of Chief Counsel, Room 9316, (202) 366–1936 (telephone) or (202) 366–3809 (fax).

SUPPLEMENTARY INFORMATION: The above-referenced waivers follow:

March 19, 2002.

Mr. Andy Racz, President and CEO, North American Bus Industries, Inc., H–1165 Budapest, XVI UJSZASZ u., 45 Hungary.

Dear Mr. Racz:

This responds to your letter dated December 14, 2001, in which you request two Buy America waivers from the Federal Transit Administration (FTA) for North American Bus Industries' (NABI) CompoBus. The CompoBus is a light-weight, composite-structured vehicle with an integrated frame and chassis developed in line with FTA's Advanced Technology Bus program. You request (1) a public interest waiver of the final assembly requirements for a period of seven years and (2) a component waiver for the integrated body/chassis of the CompoBus, based on public interest or non-availability. For the reasons discussed below, we have determined that the grounds for such waivers exist for a two-year period.

Applicable Law

FTA's requirements concerning domestic preference for federally funded transit projects are set forth in 49 U.S.C. 5323(j). Section 5323(j)(2)(C) addresses the general requirements for the procurement of rolling stock. This section provides that all rolling stock procured with FTA funds must have a domestic content of at least 60 percent and must undergo final assembly in the U.S.

Under 49 U.S.C. 5323(j)(2)(A) and the implementing regulations, these requirements may be waived if their application ''would be inconsistent with the public interest.'' 49 C.F.R. 661.7(b). The regulation also notes that ''[i]n determining whether the conditions exist to grant this public interest waiver, the [FTA] will consider all appropriate factors on a case-by-case basis . . . .'' Id. And 49 U.S.C. 5323(j)(2)(B) states that the Buy America requirements shall not apply if the item or items being procured are not produced in the U.S. in sufficient and reasonably available quantities or are not of a satisfactory quality. The implementing regulation also provides that public interest and non-availability waivers may be granted for a component of rolling stock, and in such cases, the component would be treated as domestic when calculating the overall component content of the vehicle. 49 C.F.R. 661.7(f)

Final Assembly Waiver Request

Your request for a final assembly waiver is for CompoBus models 40C–LFW and 45C–LFW. You detail a number of advantages offered by the CompoBus, including its lightweight frame/chassis, the fact that it has completed Altoona testing, the lack of rusting, the environmental advantages, and

its crash worthiness. NABI has two primary manufacturing facilities, one in Hungary, the other in Anniston, Alabama.

FTA has determined that in this case, a final assembly waiver for a two-year period is in the public interest. FTA acknowledges the technical difficulties and increased costs associated with new technology and the consequent benefits of a single manufacturing facility. FTA supports the continued development of new vehicle technology that will result in more choices for FTA grantees and better buses for the riding public. This waiver will accomplish that goal. These advances are important enough to allow NABI time to further develop the technology. FTA declines to provide a seven-year waiver because we want to encourage continued changes in the marketplace and must be in a position to review this decision in two years and consider any such changes. However, FTA is also aware of the time lapses between entering into a contract and building a bus; therefore, this waiver applies to CompoBus models 40C–LFW and 45C–LFW for all procurements for which solicitations are issued within two years of the date of this letter.

Component Wavier Request

You also request a non-availability waiver for the CompoBus' integrated frame/chassis structures for use in model numbers 40C–LFW and 45C–LFW. Based on the information you have provided, I have determined that the grounds for a non-availability waiver exist, as it does not appear that there is another source for this product. Therefore, pursuant to the provisions of 49 U.S.C. § 5323(j)(2)(B), a non-availability waiver is granted for the CompoBus models 40C–LFW and 45C–LFW integrated frame/chassis structure for all procurements for which solicitations are issued within two years of the date of this letter.

Conclusion

NABI has offered sufficient justification for a public interest waiver for the final assembly of the CompoBus for a period of two years. The grounds necessary for a non-availability component waiver also exist for the integrated frame/chassis structure, and FTA hereby grants such a waiver for a period of two years. To ensure that the public is aware of these waivers, this letter will be published in the **Federal Register**.

The public interest waiver is predicated on the fact that it is in the public's interest to waive the Buy America final assembly requirements in this case; however, FTA is not of the opinion that that public interest overrides the government's interest in full and open competition. It is for this reason that FTA has reviewed the three procurements that resulted in an award to NABI for the CompoBus. FTA has reviewed the underlying competition for each contract and found that in two cases, the waiver will have no impact on the full and open competition required in federally funded procurements. Therefore, this waiver will apply to those contracts between NABI and the City of Phoenix and between NABI and the Los Angeles County Metropolitan Transportation Authority (LACMTA) for 30 CompoBuses.[1] Another LACMTA procurement is affected by this waiver, a contract for 370 buses, the last 20 of which will be composite buses.[2] Because that award would have had a different result if NABI had certified non-compliance and requested a waiver prior to award, it is FTA's position that NABI is bound by its original certification of compliance and, therefore, must assemble those vehicles in the U.S.

If you have any questions, please contact Meghan G. Ludtke at 202–366–1936.

Very truly yours,

Gregory B. McBride,
Deputy Chief Counsel.

Issued on: April 4, 2002.

Jennifer L. Dorn,
FTA Administrator.

[FR Doc. 02–8551 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–57–M

[1] The contract with the City of Phoenix was awarded to NABI, the only bidder, which certified compliance with Buy America. Had NABI certified non-compliance, it would have been eligible for award as the only bidder, and Phoenix would have qualified for a non-availability waiver under 49 C.F.R. 661.7(c)(1). The contract with LACMTA for 30 CompoBuses was awarded after a negotiated procurement with two responsive and responsible proposers in competitive range. Both proposers certified compliance with Buy America; however, the other bid was more than twenty-five percent over NABI's bid. Thus, had NABI certified non-compliance, it would have been eligible for award because there was more than a twenty-five percent price difference between the two offers, and LACMTA would have qualified for a waiver under 49 C.F.R. 661.7(c)(1).

[2] This was a sealed bid with two responsive and responsible bidders, both of which certified compliance. There was not more than a twenty-five percent difference in the bids; therefore, had NABI certified non-compliance, it would not have qualified for the award.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Partial Grant and Partial Denial of Motor Vehicle Defect Petition, DP01–003

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Partial grant and partial denial of petition for a defect investigation.

SUMMARY: This notice sets forth the reasons for the partial grant and partial denial of a petition submitted to NHTSA under 49 U.S.C. 30162, requesting that the agency commence a proceeding to determine the existence of a defect related to motor vehicle safety. The petition is hereinafter identified as DP01–003.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Squire, Office of Defects Investigation (ODI), NHTSA, 400 Seventh Street, SW., Washington, DC 20590. Telephone 202–493–0212.

SUPPLEMENTARY INFORMATION: Mr. James J. Johnston, President of the Owner-Operator Independent Drivers Association, Inc. (OOIDA), submitted a petition to NHTSA by letter dated March 21, 2001, requesting that an investigation be initiated to determine whether to issue an order concerning safety defects in model year 1989 through 2000 Volvo heavy trucks (subject trucks). The petition is extremely broad in that the petitioner alleges multiple defects on more than 30 models of Volvo trucks produced over a span of 12 model years.

The petition identified alleged deficiencies in nine areas. Those areas were identified as: (1) Shaking and vibration in the front end; (2) steering problems; (3) premature front tire wear; (4) wheel alignment problems; (5) problems with axle parts, including an overweight condition on the steering axle; (6) suspension problems; (7) transmission and clutch problems; (8) problems with the engine, including unintended ''racing'' or ''shutting down,'' and (9) electrical problems.

The OOIDA petition and subsequent information forwarded to the NHTSA Office of Defects Investigation (ODI) contained complaints from 180 persons. A review of the ODI database for additional complaints pertaining to the alleged defects on the subject trucks revealed an additional 41 complainants. Many of the complainants cited multiple problems with one or more subject trucks. To assist with evaluation of the petition, ODI staff communicated directly with approximately 74 persons, including representatives of 13 fleet operations.

Review of the OOIDA and ODI data revealed that approximately 92% of the complaints involved model year 1995 and newer subject trucks. Eighteen complaints involved model year 1994 subject trucks, while 11 complaints involved model year 1993 and older subject trucks. Unfortunately, many complaints failed to identify the vehicle model, model year and/or vehicle identification number. Although this lack of information hampered the analysis, data from these complaints were nonetheless reviewed to the fullest extent possible.

After conducting an extensive review of the issues raised in the petition, NHTSA has granted it with respect to the following issues:

1. Alleged steering defects on model year 1998 through 2000 VN–610, 660, and 770 series trucks regarding ''lock up,'' ''binding,'' or ''pulling'' of the

steering system. An investigation has been opened (PE01–041).

2. Alleged front axle component failure regarding steer axle U-bolts on model year 1998 through 2000 VN–610, 660, and 770 series trucks. An investigation has been opened (PE01–042). An alleged defect with respect to the drive or rear axle U-bolts was previously under way (EA01–011).

The allegations regarding the scope of Volvo's recall to address front axle overweight conditions on model year 1998 through 2001 VN-series trucks is being addressed through a Recall Audit (AQ02–018).

It is unlikely that NHTSA would issue an order for the notification and remedy of the other alleged defects as defined by the petitioner for the subject vehicles at the conclusion of the investigation requested in the petition. Therefore, in view of the need to allocate and prioritize NHTSA's limited resources to best accomplish the agency's safety mission, the petition is denied with respect to the remaining allegations. However, information obtained by the agency during its evaluation of the petition has led it to open an investigation with respect to alleged electrical problems potentially leading to fires in the sleeper berth of model year 1998 through 2000 VN–610, 660, and 770 series trucks. An investigation has been opened (PE01–040).

A description of NHTSA's analysis of the issues raised by the petition and the reasons for its decisions are set forth in an Addendum to this notice.

Authority: 49 U.S.C. 30162(d); delegations of authority at CFR 1.50 and 501.8.

Issued on: April 1, 2002.

Kenneth N. Weinstein,

Associate Administrator for Safety Assurance.

DP01–003 Addendum

In March 2001, the Owner-Operator Independent Drivers Association, Inc., (OOIDA) petitioned the National Highway Traffic Safety Administration (NHTSA) to investigate numerous alleged defects on all Volvo truck tractors manufactured between the years of 1989 and 2000. The complaints provided in the OOIDA petition and those extracted from the NHTSA database were often vague and provided few details to assist with conclusively identifying an allegedly defective component. The petition itself was extremely broad and appeared to cover almost every system on the subject trucks.

Evaluation of the petition involved the review of information provided by approximately 180 complaints submitted by OOIDA on behalf of Volvo truck owners. Complaints from an additional 41 (non duplicate) complainants contained within the NHTSA database were likewise reviewed. Since July 1, 2001, no additional complaints have been received through OOIDA; however, individual owners have contacted the Office of Defects Investigation (ODI) directly. ODI staff interviewed a total of 74 individuals, including 13 fleet [1] representatives, by telephone. These individual contacts increased the original number of complainants by 64 for a total of 285.[2] Some complainants owned more than one truck (not counted as a fleet).

The petition claimed that the problems spanned twelve model years, 1989 through 2000. Review of the complaints, however, revealed that most involved recent model year (MY) trucks, MY 1994 and newer. Vehicle model and model year could not be identified for approximately 4% of the complaints. The table below illustrates the percent of complaints within various vehicle model year ranges.

Percent of Total Complaints by Model Year

Model year 1998-2001	78%
Model year 1997-2001	85%
Model year 1996-2001	89%
Model year 1995-2001	92%
Model year 1994-2001	95%

The OOIDA petition divided the complaints into nine general categories: Vibration (front-end); Steering; Premature front tire wear; Wheel alignment; Axle (components and gross axle weight); Suspension; Transmission (clutch); Engine; and Electrical. The table below illustrates the source of each complaint alleged within each area.

[1] Fleet sizes ranged from 5 to 500 vehicles. See contact sheet in DP01–003.

[2] Not all owners interviewed had complaints nor were they dissatisfied with their vehicle.

Area of Complaint by Source

Complaint	OOIDA Petition	ODI Database	Other[1]	**Total**
Vibration	20	11	5	36
Steering	7	5	12	24
Tire Wear	64	12	42	118
Alignment	42	7	3	52
Axle Parts	4	109	15	128
Front Axle Weight	66	16	28	110
Suspension	4	3	5	12
Transmission/Clutch	6	9	5	20
Engine	2	3	0	5
Electrical	27	6	32	65
Total	242	181	147	570

[1] Direct telephone contact

Additional information regarding each complaint area is provided below. A breakdown by vehicle model and model year is also provided for each complaint area.

Complaint 1—Shaking and vibration through the front of the truck (36 complaints). Although this was a recurring complaint, analysis of the written complaints and telephone interviews failed to establish a specific causal factor. Although ''front end'' vibration was referred to in the OOIDA petition, interviews revealed that vibration complaints also included the driveline and rear axles. Interviews with individual owners illustrated that this complaint was subjective in nature and often was dependant upon the driver's expectations. Fleet operators tended to have fewer complaints than owner/operators and specifically noted that they tended to adhere to regular maintenance schedules. The majority of complaints involved tractors with integral sleeper berth units.

A complaint of front-end vibration frequently accompanied a report of excessive front axle weight and/or premature front axle tire wear. There was no indication that this condition rendered the vehicle uncontrollable or created a significant risk to safety. No further action on this issue will be taken.

Complaint 1: Vibration (36 Complaints)

Model Year	Model	Total	
1994	White	1	
	WIA	2	
	WHL	1	**4**
1995	WIA	4	**4**
1997	WIA	2	
	UNK	1	**3**
1998	VNL	1	
	VN-610	3	
	VN-770	8	**12**
1999	VNL	1	
	VN-610	1	
	VN-770	5	
	UNK	2	**9**
2000	VN-770	4	**4**

1998 and newer vehicles	69%
1997 and newer vehicles	78%
1996 and newer vehicles	78%
1995 and newer vehicles	89%
1994 and newer vehicles	100%
Vehicle unspecified	0%

Complaint 2—Steering deficiencies (24 complaints). Some recurring problems with the steering system on model year 1998 and newer trucks were alleged. The OOIDA petition alleged that Volvo trucks were prone to steering problems and cited 45 complaints related to ''steering.'' In addition, ''excessive sway'' and ''road wander'' were terms used to describe a steering deficiency. Unfortunately, detailed information was lacking in many of the complaints. Analysis of the complaints revealed a total of 24 complaints with sufficient information to indicate a potential problem related to the steering system (this total excludes one fleet that reported problems with multiple vehicles).[3] In all but two cases, the problems involved VN-model trucks. A majority of the complaints involved the 770 model, Volvo's heaviest tractor. In addition to the VN-models, two complaints regarding the WIA model were received, one from a MY 1996 vehicle and one from a MY 1997 vehicle. The complaints noted one of several symptoms, including: steering wheel or shaft binding, steering lock-up, steering ''pull,'' and steering gear box leak or failure. The table below provides a summary of these complaints.

Complaint 2: Steering (24 Complaints[1])

Model Year	Model	Total	
1996	WIA	1	1
1997	WIA	1	1
1998	VN	2	
	VN-610	2	
	VN-770	3	7
1999	VN-610	1	
	VN-770	6	7
2000	VN-660	1	
	VN-770	6	7

1998 and newer vehicles	91%
1997 and newer vehicles	96%
1996 and newer vehicles	100%
Vehicle unspecified	0%

Complaints specifics

Steering wheel binding - general	4
Gear box failure - general	3
Gear box leak	4[1]
Steering lock-up	5
Steering "pulls"	4
Power steering pump - general	1
Unidentified	3

[1]Includes 1 fleet entry for multiple occurrences models unknown

The evaluation of steering complaints also led to contact with an engineering firm that reportedly has investigated approximately 11–12 collisions involving VN-series trucks where a steering defect is suspected. In addition to speaking with a representative of the engineering firm, 18 of the ''steering problem'' complainants were contacted.

An investigation of this issue has been opened.

Complaint 3—Premature tire wear (118 complaints). This complaint was the predominant recurring issue. Nearly all the complainants were owner-operators, with one fleet operator reporting tire wear problems with the steering axle tires. Most complainants generally reported 50,000 to 80,000 miles of operation before tire replacement was necessary. Many complainants reported unusual ''cupping,'' scalloping,'' or edge wear. In a majority of cases owners blamed heavy front-end weight for the wear. In March 2001, Volvo initiated a recall (NHTSA #01V–093) to address the front axle weight problem. Evaluation of the OOIDA petition failed to identify a representative number of vehicles that had undergone repairs per recall 01V–093 to assess whether the remedy improved tire wear. The issue of the scope of that recall is being considered in a Recall Audit (AQ02–018). Tire wear was cited not as a safety issue, but one of economics. Owners reported that tire purchases tended to be one of the most costly recurring expenses they faced.

In view of the apparent lack of a safety issue, no further action on this issue will be taken.

[3] The fleet representative stated that this occurred on ''several'' vehicles, but was unable to provide specific vehicle information at the time of the conversation.

Complaint 3: Front Tire Wear
(118 Complaints)

Model Year	Model	Total	
1988	White	1	1
1992	WIA	1	1
1993	WIA	1	1
1994	White	3	
	WIA	2	5
1995	WIA	3	3
1996	WIA	6	6
1997	WIA	3	3
1998	VN	9	
	VN-610	2	
	VN-770	10	21
1999	VN	10	
	VN-610	3	
	VN-770	8	21
2000	VN	18	
	VN-610	4	
	VN-660	4	
	VN-770	9	35
Unidentified		21	21

1998 and newer vehicles	65%
1997 and newer vehicles	68%
1996 and newer vehicles	73%
1995 and newer vehicles	75%
1994 and newer vehicles	80%
Vehicle unspecified	18%

Complaint 4—Wheel alignment problems (52 complaints). Although there were a few complaints that wheel alignment could not be maintained, few specifics were provided to indicate a probable cause. Alignment complaints typically coincided with tire wear and front axle weight distribution complaints. In some situations where owners reported alignment problems, they also reported problems with axle U-bolts. In many cases the U-bolts were found to be loose or fractured at the time the wheel alignment was performed. In the interviews conducted by ODI staff, only four (4) complainants reported having difficulty keeping the vehicle ''in alignment.'' A substantial number of complainants reported having repeated alignment procedures completed in an attempt to correct problems with steer axle tire wear or vibration. These complainants reported no problem with the vehicle retaining alignment. Although complainants frequently equated poor alignment with tire wear and ''lane drift'' or ''road wander,'' the issue of ''alignment'' did not appear to raise safety concerns. Complainants reported having full control of their vehicles, and no crashes or injuries were reportedly related to this issue. No further action on this issue will be taken.

Complaint 4: Alignment (52 Complaints)

Model Year	Model	Total	
1988	White	1	1
1993	WIA	1	1
1994	White	1	
	WIA	6	7
1995	WIA	3	3
1996	WIA	2	2
1997	WIA	2	2
1998	VN	15	15
1999	VN	5	5
2000	VN	7	7
Unidentified		9	9

1998 and newer vehicles	52%
1997 and newer vehicles	56%
1996 and newer vehicles	60%
1995 and newer vehicles	65%
1994 and newer vehicles	79%
Vehicle unspecified	17%

Complaint 5—Axle problems (238 complaints, total). This complaint area was divided into two parts. One area focused solely on (A) axle components and the other on (B) steer axle weight. The OOIDA petition alleged that Volvo trucks were prone to failure of axle components, thereby increasing the risk of a crash and compromising safety. Analysis of the complaints indicated that the only axle parts subject to alleged failures were the axle U-bolts and steer axle wheel bearings.

(A1) Axle Component: U-Bolt (22 complaints). A review of the OOIDA petition and NHTSA database at the time the petition was submitted revealed a total of 10 complaints alleging defective axle U-bolts, primarily on model year 1995 through 2000 Volvo trucks. Specific models mentioned included the WIA and VN-series trucks. During the petition evaluation, twelve (12) additional complainants alleging defective axle U-bolts were identified and interviewed. These complaints all involved the VN-series truck.

During the petition evaluation, it was observed that the occurrence rate for failure or problem with the front axle U-bolts exceeded that of the drive axle. Drive axle U-bolt failure is currently the subject of an Engineering Analysis, EA01–011. The scope of this investigation involves the drive axle U-bolt assemblies on model year 1996 through 2000 Volvo trucks.

Several complainants alleging defective U-bolts were interviewed during the petition evaluation. Most complained of a recurrent loosening of the U-bolts, with eventual fracturing. Statements provided by some complainants suggested that loosening of the U-bolt is a precursor to failure. Some complainants reported hearing a ''popping'' or ''clunking'' noise, particularly during turning maneuvers. Subsequent inspection frequently revealed loose steer axle U-bolts. The Volvo owner's manual guide to service recommends checking the torque of the U-bolts at 15,000-mile intervals. Nearly all complainants reported never experiencing loose U-bolt conditions with other vehicle makes.

U-bolt failure can lead to a displacement of the axle and increase the potential for a crash. At least one incident of steer axle U-bolt failure allegedly led to a crash. James Gardiner reported that while operating at highway speed, his truck unexpectedly veered to the right, departed the highway, and overturned. A post-collision inspection revealed a fractured right steer axle U-bolt. Gardiner believes that the fracturing of the U-bolt resulted in a rearward displacement of the steer axle on the right side. He believes this caused the vehicle to depart the highway.

Available information indicates that nearly all U-bolt complaints and failures involve MY 1998 through 2000 VN series trucks. An investigation of this issue with respect to those vehicles has been opened.

(A2) Steering Axle Wheel Bearings (106 complaints). A review of the OOIDA petition and NHTSA database at the time the petition was submitted revealed a total of 106 complaints alleging defective steer axle wheel bearings. The complaints involved model year 1998 through 2000 VN 610, 660, and 770 models with only one complaint outside this range, a model year 1994 WIA.

Complainants alleging wheel bearing failure described one of several symptoms. Symptoms included loose wheel bearings at the time of vehicle delivery, accelerated wear, and/or complete failure leading to the loss of a wheel. Of the 106 complaints, 103 originated with a single fleet, so there were only four different complainants.

Even though many of the complainants contacted during the petition evaluation did not complain of steer axle wheel bearing failure, they did report recurrent front-end work to correct tire wear problems. Most reported repeated procedures involving removal of the wheel and/or retorquing of the wheel bearings.

Consultation with local Volvo service managers and technicians failed to reveal any additional information or acknowledgement of problems. In a worst-case scenario, the failure of a steer axle wheel bearing can result in wheel separation and the potential for a crash. However, no crashes, injuries, or fatalities have been reported involving bearing failure on these Volvo trucks. Volvo trucks exhibited no previous recalls or investigations related to this issue.

The available information does not warrant opening an investigation of this issue at this time.

Complaint 5a: Axle Deficiencies - Parts (U-Bolts and Wheel Bearings – 128 Complaints)

Model Year	Model	Total	
1994	White	1	1
1995	WIA	1	1
1997	WIA	1	1
1998	WHT	1	
	VN	46	
	VN-610	22	
	VN-770	5	74
1999	VN	41	
	VN-610	1	
	VN-770	4	46
2000	VN	1	
	VN-610	1	
	VN-770	2	
	WG	1	5

1998 and newer vehicles	98%
1997 and newer vehicles	"
1996 and newer vehicles	"
1995 and newer vehicles	99%
1994 and newer vehicles	100%
Vehicle unspecified	0%

(B) *Steering Axle Weight (110 complaints).* The OOIDA petition alleged that Volvo trucks were prone to an overweight condition on the steer axle. Evaluation of the complaints revealed that with few exceptions, this complaint typically involved the newer VN series trucks. An overwhelming majority of the complaints involved the 770 model, Volvo's largest tractor with an integral sleeper. Complaint review, personal interviews and field studies have revealed, however, that model series 610 and 660 vehicles are also often operated in an overweight condition.

A total of 110 complaints alleging an overweight condition on the front axle were reviewed. The OOIDA petition had listed 66 individual complaints of a steer axle overweight condition. Unfortunately, many of the OOIDA complaints contained few specifics regarding the interpretation of ''overweight.'' ODI contacted 47 complainants who specifically noted that the actual axle weight exceeded the front axle weight rating (GAWR—gross axle weight rating). These complainants reported that the actual axle weight ranged from 12,400 to 13,500 pounds. For most vehicles the front GAWR was 12,350 pounds. A total of 17 complainants provided copies of scale tickets exhibiting an overweight condition.

Review of the complaint documents and personal interviews with owners revealed differing interpretations for defining an overweight condition on the steer axle. Many owners tended to define an ideal weight condition based upon past experience or the restrictions of individual states. Many owner/drivers reported the desire to keep the front axle weight below 12,000 pounds and defined an overweight condition as any weight in excess of this number. Regarding state highway restrictions, five states[4] reportedly restrict the gross front axle weight to 12,000 pounds.

Federal regulations require the manufacturer to install a label specifying the GAWR. The GAWR should not exceed the weight rating of the weakest individual axle component, including the tires. According to Volvo, the GAWR is based on the component with the lowest load capacity inclusive of the tires, wheels, suspension, brakes, and other axle components. In most cases the GAWR is equal to the tire load capacity. Through a review of the complaints and conversations with owners, front axle gross weight ratings specified on the Federal label exhibited a range between 11,620 and 12,350 pounds.

In April 2001, Nick Barber petitioned NHTSA concerning the adequacy of Volvo's actions with respect to Recall 01V–093[5] (DP01–006). This petition challenges the effectiveness and scope of recall 01V–093 and alleges other problems with regard to establishing the weight distribution on VN model trucks. Since filing his petition with NHTSA, Mr. Barber has provided information on approximately 100 trucks (including having owners contact NHTSA directly). It was through these contacts that the overweight issue was more precisely defined. All of the ''confirmed'' overweight cases involved VN 610, 660, and 770 model trucks. Overweight complaints existed across all three model lines; however, the 770 models exhibited the greatest number of complaints.

Volvo states that the front axle weight should be measured with the vehicle fully fueled and in a bobtail (no trailer) configuration. Allowances are also made for the driver and personal cargo. Some of the ''overweight'' vehicles were weighed with trailers and/or auxiliary equipment installed on the tractor.

Nearly all complainants reported that when the tractor is coupled to a trailer under any load, the 5th wheel must be at the full aft position to maintain a front axle weight less than the GAWR. Some drivers complained, however, that the ''full aft'' 5th wheel position creates additional problems. They cite the large gap between the tractor and trailer as being responsible for decreased fuel efficiency. The use of only one position on a moveable 5th wheel also negates

[4] According to the 2001 edition of Transport Topics Size & Weight Update (American Trucking Associations), the following states restrict the gross front axle weight to 12,000 pounds—Alabama, Arizona, Arkansas, California, and Kentucky. Some states impose additional restrictions limiting tire gross weight to the product of a specified number of pounds per inch of tread width.

[5] In March 2001, Volvo initiated recall RVXX0103 (NHTSA 01V–093), applicable to 1,577 VN model trucks, stating that ''under certain operating conditions, the weight certification label which contains the front GAWR information . . . does not accurately reflect the actual front gross axle weight.'' The recall involves trucks manufactured between 11/22/97 and 08/28/99.

the advantage of moving the coupler to further distribute axle loads. Volvo contends that the addition of auxiliary equipment (tools boxes, cab protection devices, generators, etc.) could increase the front axle weight and therefore discourages and accepts no responsibility if such additions are made. Owners, however, have stated that some installation of the auxiliary equipment is performed or facilitated by the dealer. In other instances, owners report that they informed the dealer of the additions at the time of purchase.

NHTSA granted DP01–006 after evaluating the issues raised in that petition and has opened a Recall Audit (AQ02–018).

Complaint 5b: Front Axle Overweight (110 Complaints)

Model Year	Model	Total	
1988	White	1	1
1992	WIA	1	1
1993	WIA	1	1
1994	White	2	2
1995	WIA	2	2
1996	WIA	5	5
1997	WIA	3	3
1998	VN	4	
	VN-610	3	
	VN-660	1	
	VN-770	22	30
1999	VN	2	
	VN-610	4	
	VN-770	23	29
2000	VN-610	8	
	VN-660	10	
	VN-770	15	33
2001	VN-770	3	3

1998 and newer vehicles	86%
1997 and newer vehicles	89%
1996 and newer vehicles	94%
1995 and newer vehicles	95%
1994 and newer vehicles	97%
Vehicle unspecified	0%

Complaint 6—Suspension problems (12 complaints). This issue involves many of the same issues raised in the axle component complaints. Most complaints also cited vibration, alignment, and premature steer axle tire wear as being suspension related. Regarding this issue, no failed components, other than axle U-bolts, were identified. As such, no specific suspension problems were identified. The number of complaints citing suspension problems is tallied in the table below. No further action on this issue will be taken.

Complaint 6: Suspension (12 Complaints)

Model Year	Model	Total	
1994	WIA	1	1
1996	WIA	6	6
1998	VN	3	
	VN-610	2	5

1998 and newer vehicles	42%
1997 and newer vehicles	42%
1996 and newer vehicles	92%
1995 and newer vehicles	92%
1994 and newer vehicles	100%
Vehicle unspecified	0%

Complaint 7—Transmission and clutch problems (20 complaints). There were a few complaints of transmission failure; however, all but one of the owners interviewed reported that the transmission was replaced under warranty. Two owners complained of difficulty with shifting and another reported that the transmission shifted into the wrong gear. Two owners complained of the transmission overheating. None of the transmission complaints indicated that the situation presented a recurring safety hazard. There were no reports of collisions or injuries related to this issue.

Regarding clutch complaints, most complainants reported premature wear

requiring expensive replacement. Other complaints noted that the clutch required repeated adjustment. None of the complaints indicated that a hazard to safety existed. No further action on this issue will be taken.

Complaint 7: Transmission and Clutch (20 Complaints)

Model Year	Model	Total			
1990	TD365	2	2	1998 and newer vehicles	80%
1998	VN	3	3	1997 and newer vehicles	80%
1999	VN	4	4	1996 and newer vehicles	80%
2000	VN	8	8	1995 and newer vehicles	80%
2001	VN	1	1	1994 and newer vehicles	80%
Unidentified		2	2	Vehicle unspecified	10%

Complaint 8—Engine defects (5 complaints). Very few complaints alleged engine problems and none exhibited any trend that could be considered a hazard to safety. The OOIDA petition specifically noted unexpected ''acceleration'' and ''shut down'' (stalling) as issues of contention. One complaint noted the occurrence of engine ''rev up'' while at idle while most of the engine problems cited poor wiring connections leading to difficult starting or rough idle. No trend regarding engine problems was observed. No further action on this issue will be taken.

Complaint 8: Engine Complaints (5 Complaints)

Model Year	Model	Total			
1995	WIA	1	1	1998 and newer vehicles	20%
1997	WIA	2	2	1997 and newer vehicles	60%
1998	VN	1	1	1996 and newer vehicles	60%
Unidentified		1	1	1995 and newer vehicles	80%
				1994 and newer vehicles	80%
				Vehicle unspecified	20%

Complaint 9—Electrical defects (65 complaints). A substantial number of complaints noted ''electrical problems.'' Of the OOIDA petition complaints that contained specific information, most defined electrical problems with the ''instrumentation'' or ''dash.'' These issues were analyzed in greater detail through vehicle owner and truck service center interviews. Nearly all instrument problems appeared to be related to the ''SmartDash'' or vehicle management display and instrument panel lighting.

The SmartDash component at issue is a small LCD screen located on the instrument panel that displays a range of information to the driver. The unit provides information such as miles per gallon, trip time, axle and coolant temperature, diagnostic fault codes, and other information. Volvo representatives have acknowledged that the display screen on model year 1998 through 2000 vehicles is subject to failure. They report that a quality control problem with the vendor necessitated a change in the unit's design and construction (new vendor). Volvo identifies this unit as an accessory item and notes that all crucial gauges are duplicated in analog form elsewhere on the dash. This complaint was common among both individual and fleet owners and comprised about 38% of the complaints expressed through telephone interviews.

Instrument panel lighting was another recurring electrical-related complaint. Regarding this complaint, many owners, including at least three fleets, reported recurrent problems with instrument panel lighting prematurely ''burning out'' or experiencing poor electrical connections. This problem was cited in approximately 11% of the complaints expressed through telephone interviews. None of the complainants reported simultaneous failure of all instrument lighting. They complained that lamp replacement was needed every other month or so. Some complainants also noted that the lamps exhibited poor or loose connections.

Analysis of electrical problems revealed allegations of six (6) fires involving model year 1998 through 2001 VN series tractors with four (4) fires, potentially electrical in origin (one involving just smoke), originating in the sleeper compartment.

The four (4) sleeper berth fires involved VN 610 and 660 models. In each case fire investigators identified the fire's origin in the proximity of electrical wiring, with three cases originating near the sleeper ventilation control panel. Unfortunately, the exact cause of the fire was not determined although electrical short-circuiting was indicated as a possible source. The

sleeper berth of the VN-series truck is equipped with an individual heating and air conditioning blower located below the lower bunk and just right of the center of the vehicle. A controller unit used to adjust HVAC temperature and blower fan speed is located on the left side wall of the berth about midway between the ceiling and floor. At least three (3) fires reportedly originated in the area of this control panel.

The two remaining fire complaints involved a 2001 VN–610 and a 1998 VN–770. Investigation of the VN–610 fire failed to reveal the exact origin of the fire although the investigator believed it began in the vehicle's engine compartment. The VN–770 fire reportedly began in the dash wiring due to a faulty ''dimmer switch.'' Limited information was available regarding these two incidents. Complaints regarding fire and electrical problems in the sleeper berth appear to contain similar elements that warrant additional analysis.

Other than the sleeper berth fires, no trends were observed indicating a potential safety defect trend. An investigation into the sleeper berth fires has been opened.

Complaint 9: Electrical Complaints (65 Complaints)

Model Year	Model	Total	
1995	WIA	3	**3**
1996	WIA	1	**1**
1997	WIA	1	**1**
1998	VN-610	5	
	VN-660	2	
	VN-770	12	**19**
1999	VN-610	3	
	VN-660	2	
	VN-770	8	**13**
2000	VN-610	8	
	VN-660	10	
	VN-770	4	
2001	VN-610	1	
	VN-770	1	**24**
Unidentified		4	**4**

1998 and newer vehicles	86%
1997 and newer vehicles	88%
1996 and newer vehicles	89%
1995 and newer vehicles	94%
Vehicle unspecified	6%

ODI has compared the number of complaints regarding Volvo trucks with the number of complaints about similar problems on other makes of other heavy trucks. The comparison was limited to the complaint areas noted in the OOIDA petition. The table below compares the total number of Volvo truck complaints (all sources) against the complaints in the ODI database for other manufacturers' vehicles. Prior to the OOIDA petition, the total number of Volvo truck complaints recorded in the database was approximately 190.

Heavy Truck Manufacturer Complaint Comparison
ODI Complaint Database for
Model Year 1993-2001

	Mack	Freightliner	International	Hino	Peterbilt	Kenworth	*Volvo*
Vibration[1]	1	6			4	1	*10*
Steering	9	8	5	1	9	3	*5*
Tire Wear		3			1		*12*
Alignment		3			1	1	*7*
Axle (parts)[2]	3	35	1		5	7	*109*
Overweight							*16*
Suspension[3]	2	6	2		3	5	*3*
Transmission	4	9	2	1	6	1	*5*
Clutch	2	3	1		2	2	*3*
Engine[4]		3					*3*
Electrical[5]		1	1		1	1	*6*
Fires[6]		5			5	3	*3*
Database Total[7]	136	334	124	20	157	113	*182*

[1] All Occurrences
[2] All Complaints/Components
[3] May Overlap Axle Complaints
[4] Stalling or Unintended Acceleration
[5] All Interior Cab or Engine Compartment
[6] Considered Electrical in Origin
[7] Total Complaints in ODI Database

Additional Data

	Freightliner	Peterbilt	Kenworth
Reports of wheel separation	4	3	1
Reports of U-Bolt failure	2		
Reports of wheel bearing failure	1	1	
Reports of electrical fire	4	5	2

Analysis of the information made available through and as a result of the petition supports a conclusion that this petition should be partially granted and partially denied. The petition is granted with respect to three areas of concern—(1) steering problems, (2) front axle U-bolt problems and (3) sleeper berth fires. Additionally, the issue of steering axle overweight condition is being addressed through Recall Audit AQ02–018 while an issue pertaining to drive axle U-bolts is being investigated in an Engineering Analysis, EA01–011. No further action will be taken with respect to the remaining issues raised by the petition.

[FR Doc. 02–8520 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2002–11878]

Notice of Receipt of Petitions for Decision that Nonconforming 2001 and 2002 Porsche GT2 Turbo Passenger Cars are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petitions for decision that nonconforming 2001 and 2002 Porsche GT2 Turbo passenger cars are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of two separate petitions for a decision that 2001 and 2002 Porsche GT2 Turbo passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is May 9, 2002.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9 am to 5 pm].

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of

the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Northern California Diagnostic Laboratories, Inc. of Napa, California (''NCDL'') (Registered Importer 92–011) petitioned NHTSA to decide whether 2002 Porsche GT2 Turbo passenger cars are eligible for importation into the United States. Shortly after NCDL's petition was filed, J.K. Technologies, L.L.C. of Baltimore, Maryland (''J.K.'') (Registered Importer 90–006) separately petitioned NHTSA to decide whether 2001 and 2002 Porsche GT2 Turbo passenger cars are eligible for importation. J.K. requested the agency to grant confidentiality to certain information that accompanied its petition. NCDL did not file a confidentiality request. Because the two petitions pertain to the same vehicles (with the exception that the J.K. petition covers two model years and the NCDL petition only one), NHTSA is soliciting comments on both petitions in this notice.

The vehicles that NCDL and J.K. believe are substantially similar are 2001 and 2002 Porsche GT2 Turbo passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer as conforming to all applicable Federal motor vehicle safety standards.

The petitioners claim that that they have carefully compared non-U.S. certified 2001 and 2002 Porsche GT2 Turbo passenger cars to their U.S.-certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

NCDL and J.K. submitted information with their petitions intended to demonstrate that non-U.S. certified 2001 and 2002 Porsche GT2 Turbo passenger cars, as originally manufactured for sale in Europe, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioners claim that non-U.S. certified 2001 and 2002 Porsche GT2 Turbo passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence* . . . ., 103 *Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic Brake Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 113 *Hood Latch Systems,* 116 *Brake Fluid,* 124 *Accelerator Control Systems,* 135 *Passenger Car Brake Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Retention,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* and 302 *Flammability of Interior Materials.*

Additionally, NCDL claims that non-U.S. certified 2002 Porsche GT2 Turbo passenger cars are identical to their U.S.-certified counterparts with respect to compliance with Standard Nos. 110 *Tire Selection and Rims,* 111 *Rearview Mirrors,* 114 *Theft Protection,* 208 *Occupant Crash Protection,* and 301 *Fuel System Integrity* and with the Bumper Standard found in 49 CFR part 581.

J.K. states that non-U.S certified 2001 and 2002 Porsche GT2 Turbo passenger cars are capable of being readily altered to meet those standards, in the following manner:

Standard No. 110 *Tire Selection and Rims:* installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* replacement of the passenger side rearview mirror with a U.S.-model component, or inscription of the required warning statement on the surface of that mirror.

Standard No. 114 *Theft Protection:* programming of the warning system to meet the standard.

Standard No. 208 *Occupant Crash Protection:* inspection of all vehicles and replacement of the driver's and passenger's side air bags, knee bolsters, control units, sensors, and seat belts with U.S.-model components on vehicles that are not already so equipped. J.K. states that the front and rear outboard designated seating positions have combination lap and shoulder belts that are self-tensioning and that release by means of a single red pushbutton. J.K. further states that the vehicles are equipped with a seat belt warning lamp that is identical to the component installed on U.S.-certified models.

Standard No. 301 *Fuel System Integrity:* modifications for which J.K. has requested confidentiality.

Additionally, J.K. states that the bumpers and support structures on non-U.S. certified 2001 and 2002 Porsche GT2 Turbo passenger cars are identical, in most cases, to those components found on the vehicles' U.S. certified counterparts. J.K. stated, however, that all vehicles must be inspected for part number compliance.

Both petitioners contend that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* replacement of the instrument cluster with U.S.-model components.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) installation of U.S.-model headlamps and front sidemarker lamps, (b) installation of U.S.-model taillamp assemblies that incorporate rear sidemarker lamps, (c) installation of center high-mounted stop lamp if not already equipped.

Standard No. 118 *Power-Operated, Partition, and Roof Panel Systems:* modification of the system to comply with the standard.

NCDL claims that non-U.S. certified 2002 Porsche GT2 Turbo passenger cars comply with the parts marking requirements of the Theft Prevention Standard at 49 CFR Part 541. J.K. states that this standard is inapplicable to the 2001 and 2002 versions of the vehicle.

NCDL states that a vehicle identification number (VIN) plate must be affixed to non-U.S. certified 2002 Porsche GT2 Turbo passenger cars to meet the requirements of 49 CFR part 565. J.K. claims that both the 2001 and 2002 versions of the vehicle have a factory installed VIN plate in the windshield area that meets these requirements.

Interested persons are invited to submit comments on the petitions described above. Comments should refer to the docket number and be submitted to: Docket Management, Room PL–401, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9 am to 5 pm]. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before

and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petitions will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: April 3, 2002.

Marilynne Jacobs,

Office of Vehicle Safety Compliance.

[FR Doc. 02–8519 Filed 4–8–02; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34184]

The Burlington Northern and Santa Fe Railway Company–Trackage Rights Exemption–Southern Gulf Railway Company

Southern Gulf Railway Company (SGR), pursuant to a written trackage rights agreement entered into between SGR and The Burlington Northern and Santa Fe Railway Company (BNSF), has agreed to grant limited, nonexclusive overhead trackage rights to BNSF over SGR's rail line between SGR milepost 0.0 and SGR milepost 4.28, a distance of approximately 4.28 miles, in the vicinity of Sulphur, LA, for the purpose of serving the Roy S. Nelson Generating Station (Plant) of Entergy Gulf States, Inc. BNSF will operate its own trains with its own crews over SGR's line under the trackage rights agreement.[1]

Operations under the exemption were scheduled to begin on March 27, 2002, the effective date of the exemption (7 days after the notice was filed).

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.–Trackage Rights–BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.–Lease and Operate,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34184, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Michael E. Roper, 2500 Lou Menk Drive, P.O. Box 961039, Fort Worth, TX 76161–0039.

Board decisions and notices are available on our website at *WWW.STB.DOT.GOV.''*

Decided: April 1, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 02–8305 Filed 4–8–02; 8:45 am]

BILLING CODE 4915–00–P

[1] Pursuant to 49 CFR 1180.4(g), a railroad must file a verified notice with the Board at least 7 days before the trackage rights are to be consummated. In its verified notice, BNSF indicates that it has been providing service to the Plant pursuant to the trackage rights agreement dated February 17, 2000, prior to the filing of its verified notice of exemption. BNSF, states that, due to an oversight, it did not file its exemption with the Board until March 20, 2002.

DEPARTMENT OF THE TREASURY

Customs Service

Notice of Revocation of Customs Broker License

AGENCY: Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930 as amended (19 U.S.C. 1641) and the Customs Regulations [19 CFR 111.45(a)], the following Customs broker license is revoked by operation of law.

Name	License	Port
Sprint Custom House Brokerage, Inc.	17315	New York.

Dated: April 1, 2002.

Bonni G. Tischler,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 02–8488 Filed 4–8–02; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Name Change—Atlantic Alliance Fidelity and Surety Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 18 to the Treasury Department Circular 570; 2001 Revision, published July 2, 2001, at 66 FR 35024.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6765.

SUPPLEMENTARY INFORMATION: Atlantic Alliance Fidelity and Surety Company, a New Jersey corporation, has formally changed its name to the Guarantee Company of North America USA, effective March 1, 2002. The Company was last listed as an acceptable surety on Federal bonds at 66 FR 35029, July 2, 2001.

A Certificate of Authority as an acceptable surety on Federal bonds, dated today, is hereby issued under Sections 9304 to 9308 of Title 31 of the United States Code, to The Guarantee Company of North America USA, Mt. Laurel, New Jersey. This new Certificate replaces the Certificate of Authority issued to the Company under its former name. The underwriting limitation of $300,000 established for the Company as of July 2, 2001, remains unchanged until June 30, 2002.

Certificates of Authority expire on June 30, each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long the Company remains qualified (31 CFR part 223). A list of qualified companies is published annually as of July 1, in the Department Circular 570, which outlines details as to underwriting limitations, areas in which licensed to transact surety business and other information. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 2002 Revision, at pages 35029 and 35040 to reflect this change.

The Circular may be viewed and downloaded through the Internet at *www.fms.treas.gov/c570.* A hard copy may be purchased from the Government Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 769–004–40671.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F07, Hyattsville, MD 20782.

Dated: April 1, 2002.

Dorothy E. Martin,

Acting Director, Financial Accounting and Service Division, Financial Management Service.

[FR Doc. 02–8526 Filed 4–8–02; 8:45 am]

BILLING CODE 4810–35–M

Corrections

Federal Register
Vol. 67, No. 68
Tuesday, April 9, 2002

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 268

[SWH–FRL–7099–2]

RIN 2050–AE49

Hazardous Waste Management System; Identification and Listing of Hazardous Waste: Inorganic Chemical Manufacturing Wastes; Land Disposal Restrictions for Newly Identified Wastes; and CERCLA Hazardous Substance Designation and Reportable Quantities

Correction

In rule document 01–27833 beginning on page 58257 in the issue of Tuesday, November 20, 2001, make the following correction:

Due to several errors, the table titled ''TREATMENT STANDARDS FOR HADARDOUS WASTES'' that appears on pages 58298 and 58299 is being reprinted in its entirety.

§ 268.40 [Corrected]

* * * * *

TREATMENT STANDARDS FOR HAZARDOUS WASTES

[Note: NA means not applicable]

Waste code	Waste description and treatment/ regulatory Subcategory [1]	Regulated hazardous constituent		Wastewaters	Nonwastewaters
		Common name	CAS [2] No.	Concentration in mg/L [3], or Technology Code [4]	Concentration in mg/kg [5] unless noted as ''mg/L TCLP'', or Technology Code
*	* *	*	*	*	*
K176	Baghouse filters from the production of antimony oxide, including filters from the production of intermediates (e.g., antimony metal or crude antimony oxide)	Antimony	7440–36–0	1.9	1.15 mg/L TCLP
		Arsenic	7440–38–2	1.4	5.0 mg/L TCLP
		Cadmium	7440–43–9	0.69	0.11 mg/L TCLP
		Lead	7439–92–1	0.69	0.75 mg/L TCLP
		Mercury	7439–97–6	0.15	0.025 mg/L TCLP
K177	Slag from the production of antimony oxide that is speculatively accumulated or disposed, including slag from the production of intermediates (e.g., antimony metal or crude antimony oxide)	Antimony	7440–36–0	1.9	1.15 mg/L TCLP
		Arsenic	7440–38–2	1.4	5.0 mg/L TCLP
		Lead	7439–92–1	0.69	0.75 mg/L TCLP

TREATMENT STANDARDS FOR HAZARDOUS WASTES—Continued

[Note: NA means not applicable]

Waste code	Waste description and treatment/ regulatory Subcategory [1]	Regulated hazardous constituent		Wastewaters	Nonwastewaters
		Common name	CAS [2] No.	Concentration in mg/L [3], or Technology Code [4]	Concentration in mg/kg [5] unless noted as "mg/L TCLP", or Technology Code
K178	Residues from manufacturing and manufacturing-site storage of ferric chloride from acids formed during the production of titanium dioxide using the chloride-ilmenite process.	1,2,3,4,6,7,8- Heptachlorodibenzo-*p*-dioxin (1,2,3,4,6,7,8-HpCDD)	35822–39–4	0.000035 or CMBST [11]	0.0025 or CMBST [11]
		1,2,3,4,6,7,8-Heptachlorodibenzofuran (1,2,3,4,6,7,8-HpCDF)	67562–39–4	0.000035 or CMBST [11]	0.0025 or CMBST [11]
		1,2,3,4,7,8,9-Heptachlorodibenzofuran (1,2,3,4,7,8,9-HpCDF)	55673–89–7	0.000035 or CMBST [11]	0.0025 or CMBST [11]
		HxCDDs (All Hexachlorodibenzo-*p*-dioxins)	34465–46–8	0.000063 or CMBST [11]	0.001 or CMBST [11]
		HxCDFs (All Hexachlorodibenzo-furans)	55684–94–1	0.000063 or CMBST [11]	0.001 or CMBST [11]
		1,2,3,4,6,7,8,9-Octachlorodibenzo-*p*-dioxin (OCDD)	3268–87–9	0.000063 or CMBST [11]	0.005 or CMBST [11]
		1,2,3,4,6,7,8,9-Octachlorodibenzofuran (OCDF)	39001–02–0	0.000063 or CMBST [11]	0.005 or CMBST [11]
		PeCDDs (All Pentachlorodibenzo-*p*-dioxins)	36088–22–9	0.000063 or CMBST [11]	0.001 or CMBST [11]
		PeCDFs (All Pentachlorodibenzo-furans)	30402–15–4	0.000035 or CMBST [11]	0.001 or CMBST [11]
		TCDDs (All tetrachlorodibenzo-*p*-dioxins)	41903–57–5	0.000063 or CMBST [11]	0.001 or CMBST [11]
		TCDFs (All tetrachlorodibenzo-furans)	55722–27–5	0.000063 or CMBST [11]	0.001 or CMBST [11]
		Thallium	7440–28–0	1.4	0.20 mg/L TCLP

* * * * * * *

* * * * *

Footnotes to Treatment Standard Table 268.40:

[1] The waste descriptions provided in this table do not replace waste descriptions in 40 CFR part 261. Descriptions of Treatment/Regulatory Subcategories are provided, as needed, to distinguish between applicability of different standards.

[2] CAS means Chemical Abstract Services. When the waste code and/or regulated constituents are described as a combination of a chemical with its salts and/or esters, the CAS number is given for the parent compound only.

[3] Concentration standards for wastewaters are expressed in mg/L and are based on analysis of composite samples.

[4] All treatment standards expressed as a Technology Code or combination of Technology Codes are explained in detail in 40 CFR 268.42 Table 1—Technology Codes and Descriptions of Technology-Based Standards.

[5] Except for Metals (EP or TCLP) and Cyanides (Total and Amenable) the nonwastewater treatment standards expressed as a concentration were established, in part, based upon incineration in units operated in accordance with the technical requirements of 40 CFR part 264, Subpart O or 40 CFR part 265, Subpart O, or based upon combustion in fuel substitution units operating in accordance with applicable technical requirements. A facility may comply with these treatment standards according to provisions in 40 CFR 268.40(d). All concentration standards for nonwastewaters are based on analysis of grab samples.

* * * * *

[11] For these wastes, the definition of CMBST is limited to: (1) combustion units operating under 40 CFR 266, (2) combustion units permitted under 40 CFR part 264, Subpart O, or (3) combustion units operating under 40 CFR 265, Subpart O, which have obtained a determination of equivalent treatment under 268.42(b).

* * * * *

[FR Doc. C1–27833 Filed 4–8–02; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,
April 9, 2002

Part II

Environmental Protection Agency

40 CFR Parts 9, et al.

National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123, 124, and 125

[FRL–7154–7]

RIN 2040–AD62

National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Today's proposed rule would implement section 316(b) of the Clean Water Act (CWA) for certain existing power producing facilities that employ a cooling water intake structure and that withdraw 50 million gallons per day (MGD) or more of water from rivers, streams, lakes, reservoirs, estuaries, oceans, or other waters of the U.S. for cooling purposes. The proposed rule constitutes Phase II in EPA's development of section 316(b) regulations and would establish national requirements applicable to the location, design, construction, and capacity of cooling water intake structures at these facilities. The proposed national requirements, which would be implemented through National Pollutant Discharge Elimination System (NPDES) permits, would minimize the adverse environmental impact associated with the use of these structures.

Today's proposed rule would establish location, design, construction, and capacity requirements that reflect the best technology available for minimizing adverse environmental impact from the cooling water intake structure based on water body type, and the amount of water withdrawn by a facility. The Environmental Protection Agency (EPA) proposes to group surface water into five categories—freshwater rivers and streams, lakes and reservoirs, Great Lakes, estuaries and tidal rivers, and oceans—and establish requirements for cooling water intake structures located in distinct water body types. In general, the more sensitive or biologically productive the waterbody, the more stringent the requirements proposed as reflecting the best technology available for minimizing adverse environmental impact. Proposed requirements also vary according to the percentage of the source waterbody withdrawn, and facility utilization rate.

A facility may choose one of three options for meeting best technology available requirements under this proposed rule. These options include demonstrating that the facility subject to the proposed rule currently meet specified performance standards; selecting and implementing design and construction technologies, operational measures, or restoration measures that meet specified performance standards; or demonstrating that the facility qualifies for a site-specific determination of best technology available because its costs of compliance are either significantly greater than those considered by the Agency during the development of this proposed rule, or the facility's costs of compliance would be significantly greater than the environmental benefits of compliance with the proposed performance standards. The proposed rule also provides that facilities may use restoration measures in addition to or in lieu of technology measures to meet performance standards or in establishing best technology available on a site-specific basis.

EPA expects that this proposed regulation would minimize adverse environmental impact, including substantially reducing the harmful effects of impingement and entrainment, at existing facilities over the next 20 years. As a result, the Agency anticipates that this proposed rule would help protect ecosystems in proximity to cooling water intake structures. Today's proposal would help preserve aquatic organisms, including threatened and endangered species, and the ecosystems they inhabit in waters used by cooling water intake structures at existing facilities. EPA has considered the potential benefits of the proposed rule and in the preamble discusses these benefits in both quantitative and non-quantitative terms. Benefits, among other factors, are based on a decrease in expected mortality or injury to aquatic organisms that would otherwise be subject to entrainment into cooling water systems or impingement against screens or other devices at the entrance of cooling water intake structures. Benefits may also accrue at population, community, or ecosystem levels of ecological structures.

DATES: Comments on this proposed rule and Information Collection Request (ICR) must be received or postmarked on or before midnight July 8, 2002.

ADDRESSES: Public comments regarding this proposed rule should be submitted by mail to: Cooling Water Intake Structure (Existing Facilities: Phase II) Proposed Rule Comment Clerk—W–00–32, Water Docket, Mail Code 4101, EPA, Ariel Rios Building,1200 Pennsylvania Avenue, NW., Washington, DC 20460. Comments delivered in person (including overnight mail) should be submitted to the Cooling Water Intake Structure (Existing Facilities: Phase II) Proposed Rule Comment Clerk—W–00–32, Water Docket, Room EB 57, 401 M Street, SW., Washington, DC 20460. You also may submit comments electronically to *ow-docket@epa.gov*. Please submit any references cited in your comments. Please submit an original and three copies of your written comments and enclosures. For additional information on how to submit comments, see **"SUPPLEMENTARY INFORMATION**, How May I Submit Comments?"

EPA has prepared an Information Collection Request (ICR) under the Paperwork Reduction Act for this proposed rule (EPA ICR number 2060.01). For further information or a copy of the ICR contact Susan Auby by phone at (202) 260–4901, e-mail at *auby.susan@epamail.epa.gov* or download off the internet at *http://www.epa.gov/icr*. Send comments on the Agency's need for this information, the accuracy of the burden estimates, and any suggested methods for minimizing respondent burden (including the use of automated collection techniques) to the following addresses. Please refer to EPA ICR Number 2060.01 in any correspondence.

Ms. Susan Auby, U.S. Environmental Protection Agency, OP Regulatory Information Division (2137), 401 M Street, SW., Washington, DC 20460.

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA 725 17th Street, NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: For additional technical information contact Deborah G. Nagle at (202) 566–1063. For additional economic information contact Lynne Tudor, Ph.D. at (202) 566–1043. For additional biological information contact Dana A. Thomas, Ph.D. at (202) 566–1046. The e-mail address for the above contacts is "*rule.316b@epa.gov*."

SUPPLEMENTARY INFORMATION:

What Entities Are Potentially Regulated by This Action?

This proposed rule would apply to "Phase II existing facilities," i.e., existing facilities that both generate and transmit electric power or that generate electric power for sale to another entity for transmission; use one or more cooling water intake structures to withdraw water from waters of the U.S.;

have or require a National Pollutant Discharge Elimination System (NPDES) permit issued under section 402 of the CWA; and meet proposed flow thresholds.[1] Existing electric power generating facilities subject to this proposal would include those that use cooling water intake structures to withdraw fifty (50) million gallons per day (MGD) or more and that use at least twenty-five (25) percent of water withdrawn solely for cooling purposes. If a facility that otherwise would be subject to the proposed rule does not meet the fifty (50) MGD design intake flow or twenty-five (25) percent cooling water threshold, the permit authority would implement section 316(b) on a case-by-case basis, using best professional judgment. EPA intends to address such facilities in a future rulemaking effort. This proposal defines the term ''cooling water intake structure'' to mean the total physical structure and any associated constructed waterways used to withdraw water from waters of the U.S. The cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps. The category of facilities that would meet the proposed cooling water intake structure criteria for existing facilities are electric power generation utilities and nonutility power producers.

The following exhibit lists the types of entities that EPA is now aware potentially could be subject to this proposed rule. This exhibit is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. Types of entities not listed in the exhibit could also be regulated. To determine whether your facility would be regulated by this action, you should carefully examine the applicability criteria proposed at § 125.91 of the proposed rule. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Category	Examples of regulated entitles	Standard Industrial Classification (SIC) codes	North American Industry Classification System (NAICS) codes
Federal, State, and Local Government.	Operators of steam electric generating point source dischargers that employ cooling water intake structures.	4911 and 493	221112, 221113, 221119, 221121, 221122.
Industry	Steam electric generating (this includes utilities and nonutilities).	4911 and 493	221112, 221113, 221119, 221121, 221122.

Supporting Documentation

The proposed Phase II regulation is supported by three major documents:

1. *Economic and Benefits Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule* (EPA–821–R–02–001), hereafter referred to as the *EBA.* This document presents the analysis of compliance costs, closures, energy supply effects and benefits associated with the proposed rule.

2. *Case Study Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule* (EPA–821–R–02–002), hereafter referred to as the *Case Study Document.* This document presents the information gathered from the watershed and facility level case studies and methodology used to determine baseline impingement and entrainment losses.

3. *Technical Development Document for the Proposed Section 316(b) Phase II Existing Facilities Rule* (EPA–821–R–02–003), hereafter referred to as the *Technical Development Document.* This document presents detailed information on the methods used to develop unit costs and describes the set of technologies that may be used to meet the proposed rule's requirements.

How May I Review the Public Record?

The record (including supporting documentation) for this proposed rule is filed under docket number W–00–32 (Phase II Existing Facility proposed rule). The record is available for inspection from 9 a.m. to 4 p.m. on Monday through Friday, excluding legal holidays, at the Water Docket, Room EB 57, USEPA Headquarters, 401 M Street, SW, Washington, DC 20460. For access to docket materials, please call (202) 260–3027 to schedule an appointment during the hours of operation stated above.

How May I Submit Comments?

To ensure that EPA can read, understand, and therefore properly respond to comments, the Agency requests that you cite, where possible, the paragraph(s) or sections in the preamble, rule, or supporting documents to which each comment refers. You should use a separate paragraph for each issue you discuss.

If you want EPA to acknowledge receipt of your comments, enclose a self-addressed, stamped envelope. No faxes will be accepted. Electronic comments must be submitted as a WordPerfect 5.1, 6.1, 8, or 9 format, or an ASCII file or file avoiding the use of special characters and forms of encryption. Electronic comments must be identified by the docket number W–00–32. EPA will accept comments and data on disks in WordPerfect 5.1, 6.1, 8 or 9 format or in ASCII file format. Electronic comments on this notice may be filed on-line at many Federal depository libraries.

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[1] Proposed § 125.93 defines ''existing facility'' as any facility that commenced construction before January 17, 2002 and certain modifications and additions to such facilities.

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I. Legal Authority, Purpose of Today's Proposal, and Background

A. Legal Authority

Today's proposed rule is issued under the authority of sections 101, 301, 304, 306, 308, 316, 401, 402, 501, and 510 of the Clean Water Act (CWA), 33 U.S.C. 1251, 1311, 1314, 1316, 1318, 1326, 1341, 1342, 1361, and 1370. This proposal partially fulfills the obligations of the U.S. Environmental Protection Agency (EPA) under a consent decree in *Riverkeeper Inc., et al.* v. *Whitman,* United States District Court, Southern District of New York, No. 93 Civ. 0314 (AGS).

B. Purpose of Today's Proposal

Section 316(b) of the CWA provides that any standard established pursuant to section 301 or 306 of the CWA and applicable to a point source must require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available (BTA) for minimizing adverse environmental impact. Today's proposed rule would establish requirements, reflecting the best technology available for minimizing adverse environmental impact, applicable to the location, design, construction, and capacity of cooling water intake structures at Phase II existing power generating facilities that withdraw at least fifty (50) MGD of cooling water from waters of the U.S. Today's proposal would define a cooling water intake structure as the total physical structure, including the pumps, and any associated constructed waterways used to withdraw water from waters of the U.S. Cooling water absorbs waste heat rejected from processes employed or from auxiliary operations on a facility's premises. Single cooling water intake structures might have multiple intake bays. In 1977 EPA issued draft guidance for determining the best technology available to minimize adverse environmental impact from cooling water intake structures. In the absence of section 316(b) regulations or final guidance, the 1977 draft guidance has served as applicable guidance for section 316(b) determinations. *See Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) Pub. L. 92–500* (U.S. EPA, 1977). Administrative determinations in several permit proceedings also have served as de facto guidance.

Today, EPA proposes a national framework that would establish certain minimum requirements for the location, design, capacity, and construction of cooling water intake structures for large cooling water intake structures at Phase II existing facilities. In doing so, the Agency is proposing to revise the approach adopted in the 1977 draft guidance which was based on the judgment that ''[t]he decision as to best technology available for intake design location, construction, and capacity must be made on a case-by-case basis.'' Other important differences from the 1977 draft guidance include today's proposed definition of a ''cooling water intake structure.'' Today's proposal also would establish a cost-benefit test that is different from the ''wholly disproportionate'' cost-benefit test that has been in use since the 1970s.

Although EPA's judgment is that the requirements proposed today would best implement section 316(b) at Phase II existing facilities, the Agency is also inviting comment on a broad array of other alternatives, including, for example, more stringent technology-based requirements and a framework under which Directors would continue to evaluate adverse environmental impact and determine the best technology available for minimizing such impact on a wholly site-specific basis. Because the Agency is inviting comment on a broad range of alternatives for potential promulgation, today's proposal is not intended as guidance for determining the best technology available to minimize the adverse environmental impact of cooling water intake structures at potentially regulated Phase II existing facilities. Until the Agency promulgates final regulations based on today's proposal, Directors should continue to make section 316(b) determinations with respect to existing facilities, which may be more or less stringent than today's proposal, on a case-by-case basis applying best professional judgment.

Today's proposal would not apply to existing manufacturing facilities or to power generating facilities that withdraw less than fifty (50) MGD of cooling water. These facilities will be addressed in a separate rulemaking, referred to as the Phase III rule (see section I.C.2., below). In the interim, these facilities are subject to section 316(b) requirements established by permitting authorities on a case-by-case basis, using best professional judgment. Upon promulgation of final regulations based on today's proposal, the Agency will address the extent to which the final regulations and preamble should serve as guidance for developing section 316(b) requirements for Phase III facilities prior to the promulgation of the Phase III regulations.

EPA and State permitting authorities should use existing guidance and information to form their best professional judgment in issuing permits to existing facilities. EPA's draft *Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b)* (May 1, 1977), continues to be applicable for existing facilities pending EPA's issuance of final regulations under section 316(b). Two background papers that EPA prepared in 1994 and 1996 to describe cooling water intake technologies being used or tested for minimizing adverse environmental impact also contain information that could be useful to permit writers. *(Preliminary Regulatory Development, Section 316(b) of the Clean Water Act, Background Paper Number 3: Cooling Water Intake Technologies* (1994) and *Draft Supplement to Background Paper Number 3: Cooling Water Intake Technologies.)* Fact sheets from recent 316(b) State and Regional permits are another source of potentially relevant information. The evaluations of the costs and efficacies of technologies presented in the *Technical Development Document for the Final Regulations Addressing Cooling Water Intake Structures for New Facilities,* EPA–821–R–01–036, November 2001 may also be relevant on some cases, although costs for some technologies will differ between new and existing facilities. EPA and State decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from applicable guidance where appropriate. Any decisions on a particular facility should be based on the requirements of section 316(b).

C. Background

1. The Clean Water Act

The Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, seeks to ''restore and maintain the chemical, physical, and biological integrity of the nation's waters.'' 33 U.S.C. 1251(a). The CWA establishes a comprehensive regulatory program, key elements of which are (1) a prohibition on the discharge of pollutants from point sources to waters of the U.S., except as authorized by the statute; (2) authority for EPA or authorized States or Tribes to issue National Pollutant Discharge Elimination System (NPDES) permits that regulate the discharge of pollutants; and (3) requirements for EPA to develop effluent limitations guidelines and standards and for States to develop water quality standards that are the basis for the limitations required in NPDES permits.

Today's proposed rule would implement section 316(b) of the CWA as it applies to ''Phase II existing facilities'' as defined in this proposal. Section 316(b) addresses the adverse environmental impact caused by the intake of cooling water, not discharges into water. Despite this special focus, the requirements of section 316(b) are closely linked to several of the core elements of the NPDES permit program established under section 402 of the CWA to control discharges of pollutants into navigable waters. For example, section 316(b) applies to facilities that withdraw water from the waters of the United States for cooling through a cooling water intake structure and are point sources subject to an NPDES permit. Conditions implementing section 316(b) are included in NPDES permits and would continue to be included in such permits under this proposed rule.

Section 301 of the CWA prohibits the discharge of any pollutant by any person, except in compliance with specified statutory requirements. These requirements include compliance with technology-based effluent limitations guidelines and new source performance standards, water quality standards, NPDES permit requirements, and certain other requirements.

Section 402 of the CWA provides authority for EPA or an authorized State or Tribe to issue an NPDES permit to any person discharging any pollutant or combination of pollutants from a point source into waters of the U.S. Forty-four States and one U.S. territory are authorized under section 402(b) to administer the NPDES permitting program. NPDES permits restrict the types and amounts of pollutants, including heat, that may be discharged from various industrial, commercial, and other sources of wastewater. These permits control the discharge of pollutants primarily by requiring dischargers to meet effluent limitations and other permit conditions. Effluent limitations may be based on promulgated federal effluent limitations guidelines, new source performance standards, or the best professional judgment of the permit writer. Limitations based on these guidelines, standards, or best professional judgment are known as technology-based effluent limits. Where technology-based effluent limits are inadequate to ensure compliance with water quality standards applicable to the receiving water, more stringent effluent limits based on applicable water quality standards are required. NPDES permits also routinely include monitoring and reporting requirements, standard conditions, and special conditions.

Sections 301, 304, and 306 of the CWA require that EPA develop technology-based effluent limitations guidelines and new source performance standards that are used as the basis for technology-based minimum discharge requirements in wastewater discharge permits. EPA issues these effluent limitations guidelines and standards for categories of industrial dischargers based on the pollutants of concern discharged by the industry, the degree of control that can be attained using various levels of pollution control technology, consideration of various economic tests appropriate to each level of control, and other factors identified in sections 304 and 306 of the CWA (such as non-water quality environmental impacts including energy impacts). EPA has promulgated regulations setting effluent limitations guidelines and standards under sections 301, 304, and 306 of the CWA for more than 50 industries. See 40 CFR parts 405 through 471. Among these, EPA has established effluent limitations guidelines that apply to most of the industry categories that use cooling water intake structures (e.g., steam electric power generation, iron and steel manufacturing, pulp and paper manufacturing, petroleum refining, chemical manufacturing).

Section 306 of the CWA requires that EPA establish discharge standards for new sources. For purposes of section 306, new sources include any source that commenced construction after the promulgation of applicable new source performance standards, or after proposal of applicable standards of performance if the standards are promulgated in accordance with section 306 within 120 days of proposal. CWA section 306; 40 CFR 122.2. New source performance standards are similar to the technology-based limitations established for Phase II existing sources, except that new source performance standards are based on the best available demonstrated technology instead of the best available technology economically achievable. New facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies. Therefore, Congress directed EPA to consider the best demonstrated process changes, in-plant controls, and end-of-process control and treatment technologies that reduce pollution to the maximum extent feasible. In addition, in establishing new source performance standards, EPA is required to take into consideration the cost of achieving the effluent reduction

and any non-water quality environmental impacts and energy requirements.

2. Consent Decree

Today's proposed rule partially fulfills EPA's obligation to comply with an Amended Consent Decree. The Amended Consent Decree was filed on November 22, 2000, in the United States District Court, Southern District of New York, in *Riverkeeper Inc., et al.* v. *Whitman*, No. 93 Civ 0314 (AGS), a case brought against EPA by a coalition of individuals and environmental groups. The original Consent Decree, filed on October 10, 1995, provided that EPA was to propose regulations implementing section 316(b) by July 2, 1999, and take final action with respect to those regulations by August 13, 2001. Under subsequent interim orders and the Amended Consent Decree, EPA has divided the rulemaking into three phases and is working under new deadlines. As required by the Amended Consent Decree, on November 9, 2001, EPA took final action on a rule governing cooling water intake structures used by new facilities (Phase I). 66 FR 65255 (December 18, 2001). The Amended Consent Decree also requires that EPA issue this proposal by February 28, 2002, and take final action by August 28, 2003 (Phase II).[2] The decree requires further that EPA propose regulations governing cooling water intake structures used, at a minimum, by smaller-flow power plants and factories in four industrial sectors (pulp and paper making, petroleum and coal products manufacturing, chemical and allied manufacturing, and primary metal manufacturing) by June 15, 2003, and take final action by December 15, 2004 (Phase III).

3. What Other EPA Rulemakings and Guidance Have Addressed Cooling Water Intake Structures?

In April 1976 EPA published a rule under section 316(b) that addressed cooling water intake structures. 41 FR 17387 (April 26, 1976), proposed at 38 FR 34410 (December 13, 1973). The rule added a new § 401.14 to 40 CFR Chapter I that reiterated the requirements of CWA section 316(b). It also added a new part 402, which included three sections: (1) § 402.10 (Applicability), (2) § 402.11 (Specialized definitions), and (3) § 402.12 (Best technology available for cooling water intake structures). Section 402.10 stated that the provisions of part 402 applied to ''cooling water intake structures for point sources for which effluent limitations are established pursuant to section 301 or standards of performance are established pursuant to section 306 of the Act.'' Section 402.11 defined the terms ''cooling water intake structure,'' ''location,'' ''design,'' ''construction,'' ''capacity,'' and ''Development Document.'' Section 402.12 included the following language:

> The information contained in the Development Document shall be considered in determining whether the location, design, construction, and capacity of a cooling water intake structure of a point source subject to standards established under section 301 or 306 reflect the best technology available for minimizing adverse environmental impact.

In 1977, fifty-eight electric utility companies challenged these regulations, arguing that EPA had failed to comply with the requirements of the Administrative Procedure Act (APA) in promulgating the rule. Specifically, the utilities argued that EPA had neither published the Development Document in the **Federal Register** nor properly incorporated the document into the rule by reference. The United States Court of Appeals for the Fourth Circuit agreed and, without reaching the merits of the regulations themselves, remanded the rule. *Appalachian Power Co.* v. *Train*, 566 F.2d 451 (4th Cir. 1977). EPA later withdrew part 402. 44 FR 32956 (June 7, 1979). 40 CFR 401.14 remains in effect.

Since the Fourth Circuit remanded EPA's section 316(b) regulations in 1977, NPDES permit authorities have made decisions implementing section 316(b) on a case-by-case, site-specific basis. EPA published draft guidance addressing section 316(b) implementation in 1977. See *Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) P.L. 92–500* (U.S. EPA, 1977). This draft guidance describes the studies recommended for evaluating the impact of cooling water intake structures on the aquatic environment and recommends a basis for determining the best technology available for minimizing adverse environmental impact. The 1977 section 316(b) draft guidance states, ''The environmental-intake interactions in question are highly site-specific and the decision as to best technology available for intake design, location, construction, and capacity must be made on a case-by-case basis.'' (Section 316(b) Draft Guidance, U.S. EPA, 1977, p. 4). This case-by-case approach also is consistent with the approach described in the 1976 Development Document referenced in the remanded regulation.

The 1977 section 316(b) draft guidance suggests a general process for developing information needed to support section 316(b) decisions and presenting that information to the permitting authority. The process involves the development of a site-specific study of the environmental effects associated with each facility that uses one or more cooling water intake structures, as well as consideration of that study by the permitting authority in determining whether the facility must make any changes for minimizing adverse environmental impact. Where adverse environmental impact is present, the 1977 draft guidance suggests a stepwise approach that considers screening systems, size, location, capacity, and other factors.

Although the draft guidance describes the information that should be developed, key factors that should be considered, and a process for supporting section 316(b) determinations, it does not establish uniform technology-based national standards for best technology available for minimizing adverse environmental impact. Rather, the guidance leaves the decisions on the appropriate location, design, capacity, and construction of cooling water intake structures to the permitting authority. Under this framework, the Director determines whether appropriate studies have been performed and whether a given facility has minimized adverse environmental impact.

4. New Facility Rule

On November 9, 2001, EPA took final action on regulations governing cooling water intake structures at new facilities. 66 FR 65255 (December 18, 2001). The final new facility rule (Phase I) established requirements applicable to the location, design, construction, and capacity of cooling water intake structures at new facilities that withdraw at least two (2) million gallons per day (MGD) and use at least twenty-five (25) percent of the water they withdraw solely for cooling purposes. EPA adopted a two-track approach. Under Track I, for facilities with a design intake flow more than 10 MGD, the capacity of the cooling water intake structure is restricted, at a minimum, to a level commensurate with that which could be attained by use of a closed-cycle recirculating system. For facilities

[2] Under the Amended Consent Decree, EPA is to propose reuglations in Phase II that are ''applicable to, at a minimum: (i) Existing utilities (i.e., facilities that both generate and transmit electric power) that employ a cooling water intake structure, and whose intake flow levels exceed a minimum threshold to be determined by EPA during the Phase II rulemaking process; and (ii) existing non-utility power producers (i.e., facilities that generate electric power but sell it to another entity for transmission) that employa cooling water intake structure, and whose intakeflow levels exceed a minimum threshold to be determined by EPA during the Phase II rulemaking process.''

with a design intake flow more than 2 MGD, the design through-screen intake velocity is restricted to 0.5 ft/s and the total quantity of intake is restricted to a proportion of the mean annual flow of a freshwater river or stream, or to maintain the natural thermal stratification or turnover patterns (where present) of a lake or reservoir except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency(ies), or to a percentage of the tidal excursions of a tidal river or estuary. In addition, an applicant with intake capacity greater than 10 MGD must select and implement an appropriate design and construction technology for minimizing impingement mortality and entrainment if certain environmental conditions exist. (Applicants with 2–10 MGD flows are not required to reduce capacity but must install technologies for reducing entrainment at all locations.) Under Track II, the applicant has the opportunity to demonstrate that impacts to fish and shellfish, including important forage and predator species, within the watershed will be comparable to these which it would achieve were it to implement the Track I requirements for capacity and design velocity. This demonstration can include the use of restoration measures such as habitat enhancement or fish restocking programs. Proportional flow requirements also apply under Track II.

With the new facility rule, EPA promulgated a national framework that establishes minimum requirements for the design, capacity, and construction of cooling water intake structures for new facilities. EPA believes that the final new facility rule establishes a reasonable framework that creates certainty for permitting of new facilities, while providing some flexibility to take site-specific factors into account.

5. Public Participation

EPA has worked extensively with stakeholders from the industry, public interest groups, state agencies, and other federal agencies in the development of this proposed rule. These public participation activities have focused on various section 316(b) issues, including general issues, as well as issues relevant to development of the Phase I rule and issues relevant to the proposed Phase II rule.

In addition to outreach to industry groups, environmental groups, and other government entities in the development, testing, refinement, and completion of the 316(b) survey,[3] which has been used as a source of data for the Phase II proposal, EPA conducted two public meetings on 316(b) issues. In June 1998, in Arlington, Virginia (63 FR 27958) EPA conducted a public meeting focused on a draft regulatory framework for assessing potential adverse environmental impacts from impingement and entrainment. In September, 1998, in Alexandria, Virginia (63 FR 40683) EPA conducted a public meeting focused on technology, cost, and mitigation issues. In addition, in September 1998 and April 1999, EPA staff participated in technical workshops sponsored by the Electric Power Research Institute on issues relating to the definition and assessment of adverse environmental impact. EPA staff have participated in other industry conferences, met upon request on numerous occasions with industry representatives, and met on a number of occasions with representatives of environmental groups.

In the months leading up to publication of the proposed Phase I rule, EPA conducted a series of stakeholder meetings to review the draft regulatory framework for the proposed rule and invited stakeholders to provide their recommendations for the Agency's consideration. EPA managers have met with the Utility Water Act Group, Edison Electric Institute, representatives from an individual utility, and with representatives from the petroleum refining, pulp and paper, and iron and steel industries. EPA conducted several meetings with environmental groups attended by representatives from 15 organizations. EPA also met with the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and, with the assistance of ASIWPCA, conducted a conference call in which representatives from 17 states or interstate organizations participated. After publication of the proposed Phase I rule, EPA continued to meet with stakeholders at their request. These meetings are summarized in the record.

EPA received many comments from industry stakeholders, government agencies and private citizens on the Phase I proposed rule 65 FR 49059 (August 10, 2000). EPA received additional comments on the Notice of Data Availability (NODA) 66 FR 28853 (May 25, 2001). These comments have informed the development of the Phase II proposal.

[3] U.S. EPA, *Information Collection Request, Detailed Industry Questionnaires: Phase II Cooling Water Intake Structures & Watershed Case Study Short Questionnaires*, Section 3, 1999.

In January, 2001, EPA also attended technical workshops organized by the Electric Power Research Institute and the Utilities Water Act Group. These workshops focused on the presentation of key issues associated with different regulatory approaches considered under the Phase I proposed rule and alternatives for addressing 316(b) requirements.

On May 23, 2001, EPA held a day-long forum to discuss specific issues associated with the development of regulations under section 316(b) of the Clean Water Act. 66 FR 20658. At the meeting, 17 experts from industry, public interest groups, States, and academia reviewed and discussed the Agency's preliminary data on cooling water intake structure technologies that are in place at existing facilities and the costs associated with the use of available technologies for reducing impingement and entrainment. Over 120 people attended the meeting.

In August 21, 2001, EPA staff participated in a technical symposium sponsored by the Electric Power Research Institute in association with the American Fisheries Society on issues relating to the definition and assessment of adverse environmental impact under section 316(b) of the CWA.

Finally, EPA has coordinated with the staff from the Nuclear Regulatory Commission (NRC) in the development of this proposed rule to ensure that the proposal does not conflict with NRC safety requirements. NRC staff have reviewed the proposed 316(b) rule and did not identify any apparent conflict with nuclear plant safety. NRC licensees would continue to be obligated to meet NRC requirements for design and reliable operation of cooling systems. NRC staff recommended that EPA consider adding language which states that in cases of conflict between an EPA requirement under this proposed rule and an NRC safety requirement, the NRC safety requirement take precedence. EPA has added language to address this concern to the proposed rule. These coordination efforts and all of the meetings described above are documented or summarized in the record.

II. Scope and Applicability of the Proposed Rule

This proposed rule would apply to existing facilities as defined below, that use a cooling water intake structure to withdraw water for cooling purposes from waters of the U.S. and that have or are required to have a National Pollutant Discharge Elimination System (NPDES) permit issued under section 402 of the

CWA. Specifically, the rule applies to you if you are the owner or operator of an existing facility that meets all of the following criteria:

- Your facility both generates and transmits electric power or generates electric power but sells it to another entity for transmission;
- Your facility is a point source and uses or proposes to use a cooling water intake structure or structures, or your facility obtains cooling water by any sort of contract or arrangement with an independent supplier who has a cooling water intake structure;
- Your facility's cooling water intake structure(s) withdraw(s) cooling water from waters of the U.S. and at least twenty-five (25) percent of the water withdrawn is used solely for contact or non-contact cooling purposes;
- Your facility has an NPDES permit or is required to obtain one; and
- Your facility has a design intake flow of 50 million gallons per day (MGD) or greater;
- In the case of a cogeneration facility that shares a cooling water intake structure with another facility, only that portion of the cooling water flow that is used in the cogeneration process shall be considered when determining whether the 50 MGD and 25 percent criteria are met.

Facilities subject to the proposed rule are referred to as ''Phase II existing facilities.'' Existing facilities with design flows below the 50 MGD threshold, as well as certain existing manufacturing facilities, and offshore and coastal oil and gas extraction facilities, would not be subject to this proposed rule, but will be addressed in Phase III. If an existing facility that would otherwise be a Phase II existing facility has or requires an NPDES permit but does not meet the twenty-five percent cooling water use threshold, it would not be subject to permit conditions based on today's proposed rule; rather, it would be subject to permit conditions implementing section 316(b) of the CWA set by the permit director on a case-by-case basis, using best professional judgment.

A. What Is an ''Existing Facility'' for Purposes of the Section 316(b) Proposed Phase II Rule?

EPA is proposing to define the term ''existing facility'' as any facility that commenced construction before January 17, 2002 and (1) any modification of such a facility; (2) any addition of a unit at such a facility for purposes of the same industrial operation; (3) any addition of a unit at such a facility for purposes of a different industrial operation, if the additional unit uses an existing cooling water intake structure and the design capacity of intake structure is not increased; or (4) any facility constructed in place of such a facility if the newly constructed facility uses an existing cooling water intake structure whose design intake flow is not increased to accommodate the intake of additional cooling water.

The term commence construction is defined in 40 CFR 122.29(b)(4) and January 17, 2002 is the effective date of the new facility rule. EPA has specified that any modification of a facility that commenced construction before January 17, 2002 remains an existing facility for purposes of this rule to clarify that significant changes to such a facility would not, absent other conditions, cause the facility to be a ''new facility'' subject to the Phase I rule. In addition, the proposed definition specifies that any addition of a unit at a facility that commenced construction before January 17, 2002 for purposes of the same industrial operation as the existing facility would continue to be defined as an existing facility. Further, any addition of a unit at a facility that commenced construction before January 17, 2002 for purposes of a different industrial operation would remain an existing facility provided the additional unit uses an existing cooling water intake structure and the design capacity of intake structure is not increased. Finally, under the proposed definition, any facility constructed in place of a facility that commenced construction before January 17, 2002, would remain defined as an existing facility if the newly constructed facility uses an existing cooling water intake structure whose design intake flow is not increased to accommodate the intake of additional cooling water.

Under this proposed rule certain forms of repowering could be undertaken by an existing power generating facility that uses a cooling water intake structure and it would remain subject to regulation as a Phase II existing facility. For example, the following scenarios would be existing facilities under the proposed rule:

- An existing power generating facility undergoes a modification of its process short of total replacement of the process and concurrently increases the design capacity of its existing cooling water intake structures;
- An existing power generating facility builds a new process for purposes of the same industrial operation and concurrently increases the design capacity of its existing cooling water intake structures;
- An existing power generating facility completely rebuilds its process but uses the existing cooling water intake structure with no increase in design capacity.

Thus, in most situations, repowering an existing power generating facility would be addressed under this proposed rule.

The proposed definition of ''existing facility'' is sufficiently broad that it covers facilities that will be addressed under the Phase III rule (e.g., existing power generating facilities with design flows below the 50 MGD threshold, certain existing manufacturing facilities, and offshore and coastal oil and gas extraction facilities). These facilities are not covered under this proposal because they do not meet the requirements of proposed § 125.91.

B. What Is a ''Cooling Water Intake Structure?''

Today's proposal would adopt for Phase II existing facilities the same definition of a ''cooling water intake structure'' that is part of the new facility rule, i.e., 40 CFR 125.83, the total physical structure and any associated constructed waterways used to withdraw cooling water from waters of the U.S. The cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps. Today's proposal also would adopt the new facility rule's definition of ''cooling water,'' i.e., water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content. The definition specifies that the intended use of cooling water is to absorb waste heat from production processes or auxiliary operations. The definition also specifies that water used for both cooling and non-cooling purposes would not be considered cooling water for purposes of determining whether 25% or more of the flow is cooling water.

This definition differs from the definition of ''cooling water intake structure'' that is included in the 1977 Draft Guidance. The proposed definition clarifies that the cooling water intake structure includes the physical structure and technologies that extend up to and include the intake pumps. Inclusion of the term ''associated constructed waterways'' is intended to clarify that the definition includes those canals, channels, connecting waterways, and similar structures that may be built or modified to facilitate the withdrawal of cooling water. The explicit inclusion of the intake pumps in the definition reflects the key role pumps play in determining the capacity (i.e., dynamic capacity) of the intake. These pumps,

which bring in water, are an essential component of the cooling water intake structure since without them the intake could not work as designed.

In addition, the definition would apply to structures that bring water in for both contact and noncontact cooling purposes. This clarification is necessary because cooling water intake structures typically bring water into a facility for numerous purposes, including industrial processes; use as circulating water, service water, or evaporative cooling tower makeup water; dilution of effluent heat content; equipment cooling; and air conditioning.

Finally, at § 125.91(b), consistent with the new facility rule, this proposed rule provides that use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with an independent supplier (or multiple suppliers) of cooling water if the supplier or suppliers withdraw(s) water from waters of the United States. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a point source. It also provides that use of cooling water does not include obtaining cooling water from a public water system or the use of treated effluent that otherwise would be discharged to a water of the U.S.

C. Is My Facility Covered If It Withdraws From Waters of the U.S.?

The requirements proposed today would apply to cooling water intake structures that withdraw amounts of water greater than the proposed flow threshold from ''waters of the U.S.'' Waters of the U.S. include the broad range of surface waters that meet the regulatory definition at 40 CFR 122.2, which includes lakes, ponds, reservoirs, nontidal rivers or streams, tidal rivers, estuaries, fjords, oceans, bays, and coves. These potential sources of cooling water may be adversely affected by impingement and entrainment.

Some facilities discharge heated water to cooling ponds, then withdraw water from the ponds for cooling purposes. EPA does not intend this proposal to change the regulatory status of cooling ponds. Cooling ponds are neither categorically included nor categorically excluded from the definition of ''waters of the United States'' at 40 CFR 122.2. EPA interprets 40 CFR 122.2 to give permit writers discretion to regulate cooling ponds as ''waters of the United States'' where cooling ponds meet the definition of ''waters of the United States.'' The determination whether a particular cooling pond is or is not ''waters of the United States'' is to be made by the permit writer on a case-by-case basis, informed by the principles enunciated in *Solid Waste Agency of Northern Cook County* v. *US Army Corps of Engineers,* 531 U.S. 159 (2001). Therefore, facilities that withdraw cooling water from cooling ponds that are ''waters of the U.S.'' and that meet today's other proposed criteria for coverage (including the requirement that the facility have or be required to obtain an NPDES permit) would be subject to today's proposed rule.

D. Is My Facility Covered If It Is a Point Source Discharger Subject to an NPDES Permit?

Today's proposed rule would apply only to facilities that have an NPDES permit or are required to obtain one because they discharge or might discharge pollutants, including storm water, from a point source to waters of the U.S. This is the same requirement EPA included in the new facility rule. 40 CFR 125.81(a)(1). Requirements for minimizing the adverse environmental impact of cooling water intake structures would continue to be applied through NPDES permits.

Based on the Agency's review of potential Phase II existing facilities that employ cooling water intake structures, the Agency anticipates that most existing power generating facilities that would be subject to this rule will control the intake structure that supplies them with cooling water, and discharge some combination of their cooling water, wastewater, and storm water to a water of the U.S. through a point source regulated by an NPDES permit. In this scenario, the requirements for the cooling water intake structure would be specified in the facility's NPDES permit. In the event that a Phase II existing facility's only NPDES permit is a general permit for storm water discharges, the Agency anticipates that the Director would write an individual NPDES permit containing requirements for the facility's cooling water intake structure. The Agency invites comment on this approach for applying cooling water intake structure requirements to the facility. Alternatively, requirements applicable to cooling water intake structures could be incorporated into general permits. The Agency also invites comment on this approach.

The Agency also recognizes that some facilities that have or are required to have an NPDES permit might not directly control the intake structure that supplies their facility with cooling water. For example, facilities operated by separate entities might be located on the same, adjacent, or nearby property; one of these facilities might take in cooling water and then transfer it to other facilities prior to discharge of the cooling water to a water of the U.S. Proposed § 125.91(c) addresses such a situation. It provides that use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with an independent supplier (or multiple suppliers) of cooling water if the supplier or suppliers withdraw(s) water from waters of the United States. This provision is intended to prevent circumvention of the proposed requirements by creating arrangements to receive cooling water from an entity that is not itself a point source discharger. It is the same as in the final new facility rule. 40 CFR 125.81(b).

Proposed § 125.91(c) also provides, as in the new facility rule, that facilities that obtain cooling water from a public water system or use treated effluent that otherwise would be discharged to a water of the U.S. would not be subject to this proposed rule.

In addition, as EPA stated in the preamble to the final new facility rule, the Agency would encourage the Director to closely examine scenarios in which a potential Phase II existing facility withdraws significant amounts of cooling water but does not have an NPDES permit. As appropriate, the Director should apply other legal requirements, such as section 404 or 401 of the Clean Water Act, the Coastal Zone Management Act, the National Environmental Policy Act, or similar State authorities to address adverse environmental impact caused by cooling water intake structures at those existing facilities.

E. Who Is Covered Under the Thresholds Included in This Proposed Rule?

This proposed rule applies to facilities that (1) withdraw cooling water from water of the U.S. and use at least twenty-five (25) percent of the water withdrawn for cooling purposes and (2) have at least one cooling water intake structure with a design intake capacity of 50 MGD or more. Proposed § 125.91.

EPA is proposing to include a provision, like that specified in the new facility rule, that facilities that use less than twenty-five (25) percent of the water withdrawn for cooling purposes are not subject to this rule. This threshold ensures that nearly all cooling water and the most significant facilities using cooling water intake structures are addressed by these requirements to minimize adverse environmental impact (see 66 FR 65338). Phase II existing

facilities typically use far more than 25 percent of the water they withdraw for cooling. As in the new facility rule, water used for both cooling and non-cooling purposes would not count towards the 25 percent threshold.

In addition, at § 125.91, EPA is proposing that this rule would apply to facilities that have a cooling water intake structure with a design intake capacity of 50 million gallons per day (MGD) or greater of source water. EPA chose the 50 MGD threshold to focus the proposed rule on the largest existing power generating facilities. Existing power generating facilities with design flows below this threshold, as well as certain existing manufacturing facilities, and offshore and coastal oil and gas extraction facilities, would not be subject to this proposed rule but will be addressed under the Phase III rule. To clarify that manufacturing and commercial facilities are not subject to the Phase II rule as a result of their relationship as a host plant to a cogeneration facility, only that portion of the cooling water intake flow that is used in the cogeneration process would be considered in determining whether the 50 MGD and 25 percent criteria are met. EPA estimates that the 50 MGD threshold would subject approximately 539 of 942 (57 percent) of existing power generating facilities to the proposal and would address 99.04 percent of the total flow withdrawn by existing steam electric power generating facilities.[4] EPA believes the regulation of existing facilities with flows of 50 MGD or greater in Phase II will address those existing power generating facilities with the greatest potential to cause or contribute to adverse environmental impact. In addition, EPA has limited data on impacts at facilities withdrawing less than 50 MGD. Deferring regulation of such facilities to Phase III provides additional opportunity for the Agency to collect impingement and entrainment data for these smaller facilities. EPA requests comment on both the 50 MGD and 25 percent cooling water thresholds.

F. When Must a Phase II Existing Facility Comply With the Proposed Requirements?

If your facility is subject to the rule, proposed § 125.92 would require that you must comply when an NPDES permit containing requirements consistent with this subpart is issued to you.

[4] Source: Initial SBREFA Analysis, 6/01.

G. What Special Definitions Apply to This Proposal?

Definitions specific to this proposal are set forth in proposed § 125.93. Except for the definitions of ''cooling water'' and ''existing facility,'' which are separately defined for Phase II facilities in proposed § 125.93, the definitions in the new facility rule, 40 CFR 125.83, also apply to this proposed rule. The definitions in the new facility rule that would apply to Phase II existing facilities are as follows:

Annual mean flow means the average of daily flows over a calendar year. Historical data (up to 10 years) must be used where available.

Closed-cycle recirculating system means a system designed, using minimized makeup and blowdown flows, to withdraw water from a natural or other water source to support contact and/or noncontact cooling uses within a facility. The water is usually sent to a cooling canal or channel, lake, pond, or tower to allow waste heat to be dissipated to the atmosphere and then is returned to the system. (Some facilities divert the waste heat to other process operations.) New source water (make-up water) is added to the system to replenish losses that have occurred due to blowdown, drift, and evaporation.

Cooling water intake structure means the total physical structure and any associated constructed waterways used to withdraw cooling water from waters of the U.S. The cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps.

Design intake flow means the value assigned (during the facility's design) to the total volume of water withdrawn from a source waterbody over a specific time period.

Design intake velocity means the value assigned (during the design of a cooling water intake structure) to the average speed at which intake water passes through the open area of the intake screen (or other device) against which organisms might be impinged or through which they might be entrained.

Entrainment means the incorporation of all life stages of fish and shellfish with intake water flow entering and passing through a cooling water intake structure and into a cooling water system.

Estuary means a semi-enclosed body of water that has a free connection with open seas and within which the seawater is measurably diluted with fresh water derived from land drainage. The salinity of an estuary exceeds 0.5 parts per thousand (by mass) but is typically less than 30 parts per thousand (by mass).

Freshwater river or *stream* means a lotic (free-flowing) system that does not receive significant inflows of water from oceans or bays due to tidal action. For the purposes of this rule, a flow-through reservoir with a retention time of 7 days or less will be considered a freshwater river or stream.

Hydraulic zone of influence means that portion of the source waterbody hydraulically affected by the cooling water intake structure withdrawal of water.

Impingement means the entrapment of all life stages of fish and shellfish on the outer part of an intake structure or against a screening device during periods of intake water withdrawal.

Lake or *reservoir* means any inland body of open water with some minimum surface area free of rooted vegetation and with an average hydraulic retention time of more than 7 days. Lakes or reservoirs might be natural water bodies or impounded streams, usually fresh, surrounded by land or by land and a man-made retainer (e.g., a dam). Lakes or reservoirs might be fed by rivers, streams, springs, and/or local precipitation. Flow-through reservoirs with an average hydraulic retention time of 7 days or less should be considered a freshwater river or stream.

Maximize means to increase to the greatest amount, extent, or degree reasonably possible.

Minimum ambient source water surface elevation means the elevation of the 7Q10 flow for freshwater streams or rivers; the conservation pool level for lakes or reservoirs; or the mean low tidal water level for estuaries or oceans. The 7Q10 flow is the lowest average 7 consecutive day low flow with an average frequency of one in 10 years determined hydrologically. The conservation pool is the minimum depth of water needed in a reservoir to ensure proper performance of the system relying upon the reservoir. The mean low tidal water level is the average height of the low water over at least 19 years.

Minimize means to reduce to the smallest amount, extent, or degree reasonably possible.

Natural thermal stratification means the naturally-occurring division of a waterbody into horizontal layers of differing densities as a result of variations in temperature at different depths.

New facility means any building, structure, facility, or installation that meets the definition of a ''new source'' or ''new discharger'' in 40 CFR 122.2

and 122.29(b)(1), (2), and (4) and is a greenfield or stand-alone facility; commences construction after January 17, 2002; and uses either a newly constructed cooling water intake structure, or an existing cooling water intake structure whose design capacity is increased to accommodate the intake of additional cooling water. New facilities include only ''greenfield'' and ''stand-alone'' facilities. A greenfield facility is a facility that is constructed at a site at which no other source is located, or that totally replaces the process or production equipment at an existing facility (see 40 CFR 122.29(b)(1)(i) and (ii)). A stand-alone facility is a new, separate facility that is constructed on property where an existing facility is located and whose processes are substantially independent of the existing facility at the same site (see 40 CFR 122.29(b)(1)(iii)). New facility does not include new units that are added to a facility for purposes of the same general industrial operation (for example, a new peaking unit at an electrical generating station).

(1) Examples of ''new facilities'' include, but are not limited to the following scenarios: (i) A new facility is constructed on a site that has never been used for industrial or commercial activity. It has a new cooling water intake structure for its own use. (ii) A facility is demolished and another facility is constructed in its place. The newly-constructed facility uses the original facility's cooling water intake structure, but modifies it to increase the design capacity to accommodate the intake of additional cooling water. (iii) A facility is constructed on the same property as an existing facility, but is a separate and independent industrial operation. The cooling water intake structure used by the original facility is modified by constructing a new intake bay for the use of the newly constructed facility or is otherwise modified to increase the intake capacity for the new facility.

(2) Examples of facilities that would *NOT* be considered a ''new facility'' include, but are not limited to, the following scenarios: (i) A facility in commercial or industrial operation is modified and either continues to use its original cooling water intake structure or uses a new or modified cooling water intake structure. (ii) A facility has an existing intake structure. Another facility (a separate and independent industrial operation), is constructed on the same property and connects to the facility's cooling water intake structure behind the intake pumps, and the design capacity of the cooling water intake structure has not been increased. This facility would not be considered a ''new facility'' even if routine maintenance or repairs that do not increase the design capacity were performed on the intake structure.

Ocean means marine open coastal waters with a salinity greater than or equal to 30 parts per thousand (by mass).

Source water means the waterbody (waters of the U.S.) from which the cooling water is withdrawn.

Thermocline means the middle layer of a thermally stratified lake or reservoir. In this layer, there is a rapid decrease in temperatures.

Tidal excursion means the horizontal distance along the estuary or tidal river that a particle moves during one tidal cycle of ebb and flow.

Tidal river means the most seaward reach of a river or stream where the salinity is typically less than or equal to 0.5 parts per thousand (by mass) at a time of annual low flow and whose surface elevation responds to the effects of coastal lunar tides.

III Summary of Data Collection Activities

EPA focused its data collection activities on traditional utilities and nonutility power producers. Based on the *1982 Census of Manufacturers,* these industries account for more than 90 percent of cooling water use in the United States. Traditional utilities and nonutility power producers that use cooling water were further limited to those plants that generate electricity by means of steam as the thermodynamic medium (steam electric) because they are associated with large cooling water needs. Other power producers generate electricity by means other than steam (e.g., gas turbines) and typically require only small amounts of cooling water, if any.

Facilities in the traditional steam electric utility category are classified under Standard Industrial Classification (SIC) codes 4911 and 493, while nonutility power producers are classified under the major code that corresponds to the primary purpose of the facility. Nonutility facilities are classified under SIC codes 4911 and 493 if the primary purpose of the facility is to generate electricity, and it is these nonutility facilities that are potentially subject to this rule.

A. Existing Data Sources

EPA collected data from multiple sources, both public and proprietary, in order to compile an accurate profile of the potentially regulated community. EPA reviewed information collected by other Federal agencies, as well as data compiled by private companies. In those instances where databases are considered confidential, or where raw data was unavailable for review, EPA did not consider the information. Summaries of the reviewed data sources are listed below.

1. Traditional Steam Electric Utilities

Federal Energy Regulatory Commission Data Sources. The Federal Energy Regulatory Commission (FERC) is an independent agency that oversees America's natural gas industry, electric utilities, nonfederal hydroelectric projects, and oil pipeline transportation system. FERC requires that utilities, companies, or individuals subject to its regulations periodically file data or information relating to such matters as financial operations, energy production or supply, and compliance with applicable regulations. Following are brief descriptions of the relevant FERC data collection forms associated with traditional steam electric utilities:

- *FERC Form 1,* the *Annual Report for Major Electric Utilities, Licensees and Others,* collects extensive accounting, financial, and operating data from major privately-owned electric utilities. A privately-owned electric utility is considered ''major'' if its sales and transmission services, in each of the three previous calendar years, exceeded one of the following: (1) One million megawatt hours of total annual sales; (2) 100 megawatt hours of annual sales for resale; (3) 500 megawatt hours of annual power exchanges delivered; or (4) 500 megawatt hours of annual wheeling for others. Utility-level information (e.g., number of employees, detailed revenue and expense information, balance sheet information, and electricity generation information) and plant-level information (e.g., production expenses, balance sheet information, and electricity generation information) was used in the economic analysis of the proposed regulation. EPA used FERC Form 1 data as compiled and distributed by other organizations than FERC (see below). (Note that FERC Form 1 applies only to *privately-owned utilities.* Publicly-owned utilities and rural electric cooperatives are discussed below.)
- *FERC Form 1–F,* the *Annual Report of Nonmajor Public Utilities and Licensees,* collects accounting, financial, and operating data from nonmajor privately-owned electric utilities. A privately-owned electric utility is considered ''nonmajor'' if it had total annual sales of 10,000 megawatt hours or more in the previous calendar year but is not classified as ''major'' under the FERC Form 1 definition. FERC Form

1–F collects utility- and plant-level data similar to that on FERC Form 1, albeit less detailed.

Energy Information Administration Data Sources. The Energy Information Administration (EIA) is an independent statistical and analytical agency within the U.S. Department of Energy (DOE). In support of its analytic activities, the EIA administers a series of data collection efforts including extensive surveys of electric utilities' financial operations, and their production and disposition of electricity. Following are brief descriptions of the EIA data collection forms associated with traditional steam electric utilities that EPA has used as data sources:

• *Form EIA–412,* the *Annual Report of Public Electric Utilities,* collects accounting, financial, and operating data from publicly-owned electric utilities. The information collected in Form EIA–412 is similar to, but less detailed than data collected from major privately-owned electric utilities in FERC Form 1. EPA use of Form EIA–412 data included both utility-level information (e.g., number of employees, detailed revenue and expense information, balance sheet information, and electricity generation information) and plant-level information (e.g., production expenses, balance sheet information, and electricity generation information).

• *Form EIA–767,* the *Steam-Electric Plant Operation and Design Report,* collects data on air and water quality from steam-electric power plants with generating capacity of 100 megawatts or greater. A subset of these data are provided for steam-electric power plants with generating capacity between 10 and 100 megawatts. EPA use of Form EIA–767 data included unit-level information on net electricity generation, hours in operation, and the quantity of fuel burned.

Form EIA–860, the *Annual Electric Generator Report*, collects data on the status of electric generating plants and associated equipment in operation and those scheduled to be in operation within the next 10 years of filing the report. Each utility that operates or plans to operate a power plant in the United States is required to file Form EIA–860. EPA use of Form EIA–860 data included unit-level information on operating status, nameplate capacity, and ownership percentage.

Form EIA–861, the *Annual Electric Utility Report*, collects data on generation, wholesale purchases, and sales and revenue by class of consumer and State. Respondents include each electric utility that is engaged in the generation, transmission, distribution, or sale of electric energy primarily for use by the public. Data used from Form EIA–861 included sales and revenue by consumer class, the utility's NERC region, and address information. In addition, EPA used data on utility ownership to classify each utility as either a privately-owned utility, a publicly-owned utility, or a rural electric cooperative.

In addition to data from the EIA data collection forms outlined above, EPA used EIA's database of FERC Form 1 data, containing the majority of utility-level financial and operating data submitted on the FERC Form 1. While these data are directly available from FERC, the EIA database is published in an electronic format that is more convenient to use than the FERC data. Because EIA conducts basic quality assurance activities, EPA expects that the EIA data is more reliable than the FERC data.

Rural Utility Service Data Sources. The Rural Utility Service (RUS) is a Federal agency that provides rural infrastructure assistance in electricity, water and telecommunications. As a Federal credit agency in the U.S. Department of Agriculture, RUS plays a leadership role in financial lending and technical guidance for the rural utilities industries. Rural utilities that borrow from RUS are subject to annual reporting requirements administered by RUS. Following are brief descriptions of the relevant RUS data collection forms associated with traditional steam electric utilities:

• *RUS Form 12, the Electric Operating Report,* collects accounting, financial, and operating data from rural electric cooperatives [7]. The information collected in RUS Form 12 is similar to data collected from major privately-owned electric utilities in FERC Form 1. EPA use of RUS Form 12 data included utility-level information (e.g., number of employees, detailed revenue and expense information, balance sheet information, and electricity generation information), plant-level information (e.g., production expenses, balance sheet information, and electricity generation information), as well as unit-level information (e.g., fuel consumption, operating hours, and electricity generation).

U.S. Nuclear Regulatory Commission Data Sources. The U.S. Nuclear Regulatory Commission (NRC) is an independent agency established to ensure the protection of the public health and safety, the common defense and security, and the environment in the use of nuclear materials in the United States. In carrying out its responsibilities of regulating commercial nuclear power reactors, the NRC compiles and publishes data and reports regarding the operation and maintenance of commercial nuclear power plants around the country. EPA collected information from the NRC regarding the configuration of cooling water intake structures to assist in estimating the capacities of condenser flows.

Opri Data Sources. Opri is a private firm located in Boulder, Colorado, that has compiled extensive databases related to the traditional steam electric utility industry. Opri's *Electric Generating Plant Database* includes plant-level data for privately-owned utilities, publicly-owned utilities, and cooperatives for 1988–1997. While these data are available from FERC, EIA, and RUS, these agencies do not make the information available in an easily accessible electronic format. As a consequence, EPA purchased plant-level data from Opri to support its economic analyses. Because the compilation of data in the Electric Generating Plant Database is proprietary, EPA has included a summary of the data utilized in its analyses in the public record.

2. Steam Electric Nonutility Power Producers

Energy Information Administration Data Sources. Form EIA–867, the *Annual Nonutility Power Producer Report,* collects data on electricity generation, installed capacity, and energy consumption from nonutility power producers that own or plan on installing electric generation equipment with a total capacity of one megawatt or more. The form does not collect any economic or financial data. EPA did not utilize company-level data from the Form EIA–867 because the confidential nature of this data prevented EIA from releasing it. EPA did use Form EIA–867 to assess the population of potentially affected facilities and to identify survey recipients.

Utility Data Institute Data Sources. The *UDI Directory of U.S. Cogeneration, Small Power, and Industrial Power Plants* contains data for more than 4,300 nonutility power producer plants. The database, however, is not exclusive to facilities that have steam electric generators. The database also contains nonutility power producers with turbines that do not use cooling water such as gas turbines, geothermal units, wind and solar installations, and a

[7] Note that this data collection form only applies to rural electric cooperatives. Corresponding data collection forms for privately-owned and publicly-owned utilities are discussed in other parts of this section.

variety of other plant types. The primary focus of the UDI nonutility database is on facilities that provide at least some electricity for sale to utilities. EPA used the UDI database to compare the names and addresses of steam electric plants with those in the Form EIA–867 database to ensure comprehensive coverage of nonutility power producers.

Edison Electric Institute Data Sources. EEI conducts an annual survey and presents statistics on nonutility power producers in a document entitled, *Capacity and Generation of Nonutility Sources of Energy.* However, the data are considered confidential and EEI will only disseminate data in an aggregated form. Because EPA must have the raw data on a facility-specific basis for this rulemaking, EPA was unable to use this database.

3. Repowering of Steam Electric Power Generating Facilities (Utility and Nonutility)

As discussed in part B of this Section, the section 316(b) Survey acquired technological and economic information from facilities for the years 1998 and 1999. With this information, the Agency established a subset of facilities potentially subject to this rule. Since 1999, some existing facilities have proposed and/or enacted changes to their facilities in the form of repowering that could potentially affect the applicability of today's proposal or a facility's compliance costs. The Agency therefore conducted research into repowering facilities for the section 316(b) existing facility rule and any information available on proposed changes to their cooling water intake structures. The Agency defines repowering as existing facilities either undertaking replacement of existing generating capacity or making additions to existing capacity. The Agency used two separate databases to assemble available information for the repowering facilities: RDI's NEWGen Database, November 2001 version and the Section 316(b) Survey.

In January 2000, EPA conducted a survey of the technological and economic characteristics of 961 steam-electric generating plants. Only the detailed questionnaire, filled out by 283 utility plants and 50 nonutility plants, contains information on planned changes to the facilities' cooling systems (Part 2, Section E). Of the respondents to the detailed questionnaire, only six facilities (three utility plants and three nonutility plants) indicated that their future plans would lead to changes in the operation of their cooling water intake structures.

The NEWGen database is a compilation of detailed information on new electric generating capacity proposed over the next several years. The database differentiates between proposed capacity at new (greenfield) facilities and additions/modifications to existing facilities. To identify repowering facilities of interest, the Agency screened the 1,530 facilities in the NEWGen database with respect to the following criteria: Facility status, country, and steam electric additions. The Agency then identified 124 NEWGen facilities as potential repowering facilities.

Because the NEWGen database provides more information on repowering than the section 316(b) survey, the Agency used it as the starting point for the analysis of repowering facilities. Of the 124 NEWGen facilities identified as repowering facilities, 85 responded to the section 316(b) survey. Of these 85 facilities, 65 are in-scope and 20 are out of scope of this proposal. For each of the 65 in scope facilities, the NEWGen database provided an estimation of the type and extent of the capacity additions. The Agency found that 36 of the 65 facilities would be combined-cycle facilities after the repowering changes. Of these, 34 facilities are projected to decrease their cooling water intake after repowering (through the conversion from a simple steam cycle to a combined-cycle plant). The other 31 facilities within the scope of the rule would increase their cooling water intake. The Agency examined the characteristics of these facilities projected to undergo repowering and determined the waterbody type from which they withdraw cooling water. The results of this analysis are presented in Exhibit 1.

EXHIBIT 1.—IN-SCOPE EXISTING FACILITIES PROJECTED TO ENACT REPOWERING CHANGES

Waterbody type	Number of plants projected to increase cooling water withdrawal	Number of plants projected to decrease or maintain cooling water withdrawal
Ocean	N/A	N/A
Estuary/Tidal River	3	17
Freshwater River/Stream	14	10
Freshwater Lake/Reservoir	10	1
Great Lake	0	1

Of the 65 in-scope facilities identified as repowering facilities in the NEWGen database, 24 received the detailed questionnaire, which requested information about planned cooling water intake structures and changes to capacity. Nineteen of these 24 facilities are utilities and the remaining five are nonutilities. The Agency analyzed the section 316(b) detailed questionnaire data for these 24 facilities to identify facilities that indicated planned modifications to their cooling systems which will change the capacity of intake water collected for the plant and the estimated cost to comply with today's proposal. Four such facilities were identified, two utilities and two nonutilities. Both utilities responded that the planned modifications will decrease their cooling water intake capacity and that they do not have any planned cooling water intake structures that will directly withdraw cooling water from surface water. The two nonutilities, on the other hand, indicated that the planned modifications will increase their cooling water intake capacity and that they do have planned cooling water intake structures that will directly withdraw cooling water from surface water.

Using the NEWGen and section 316(b) detailed questionnaire information on repowering facilities, the Agency examined the extent to which planned and/or enacted repowering changes would effect cooling water withdrawals and, therefore, the potential costs of compliance with this proposal. Because the Agency developed a cost estimating methodology that primarily utilizes design intake flow as the independent variable, the Agency examined the extent to which compliance costs would change if the repowering data summarized above were incorporated into the cost analysis of this rule. The Agency determined that projected compliance costs for facilities withdrawing from estuaries could be lower after incorporating the repowering changes. The primary reason for this is the fact that the majority of estuary repowering facilities would change from a full-steam cycle to a combined-cycle, thereby maintaining or decreasing their cooling water withdrawals (note that a combined-cycle facility generally will withdraw one-third of the cooling water of a comparably sized full-steam facility). Therefore, the portion of compliance costs for regulatory options that included flow reduction requirements or technologies would significantly decrease if the Agency incorporated repowering changes into the analysis. As shown in Exhibit 1 the

majority of facilities projected to increase cooling water withdrawals due to the repowering changes use freshwater sources. In turn, the compliance costs for these facilities would increase if the Agency incorporated repowering for this proposal.

For the final rule, the Agency intends to continue its research into repowering at existing facilities. The Agency will consider the results of its repowering research and any comments provided on this subject for the final rule. The Agency therefore requests comment on planned and enacted repowering activities and the above summary of its repowering research to date. The Agency is especially interested in information from facilities that have enacted repowering changes and the degree to which these changes have changed their design intake flow.

B. Survey Questionnaires

EPA's industry survey effort consists of a two-phase process. EPA administered a screener questionnaire focused on nonutility and manufacturing facilities as the first phase of this data collection process. The screener questionnaire provides information on cooling-water intake capacity, sources of the water, intake structure types, and technologies used to minimize adverse environmental impacts. It also provides data on facility and parent-firm employee numbers and revenues. This information was used to design a sampling plan for the subsequent detailed questionnaire. Following the screener survey, the Agency sent out and collected either a short technical or a detailed questionnaire to utility, nonutility, and manufacturing facilities, as described below. The two-phase survey was designed to collect representative data from a sample group of those categories of facilities potentially subject to section 316(b) regulation for use in rule development.

In 1997, EPA estimated that over 400,000 facilities could potentially be subject to a cooling water intake regulation. Given the large number of facilities potentially subject to regulation, EPA decided to focus its data collection efforts on six industrial categories that, as a whole, are estimated to account for over 99 percent of all cooling water withdrawals. These six sectors are: Utility Steam Electric, Nonutility Steam Electric, Chemicals & Allied Products, Primary Metals Industries, Petroleum & Coal Products, and Paper & Allied Products. There are about 48,500 facilities in these six categories. EPA believes that this approach provides a sound basis for assessing best technologies available for minimizing adverse environmental impacts.

The screener survey focused on nonutility and manufacturing facilities. EPA developed the sample frame (list of facilities) for the screener questionnaire using public data sources as described in the Information Collection Request (DCN 3–3084–R2 in Docket W–00–03). Facilities chosen for the screener questionnaire represented a statistical sample of the entire universe of nonutility and manufacturing facilities potentially subject to cooling water intake regulations. EPA did not conduct a census of all facilities (i.e. send a survey to all facilities) for the screener questionnaire because of the burden associated with surveying a large number of facilities. Rather, EPA refined the industry data using industry-specific sources to develop sample frames and mailing lists. EPA believes the sample frame was sufficient to characterize the operations of each industrial category. EPA sent the screener questionnaire to 2600 facilities identified in the sample frame as follows: (1) All identified steam electric nonutility power producers, both industrial self-generators and nonindustrial generators (1050 facilities, of which 853 responded); (2) and a sample of manufacturers that fell under four other industrial categories: Paper and allied products, chemical and allied products, petroleum and coal products, and primary metals (1550 facilities, of which 1217 responded). EPA adjusted the sample frame for the screener questionnaire to account for several categories of non-respondents, including facilities with incorrect address information, facilities no longer in operation, and duplicate mailings. Through follow-up phone calls and mailings, EPA increased the response rate for the screener questionnaire to 95 percent. The screener questionnaire was not sent to utilities, all of which were believed to be identified accurately using the publically-available data described above.

A sample of manufacturing and nonutility facilities identified as in-scope (subject to regulation) with the screener questionnaire, and all utilities then were sent either a short technical or a detailed questionnaire. A total of 878 utility facilities, 343 nonutility facilities and 191 manufacturing facilities received one of the two questionnaires (short technical or detailed) during the second phase of the survey. For utilities, nonutilities, and other manufacturing facilities, EPA selected a random sample of these eligible facilities to receive a detailed questionnaire. The sample included 282 utility facilities and 181 nonutility facilities. All 191 manufacturing facilities received a detailed questionnaire. For nonutilities and utilities, those facilities not selected to receive a detailed questionnaire were sent a Short Technical Questionnaire. EPA's approach in selecting a sample involved the identification of population strata, the calculation of sample sizes based on desired levels of precision, and the random selection of sites given the sample size calculations within each stratum. More detail is provided in a report, *Statistical Summary for Cooling Water Intakes Structures Surveys* (See DCN 3–3077 in Docket W–00–03).

Five questionnaires were distributed to different industrial groups. They were: (1) Detailed Industry Questionnaire: Phase II Cooling Water Intake Structures—Traditional Steam Electric Utilities, (2) Short Technical Industry Questionnaire: Phase II Cooling Water Intake Structures—Traditional Steam Electric Utilities, (3) Detailed Industry Questionnaire: Phase II Cooling Water Intake Structures—Steam Electric Nonutility Power Producers, (4) Detailed Industry Questionnaire: Phase II Cooling Water Intake Structures—Manufacturers, (5) Watershed Case Study Short Questionnaire.

The questionnaires provided EPA with technical and financial data necessary for developing this proposed regulation. Specific details about the questions may be found in EPA's Information Collection Request (DCN 3–3084-R2 in Docket W–00–03) and in the questionnaires (see DCN 3–0030 and 3–0031 in Docket W–00–03 and Docket for today's proposal); these documents are also available on EPA's web site (*http://www.epa.gov/waterscience/316b/question/*).

C. Site Visits

From 1993 to the present, EPA has conducted site visits to numerous power generating stations around the country to observe cooling water intake structure design and operations and document examples of different cooling water intake structure configurations. EPA has visited the plants (each with either a once-through or closed-cycle, recirculating cooling system, except as noted) listed below:

- California: Moss Landing Power Plant and Pittsburg Power Plant
- Florida: Big Bend Power Station, St. Lucie Plant, Martin Plant, and Riviera Beach Power Plant
- Illinois: Will County Station and Zion Nuclear Power Station

- Indiana: Clifty Creek Station and Tanners Creek Plant
- Maryland: Calvert Cliffs Nuclear Power Plant and Chalk Point Generating Station
- Massachusetts: Pilgrim Nuclear Power Station
- Nevada: El Dorado Energy Power Plant (dry cooling)
- New York: Indian Point Nuclear Power Plant and Lovett Generating Station
- New Jersey: Salem Generating Station
- Ohio: Cardinal Plant, W.H. Zimmer Plant, and W.C. Beckjord Station
- Wisconsin: Valley Power Plant and Pleasant Prairie Power Plant

D. Data Provided to EPA by Industrial, Trade, Consulting, Scientific or Environmental Organizations or by the General Public

1. Public Participation

EPA has worked extensively with stakeholders from industry, public interest groups, state agencies, and other Federal agencies in the development of this proposed rule. These public participation activities have focused on various section 316(b) issues, including general issues, as well as issues relevant to development of the Phase I rule and issues relevant to the proposed Phase II rule. See section I.C.5 of this preamble for a discussion of key public participation activities.

2. Data and Documents Collected by EPA

Since 1993, EPA has developed cooling water regulations as part of a collaborative effort with industry and environmental stakeholders, other Federal agencies, the academic and scientific communities as well as the general public. As such, EPA has reviewed and considered the many documents, demonstration studies, scientific analyses and historical perspectives offered in support of each phase of the regulatory process. For example, during the early stages of data gathering EPA created an internal library of reference documents addressing cooling water intake structure issues. This library currently holds over 2,800 documents, many of which were referenced in the rulemaking process and are contained in the record (see below for further information on the record). The library contains a thorough collection of a wide variety of documents, including over 80 316(b) demonstration documents, over 300 impingement and entrainment studies, over 100 population modeling studies, over 500 fish biology and stock assessment documents, over 350 biological studies commissioned by power generators, over 80 NPDES decisions and NPDES or SPDES-related documents, over 120 intake technology reports, over 10 databases on the electric power industry, and documents from interagency committees such as the Ohio River Valley Water Sanitation Commission (ORSANCO).

The record for the new facility rule contains nearly 1,000 documents (research articles, databases, legal references, memorandums, meeting notes, and other documents), consisting of approximately 47,000 pages of supporting material available for public review. The record for this proposed rule contains over 40 additional documents.

For a more complete list of reference and technical documents, see the record for this proposed rule.

IV. Overview of Facility Characteristics (Cooling Water Systems & Intakes) for Industries Potentially Subject to Proposed Rule

As discussed above, today's proposed rule would apply to Phase II existing facilities, which include any existing facility that both generates and transmits electric power, or generates electric power but sells it to another entity existing for transmission and that meets the other applicability criteria in § 125.91: (1) They are a point source that uses or proposes to use a cooling water intake structure; (2) they have at least one cooling water intake structure that uses at least 25 percent of the water it withdraws for cooling purposes; (3) they have a design intake flow of 50 million gallons per day (MGD) or greater; and (4) they have an NPDES permit or are required to obtain one. Today's rule does not apply to facilities whose primary business activity is not power generation, such as manufacturing facilities that produce electricity by co-generation.

Based on data collected from the Short Technical Industry Questionnaire and Detailed Questionnaire, and compliance requirements in today's proposed rule, EPA has identified 539 facilities to which today's rule will apply, and estimates that the total number could be 549. The Agency has identified 420 plants owned by utilities that are potentially subject to proposed rule. The Agency estimates that 129 nonutilities may potentially be subject to the proposed rule. This number, however, is subject to some uncertainty. The Agency has identified 119 plants owned by nonutilities that are potentially subject to the proposed rule, and after taking into account a small non-response rate to the survey among nonutilities, the Agency's best estimate of the total number is 129.

Sources of Surface Water. The source of surface water withdrawn for cooling is an important factor in determining potential environmental impacts. An estimated 8 nonutility facilities and 15 utility facilities withdraw all cooling water from an ocean. An estimated 55 nonutility facilities and 50 utility facilities withdraw all cooling water from an estuary or tidal river. An estimated 50 nonutility facilities and 203 utility facilities withdraw all cooling water from a freshwater stream or river. An estimated 12 or 13 nonutility facilities and 136 utility facilities withdraw all cooling water from a lake or reservoir, including 15 utilities on the Great Lakes. Fewer than 20 plants withdraw cooling water from a combination of these sources.

Average Daily Cooling Water Intake in 1998. Of the estimated 129 nonutility plants that are potentially subject to this proposed rule, EPA estimates that in 1998, 4 plants had an average intake of not more than 10 million gallons per day (MGD), 12 had an average intake more than 10 MGD and not over 50 MGD, 20 had an average intake more than 50 MGD but not over 100 MGD, and 90 had an average intake over 100 MGD (three had zero or unreported intake). Note that coverage under the rule is based on design intake, not average intake flow. Of the 420 utility plants that are potentially subject to this proposed rule, EPA found that in 1998, 8 plants had an average intake of not more than 10 million gallons per day (MGD), 59 had an average intake more than 10 MGD and not over 50 MGD, 58 had an average intake more than 50 MGD but not over 100 MGD, and 288 had an average intake over 100 MGD (seven had zero or unreported intake).

Cooling Water Systems. Facilities may have more than one cooling water system. Therefore, in providing the information on cooling water systems, a plant may be counted multiple times (as many times as it has distinct cooling water systems). Thus, of the plants that are potentially subject to this proposed rule, the 129 nonutility plants are counted 165 times; the 420 utility plants are counted 599 times. As a consequence, the percentages reported sum to more than 100 percent. Among nonutility plants, 110 plants (85 percent) use once-through cooling systems, 16 plants (12 percent) use closed-cycle, recirculating cooling systems, and an estimated 6 plants (5 percent) use another type of system. Of the estimated 599 utility plants, 314 plants (75 percent) use once-through cooling systems, 65 plants (15 percent)

use closed-cycle, recirculating cooling systems, and 49 plants (12 percent) use another type of system.

Cooling Water Intake Structure Configurations. Facilities may have more than one cooling water intake structure configuration. Therefore, in providing the information on cooling water systems, a plant may be counted multiple times (as many times as it has distinct cooling water intake structure configurations). Thus, of the plants that are potentially subject to this proposed rule, the 129 nonutility plants are counted 194 times and the 420 utility plants are counted 690 times. As a consequence, the percentages reported sum to more than 100 percent. Of the estimated 129 nonutility plants that are potentially subject to this proposed rule, 30 (23 percent) withdraw cooling water through a canal or channel, 13 (10 percent) have an intake structure situated in a natural or constructed bay or cove, 96 (74 percent) have an intake structure (surface or submerged) that is flush with the shoreline, and 16 (12 percent) have a submerged offshore intake structure. Of the 420 utility plants that are potentially subject to this proposed rule, 142 (34 percent) withdraw cooling water through a canal or channel, 41 (10 percent) have an intake situated in a bay or cove, 251 (60 percent) have a shoreline intake, 59 (14 percent) have a submerged offshore intake, and 6 (1 percent) have another type of configuration or reported no information.

V. Environmental Impacts Associated With Cooling Water Intake Structures

The majority of environmental impacts associated with intake structures are caused by water withdrawals that ultimately result in aquatic organism losses. This section describes the general nature of these biological impacts; discusses specific types of impacts that are of concern to the Agency; and presents examples of documented impacts from a broad range of facilities. EPA believes that in light of the national scope of today's proposed rule, it is important to present the variety of impacts observed for facilities located on different waterbody types, under high and low flow withdrawal regimes, and operating with and without technologies designed to reduce environmental impacts.

Based on preliminary estimates from the questionnaire sent to more than 1,200 existing power plants and factories, industrial facilities in the United States withdraw more than 279 billion gallons of cooling water a day from waters of the U.S.[8] The withdrawal of such large quantities of cooling water affects large quantities of aquatic organisms annually, including phytoplankton (tiny, free-floating photosynthetic organisms suspended in the water column), zooplankton (small aquatic animals, including fish eggs and larvae, that consume phytoplankton and other zooplankton), fish, crustaceans, shellfish, and many other forms of aquatic life. Aquatic organisms drawn into cooling water intake structures are either impinged on components of the cooling water intake structure or entrained in the cooling water system itself.

Impingement takes place when organisms are trapped against intake screens by the force of the water passing through the cooling water intake structure. Impingement can result in starvation and exhaustion (organisms are trapped against an intake screen or other barrier at the entrance to the cooling water intake structure), asphyxiation (organisms are pressed against an intake screen or other barrier at the entrance to the cooling water intake structure by velocity forces that prevent proper gill movement, or organisms are removed from the water for prolonged periods of time), and descaling (fish lose scales when removed from an intake screen by a wash system) as well as other physical harms.

Entrainment occurs when organisms are drawn through the cooling water intake structure into the cooling system. Organisms that become entrained are normally relatively small benthic,[9] planktonic,[10] and nektonic [11] organisms, including early life stages of fish and shellfish. Many of these small organisms serve as prey for larger organisms that are found higher on the food chain. As entrained organisms pass through a plant's cooling system they are subject to mechanical, thermal, and/or toxic stress. Sources of such stress include physical impacts in the pumps and condenser tubing, pressure changes caused by diversion of the cooling water into the plant or by the hydraulic effects of the condensers, sheer stress, thermal shock in the condenser and discharge tunnel, and chemical toxemia induced by antifouling agents such as chlorine. The mortality rate of entrained organisms varies by species; mortality rates for fish can vary from 2 to 97 percent depending on the species and life stage entrained.[12, 13] Naked goby larvae demonstrated mortality rates as low as 2 percent whereas bay anchovy larvae mortality rates were as high as 97 percent.[14] Macroinvertebrate mortality ranged from 0 to 84 percent for several species evaluated, but rates were usually less than 29 percent.[15, 16]

In addition to impingement and entrainment losses associated with the operation of the cooling water intake structure, EPA is concerned about the cumulative overall degradation of the aquatic environment as a consequence of (1) multiple intake structures operating in the same watershed or in the same or nearby reaches and (2) intakes located within or adjacent to an impaired waterbody. Historically, impacts related to cooling water intake structures have been evaluated on a facility-by-facility basis. The potential cumulative effects of multiple intakes located within a specific waterbody or along a coastal segment were not typically assessed and thus are largely unknown. (One relevant example is provided for the Hudson River; see discussion below. Also see recently completed case studies for the Delaware Estuary and Ohio River in the Case Study Document). There is concern, however, about the effects of multiple intakes on fishery stocks. As an example, the Atlantic States Marine Fisheries Commission has been requested by its member States to investigate the cumulative impacts on commercial fishery stocks, particularly overutilized stocks, attributable to

[8] EPA 2000. Detailed Industry Questionnaire: Phase II Cooling Water Intake Structures. U.S. Environmental Protection Agency, Office of Wastewater Management, Washington, DC. OMB Control No. 2040–0213.

[9] Refers to bottom dwellers that are generally small and sessile (attached) such as mussels and anemones, but can include certain large motile (able to move) species such as crabs and shrimp. These species can be important members of the food chain.

[10] Refers to free-floating microscopic plants and animals, including the egg and larval stages of fish and invertebrates that have limited swimming abilities. Plankton are also an important source of food for other aquatic organisms and an essential component of the food chain in aquatic ecosystems.

[11] Refers to free-swimming organisms (e.g., fish, turtles, marine mammals) that move actively through the water column and against currents.

[12] Mayhew, D.A., L.D. Jensen, D.F. Hanson, and P.H. Muessig. 2000. A comparative review of entrainment survival studies at power plants in estuarine environments. *Environmental Science and Policy* 3:S295–S301.

[13] EPRI. 2000. Review of entrainment survival studies: 1970–2000. Prepared by EA Engineering Science and Technology for the Electric Power Research Institute, Palo Alto, CA.

[14] *Ibid.*

[15] Mayhew, D.A., L.D. Jensen, D.F. Hanson, and P.H. Muessig. 2000. A comparative review of entrainment survival studies at power plants in estuarine environments. *Environmental Science and Policy* 3:S295–S301.

[16] EPRI. 2000. Review of entrainment survival studies: 1970–2000. Prepared by EA Engineering Science and Technology for the Electric Power Research Institute, Palo Alto, CA.

cooling water intakes located in coastal regions of the Atlantic.[17] Specifically, the study will focus on revising existing fishery management models so that they accurately consider and account for fish losses from multiple intake structures.

Further, the Agency believes that cooling water intakes potentially contribute additional stress to waters already showing aquatic life impairment from other sources such as industrial discharges and urban stormwater. EPA notes that the top four leading causes of waterbody impairment (siltation, nutrients, bacteria, and metals) affect the aquatic life uses of a waterbody. Thus, the Agency is concerned that many of the aquatic organisms subject to the effects of cooling water withdrawals reside in impaired waterbodies and are therefore potentially more vulnerable to cumulative impacts from an array of physical and chemical anthropogenic stressors.

When enough individual aquatic organisms are subject to lethal or function-impairing stressors, whether from cooling water intake structures or water pollutants, the structure of their ecosystem can change significantly in response. Changes in ecosystem structure can then affect all organisms within the ecosystem, including those organisms a cooling water intake structure does not directly impact.

Decreased numbers of aquatic organisms can have any or several of the following ecosystem-level effects: (1) Disruption of food webs,[18] (2) disruption of nutrient, carbon, and energy transfers among the physical and biological ecosystem compartments,[19] (3) alteration of overall aquatic habitat,[20] and (4) alteration of species composition and overall levels of biodiversity.[21]

The nature and extent of the ecosystem-level effect depends on the characteristics of the aquatic organism and its interactions with other members of the ecosystem. Some species, known as ''keystone species,'' have a larger impact on ecosystem structure and function than other species. Examples of keystone species from cooling water intake structure-impacted water bodies include menhaden, Pacific salmon, and Eastern oysters.

As discussed above, structural changes at the ecosystem level are influenced by a large number of forces at work within the ecosystem. Because of the large number of these forces and the complexity of their interactions, ecologists can find it difficult to determine the contribution of any one stressor to a structural change in an ecosystem. Much work remains to be done to determine the extent to which cooling water intake structures induce structural change in their host ecosystems through impingement and entrainment of aquatic organisms. Nevertheless, EPA believes that many cooling water intake structures clearly have a significant negative impact on aquatic organisms at the individual level. The studies discussed below suggest that these individual-level impacts can lead to negative impacts at higher organizational levels.

In addition to ecosystem-level impacts, EPA is concerned about the potential impacts of cooling water intake structures located in or near habitat areas that support threatened, endangered, or other protected species. Although limited information is available on locations of threatened or endangered species that are vulnerable to impingement or entrainment, such impacts do occur. For example, EPA is aware that from 1976 to 1994, approximately 3,200 threatened or endangered sea turtles entered enclosed cooling water intake canals at the St. Lucie Nuclear Generating Plant in Florida.[22] The plant developed a capture-and-release program in response to these events. Most of the entrapped turtles were captured and released alive; however, approximately 160 turtles did not survive. More recently, the number of sea turtles being drawn into the intake canal increased to approximately 600 per year. Elevated numbers of sea turtles found within nearshore waters are thought to be part of the reason for the rising numbers of turtles entering facility waters. In response to this increase, Florida Power and Light Co. proposed installation of nets with smaller size mesh (5-inch square mesh rather than 8-inch square mesh) at the St. Lucie facility to minimize entrapment.[23]

Finally, EPA is concerned about environmental impacts associated with re-siting or modification of existing cooling water intake structures. Three main factors contribute to the environmental impacts: Displacement of biota and habitat resulting from the physical siting or modification of a cooling water intake structure in an aquatic environment, increased levels of turbidity in the aquatic environment, and effects on biota and habitat associated with aquatic disposal of materials excavated during re-siting or modification activities. Existing programs, such as the CWA section 404 program, National Environmental Policy Act (NEPA) program, and programs under State/Tribal law, include requirements that address many of the environmental impact concerns associated with the intake modifications (see Section X for applicable Federal statutes).

A. Facility Examples

The following discussion provides a number of examples of impingement and entrainment impacts that can be associated with existing facilities. It is important to note that these examples are meant to illustrate the range of impacts that can occur nationally at facilities sited at diverse geographic locations, differing waterbody types, and with a variety of control technologies in place. In some cases, the number of organisms impinged and entrained by a facility can be substantial and in other examples impingement and entrainment may be minimal due to historical impacts from anthropogenic activities such as stream or river channelization. EPA notes that these examples are not representative of all sites whose facilities use cooling water intake structures and that these examples may not always reflect subsequent action that may have been taken to address these impacts on a site-specific basis. (Facility reports documenting the efficacy of more recently installed control technologies are not always available to the Agency.) With this background, EPA provides the following examples, illustrating that the impacts attributable to impingement

[17] Personal communication, D. Hart (EPA) and L. Kline (ASMFC), 2001.

[18] Food webs are modified by cooling water intake structure impacts because (1) some species within the ecosystem suffer heavier mortality impacts than others, and (2) cooling water intake structures convert living organisms to various forms of organic matter, thereby removing food resources from consumers of living organisms, and increasing food resources for scavengers and decomposers.

[19] Cooling water intake structures can transfer large amounts of nutrients, carbon, and energy from living organisms (in some cases highly mobile or migratory organisms) to the physical environment. Nutrients, carbon, and energy may re-enter the biological compartment, but they will do so via different pathways than those used prior to cooling water intake structures operation (see alteration of food webs).

[20] In addition to altering the physical nature of aquatic habitat directly (e.g., current modification and water withdrawal), cooling water intake structure may modify habitat by reducing numbers of habitat-modifying organisms (e.g., Pacific salmon).

[21] Species may disappear from a site in response to cooling water intake structure impacts. Threatened and endangered or otherwise rare or sensitive species may be at greater risk. New species (including invasive species), may establish themselves within the disrupted area if they are able to withstand cooling water intake structure impacts.

[22] Florida Power and Light Company. 1995. Assessment of the impacts at the St. Lucie Nuclear Generating Plant on sea turtle species found in the inshore waters of Florida.

[23] *Ibid.*

and entrainment at individual facilities may result in appreciable losses of early life stages of fish and shellfish (e.g., three to four billion individuals annually [24]), serious reductions in forage species and recreational and commercial landings (e.g., 23 tons lost per year [25]), and extensive losses over relatively short intervals of time (e.g., one million fish lost during a three-week study period).[26]

In addition, some studies estimating the impact of impingement and entrainment on populations of key commercial or recreational fish have predicted substantial declines in population size. This has led to concerns that some populations may be altered beyond recovery. For example, a modeling effort evaluating the impact of entrainment mortality on a representative fish species in the Cape Fear estuarine system predicted a 15 to 35 percent reduction in the species population.[27] More recent modeling studies of Mount Hope Bay, Massachusetts, predicted 87 percent reductions in overall finfish abundance (see Brayton Point Generating Station discussion below for additional detail.) EPA acknowledges that existing fishery resource baselines may be inaccurate.[28] Further, according to one article, ''[e]ven seemingly gloomy estimates of the global percentage of fish stocks that are overfished are almost certainly far too low.'' [29] Thus, EPA is concerned that historical overfishing may have increased the sensitivity of aquatic ecosystems to subsequent disturbance, making them more vulnerable to human impact and potential collapse.

Further, studies of entrainment at five Hudson River power plants during the 1980s predicted year-class reductions ranging from six percent to 79 percent, depending on the fish species.[30] An updated analysis completed in 2000 of entrainment at three of these power plants predicted year-class reductions of up to 20 percent for striped bass, 25 percent for bay anchovy, and 43 percent for Atlantic tom cod, even without assuming 100 percent mortality of entrained organisms.[31] The New York Department of Environmental Conservation concluded that these reductions in year-class strength were ''wholly unacceptable'' and that any ''compensatory responses to this level of power plant mortality could seriously deplete any resilience or compensatory capacity of the species needed to survive unfavorable environmental conditions.'' [32]

In contrast, facilities sited on waterbodies previously impaired by anthropogenic activities such as channelization may demonstrate limited entrainment and impingement losses. The Neal Generating Complex facility, located near Sioux City, Iowa, on the Missouri River is coal-fired and utilizes once-through cooling systems. According to a ten-year study conducted from 1972–82, the Missouri River aquatic environment near the Neal complex was previously heavily impacted by channelization and very high flow rates meant to enhance barge traffic and navigation.[33] These anthropogenic changes to the natural river system resulted in significant losses of habitat necessary for spawning, nursery, and feeding. At this facility, fish impingement and entrainment by cooling water intakes were found to be minimal.

The following are summaries of other, documented examples of impacts occurring at existing facilities sited on a range of waterbody types. Also, see the Case Study Document and the benefits discussion in Section IX of this notice.

Brayton Point Generating Station. The Brayton Point Generating Station is located on Mt. Hope Bay, in Somerset, Massachusetts, within the northeastern reach of Narragansett Bay. Because of problems with electric arcing caused by salt drift from an open spray pod design located near transmission wires, and lack of fresh water to replace the salt water used for the closed-cycle recirculating spray pod cooling water system, the company converted Unit 4 from a closed-cycle, recirculating system to a once-through cooling water system in July 1984. The modification of Unit 4 resulted in a 41 percent increase in coolant flow, amounting to a maximum average intake flow of approximately 1.3 billion gallons per day and increased thermal discharge to the bay.[34] An analysis of fisheries data by the Rhode Island Division of Fish and Wildlife using a time series-intervention model showed an 87 percent reduction in finfish abundance in Mt. Hope Bay coincident with the Unit 4 modification.[35] The analysis also indicated that, in contrast, finfish abundance trends have been relatively stable in adjacent coastal areas and portions of Narragansett Bay that are not influenced by the operation of Brayton Point station. Thus, overall finfish biomass and finfish species diversity declined in Mount Hope Bay but not in Narragansett Bay. There appear to be multiple, interacting factors that influence these declines including overfishing and climate change as well as temperature increases from thermal discharges and impingement and entrainment losses associated with the Brayton Point facility.

San Onofre Nuclear Generating Station. The San Onofre Nuclear Generating Station (SONGS) is located on the coastline of the Southern California Bight, approximately 2.5 miles southeast of San Clemente, California.[36] The marine portions of Units 2 and 3, which are once-through, open-cycle cooling systems, began commercial operation in August 1983 and April 1984, respectively.[37] Since

[24] EPA Region IV. 1979. Brunswick Nuclear Steam Electric Generating Plant of Carolina Power and Light Company, historical summary and review of section 316(b) issues.

[25] EPA Region IV. 1986. Findings and determination under 33 U.S.C. 1326, In the Matter of Florida Power Corporation Crystal River Power Plant Units 1, 2, and 3, NPDES permit no. FL0000159.

[26] Thurber, N.J. and D.J. Jude. 1985. Impingement losses at the D.C. Cook Nuclear Power Plant during 1975–1982 with a discussion of factors responsible and possible impact on local populations. Special report no. 115 of the Great Lakes Research Division, Great Lakes and Marine Waters Center, University of Michigan.

[27] EPA Region IV. 1979. Brunswick Nuclear Steam Electric Generating Plant of Carolina Power and Light Company, historical summary and review of section 316(b) issues.

[28] Watson, R. and D. Pauly. 2001. Systematic distortions in world fisheries catch trends. *Nature* 414–534–536.

[29] Jackson J.B.C., M.X. Kirby, W.H. Berger, K.A. Bjorndal, L.W. Botsford, B.J. Bourque, R.H. Bradbury, R. Cooke, J. Erlandson, J.A. Estes, T.P. Hughes, S. Kidwell, C.B. Lange, H.S. Lenihan, J.M. Pandolfi, C.H. Peterson, R.S. Steneck, M.J. Tegner, and R.R. Warner, 2001. Historical overfishing and the recent collapse of coastal ecosystems. *Science* 293(5530): 629–638.

[30] Boreman J. and P. Goodyear. 1988. Estimates of entrainment mortality for striped bass and other fish species inhabiting the Hudson River Estuary. *American Fisheries Society Monograph* 4:152–160.

[31] Consolidated Edison Company of New York. 2000. Draft environmental impact statement for the state pollutant discharge elimination system permits for Bowline Point, Indian Point 2 & 3, and Roseton steam electric generating stations.

[32] New York Department of Environmental Conservation (NYDEC). 2000. Internal memorandum provided to the USEPA on NYDEC's position on SPDES permit renewals for Roseton, Bowline Point 1 & 2, and Indian Point 2 & 3 generating stations.

[33] Morningside College. 1982. Missouri River aquatic ecology studies. Prepared for Iowa Public Service Company, Sioux City, Iowa.

[34] Metcalf & Eddy. 1992. Brayton Point station monitoring program technical review. Prepared for USEPA.

[35] Gibson, M. 1995 (revised 1996). Comparison of trends in the finfish assemblages of Mt. Hope Bay and Narragansett Bay in relation to operations of the New England Power Brayton Point station. Rhode Island Division of Fish and Wildlife, Marine Fisheries Office.

[36] Southern California Edison. 1988. Report on 1987 data: marine environmental analysis and interpretation, San Onofre Nuclear Generating Station.

[37] *Ibid.*

then, many studies evaluated the impact of the SONGS facility on the marine environment.

In a normal (non-El Niño) year, an estimated 121 tons of midwater fish (primarily northern anchovy, queenfish, and white croaker) may be entrained at SONGS.[38] The fish lost include approximately 350,000 juveniles of white croaker, a popular sport fish; this number represents 33,000 adult individuals or 3.5 tons of adult fish. Within 3 kilometers of SONGS, the density of queenfish and white croaker in shallow-water samples decreased by 34 and 36 percent, respectively. Queenfish declined by 50 to 70 percent in deepwater samples.[39] In contrast, relative abundances of bottom-dwelling adult queenfish and white croaker increased in the vicinity of SONGS.[40] Increased numbers of these and other bottom-dwelling species were believed to be related to the enriching nature of SONGS discharges, which in turn support elevated numbers of prey items for bottom fish.[41]

Pittsburg and Contra Costa Power Plants. The Pittsburg and Contra Costa Power Plants are located in the San Francisco Bay-Delta Estuary, California. Several local fish species (e.g., Delta smelt, Sacramento splittail, chinook salmon, and steelhead) found in the vicinity of the facilities are now considered threatened or endangered by Sate and/or Federal authorities. EPA evaluated facility data on impingement and entrainment rates for these species and estimated that potential losses of special status fish species at the two facilities may reach 145,003 age 1 equivalents per year resulting from impingement and 269,334 age 1 equivalents per year due to entrainment[42] Based on restoration costs for these species, EPA estimates that the value of the potential impingement losses of these species is $12.8 to 43.2 million per year and the value of potential entrainment is $25.6 million to $83.2 million per year (all in $2001).

Lovett Generating Station. The Lovett Generating Station is located in Tompkins Cove, New York, on the western shore of the Hudson River. As a method of reducing ichthyoplankton (free floating fish eggs and larvae) entrainment at the Lovett station, the Gunderboom Marine Life Exclusion System was installed in 1995 at the Unit 3 intake structure. Gunderboom is a woven mesh material initially designed to prevent waterborne pollutants from entering shoreline environments during construction or dredging activities. Since its initial installation, the Gunderboom system has undergone a series of tests and modifications to resolve problems with fabric clogging, anchoring, and the boom system. Data from testing in 1998 demonstrated that with the Gunderboom system in place, entrainment of eggs, larvae, and juveniles was reduced by 80 percent.[43]

Ohio River. EPA evaluated entrainment and impingement impacts at nine in-scope facilities along a 500-mile stretch of the Ohio River as one of its case studies. Results from these nine facilities were extrapolated to 20 additional in-scope facilities. All in-scope facilities spanned a stretch of the Ohio River that extended from the western portion of Pennsylvania, along the southern border of Ohio, and into eastern Indiana. Impingement losses for all in-scope facilities were approximately 11.3 million fish (age 1 equivalents) annually; entrainment losses totaled approximately 23.0 million fish (age 1 equivalents) annually.[44] EPA believes that the results from this case study may not be representative of entrainment and impingement losses along major U.S. rivers because they are based on limited data collected nearly 25 years ago. In addition, due to improvements in water quality and implementation of fishery management plans, fish populations near these facilities may have increased and therefore these results may underestimate current entrainment and impingement at Ohio River facilities.

Power Plants with Flows Less Than 500 MGD. The following results from the case studies conducted by EPA under this rulemaking effort provide an indication of impingement and entrainment rates for facilities with lower flows than the previous examples. Impingement and entrainment rates are expressed as numbers of age 1 equivalents, calculated by EPA from the impingement and entrainment data provided in facility monitoring reports.[45]

- The Pilgrim Nuclear Power Station, located on Cape Cod Bay, Massachusetts, has an intake flow of 446 MGD.[46] The average annual number of age 1 equivalents impinged at Pilgrim from 1974–1999 was 52,800 fish. The average annual number entrained was 14.4 million fish.
- The Miami Fort Power Plant, located on the Ohio River about 20 miles downstream of Cincinnati, has an intake flow of about 98.7 MGD[47] and combined average impingement and entrainment of about 1.8 million age 1 equivalent fish per year (298,027 impinged and 1,519,679 entrained).
- The JR Whiting Plant, located in Michigan on Lake Erie has an intake flow of 308 MGD.[48] The average annual number of age 1 equivalent fish entrained was 1.8 million. Before installation of a deterrent net in 1980 to reduce impingement, some 21.5 million age 1 equivalents were lost to impingement at the facility each year. These losses were reduced by nearly 90 percent with application of the deterrent net.[49]

Studies like those described in this section may provide only a partial picture of the severity of environmental impact associated with cooling water intake structures. Most important, the methods for evaluating adverse environmental impact used in the 1970s and 1980s, when most section 316(b) evaluations were performed, were often inconsistent and incomplete, making detection and consideration of all impacts difficult in some cases, and making cross-facility comparison difficult for developing a national rule. For example, some studies reported only gross fish losses; others reported fish losses on the basis of species and life stage; still others reported percent losses of the associated population or subpopulation (e.g., young-of-year fish). Recent advances in environmental assessment techniques provide new and in some cases better tools for monitoring impingement and entrainment and detecting impacts associated with the

[38] Swarbrick, S. and R.F. Ambrose. 1989. Technical report C: entrapment of juvenile and adult fish at SONGS. Prepared for Marine Review Committee.

[39] Kastendiek, J. and K. Parker. 1988. Interim technical report: midwater and benthic fish. Prepared for Marine Review Committee.

[40] Swarbrick, S. and R.F. Ambrose. 1989. Technical report C: entrapment of juvenile and adult fish at SONGS. Prepared for Marine Review Committee.

[41] Kastendiek, J. and K. Parker. 1988. Interim technical report: midwater and benthic fish. Prepared for Marine Review Committee.

[42] Impingement and entrainment data were obtained from the 2000 Draft Habitat Conservation Plan for the Pittsburg and Contra Costa facilities. Please see EPA's Case Study Document for detailed information on EPA's evaluation of impingement and entrainment at these facilities.

[43] Lawler, Matusky & Skelly Engineers. 1998. Lovett Generating Station Gunderboom system evaluation program 1998.

[44] Please see EPA's Case Study Document for more detailed information on these facilities and the data and methods used by EPA to calculate age 1 equivalent losses.

[45] *Ibid.*

[46] U.S. Department of Energy. 1999. Form EIA–767 (1999). Steam-electric plant operation and design report. Edison Electric Institute.

[47] *Ibid.*

[48] *Ibid.*

[49] Consumers Power Company. 1984, 1988, and 1992 reports of deterrent net performance, J.R. Whiting Plant. Prepared for the Michigan Water Resources Commission.

operation of cooling water intake structures.[50] [51]

VI. Best Technology Available for Minimizing Adverse Environmental Impact at Phase II Existing Facilities

A. What Is the Best Technology Available for Minimizing Adverse Environmental Impact at Phase II Existing Facilities?

1. How Will Requirements Reflecting Best Technology Available for Minimizing Adverse Environmental Impact Be Established for My Phase II Existing Facility?

Today's proposed rule would establish national minimum performance requirements for the location, design, construction, and capacity of cooling water intake structures at Phase II existing facilities. These requirements would represent best technology available for minimizing adverse environmental impact based on the type of waterbody in which the intake structure is located, the volume of water withdrawn by a facility, and the facility's capacity utilization rate. Under this proposal, EPA would set technology-based performance requirements, but the Agency would not mandate the use of any specific technology.

A facility may use one of three different methods for establishing the best technology available for minimizing adverse environmental impact. Under the first method, a facility would demonstrate to the Director issuing the permit that the facility's existing design and construction technologies, operational measures, and/or restoration measures already meet the national minimum performance requirements that EPA is proposing.

Under the second method, a facility would select design and construction technology, operational measures, restoration measures or some combination thereof. The facility would then demonstrate to the Director that its selected approach would meet the performance requirements EPA is proposing.

Under the third method, a facility would calculate its cost of complying with the presumptive performance requirements and compare those costs either to the compliance costs EPA estimated in the analysis for this proposed rule or to a site-specific determination of the benefits of meeting the presumptive performance requirements. If the facility's costs are significantly greater than EPA's estimated costs or site-specific benefits, the facility would qualify for a site-specific determination of best technology available.

The Agency discusses each of these three methods for compliance and the proposed presumptive minimum performance requirements in greater detail below. EPA invites comments on all aspects of this proposed regulatory framework as well as the alternative regulatory approaches discussed later in this section.

a. What Are the Performance Standards for the Location, Design, Construction, and Capacity of Cooling Water Intake Structures To Reflect Best Technology Available for Minimizing Adverse Environmental Impact?

EPA is proposing four performance standards at § 125.94(b), all of which reflect best technology available for minimizing adverse environmental impact from cooling water intake structures. Under proposed § 125.94(b)(1), any owner or operator able to demonstrate that a facility employs technology that reduces intake capacity to a level commensurate with the use of a closed-cycle, recirculating cooling system would meet the performance requirements proposed in today's rule. Use of this type of technology satisfies both impingement and entrainment performance requirements for all waterbodies.

The performance standards at proposed § 125.94(b)(2),(3), and (4) are based on the type of waterbody in which the intake structure is located, the volume of water withdrawn by a facility, the facility capacity utilization rate, and the location of a facility's intake structure in relation to fishery resources of concern to permit authorities or fishery managers. Under the proposed rule, EPA would group waterbodies into five categories: (1) Freshwater rivers or streams, (2) lakes or reservoirs, (3) Great Lakes, (4) tidal rivers and estuaries, and (5) oceans. The Agency considers location to be an important factor in addressing adverse environmental impact caused by cooling water intake structures. Because different waterbody types have different potential for adverse environmental impact, the requirements proposed to minimize adverse environmental impact would vary by waterbody type. For example, estuaries and tidal rivers have a higher potential for adverse impact because they contain essential habitat and nursery areas for the vast majority of commercial and recreational important species of shell and fin fish, including many species that are subject to intensive fishing pressures. Therefore, these areas require a higher level of control that includes both impingement and entrainment controls. Organisms entrained may include small species of fish and immature life stages (eggs and larvae) of many species that lack sufficient mobility to move away from the area of the intake structure. The reproductive strategies of many estuarine species include pelagic or planktonic larvae, which are very susceptible to entrainment.

EPA discussed these concepts in a Notice of Data Availability (NODA) for the new facility rule (66 FR 28853, May 25, 2001) and invited comment on a number of documents which may support a judgment that the reproductive strategies of tidal river and estuarine species, together with other physical and biological characteristics of those waters, which make them more susceptible than other waterbodies to impacts from cooling water intake structures. In addition to these documents, the NODA presented information regarding the low entrainment susceptibility of non-tidal freshwater rivers and streams to cooling water intake structure impacts. This information also may be relevant in determining whether tidal rivers and estuaries are more sensitive to cooling water intake structures than some parts of other waterbodies.

In general, commenters on the NODA agreed that location is an important factor in assessing the impacts of cooling water intake structure, but that creating a regulatory framework to specifically address locational issues would be extremely difficult. In the end, EPA elected not to vary requirements for new facilities on the basis of whether a cooling water intake structure is located in one or another broad category of waterbody type. Instead, EPA promulgated the same technology-based performance requirements for all new facilities, regardless of the waterbody type after finding this approach to be economically practicable.

For the Phase II existing facility rule, which would establish the best technology available for minimizing adverse environmental impact in all waterbody types, EPA is again proposing an approach that it believes is economically practicable, but is proposing to require the most control in areas where such controls would yield the greatest reduction in impingement and entrainment. EPA believes that section 316(b) affords EPA such

[50] Schmitt, R.J. and C.W. Osenberg. 1996. *Detecting ecological impacts.* Academic Press, San Diego, CA.

[51] EPRI. 1999. Catalog of assessment methods for evaluating the effects of power plant operations on aquatic communities. TR–112013, EPRI, Palo Alto, CA.

discretion because unlike the sections authorizing technology-based effluent limitations guidelines and new source performance standards for the discharge of pollutants, section 316(b) expressly states that its objective is to require best technology available for minimizing adverse environmental impact. EPA believes this language affords the Agency discretion to consider the environmental effects of various technology options. Therefore, EPA is proposing to vary technology-based performance requirements by waterbody type, requiring more effective controls in waterbodies with higher overall productivity or greater sensitivity to impingement and entrainment. (Appendix 1 to the preamble presents the proposed regulatory framework in a flow chart).

Under this approach, facilities that operate at less than 15 percent capacity utilization would be required to have only impingement control technology. This level of control was found to be the most economically practicable given these facilities' reduced operating levels. In addition, these facilities tend to operate most often in mid-winter or late summer, times of peak energy demand but periods of generally low abundance of entrainable life stages of fish and shellfish. The flow or capacity of a cooling water intake structure is also a primary factor affecting the entrainment of organisms. The lower the intake flow at a site, the lesser the potential for entrained organisms.

As in the Phase I (new facility) rule, EPA is proposing to set performance standards for minimizing adverse environmental impact based on a relatively easy to measure and certain metric-reduction of impingement mortality and entrainment. EPA is choosing this approach to provide certainty about permitting requirements and to streamline and speed the issuance of permits.

Facilities with cooling water intake structures located in a freshwater river or stream would have different requirements depending on the proportion of the source waterbody that is withdrawn. If the intake flow is 5 percent or less of the source water annual mean flow, then the facility would be required to reduce fish and shellfish impingement mortality by 80 to 95 percent. If the intake flow is 5 percent or more of the source water annual mean flow, then the facility would be required to reduce fish and shellfish impingement mortality by 80 to 95 percent and reduce entrainment by 60 to 90 percent. As described in the new facility proposed rule (65 FR 49060) and NODA (66 FR 28853), EPA believes that, absent entrainment control technologies entrainment, at a particular site is proportional to intake flow at that site. As we discuss above, EPA believes it is reasonable to vary the suite of technologies by the potential for adverse environmental impact in a waterbody type. EPA is therefore proposing to limit the requirement for entrainment control in fresh waters to those facilities that withdraw the largest proportion of water from freshwater rivers or streams.

Facilities with cooling water intake structures located in a lake or reservoir would have to implement impingement control technology to reduce impingement mortality by 80 to 95 percent for fish and shellfish, and, if they expand their design intake capacity, the increase in intake flow must not disrupt the natural thermal stratification or turnover pattern of the source water. Cooling water intake structures withdrawing from the Great Lakes would be required to reduce fish and shellfish impingement mortality by 80 to 95 percent and to reduce entrainment by 60 to 90 percent. As described in the new facility proposed rule (65 FR 49060) and NODA (66 FR 28853), EPA believes that the Great Lakes are a unique system that should be protected to a greater extent than other lakes and reservoirs. The Agency is therefore proposing to specify entrainment controls as well as impingement controls for the Great Lakes.

Facilities with cooling water intake structures located in a tidal river or estuary would need to implement impingement control technology to reduce impingement mortality by 80 to 95 percent and entrainment by 60 to 90 percent for fish and shellfish. As discussed above, estuaries and tidal rivers are more susceptible than other water bodies to adverse impacts from impingement and entrainment.

Facilities with cooling water intake structures located in an ocean would have to implement impingement control technology to reduce impingement mortality by 80 to 95 percent and entrainment by 60 to 90 percent for fish and shellfish. EPA is establishing requirements for facilities withdrawing from oceans that are similar to those proposed for tidal rivers and estuaries because the coastal zone of oceans (where cooling water intakes withdraw) are highly productive areas. (See the new facility proposed rule (65 *FR* 45060) and documents in the record (Docket # W–00–03) such as 2–013A through O, 2–019A–R11, 2–019A–R12, 2–019A–R33, 2–019A–R44, 2–020A, 3–0059.) EPA is also concerned about the extent to which fishery stocks that rely upon tidal rivers, estuaries and oceans for habitat are overutilized and seeks to minimize the impact that cooling water intake structures may have on these species or forage species on which these fishery stocks may depend. (See documents 2–019A–R11, 2–019A–R12, 2–019A–R33, 2–019A–R44, 2–020A, 2–024A through O, and 3–0059 through 3–0063 in the record of the Final New Facility Rule (66 *FR* 65256), Docket # W–00–03).

EPA is proposing a range of impingement mortality and entrainment reduction in its requirements for facilities that are required to select and implement design and construction technologies or operational or restoration measures to minimize potential impact from their cooling water intake structures. The calculation baseline against which compliance with the performance standards should be assessed is a shoreline intake with the capacity to support once-through cooling and no impingement mortality or entrainment controls. In many cases existing technologies at the site achieve some reduction in impingement and entrainment when compared to this baseline. In such cases, impingement mortality and entrainment reductions (relative to the calculated baseline) achieved by these existing technologies should be counted toward compliance with the performance standards.

EPA is proposing performance ranges rather than a single performance benchmark because of the uncertainty inherent in predicting the efficacy of a technology on a site-specific basis. The lower end of the range is being proposed as the percent reduction that EPA, based on the available efficacy data, has determined that all facilities could achieve if they were to implement available technologies and operational measures on which the performance standards are based. (See Chapter 5, ''Efficacy of Cooling Water Intake Structure Technologies,'' of the Technical Development Document for the Final Rule for New Facilities, EPA–821–R–01–036, November 2001). The baseline for assessing performance is a Phase II existing facility with a shoreline intake with the capacity to support once-through cooling and no impingement or entrainment controls. The lower end of the range would take into account sites where there may be more fragile species that may not have a high survival rate after coming in contact with fish protection technologies at the cooling water intake structure (i.e., fine mesh screens). The higher end of the range is being proposed as a percent reduction that

available data show many facilities can and have achieved with the available technologies on which the performance standards are based. Some facilities may be able to exceed the high end of the performance range, though they would not be required to do so by today's proposed rule. In specifying a range, EPA anticipates that facilities will select technologies or operational measures to achieve the greatest cost-effective reduction possible (within today's proposed performance range) based on conditions found at their site, and that Directors will review the facility's application to ensure that appropriate alternatives were considered. EPA also expects that some facilities may be able to meet these performance requirements by selecting and implementing a suite (i.e., more than one) of technologies and operational measures and/or, as discussed below, by undertaking restoration measures. EPA invites comment on whether the Agency should establish regulatory requirements to ensure that facilities achieve the greatest possible reduction (within the proposed ranges) that can be achieved at their site using the technologies on which the performance standards are based. EPA also invites comment on whether EPA should leave decisions about appropriate performance levels for a facility to the Director, provided that the facility will achieve performance that is no lower than the bottom of the performance ranges in today's proposal.

EPA based the presumptive performance standards specified at 125.94(b), (c), and (d) for impingement mortality reduction, compared with conventional once-through systems, on the following technologies: (1) Design and construction technologies such as fine and wide-mesh wedgewire screens, as well as aquatic filter barrier systems, that can reduce mortality from impingement by up to 99 percent or greater compared with conventional once-through systems; (2) barrier nets that may achieve reductions of 80 to 90 percent; and (3) modified screens and fish return systems, fish diversion systems, and fine mesh traveling screens and fish return systems that have achieved reductions in impingement mortality ranging from 60 to 90 percent as compared to conventional once-through systems. (See Chapter 5 of the Technical Development Document for the Final Rule for New Facilities.)

Less full-scale performance data are available for entrainment reduction. Aquatic filter barrier systems, fine mesh wedgewire screens, and fine mesh traveling screens with fish return systems achieve 80 to 90 percent greater reduction in entrainment compared with conventional once-through systems. EPA notes that screening to prevent organism entrainment may cause impingement of those organisms instead. Questions regarding impingement survival of relatively delicate fish, larvae, and eggs would need to be considered by the Director and the facility in evaluating the efficacy of the technology. In addition, all of these screening-and-return technologies would need to be evaluated on a case-by-case basis to determine if they are capable of screening and protecting the specific species of fish, larvae and eggs that are of concern at a particular facility.

Several additional factors suggest that the performance levels discussed above and described in more detail in Chapter 5 of the Technical Development Document for the Final New Facility Rule can be improved. First, some of the performance data reviewed is from the 1970's and 1980's and does not reflect recent developments and innovations (e.g., aquatic filter barrier systems, sound barriers). Second, these conventional barrier and return system technologies have not been optimized on a widespread level to date, as would be encouraged by this rule. Third, EPA believes that many facilities could achieve further reductions (estimated at 15–30 percent) in impingement mortality and entrainment by providing for seasonal flow restrictions, variable speed pumps, and other operational measures and innovative flow reduction alternatives. For additional discussion, see section 5.5.11 in the Technical Development Document for the new facility rule.

EPA notes that available data described in Chapter 5 of the Technical Development Document for the Final Rule for New Facilities suggest that closed-cycle, recirculating cooling systems (e.g., cooling towers or ponds) can reduce mortality from impingement by up to 98 percent and entrainment by up to 98 percent when compared with conventional once-through systems. Therefore, although closed-cycle, recirculating cooling is not one of the technologies on which the presumptive standards are base, use of a closed-cycle, recirculating cooling system would achieve the presumptive standards. The proposed rule, at § 124.94(b)(1) would thus establish the use of a closed-cycle, recirculating cooling system as one method for meeting the presumptive standards.

Based on an analysis of data collected through the detailed industry questionnaire and the short technical questionnaire, EPA believes that today's proposed rule would apply to 539 existing steam electric power generating facilities. Of these, 53 facilities that operate at less than 15 percent capacity utilization would potentially require only impingement controls, with 34 of these estimated to actually require such controls. (The remaining 19 facilities have existing impingement controls). Of the remaining 486 facilities, the proposed rule would not require any changes at approximately 69 large existing facilities with recirculating wet cooling systems (e.g., wet cooling towers or ponds).

Of the remaining 417 steam electric power generating facilities (i.e., those that exceed 15 percent capacity utilization and have non-recirculating systems), EPA estimates that 94 are located on freshwater lakes or reservoirs, 13 are located on the Great Lakes, 109 are located on oceans, estuaries, or tidal rivers, and 201 are located on freshwater rivers or streams.

Of the 94 Phase II existing facilities located on freshwater lakes or reservoirs, EPA estimates that 67 of these facilities would have to install impingement controls and that 27 facilities already have impingement controls that meet the proposed rule requirements. As for existing steam electric power generating facilities located on the Great Lakes, EPA estimates that the proposed rule would require all 13 such facilities to install impingement and entrainment controls.

Of the 109 facilities located on estuaries, tidal rivers, or oceans, EPA estimates that 15 facilities would already meet today's proposed impingement and entrainment controls. The remaining 94 facilities would need to install additional technologies to reduce impingement, entrainment, or both.

For Phase II existing facilities located on freshwater river or streams, the proposed rule would establish an intake flow threshold of five (5) percent of the mean annual flow. Facilities withdrawing more than this threshold would have to meet performance standards for reducing both impingement mortality and entrainment. Facilities withdrawing less than the threshold would only have to meet performance standards for reducing impingement mortality. EPA estimates that of 201 facilities located on freshwater river or streams, 94 are at or below the flow threshold, and that only 53 of these facilities would have to install additional impingement controls (the remaining facilities have controls in place to meet the proposed rule requirements). EPA estimates that 107 facilities exceed the flow threshold. Twenty one (21) of these facilities have

sufficient controls in place; 86 would require entrainment or impingement and entrainment controls.

b. How Could a Phase II Existing Facility Use Existing Design and Construction Technologies, Operational Measures, and/or Restoration Measures To Establish Best Technology Available for Minimizing Adverse Environmental Impact?

Under the first option for determination of best technology available, as specified in proposed § 125.94(a)(1), an owner or operator of a Phase II existing facility may demonstrate to the permit-issuing Director that it already employs design and construction technologies, operational measures, or restoration measures that meet the performance requirements proposed today. To do this the owner or operator would calculate impingement mortality and entrainment reductions of existing technologies and measures relative to the calculation baseline and compare these reductions to those specified in the applicable performance standards. EPA expects that owners and operators of some facilities may be able to demonstrate compliance through a suite of (i.e., multiple) existing technologies, operational measures, and/or restoration measures.

To adequately demonstrate the efficacy of existing technologies, operational measures, and/or restoration measures, a facility owner or operator must conduct and submit for the Director's review a Comprehensive Demonstration Study as specified in proposed § 125.95(b) and described in section VII of today's preamble. In this Study, the owner or operator would characterize the impingement mortality and entrainment due to the cooling water intake structure, describe the nature and operation of the intake structure, and describe the nature and performance levels of the existing technologies, operational measures, and restoration measures for mitigating impingement and entrainment impacts. Owners and operators may use existing data for the Study as long as it adequately reflects current conditions at the facility and in the waterbody from which the facility withdraws cooling water.

c. How Could a Phase II Existing Facility Use Newly Selected Design and Construction Technologies, Operational Measures, and/or Restoration Measures To Establish Best Technology Available for Minimizing Adverse Environmental Impact?

Under the second option for determination of best technology available specified in proposed § 125.94(a)(2), an owner or operator of a Phase II existing facility that does not already employ sufficient design and construction technologies, operational measures, or restoration measures to meet the proposed performance standards must select additional technologies and operational or restoration measures. The owner or operator must demonstrate to the permit-issuing Director that these additions will, in conjunction with any existing technologies and measures at the site, meet today's proposed performance standards. EPA expects that some facilities may be able to meet their performance requirements by selecting and implementing a suite (i.e., more than one) of technologies, operational, or restoration measures.

To adequately demonstrate the efficacy of the selected technologies, operational measures, and/or restoration measures, a facility must conduct and submit for the Director's review a Comprehensive Demonstration Study as specified in proposed § 125.95(b) and described in section VII of today's preamble. In this Study, the owner or operator would characterize the impingement mortality and entrainment due to the cooling water intake structure, describe the nature and operation of the intake structure, and describe the nature and performance levels of both the existing and proposed technologies, operational measures, and restoration measures for mitigating impingement and entrainment impacts. Owners and operators may use existing data for the Study as long as it adequately reflects current conditions at the facility and in the waterbody from which the facility withdraws cooling water.

If compliance monitoring determines that the design and construction, operating measures, or restoration measures prescribed by the permit have been properly installed and were properly operated and maintained, but were not achieving compliance with the applicable performance standards, the Director could modify permit requirements consistent with existing NPDES program regulations (e.g., 40 CFR 122.62, 122.63, and 122.41) and the provisions of this proposal. In the meantime, the facility would be considered in compliance with its permit as long as it was satisfying all permit conditions. EPA solicits comment on whether the proposed regulation should specify that proper design, installation, operation and maintenance would satisfy the terms of the permit until the permit is reissued pursuant to a revised Design and Construction Technology Plan. If EPA were to adopt this approach, EPA would specify in the regulations that the Director should require as a permit condition the proper design, installation, operation and maintenance of design and construction technologies and operational measures rather than compliance with performance standards.

d. How Could a Phase II Existing Facility Qualify for a Site-Specific Determination of Best Technology Available for Minimizing Adverse Environmental Impact?

Under the third option for determination of best technology available, specified in proposed § 125.94(a)(3), the owner or operator of a Phase II existing facility may demonstrate to the Director that a site-specific determination of best technology available is appropriate for the cooling water intake structure(s) at that facility if the owner or operator can meet one of the two cost tests specified in proposed § 125.94(c)(1). To be eligible to pursue this approach, the facility must first demonstrate to the Director either: (1) that its costs of compliance with the applicable performance standards specified in § 125.94(b) would be significantly greater than the costs considered by the Administrator in establishing such performance standards; or (2) that the facility's costs would be significantly greater than the benefits of complying with the performance standards at the facility's site. A discussion of applying the cost test is provided in section VI.A.12 of this proposed rule. A discussion of applying the test in which costs are compared to benefits is provided in Section VI.A.8.

To adequately demonstrate the efficacy of the selected technologies, operational measures, and/or restoration measures considered in the site-specific cost tests, a facility must conduct and submit for the Director's review a Comprehensive Demonstration Study as specified in proposed § 125.95(b) and described in section VII of today's preamble. In this Study, the owner or operator would characterize the impingement mortality and entrainment due to the cooling water intake

structure, describe the nature and operation of the intake structure, and describe the nature and performance levels of the existing technologies, operational measures, and restoration measures for mitigating impingement and entrainment impacts. Owners or operators would also need to document the costs to the facility of any additional technologies or measures that would be needed to meet the performance standards and in the case of the site-specific cost to benefits test, the monetized benefits of meeting the standards. Owners and operators may use existing data for the Study as long as it adequately reflects current conditions at the facility and in the waterbody from which the facility withdraws cooling water.

Where a Phase II existing facility demonstrates that it meets either of the cost tests, the Director is to make a site-specific determination of best technology available for minimizing adverse environmental impact. This determination would be based on less costly design and construction technologies, operational measures, and/or restoration measures proposed by the facility and approved by the Director. The Director would approve less costly technologies to the extent justified by the significantly greater cost.

Phase II Existing facilities that pursue this option would have to assess the nature and degree of adverse environmental impact associated with their cooling water intake structures, and then identify the best technology available to minimize such impact. Owners and operators would be required to submit to the Director for approval a Site-Specific Technology Plan. This plan would be based on a Comprehensive Cost Evaluation Study and a Valuation of Monetized Benefits of Reducing Impingement and Entrainment, as required by proposed § 125.95(b)(6)(i) and (ii). (See section VII). The Plan would describe the design and operation of all design and construction technologies, operational measures, and restoration measures selected, and provide information that demonstrates the effectiveness of the selected technologies or measures for reducing the impacts on the species of concern.

To document that its site-specific costs would be significantly greater than those EPA considered, the facility would need to develop engineering cost estimates as part of its Comprehensive Cost Evaluation Study. The facility would then consider the model plants presented in EPA's Technical Development Document, determine which model plant most closely matches its fuel source, mode of electricity generation, existing intake technologies, waterbody type, geographic location, and intake flow and compare its engineering estimates to EPA's estimated cost for this model plant .

2. What Available Technologies Are Proposed as Best Technology Available for Minimizing Adverse Environmental Impact?

Currently, 14 percent of Phase II existing facilities potentially subject to this proposal already have a closed-cycle recirculating cooling water system (69 facilities operating at 15 percent capacity utilization or more and 4 facilities operating at less than 15 percent capacity utilization). In addition, 50 percent of the remaining potentially regulated facilities have some other technology in place that reduces impingement or entrainment. Thirty-three percent of these facilities have fish handling or return systems that reduce the mortality of impinged organisms.

EPA finds that the design and construction technologies necessary to meet the proposed requirements are commercially available and economically practicable, because facilities can and have installed many of these technologies years after a facility began operation. Typically, additional design and construction technologies such as fine mesh screens, wedgewire screens, fish handling and return systems, and aquatic fabric barrier systems can be installed during a scheduled outage (operational shutdown). Referenced below are examples of facilities that installed these technologies after they initially started operating.

Lovett Generating Station. A 495 MW facility (nameplate, gas-fired steam), Lovett is located in Tomkins Cove, New York, along the Hudson River. The facility first began operations in 1949 and has 3 generating units with once-through cooling systems. In 1994, Lovett began the testing of an aquatic filter fabric barrier system to reduce entrainment, with a permanent system being installed the following year. Improvements and additions were made to the system in 1997, 1998, and 1999, with some adjustments being accepted as universal improvements for all subsequent installations of this vendor's technology at other locations.

Big Bend Power Station. Situated on Tampa Bay, Big Bend is a 1998 MW (nameplate, coal-fired steam) facility with 4 generating units. The facility first began operations in 1970 and added generating units in 1973, 1976, and 1985. Big Bend supplies cooling water to its once-through cooling water systems via two intake structures. When the facility added Unit 4 in 1985, regulators required the facility to install additional intake technologies. A fish handling and return system, as well as a fine-mesh traveling screen (used only during months with potentially high entrainment rates), were installed on the intake structure serving both the new Unit 4 and the existing Unit 3.

Salem Generating Station. A 2381 MW facility (nameplate, nuclear), Salem is located on the Delaware River in Lower Alloways Creek Township, New Jersey. The facility has two generating units, both of which use once-through cooling and began operations in 1977. In 1995, the facility installed modified Ristroph screens and a low-pressure spray wash with a fish return system. The facility also redesigned the fish return troughs to reduce fish trauma.

Chalk Point Generating Station. Located on the Patuxent River in Price George's County, Maryland, Chalk Point has a nameplate capacity of 2647 MW (oil-fired steam). The facility has 4 generating units and uses a combination of once-through and closed cycle cooling (two once-through systems serving two generating units and one recirculating system with a tower serving the other two generating units). In 1983, the facility installed a barrier net, followed by a second set of netting in 1985, giving the facility a coarse mesh (1.25″) outer net and a fine mesh (.75″) inner net. The barrier nets are anchored to a series of pilings at the mouth of the intake canal that supplies the cooling water to the facility and serve to reduce both entrainment and the volume of trash taken in at the facility.

EPA believes that the technologies used as the basis for today's proposal are commercially available and economically practicable (see discussion below) for the industries affected as a whole, and have negligible non-water quality environmental impacts, including energy impacts. The proposed option would meet the requirement of section 316(b) of the CWA that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

3. Economic Practicability

EPA believes that the requirements of this proposal are economically practicable. EPA examined the annualized post-tax compliance costs of the proposed rule as a percentage of annual revenues to determine whether

the options are economically practicable. This analysis was conducted both at the facility and firm levels.

a. Facility Level

EPA examined the annualized post-tax compliance costs of the proposed rule as a percentage of annual revenues, for each of the 550 facilities subject to this proposed rule.[52] The revenue estimates are facility-specific baseline projections from the Integrated Planning Model (IPM) for 2008 (see Section VIII. Economic Analysis of this document for a discussion of EPA's analyses using the IPM). The results of this analysis show that the vast majority of facilities subject to the proposed rule, 409 out of 550, or approximately 74 percent, would incur annualized costs of less than 1 percent of revenues. Of these, 331 facilities would incur compliance costs of less than 0.5 percent of revenues. Eighty-two facilities, or 15 percent, would incur costs of between 1 and 3 percent of revenues, and 46 facilities, or 8 percent, would incur costs of greater than 3 percent. Eleven facilities are estimated to be baseline closures, and for one facility, revenues are unknown.[53] Exhibit 2 below summarizes these findings.

EXHIBIT 2.—PROPOSED RULE (FACILITY LEVEL)

Annualized cost-to-revenue ratio	All phase II	Percent of total phase II
<0.5%	331	60
0.5–1.0%	78	14
1.0–3.0%	82	15
>3.0%	46	8
Baseline Closure	11	2
n/a	1	0
Total	550	100

b. Firm Level

Facility-leval compliance costs are low compared to facility-level revenues. However, the firms owning the facilities subject to the proposed rule may experience greater impacts if they own more than one facility with compliance costs. EPA therefore also analyzed the economic practicability of this proposed rule at the firm level. EPA identified the domestic parent entity of each in-scope facility and obtained their sales revenue from publicly available data sources (the 1999 Forms EIA–860A, EIA–860B, and EIA–861; and the Dun and Bradstreet database) as well as EPA's 2000 Section 316(b) Industry Survey. This analysis showed that 131 unique domestic parent entities own the facilities subject to this proposed rule. EPA compared the aggregated annualized post-tax compliance costs for each facility owned by the 131 parent entities to the firms' total sales revenue. Based on the results from this analysis, EPA concludes that the proposed rule will be economically practicable at the firm level.

EPA estimates that the compliance costs will comprise a very low percentage of firm-level revenues. Of the 131 unique entities, 3 would incur compliance costs of greater than 3 percent of revenues; 10 entities would incur compliance costs of between 1 and 3 percent of revenues; 12 entities would incur compliance costs of between 0.5 and 1 percent of revenues; and the remaining 104 entities would incur compliance costs of less than 0.5 percent of revenues.[54] The estimated annualized compliance costs represent between 0.002 and 5.3 percent of the entities' annual sales revenue. Exhibit 3 below summarizes these findings.

EXHIBIT 3.—PROPOSED RULE (FACILITY LEVEL)

Annualized cost-to-revenue ratio	Number of phase II entities	Percentage of total phase II
<0.5%	104	79
0.5–1.0%	12	9
1.0%–3.0	10	8
>3.0%	3	2
Baseline Closures	2	2
Total	131	100

c. Additional Impacts

As described in Sections VIII and X.J below, EPA also considered the potential effects of the proposed rule on installed electric generation capacity, electrical production, production costs, and electricity prices. EPA determined that the proposed rule would not lead to the early retirement of any existing generating capacity, and would have very small or no energy effects. After considering all of these factors, EPA concludes that the costs of the proposed rule are economically practicable.

d. Benefits

As described in Section IX., EPA estimates the annualized benefits of the proposed rule would be $70.3 million for impingement reductions and $632.4 million for reduced entrainment. For a more detailed discussion, also see the Economic and Benefits Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule.

4. Site-Specific Determination of Best Technology Available

Under today's proposed rule, the owner or operator of an Phase II existing facility may demonstrate to the Director that a site-specific determination of best technology available is appropriate for the cooling water intake structures at that facility if the owner or operator can meet one of the two cost tests specified under § 125.94(c)(1). To be eligible to pursue this approach, the facility must first demonstrate to the Director either (1) that its costs of compliance with the applicable performance standards specified in § 125.94(b) would be significantly greater than the costs considered by the Administrator in establishing such performance standards, or (2) that its costs of complying with such standards would be significantly greater than the environmental benefits at the site.

The proposed factors that may justify a site-specific determination of the best technology available requirements for Phase II existing facilities differ in two major ways from those in EPA's recently promulgated rule for new facilities. First, the new facility rule required costs to be ''wholly disproportionate'' to the costs EPA considered when establishing the requirement at issue rather than ''significantly greater'' as proposed today. EPA's record for the Phase I rule shows that those facilities could technically achieve and economically afford the requirements of the Phase I rule. New facilities have greater flexibility than existing facilities in selecting the location of their intakes and technologies for minimizing adverse environmental impact so as to avoid potentially high costs. Therefore, EPA believes it appropriate to push new facilities to a more stringent economic standard. Additionally, looking at the question in terms of its national effects on the economy, EPA notes that in contrast to the Phase I rule, this rule would affect facilities responsible for a

[52] EPA's 2000 Section 316(b) Industry Survey identified 539 facilities that are subject to this proposed rule. EPA applied sample weights to the 539 facilities to account for non-sampled facilities and facilities that did not respond to the survey. The 539 analyzed facilities represent 550 facilities in the industry.

[53] IPM revenues for 2008 were not available for 11 facilities estimated to be baseline closures, 10 facilities not modeled by the IPM, and 9 facilities projected to have zero baseline revenues. EPA used facility-specific electricity generation and firm-specific wholesale prices as reported to the Energy Information Administration (EIA) to calculate the cost-to-revenue ratio for the 19 non-baseline closure facilities with missing information. The revenues for one of these facilities remained unknown.

[54] Two entities only own Phase II facilities that are projected to be baseline closures. EPA estimated that for both entities, the compliance costs incurred would have been less than 0.5 percent of revenues.

significant portion (about 55 percent) of existing electric generating capacity, whereas the new facility rule only affects a small portion of electric generating capacity projected to be available in the future (about 5 percent). EPA believes it is appropriate to set a lower cost threshold in this rule to avoid economically impracticable impacts on energy prices, production costs, and energy production that could occur if large numbers of Phase II existing facilities incurred costs that are more than significantly greater than but not wholly disproportionate to the costs in EPA's record. EPA invites comment on whether a ''significantly greater'' cost test is appropriate for evaluating requests for alternative requirements by Phase II existing facilities.

Second, today's proposal includes an opportunity for a facility to demonstrate significantly greater costs as compared to environmental benefits at a specific site. As stated above, EPA's record for the Phase I rule shows that new facilities could technically achieve and economically afford the requirements of the Phase I rule. At the same time, EPA was interested in expeditious permitting for these new facilities, due to increased energy demand, and particular energy issues facing large portions of the country. For this reason, EPA chose not to engage in a site-specific analysis of costs and benefits, because to do this properly would take time. Balancing the desire for expeditious permitting with a record that supported the achievability of the Phase I requirements, EPA believes it was reasonable not to adopt a cost benefit alternative for the Phase I rule. By contrast, Phase II existing facilities will be able to continue operating under their existing permits pending receipt of a permit implementing the Phase II regulations, even where their existing permit has expired (Permits may be administratively continued under section 558(c) of the Administrative Procedure Act if the facility has filed a timely application for a new permit). Therefore, delay in permitting, which could affect the ability of a new facility to begin operations while such a site-specific analysis is conducted, is not an issue for existing facilities. Also, EPA recognizes that Phase II existing facilities have already been subject to requirements under section 316(b). EPA is not certain that it is necessary to overturn the work done in making those determinations by necessarily requiring retrofit of the existing system without allowing facilities and permit authorities to examine what the associated costs and benefits. Once again, because today's proposal would affect so many facilities that are responsible for such a significant portion of the country's electric generating capacity, EPA is interested in reducing costs where it can do so without significantly impacting aquatic communities (recognizing this could increase permitting work loads for the State and Federal permit writers).

EPA invites comment on whether the standards proposed today might allow for backsliding by facilities that have technologies or operational measures in place that are more effective than in today's proposal. EPA invites comment on approaches EPA might adopt to ensure that backsliding from more effective technologies does not occur.

If a facility satisfies one of the two cost tests in the proposed § 125.94(c)(1), it must propose less costly design and construction technologies, operational measures, and restoration measures to the extent justified by the significantly greater costs. In some cases the significantly greater costs may justify a determination that no additional technologies or measures are appropriate. This would be most likely in cases where either (1) the monetized benefits at the site were very small (e.g., a facility with little impingement mortality and entrainment, even in the calculated baseline), or (2) the costs of implementing any additional technologies or measures at the site were unusually high.

5. What Is the Role of Restoration Under Today's Preferred Option?

Under today's preferred option, restoration measures can be implemented by a facility in lieu of or in combination with reductions in impingement mortality and entrainment. Thus, should a facility choose to employ restoration measures rather than reduce impingement mortality or entrainment, the facility could demonstrate to the Director that the restoration efforts will maintain the fish and shellfish in the waterbody, including the community structure and function, at a level comparable to that which would be achieved through § 125.94 (b) and (c). In those cases where it is not possible to quantify restoration measures, the facility may demonstrate that such restoration measures will maintain fish and shellfish in the waterbody at a level substantially similar to that which would be achieved under § 125.94 (b) and (c).

Similarly, should a facility choose to implement restoration measures in conjunction with reducing impingement mortality and entrainment through use of design and construction technologies or operational measures, the facility would demonstrate to the Director that the control technologies combined with restoration efforts will maintain the fish and shellfish, including the community structure and function, in the waterbody at a comparable or substantially similar level to that which would be achieved through § 125.94 (b) and (c). EPA invites comment on all aspects of this approach. EPA specifically invites comment on whether restoration measures should be allowed only as a supplement to technologies or operational measures. EPA also seeks comment on the most appropriate spatial scale under which restoration efforts should be allowed ''should restoration measures be limited to the waterbody at which a facility's intakes are sited, or should they be implemented on a broader scale, such as at the watershed or State boundary level.

Under today's preferred option, any restoration demonstration must address species of concern identified by the permit director in consultation with Federal, State, and Tribal fish and wildlife management agencies that have responsibility for aquatic species potentially affected by a facility's cooling water intake structure(s). EPA invites comment on the nature and extent of consultations with Federal, State, and Tribal fish and wildlife management agencies that would be appropriate in order to achieve the objectives of section 316(b) of the CWA. In general, EPA believes that consultations should seek to identify the current status of species of concern located within the subject waterbody and provide general life history information for those species, including preferred habitats for all life stages. Consultations also should include discussion of potential threats to species of concern found within the waterbody other than cooling water intake structures (i.e., identify all additional stressors for the species of concern), appropriate restoration methods, and monitoring requirements to assess the overall effectiveness of proposed restoration projects. EPA believes that it is important that the consultation occur because natural resource management agencies typically have the most accurate information available and thus are the most knowledgeable about the status of the aquatic resources they manage. EPA seeks comment on the type of information that would be appropriate to include in a written request for consultation submitted to the State, Tribal, and Federal agencies

responsible for management of aquatic resources within the waterbody at which the cooling water intake is sited. A copy of the request and any agency responses would be included in the permit application.

Under the preferred option, an applicant who wishes to include restoration measures as part of its demonstration of comparable performance would submit the following information to the Director for review and approval:

- A list and narrative description of the proposed restoration measures;
- A summary of the combined benefits resulting from implementation of technology and operational controls and/or restoration measures and the proportion of the benefits that can be attributed to these;
- A plan for implementing and maintaining the efficacy of selected restoration measures and supporting documentation that shows that restoration measures or restoration measures in combination with control technologies and operational measures will maintain the fish and shellfish, including community structure, at substantially similar levels to those specified at § 125.94 (b) and (c);
- A summary of any past or voluntary consultation with appropriate Federal, State, and Tribal fish and wildlife management agencies related to proposed restoration measures and a copy of any written comments received as a result of consultations; and
- Design and engineering calculations, drawings, and maps documenting that proposed restoration measures will meet the performance standard at § 125.94 (d).

EPA believes this information is necessary and sufficient for the proper evaluation of a restoration plan designed to achieve comparable performance for species of concern identified by the Director in consultation with fish and wildlife management agencies. EPA invites comment on whether this information is appropriate and adequate or if it should be augmented or streamlined. EPA invites comment on what specific, additional information should be included in a facility's restoration plan and/or which of the proposed information requirements are unnecessary.

For restoration measures such as fish restocking programs, EPA expects that applicants will be able to quantitatively demonstrate increases in fish and shellfish that are comparable to the performance that would be achieved by meeting the performance standards for reducing impingement and entrainment. However, as it did in the preamble to the final new facility rule, EPA recognizes that, due to data and modeling limitations as well as the uncertainty associated with restoration measures such as creation of new habitats to serve as spawning or nursery areas, it may be difficult to establish quantitatively that some restoration measures adequately compensate for entrainment and impingement losses from cooling water withdrawals. The success of many approaches to restoration depends on the functions, behavior, and dynamics of complex biological systems that are often not scientifically understood as well as engineered technologies.

There are, however, several steps that can be taken to increase the certainty of attainment of performance levels by restoration measures. Most of these steps require detailed planning prior to initiation of restoration efforts. Under today's preferred option, restoration planners would take care to incorporate allowances in their plans for the uncertainties stemming from incomplete knowledge of the dynamics underlying aquatic organism survival and habitat creation. Plans would include provisions for monitoring and evaluating the performance of restoration measures over the lifetime of the measures. Provisions would also be made for mid-course corrections as necessary. Unexpected natural forces can alter the direction of a restoration project.[55] If uncertainty regarding levels of performance is high enough, restoration planners would consider restoration measures in addition to those otherwise calculated as sufficient in order to ensure adequate levels of performance. EPA invites comment on how to measure ''substantially similar performance'' of restoration measures and methods that can be used to reduce the uncertainty of restoration activities undertaken as part of today's preferred option.

EPA recognizes that substantial information exists regarding wetlands mitigation and restoration. For example, tools and procedures exist to assess wetlands in the context of section 404 of the Clean Water Act.[56] However, restoration of other aquatic systems such as estuaries is complex and continues to evolve. EPA seeks comment on how it may measure the success or failure of restoration activities given the high degree of uncertainty associated with many areas of this developing science and that many of these activities do not produce measurable results for many months or years after they are implemented. For these reasons, EPA requests comment on whether to require that a facility using restoration measures restore more fish and shellfish than the number subjected to impingement mortality or entrainment. EPA believes that restoring or mitigating above the level that reflects best technology available for minimizing adverse environmental impact (e.g., restocking higher numbers of fish than those impinged or entrained by facility intakes or restoring aquatic system acreages at ratios greater than one-to-one) would help build a margin of safety, particularly when the uncertainties associated with a particular restoration activity are known to be high.

The concept of compensatory mitigation ratios being greater than one-to-one is found in other programs. For example, under the CWA section 404 program no set mitigation ratio exists, however, current policies require no net loss of aquatic resources on a programmatic basis. The permitting authority often requires permit applicants to provide more than one-to-one mitigation on an acreage basis to address the time lapse between when the permitted destruction of wetlands takes place and when the newly restored or created wetlands are in place and ecologically functioning. The permit may also require more than one-to-one replacement to reflect the fact that mitigation is often only partially successful. Alternatively, in circumstances where there is a high confidence that the mitigation will be ecologically successful, the restoration/creation has already been completed prior to permitted impacts, or when the replacement wetlands will be of greater ecological value than those they are replacing, the permitting authority may require less than one-to-one replacement.

In the case of section 316(b), restocking numbers and restoration ratios could be established either by the Director on a permit-by-permit basis or by EPA in the final rule. EPA requests comment on establishing margins of safety for restoration measures (particularly for activities associated with outcomes having a high degree of uncertainty) and identifying the appropriate authority for establishing safety measures. EPA also seeks comment on an appropriate basis for

[55] For a discussion of the extensive range of experience with wetland restoration efforts, see Wetlands, Third Edition, William J. Mitsch and James G. Gosselink, pp. 653–686.

[56] For a general discussion on different assessment procedures see *The Process of Selecting a Wetland Assessment Procedure: Steps and Considerations,* by Candy C. Bartoldus, *Wetland Journal,* Vol. 12, No. 4, Fall 2000.

establishing safety margins (e.g., based exclusively on project uncertainty, relative functional value or rareness of the system being restored, or a combination of these) to ensure that restoration measures achieve performance comparable to intake technologies.

EPA also recognizes that restoration measures may in some cases provide additional environmental benefits that design and construction technologies and operational measures focused solely on reducing impingement and entrainment would not provide. For example, fish restocking facilities may be able to respond, on relatively short notice, to species-specific needs or threats, as identified by fish and wildlife management agencies. Habitat restoration measures may provide important benefits beyond direct effects on fish and shellfish numbers, such as flood control, habitat for other wildlife species, pollution reduction, and recreation. EPA requests comment on whether and how additional environmental benefits should also be considered in determining appropriate fish and shellfish rates for restoration projects.

Assessing the full range of requirements necessary for the survival of aquatic organisms requires understanding and use of knowledge from multiple scientific disciplines (aquatic biology, hydrology, landscape ecology) that together address the biological and physical requirements of particular species. Under today's preferred option, restoration planners would utilize the full range of disciplines available when designing restoration measures for a facility. Plans utilizing an insufficient range of knowledge are more likely to fail to account for all aquatic organism survival requirements.

For some aquatic organisms, or for certain life stages of some aquatic organisms, there may not be sufficient knowledge of the factors required for that organism's survival and thus restoration planners would be unable to address those factors directly in a restoration plan. In such cases, it may be necessary for restoration planners to plan to create habitat that replicates as closely as possible those habitats in which the aquatic organisms are found to thrive naturally. Suitable habitat can be created or restored, or existing habitats can be enhanced in order to provide suitable habitat for the organisms of concern. In this manner, appropriate conditions can be created even without full understanding of an organism's requirements. Habitat approaches also have the benefit, when properly designed, of simultaneously providing suitable survival conditions for multiple species. In contrast, measures such as stocking and fish ladders provide benefits for much more limited number of species and life stages.

In some cases, conservation of existing, functional habitats—particularly conservation of habitats that are vulnerable to human encroachment and other anthropogenic impacts—may be desirable as part of a facility's restoration effort. In the case of conservation, the functionality of the habitat would not be compromised, therefore eliminating much of the uncertainty associated with measuring the success of other restoration efforts such as habitat enhancement or creation. However, because conserved habitat is already contributing to the relative productivity and diversity of an aquatic system, conservation measures would not necessarily ensure a net benefit to the waterbody or watershed of concern. EPA seeks comment on whether habitat conservation would be an appropriate component of a facility's restoration efforts.

Restoration projects should not unduly compromise the health of already-existing aquatic organisms in order to restore aquatic organisms for purposes of section 316(b). Such alterations could negate or detract from accomplishments under a restoration plan and produce an insufficient net benefit. For example, fish stocking programs might introduce disease or weaken the genetic diversity of an ecosystem. Habitat creation programs should not alter well-functioning habitats to better support species of concern identified in the restoration plan, but rather should focus on restoring degraded habitats that historically supported the types of aquatic organisms currently impacted by a facility's cooling water intake.

Another issue to consider when relying on restoration projects that involve habitat creation is that many such projects can take months or years to reach their full level of performance. The performance of these projects often relies heavily on establishment and growth of higher vegetation and of the natural communities that rely on such vegetation. Establishment and growth of both vegetation and natural communities can take months to years depending on the type of habitat under development. Restoration planners need to ensure that performance levels are met at all points in a mitigation process. Where facilities are depending in part on habitat creation, this may entail supplementing habitat creation measures with other restoration measures during the early stages of habitat creation in order to ensure all facility impacts are properly mitigated.

Under the preferred option, restoration plans should be developed in sufficient detail to address the issues above before significant resources are committed or other actions taken that are difficult to reverse. EPA invites comment on the role of restoration in addressing the impact of cooling water intake structures. EPA invites commenters to suggest alternative approaches to ensuring that restoration efforts are successful.

6. Impingement and Entrainment Assessments

a. What Are the Minimum Elements of an Impingement Mortality and Entrainment Characterization Study?

Today's proposal requires the permit applicant to conduct an Impingement Mortality and Entrainment Characterization Study § 125.95(b)(3) to support many important analyses and decisions. The data from this Study supports development of the calculation baseline for evaluating reductions in impingement mortality and entrainment, documents current impingement mortality and entrainment, and provides the basis for evaluating the performance of potential technologies, operational measures and/or restoration measures. Should a facility request a site-specific determination of best technology available for minimizing adverse environmental impact, the Study would provide the critical biological data for estimating monetized benefits.

EPA invites comment on whether the narrative criteria at § 125.95(b)(1) are sufficiently comprehensive and specific to ensure that scientifically valid, representative data are used to support the various approaches for determining best technology available for minimizing adverse environmental impact in today's proposal. EPA recognizes the difficulties in obtaining accurate and precise samples of aquatic organisms potentially subject to impingement and entrainment. EPA also recognizes that biological activity in the vicinity of a cooling water intake structure can vary to great degree, both within and between years, seasons and intervals including time-of-day. EPA invites comment on whether it should set specific, minimum monitoring frequencies and/or whether it should specify requirements for ensuring appropriate consideration of uncertainty in the impingement mortality and entrainment estimates.

b. What Should Be the Minimum Frequencies for Impingement and Entrainment Compliance Monitoring?

Today's proposal requires compliance monitoring as specified by the Director in § 125.96, but does not specify minimum sampling frequencies or durations. EPA is considering specifying minimum frequencies for impingement and entrainment sampling for determining compliance. EPA invites comment on including minimum sampling frequencies and durations as follows: for at least two years following the initial permit issuance, impingement samples must be collected at least once per month over a 24 hour period and entrainment samples must be collected at least biweekly over a 24 hour period during the primary period of reproduction, larval recruitment and peak abundance. These samples would need to be collected when the cooling water intake structure is in operation. Impingement and entrainment samples would be sufficient in number to give an accurate representation of the annual and seasonal impingement and entrainment losses for all commercial, recreational and forage based fish and shellfish species and their life stages at the Phase II existing facility as identified in the Impingement Mortality and Entrainment Characterization Study required under § 125.95(b)(3). Sample sets would be of sufficient size to adequately address inter-annual variation of impingement and entrainment losses. Sampling would be planned to eliminate variation in data due to changes in sampling methods. Data would also be collected using appropriate quality assurance/quality control procedures.

EPA invites comment on whether more frequent sampling would be appropriate to accurately assess diel, seasonal, and annual variation in impingement and entrainment losses. EPA also invites comment on whether less frequent compliance biological monitoring would be appropriate (perhaps depending on the technologies selected and implemented by a facility).

7. How Is Entrainment Mortality and Survival Considered in Determining Compliance With the Proposed Rule?

Today's proposed rule sets a performance standard for reducing entrainment rather than reducing entrainment mortality. EPA choose this approach because EPA does not have sufficient data to establish performance standards based on entrainment mortality for the technologies used as the basis for today's proposal. Entrainment mortality studies can be very difficult to conduct and interpret for use in decisionmaking (see section VI.A.8.b.below). EPA invites comment on regulatory approaches that would allow Phase II existing facilities to incorporate estimates of entrainment mortality and survival when determining compliance with the applicable performance standards proposed in § 125.94(b) of today's proposed rule. EPA invites commenters to submit any studies that document entrainment survival rates for the technologies used as the basis for today's performance standards and for other technologies.

8. What Should Be Included in a Demonstration To Compare Benefits to Costs?

As part of a Site-Specific Determination of Best Technology Available specified proposed in § 125.94(c) of today's proposed rule, a Phase II existing facility can attempt to demonstrate to the Director that the costs of compliance with the applicable performance standards proposed in § 125.94(b) would be significantly greater than the benefits of complying with such performance standards at the site. EPA is considering whether it should develop regulatory requirements or guidance to outline appropriate methodologies to ensure that a reliable and objective valuation of benefits is derived from the best available information. The elements in the benefit assessment guidance would, at a minimum, include standards for data quality, acceptable methodologies, technical peer review, and public comment.

a. What Should Be the Appropriate Methodology for Benefits Assessment?

EPA believes that a rigorous environmental and economic analysis should be performed when a facility seeks a site-specific determination of best technology available due to significantly greater cost as compared to the benefits of compliance with the applicable performance standards. EPA invites comment on which of these methodologies, or any other, is the most appropriate for determining a fair estimate of the benefits that would occur should the Phase II existing facility implement technology to comply with the applicable performance standards. In addition, EPA invites comment on whether narrative benefits assessments should supplement these methodologies to properly account for those benefits which cannot be quantified and monetized.

(1) Quantified and Monetized Baseline Impingement and Entrainment Losses

To evaluate the total economic impact to fisheries with regard to impingement and entrainment losses at an existing facility, the impacts on commercial, recreational, and forage species must be evaluated. Commercial fishery impacts are relatively easy to value because commercially caught fish are a commodity with a market price for the individual species. Recreation fishery impacts are based on benefits transfer methods, applying the results from nonmarket valuation studies. Valuing recreational impacts involves the use of willingness-to-pay values for increases in recreational catch rates. The analysis of the economic impact of forage species losses can be determined by estimating the replacement costs of these fish if they were to be restocked with hatchery fish, or by considering the foregone biomass production of forage fish resulting from impingement and entrainment losses and the consequential foregone production of commercial and recreation species that prey on the forage species. Trophic transfer efficiency is used to estimate the value of forage fish in terms of the foregone biomass production and the consequential foregone production of commercial and recreational species that prey upon them. This methodology can also incorporate nonuse or passive values. Nonuse or passive use values include the concepts of existence (stewardship) and bequest (intergenerational equity) motives to value environmental changes. In Regulatory Impact Analyses, EPA values nonuse impacts at 50% of value of the recreational use impact. [57] EPA invites comment on the inclusion of this approach for estimating nonuse or passive values. Examples of the use of this method for evaluating benefits are provided in the Case Study Document.

EPA notes that in locations where fisheries have been depleted by cumulative and long term impingement and entrainment losses from cooling water intake structures, this methodology may not be the most appropriate as it may have a tendency to underestimate the long term benefits associated with technology implementation.

(2) Random Utility Model

The Random Utility Model (RUM) estimates the effect of improved fishing opportunities to determine recreational

[57] Fisher, A. and R. Raucher. 1984. Intrinsic benefits of improved water quality: Conceptual and empirical perspectives. *Advances in Applied Micro-Economics.* 3:37–66.

fishing benefits due to reduced impingement and entrainment. The main assumption of this model is that anglers will get greater satisfaction, and thus greater economic value, from sites where the catch rate is higher. When anglers enjoy fishing trips with higher catch rates, they may take more fishing trips resulting in a greater overall value for fishing in the region. This method requires information on the socioeconomic characteristics of anglers and their fishing preference in terms of location and target species, information on site characteristics that are important determinants of anglers' behavior, and the estimated price of visiting the sites. Two models are used for estimating the total economic value of recreational fish to anglers, the discrete choice model which focuses on the choice of fishing site by individual anglers and the trip participation model which estimates the number of trips that an angler will take annually. A more thorough description of the RUM can be found in Chapter A10 of the Case Study Document. Examples of its use are provided in Chapter 5 of the case studies for Delaware Bay (Part B), Ohio River (Part C) and Tampa Bay (Part F).

The greatest strength of this model is that it is able to estimate a theoretically defensible monetary value for recreational fishing benefits. The weakness in the model is its dependence on the availability of survey data on angler preferences, and the bias associated with conducting a survey. This approach is also limited to estimating recreational benefits only, and should be used in conjunction with another methodology that values commercial and forage species impacts and other benefit categories where these are significant.

(3) Contingent Valuation Approach

Stated preference methods attempt to measure willingness-to-pay values directly. Unlike the revealed preference methods, such as the RUM described above, that determine values for environmental goods and services from observed behavior, stated preference methods rely on data from surveys that directly question respondents about their preferences to measure the value of environmental goods and services. Contingent valuation is one of the most well developed of the stated preference methods. Contingent valuation surveys either ask respondents if they would pay a specified amount for a described commodity (usually a change in environmental quality) or ask their highest willingness-to-pay for that commodity. For example, in the case of section 316(b), a contingent valuation survey might ask how much individuals would be willing to have their electricity bill increase from their utility's power plants to avoid the impacts of impingement and entrainment on fish and shellfish, as well as impacts on threatened and endangered species. One strength of contingent valuation estimates is that they include the nonuse values such as option, existence, and bequest values, so adjustments to the estimates to cover these values are not needed. A weakness of this approach is that respondents are asked to value a hypothetical good and they do not have to back up their stated willingness-to-pay with actual expenditures. However, this concern can be minimized by placing the valuation questions in the context of familiar economic transactions (e.g., increases in electricity bills).

b. Should Estimates of Entrainment Mortality and Survival Be Included in Benefits Assessments?

The proposed rule language for Phase II existing facilities does not preclude the use of estimates of entrainment mortality and survival when presenting a fair estimation of the monetary benefits achieved through the installation of the best technology available, instead of assuming 100 percent entrainment mortality. In EPA's view, estimates of entrainment mortality and survival used for this purpose should be based on sound scientific studies. EPA believes such studies should address times of both full facility capacity and peak abundance of entrained organisms. EPA requests comment on whether it is appropriate to allow consideration of entrainment mortality and survival in benefit estimates, and if so, should EPA set minimum data quality objectives and standards for a study of entrainment mortality and survival used to support a site-specific determination of best technology available for minimizing adverse environmental impact. EPA may decide to specify such data quality objectives and standards either in the final rule language or through guidance.

A more thorough discussion of entrainment survival is provided in Chapter D7 of the EBA. In this chapter, EPA has reviewed a number of entrainment survival studies (see DCN 2–017A–R7 in Docket W–00–03). EPA's preliminary review of these studies has raised a number of concerns regarding the quality of data used to develop some estimates of entrainment survival. Specifically, the majority of studies reviewed collected samples at times of low organismal abundance, at times when the facility was not operating at full capacity, at times when biocides were not in use, and at times which may not reflect current entrainment rates at the facility. These sampling conditions may lead to overestimation of entrainment survival. In addition, the majority of studies reviewed had very low sample sizes and calculated survival for only a few of all species entrained. EPA is also concerned that entrainment survival estimates were based on mortal effects only and did not address sub-lethal entrainment effects, which can include changes to organismal growth, development, and reproduction. EPA invites comment on its preliminary review of the data quality of entrainment survival studies provided in Chapter D7. EPA also requests that commenters submit additional entrainment survival or mortality studies for review.

9. When Could the Director Impose More Stringent Requirements?

Proposed § 125.94(e) provides that the Director could establish more stringent requirements relating to the location, design, construction, or capacity of a cooling water intake structure at a Phase II existing facility than those that would be required based on the proposed performance standards in the rule (§ 125.94(b)), or based on the proposed site-specific determination of best technology allowed under the rule (§ 125.94(c)), where compliance with the proposed requirements of § 125.94(b) or (c) would not meet the requirements of applicable Tribal, State or other Federal law. The relevant State law may include, but is not necessarily limited to, State or Tribal water quality standards, including designated uses, criteria, and antidegradation provisions; endangered or threatened species or habitat protection provisions; and other resource protection requirements. The term ''other Federal law'' is intended to denote Federal laws others than section 316(b), and could include, but not be limited to, the Endangered Species Act, 16 U.S.C. 1531 *et seq.,* the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, the Wild and Scenic Rivers Act, 16 U.S.C. 1273 *et seq.*, and potentially the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* See 40 CFR 122.49 for a brief description of these and certain other laws. Note that these laws may apply to federally issued NPDES permits independent of this proposed rule.

EPA expects that Federal, State, and Tribal resource protection agencies will work with Federal and State Directors and permittees to identify and assess

situations where Federal, State, or Tribal law might be violated, particularly where such violations involve impacts to species of concern. For example, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service implement the Endangered Species Act. Where a NPDES permit for a cooling water intake structure would comply with the performance requirements of § 125.94(b) or (c) but may harm endangered species or critical habitat, EPA expects the resource agencies to contribute their expertise to the evaluation and decisionmaking process.

EPA is considering whether to establish additional criteria for when the Director could establish more stringent requirements. EPA requests comment on specifying that more stringent requirements would be appropriate when compliance with the applicable requirements in § 125.94(b) and (c) would (1) result in unacceptable effects on migratory and/or sport or commercial species of concern to the Director; and (2) not adequately address cumulative impacts caused by multiple intakes or multiple stressors within the waterbody of concern. Unacceptable effects on sport or commercial species of concern might include a significant reduction in one or more such species due to direct or indirect effects of one or more cooling water intake structures. Examples of unacceptable effects on migratory species of concern might include the interference with or disruption of migratory pathways, patterns, or behavior. Multiple stressors within the waterbody of concern might include toxics, nutrients, low dissolved oxygen, habitat loss, non-point source runoff, and pathogen introductions. EPA is also concerned about the potential stress from multiple intakes because demonstration studies are typically conducted on an individual facility basis and do not consider the effects of multiple intakes on local aquatic organisms.

EPA notes that under section 510 of the CWA, States already have the authority to establish more stringent conditions in any permit in accordance with State law. However, this provision does not apply in cases where EPA is the permitting authority. EPA requests comment on whether any explicit regulatory provision for more stringent requirements is needed in light of section 510.

EPA also notes that States have designated many waterbodies for the propagation of fish and shellfish that are not attaining such uses due to pollution, and that, in these waters, aquatic communities may be significantly stressed or under-populated. EPA also believes that in some waterbodies, heavy fishing pressures have greatly altered and reduced aquatic communities. EPA anticipates that studies valuing the monetized benefits of reducing impingement and entrainment may not identify significant site-specific benefits in such areas and, should one or more permit applicants request site-specific determinations of less-costly best technology available for minimizing adverse environmental impact, a State may not have authority to deny such requests. EPA requests comment on whether recovery of aquatic communities in such waterbodies might be delayed by use of the significantly greater cost-to-benefit test proposed today. EPA requests comment on an regulatory alternative that would explicitly allow the Director to require more stringent technologies or measures where not doing so would delay recovery of an aquatic species or community that fish and wildlife agencies are taking active measures to restore, such as imposing significant harvesting restrictions.

10. Discussion of the 5% Flow Threshold in Freshwater Rivers

The withdrawal threshold is based on the concept that, absent any other controls, withdrawal of a unit volume of water from a waterbody will result in the entrainment of an equivalent unit of aquatic life (such as eggs and larval organisms) suspended in that volume of the water column. This, in turn, is related to the idea that, absent any controls, the density of aquatic organisms withdrawn by a cooling water intake structure is equivalent to the density of organisms in the water column. Thus, if 5% of the mean annual flow is withdrawn, it would generally result in the entrainment of 5% of the aquatic life within the area of hydraulic influence of the intake. EPA believes that it is unacceptable to impact more than 5% of the organisms within the area of an intake structure. Hence, if the facility withdraws more than 5% of the mean annual flow of a freshwater river or stream, the facility would be required to reduce entrainment by 60–90%. EPA discussed these concepts in more detail and invited comment on the use of this threshold and supporting documents in its NODA for the New Facility Rule (66 FR 28863). In today's proposed rule, EPA again invites comment on use of this threshold for Phase II existing facilities and on the supporting documents for this threshold that were referenced in the NODA.

EPA also requests comment on the following alternative withdrawal thresholds for triggering the requirement for entrainment controls: (1) 5% of the mean flow measured during the spawning season (to be determined by the average of flows during the spawning season, but remaining applicable to non-spawning time periods); (2) 10% or 15% of the mean annual or spawning season flow; (3) 25% of the 7Q10; and (4) a species-specific flow threshold that would use minimum flow requirements of a representative species to determine allowable withdrawals from the waterbody.

11. State or Tribal Alternative Requirements That Achieve Comparable Environmental Performance to the Regulatory Standards Within a Watershed

In § 125.90, today's proposal includes an alternative where an authorized State or Tribe may choose to demonstrate to the Administrator that it has adopted alternative regulatory requirements that will result in environmental performance within a watershed that is comparable to the reductions in impingement mortality and entrainment that would otherwise be achieved under § 125.94. If a State or Tribe can successfully make this demonstration, the Administrator is to approve the State or Tribe's alternative regulatory requirements.

EPA is proposing that such alternative requirements achieve comparable performance at the watershed level, rather than at larger geographic scales or at the individual facility-level, to allow States and Tribes greater flexibility and, potentially, greater efficiency in efforts to prevent or compensate for impingement mortality and entrainment losses, while still coordinating those efforts within defined ecological boundaries where the increased impacts are directly offset by controls or restoration efforts. Requiring performance level assessment to take place at the watershed level ensures that facility mitigation efforts take the overall health of the waterbody in the target watershed into account.

The Agency requests comment on all aspects of this approach, including the appropriate definition of watershed. A watershed is generally a hydrologically-delineated geographic area, typically the area that drains to a surface waterbody or that recharges or overlays ground waters or a combination of both. Watersheds can be defined at a variety of geographic scales. The United States Geological Survey (USGS) defines watersheds (hydrologic units) in the United States at scales ranging from the drainage areas of major rivers, such as

the Missouri, to small surface drainage basins, combinations of drainage basins, or distinct hydrologic features. The USGS is currently defining additional, more detailed subdivisions of currently existing hydrologic units. (See http://water.usgs.gov/GIS/huc.html.) Watersheds have been defined for other natural resource programs as well (e.g., the Total Maximum Daily Load program, actions under section 306 of the Coastal Zone Management Act).

In general, the appropriate scale at which to define a watershed depends on a program's goals. EPA believes that the watershed scale selected for the purposes of determining comparability of a State or Tribal alternative requirements should allow confident accounting of impingement and entrainment levels at facilities within the watershed and of the results of the actions taken to prevent or compensate for impingement and entrainment losses. EPA invites comment on use of the USGS eight-digit hydrologic unit (generally about the size of a county) as the maximum geographic scale at which an authorized State or Tribe could establish alternative regulatory requirements. A State or Tribe could seek to establish the comparability of alternative regulatory requirements for as many eight-digit hydrologic units as it saw fit, but would need to demonstrate that its alternative requirements achieve environmental performance comparable to the performance standards proposed in today's rule within each such unit.

EPA believes that defining watersheds at too small a scale might not allow sufficient flexibility. However, EPA is concerned that defining watersheds at a very large scale increases the potential that there will be no direct ecological connection between increased impacts in one area and compensatory efforts in another.

EPA also recognizes that States sometimes assign higher priority to protecting some waters over others. This may be due to the exceptional environmental, historic, or cultural value of some waters, or conversely to a concern with multiple stresses already occurring in a watershed. It could also be based on the presence of individual species of particular commercial, recreational, or ecological importance. For these reasons, States with alternative requirements might choose to provide more protection that would be achieved under § 125.94 in some watersheds and less protection in others. Under current language in proposed § 125.90, States could not use such an approach because they would not be able to demonstrate comparable environmental performance within each watershed. EPA requests comment on whether it should instead allow States to demonstrate comparable environmental performance at the State level, thus allowing States the flexibility to focus protection on priority watersheds.

The standard provided in proposed § 125.90 for evaluating alternate State requirements is ''environmental performance that is comparable to the reductions that would otherwise be achieved under § 125.94.'' EPA recognizes that it may not always be possible to determine precisely the reductions in impingement and entrainment associated with either § 125.94 or the alternate State requirements, particularly at the watershed level or State-wide. Furthermore, alternate State requirements may provide additional environmental benefits, beyond impingement and entrainment reductions, that the State may wish to factor into its comparability demonstration. However, in making this demonstration, the State should make a reasonable effort to estimate impingement and entrainment reductions that would occur under § 125.94 and under its alternate requirements, and should clearly identify any other environmental benefits it is taking into account and explain how their comparability to impingement and entrainment reduction under § 125.94 is being evaluated. EPA invites comment on the most appropriate scale at which to define a watershed to reflect the variability of the nature of the ecosystems impacted by cooling water intake structures within a State or Tribal area and on methods for ensuring ecological comparability within watershed-level assessments. EPA also invites comment on whether defined watershed boundaries for the purpose of section 316(b) programs should lie entirely within the political boundaries of a Tribe or State unless adjoining States and/or Tribes jointly propose to establish alternative regulatory requirements for shared watersheds.

12. Comprehensive Cost Evaluation Study

Section 125.94 of today's proposal allows a facility to request a site-specific determination of best technology available for minimizing adverse environmental impact based on costs significantly greater than in EPA's record, or significantly greater than site-specific benefits. Section 125.95(b)(6)(i) requires a facility seeking such a determination to conduct a Comprehensive Cost Evaluation Study.

To adequately demonstrate site-specific compliance costs, EPA believes that a facility would need to provide engineering cost estimates that are sufficiently detailed to allow review by a third party. The preferred cost estimating methodology, in the Agency's view, is the adaption of empirical costs from similar projects tailored to the facility's characteristics. The submission of generic costs relying on engineering judgment should be verified with empirical data wherever possible. In the cases where empirical demonstration costs are not available, the level of detail should allow the costs to be reproduced using standard construction engineering unit cost databases. These costs should be supported by estimates from architectural and engineering firms. Further, the engineering assumptions forming the basis of the cost estimates should be clearly documented for the key cost items.

The Agency and other regulatory entities have reviewed recent cost estimates submitted by permittees for several section 316(b) and 316(a) demonstrations. As discussed in Chapter X of the Technical Development Document, in several cases where the level of detail provided by the permittee was sufficient to afford a detailed review, EPA has some concerns about the magnitude of these cost estimates. In other cases, the engineering assumptions that formed the basis of the cost submissions were insufficiently documented to afford a critical review. Based in part on these examples, the Agency emphasizes the importance of empirically verified and well documented engineering cost submissions.

The Agency anticipates that the inclusion of a site-specific cost to benefit test will continue to be of concern to local regulatory entities and the regulated community in light of the associated burden on permit writers. In two recent cases, significant burden was associated with engineering cost reviews. In one case, a regional authority utilized a significant portion of its annual permitting budget (over $80,000) and significant man-hours (approximately 500 hours) to review the engineering cost estimates submitted in a single permit demonstration. In another case, EPA conducted approximately 200 hours of senior-level review of a single engineering estimate that had already undergone significant, and costly, local regulatory review. In each of these cases, the reviewers identified areas where they believed the

permit applicant had significantly overestimated costs of a potential compliance option. The level of effort was sufficient to identify the areas of concern, but not to develop counter proposals for cost estimates.

However, EPA believes it is important to have a site-specific option in the rule to cover cases of exceptionally high costs and/or minimal benefits. By EPA's estimates, the costs for some of the technologies on which the presumptive performance standards are based may be several million dollars. In cases where, due to the site-specific factors, an individual facility's costs are significantly higher, or the benefits are minimal, the additional permitting burden hours (upwards of several hundred hours) associated with the site-specific estimate may be appropriate. EPA anticipates that many, if not most, facilities will choose to comply with the presumptive standards, but believes that for those facilities with exceptionally high costs or exceptionally low benefits, the site-specific provisions provide an important ''safety valve.''

EPA invites comment on whether the Agency should establish minimum standards for a Comprehensive Cost Evaluation Study and on whether such standards should be established by regulation or as guidance only. EPA also invites comment on the above discussion of the burden that reviewing site-specific cost studies poses for permitting authorities and on its belief that site-specific provisions to address cases of unusually high costs or unusually low benefits are necessary.

13. Cost-Benefit Test

EPA requests comment on the cost-benefit provision in § 124.95. EPA placed several documents in the docket for the new facilities final rule (see docket items 2–034A and 2–034B) that summarized information from several States on the burdens of site-specific decisionmaking. To make section 316(b) determinations for large power plants in the Southeast in the late 1970s and early 1980s, EPA estimates a workload of as much as 650 person hours per permit and $25,000 contract dollars, with an additional (and potentially larger) resource investment by State permitting authorities. To reissue a permit to the Salem Nuclear Generating Station, the New Jersey Department of Environment Protection recently reviewed and considered a 36-volume permit application supported by 137 volumes of technical and reference materials. The facility filed its application in 1994; NJDEP made its decision in 2001. EPA invites comments on these burden estimates.

As noted above, however, while concerned about the burden of site-specific section 316(b) determinations, EPA also recognizes the much larger costs of complying with the presumptive performance standards and believes that some provision for situations where costs are significantly greater than benefits is appropriate. EPA notes that at some sites, impingement and entrainment losses are minimal. In such cases it may not make sense to require a facility to spend a lot of dollars to comply with presumptive performance requirements. EPA is also concerned about the potential for members of the public who object to the authority's site-specific determinations to raise challenges that must be resolved in administrative appeals that can be very lengthy and burdensome, followed in some cases by judicial challenges. An ongoing State study of permitting workloads estimates that appeals of NPDES permits issued to major facilities require 40 hours to resolve in a simple case and up to 240 hours for a very complex permit.[58] EPA Region 1 estimates that one year is required to resolve a complex administrative appeal, involving significant amounts of technical and legal resources. Should the permit appeal be followed by a judicial challenge, EPA Region 1 estimates an additional two years or more of significant investment of technical and legal resources in one decision, with additional time and resources needed if the initial judicial decision is appealed.[59] Again, however, EPA notes that these burdens may be small compared to the potential costs of complying with presumptive performance standards. EPA invites comments on ways to incorporate site-specific consideration of costs and benefits without undue burden on the Director. In particular, EPA invites comment on decision factors and criteria for weighing and balancing these factors that could be included in a regulation or guidance that would streamline the workload for evaluating site-specific applications and minimize the potential for legal challenges.

14. Capacity Utilization

In § 125.94 (b)(2), the Agency proposes standards for reducing impingement mortality but not entrainment when a facility operates less than 15 percent of the available operating time over the course of several years. Fifteen percent capacity utilization corresponds to facility operation for roughly 55 days in a year (that is, less than two months). The Agency refers to this differentiation between facilities based on their operating time as a capacity utilization cut-off. The Agency's record demonstrates that facilities operating at capacity utilization factors of less than 15 percent are generally facilities of significant age, including the oldest facilities within the scope of the rule. Frequently, entities will refer to these facilities as peaker plants, though the definition extends to a broader range of facilities. These peaker plants are less efficient and more costly to operate than other facilities. Therefore, operating companies generally utilize them only when demand is highest and, therefore, economic conditions are favorable. Because these facilities operate only a fraction of the time compared to other facilities, such as base-load plants, the peaking plants achieve sizable flow reductions over their maximum design annual intake flows. Therefore, the concept of an entrainment reduction requirement for such facilities does not appear necessary. Additionally, the plants typically operate during two specific periods: the extreme winter and the extreme summer demand periods. Each of these periods can, in some cases, coincide with periods of abundant aquatic concentrations and/or sensitive spawning events. However, it is generally accepted that peak winter and summer periods will not be the most crucial for aquatic organism communities on a national basis.

Of the facilities exceeding the capacity utilization cut-off, the median and average capacity utilization is 50 percent. As a general rule, steam plants operate cyclically between 100 percent load and standby. In turn, the intake flow rate of a typical steam plant cycles between full design intake flow and standby. Facilities operating with an average capacity utilization of 50 percent would generally withdraw more than three times as much water over the course of time than a facility with a capacity utilization of less than 15. Therefore, the capacity utilization cut-off coincides with an approximate flow reduction, and hence entrainment reduction, of roughly 70 percent as compared to the average facility above

[58] State Water Quality Management Resource Model, ver.3.16 (9/00). (See Docket for today's proposal.) This is an on-going joint effort between states and EPA to develop information on the resource ''gap'' facing State water quality management programs. The information included in the model reflects the consensus of the participating states and is intended to reflect averages.

[59] Communication from Mr. Mark Stein, Office of Regional Counsel, US EPA Region I, Boston, MA, dated January 24, 2002. (See Docket for today's proposal.)

the cut-off, which is within the range of the performance standard for entrainment reduction. Of the 539 facilities for which the Agency has detailed intake flow information, 53 would fall under the capacity utilization cut-off. Were the Agency to establish the cut-off at less than 20 percent capacity utilization, an additional 18 facilities would be subject to the reduced requirements and the comparable flow reduction would be roughly 60 percent. However, the operating period would extend to approximately 75 days (that is, 2.5 months). Were the Agency to establish the cut-off at less than 25 percent capacity, 108 of the 539 facilities would be subject to the reduced standards, and the comparable entrainment reduction would be roughly 54 percent. For a hypothetical 25 percent capacity utilization cut-off, the operating period would extend to approximately three months.

EPA invites comment on its proposed approach to regulating Phase II existing facilities with limited capacity utilization. EPA specifically invites comment on the above alternative thresholds for using capacity utilization to establish performance standard that address impingement mortality but not entrainment.

B. Other Technology-Based Options Under Consideration

EPA also considered a number of other technology-based options for regulating Phase II existing facilities. As in the proposed option, any technology-based options considered below would allow for voluntary implementation of restoration measures by facilities that choose to reduce their intake flow to a level commensurate with performance requirements. Thus, under these options, facilities would be able to implement restoration measures that would result in increases in fish and shellfish if a demonstration of comparable performance is made for species of concern identified by the Director in consultation with national, State, and Tribal fish and wildlife management agencies with responsibility for aquatic resources potentially affected by the cooling water intake structure.

Similarly, any technology-based options considered also would allow facilities to request alternative requirements that are less stringent than those specified, but only if the Director determines that data specific to the facility indicate that compliance with the relevant requirement would result in compliance costs significantly greater than those EPA considered in establishing the requirement at issue, or would result in significant adverse impacts on local air quality or local energy markets. The alternative requirement could be no less stringent than justified by the significantly greater cost or the significant adverse impacts on local air quality or local energy markets. EPA invites comment on these provisions and on other factors that might form the basis for alternative regulations.

The example regulatory language presented in section VI.B.3 below does not include a provision similar to the 40 CFR 125.85 in the new facility final rule for alternative requirements based on significant adverse impact on local water resources other than impingement and entrainment. In EPA's judgement, this provision would primarily be used to address water allocation and quantity issues which do not arise in tidal rivers, estuaries and oceans, where salinity limits competing water uses.

1. Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System for All Facilities

EPA considered a regulatory option that would require Phase II existing facilities having a design intake flow 50 MGD or more to reduce the total design intake flow to a level, at a minimum, commensurate with that which can be attained by a closed-cycle recirculating cooling system using minimized make-up and blowdown flows. In addition, facilities in specified circumstances (e.g., located where additional protection is needed due to concerns regarding threatened, endangered, or protected species or habitat; migratory, sport or commercial species of concern) would have to select and implement design and construction technologies to minimize impingement mortality and entrainment. This option does not distinguish between facilities on the basis of the waterbody from which they withdraw cooling water. Rather, it would ensure that the same stringent controls are the nationally applicable minimum for all waterbody types. This is the regulatory approach EPA adopted for new facilities.

Reducing the cooling water intake structure's capacity is one of the most effective means of reducing entrainment (and impingement). For the traditional steam electric utility industry, facilities located in freshwater areas that have closed-cycle, recirculating cooling water systems can, depending on the quality of the make-up water, reduce water use by 96 to 98 percent from the amount they would use if they had once-through cooling water systems, though many of these areas generally contain species that are less susceptible to entrainment. Steam electric generating facilities that have closed-cycle, recirculating cooling systems using salt water can reduce water usage by 70 to 96 percent when make-up and blowdown flows are minimized.[60]

Of the 539 existing steam electric power generating facilities that EPA believes would potentially be subject to the Phase II existing facility proposed rule, 73 of these facilities already have a recirculating wet cooling system (e.g., wet cooling towers or ponds). These facilities would meet the requirements under this option unless they are located in areas where the director or fisheries managers determine that fisheries need additional protection. Therefore, under this option, 466 steam electric power generating facilities would be required to meet performance standards for reducing impingement mortality and entrainment based on a reduction in intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system.

A closed-cycle recirculating cooling system is an available technology for facilities that currently have once-through cooling water systems. There are a few examples of existing facilities converting from one type of cooling system to another (e.g., from once-through to closed-cycle recirculating cooling system). Converting to a different type of cooling water system, however, is significantly more expensive than the technologies on which the proposed performance standards are based (generally by a factor of 10 or greater) and significantly more expensive that designing new facilities to run on recirculating systems. EPA has identified four power plants that would be regulated by today's proposal that have converted from once-through to closed-cycle recirculating cooling systems. Three of these facilities—Palisades Nuclear Plant in Michigan, Jefferies Coal in South Carolina, and Canadys Steam in South Carolina— converted from once-through to closed-cycle recirculating cooling systems after significant periods of operation utilizing the once-through system. The fourth facility—Pittsburg Unit 7—is not a full conversion in that it never operated with its once-through system. In this case, the ''conversion'' occurred just prior to construction, after initial design of the once-through system design and power plant had

[60] The lower range would be appropriate where State water quality standards limit chloride to a maximum increase of 10 percent over background and therefore require a 1.1 cycle of concentration. The higher range may be attained where cycles of concentration up to 2.0 are used for the design.

occurred. A brief description of these conversions follows. The Technical Development Document for the Proposed Section 316(b) Phase II Existing Facilities Rule provides additional detail.

The Palisades Nuclear Plant. Located in Covert, Michigan, the Palisades Nuclear Plant is a 812 MW (nameplate, steam capacity) facility with a pressurized water reactor, utilizing a mechanical draft wood cooling tower to condense the steam load of the plant. The reactor began operation in 1972 utilizing a once-through cooling system and subsequently converted to a closed-cycle, recirculating system at the beginning of 1974.

Canadys Steam Plant. This 490 MW (nameplate, steam capacity) coal-fired facility with three generating units is located in Colleton County, South Carolina. The first unit initially came online in 1962, the second in 1964, and the third in 1967. All three units operated with a once-through cooling water system for many years. The Canadys Steam plant was converted from a once-through to a closed-cycle recirculating cooling system in two separate projects. Unit 3 (218 MW) was first converted in 1972. Units 1 and 2, both with nameplate capacities of 136 MW, were converted from a once-through to a closed-cycle, recirculating cooling system in 1992.

Jefferies Coal Units 3 & 4. Located in Moncks Corner, South Carolina, this facility has a combined, coal-fired capacity of 346 MW (nameplate, steam). The coal units came online in 1970 and operated for approximately 15 years utilizing once-through cooling. After the Army Corps of Engineers re-diverted the Santee Cooper River, thereby limiting the plant's available water supply, the cooling system was converted from once-through to recirculating towers. The plant conducted an empirical energy-penalty study over several years to determine the economic impact of the cooling system conversion.

Pittsburg Power Plant, Unit 7. Located in Contra Costa County, California, this 750 MW (nameplate, gas-fired steam) unit was designed and planned with a once-through cooling water system. However, late in the construction process, the plant switched to a closed-cycle, recirculating cooling system with a mechanical draft cooling tower. The system utilizes the condenser, conduit system, and circulating pumps originally designed for the once-through cooling water system.

EPA did not select closed-cycle, recirculating cooling systems as the best technology available for existing facilities because of the generally high costs of such conversions. According to EPA's cost estimates, capital costs for individual high-flow plants to convert to wet towers generally ranged from 130 to 200 million dollars, with annual operating costs in the range of 4 to 20 million dollars. EPA estimates that the total annualized post-tax cost of compliance for this option is approximately $2.26 billion. Not included in this estimate are 9 facilities that are projected to be baseline closures. Including compliance costs for these 9 facilities would increase the total cost of compliance with this option to approximately $2.32 billion. EPA also has serious concerns about the short term energy implications of a massive concurrent conversion and the potential for supply disruptions that it would entail. EPA requests comment on its decision not to base best technology available for all Phase II existing facilities on closed-cycle, recirculating technology.

The estimated annual benefits (in $2001) for requiring all Phase II existing facilities to reduce intake capacity commensurate with the use of closed-cycle, recirculating cooling systems are $83.9 million per year and $1.08 billion for entrainment reductions.

2. Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling Systems Based on Waterbody Type

EPA also considered an alternate technology-based option in which closed-cycle, recirculating cooling systems would be required for all facilities on certain waterbody types. Under this option, EPA would group waterbodies into the same five categories as in today's proposal: (1) Freshwater rivers or streams, (2) lakes or reservoirs, (3) Great Lakes, (4) tidal rivers or estuaries; and (5) oceans. Because oceans, estuaries and tidal rivers contain essential habitat and nursery areas for the vast majority of commercial and recreational important species of shell and fin fish, including many species that are subject to intensive fishing pressures, these waterbody types would require more stringent controls based on the performance of closed-cycle, recirculating cooling systems. EPA discussed the susceptibility of these waters in a Notice of Data Availability (NODA) for the new facility rule (66 FR 28853, May 25, 2001) and invited comment on documents that may support its judgment that these waters are particularly susceptible to adverse impacts from cooling water intake structures. In addition, the NODA presented information regarding the low susceptibility of non-tidal freshwater rivers and streams to impacts from entrainment from cooling water intake structures.

Under this alternative option, facilities that operate at less than 15 percent capacity utilization would, as in the proposed option, only be required to have impingement control technology. Facilities that have a closed-cycle, recirculating cooling system would require additional design and construction technologies to increase the survival rate of impinged biota or to further reduce the amount of entrained biota if the intake structure was located within an ocean, tidal river, or estuary where there are fishery resources of concern to permitting authorities or fishery managers.

Facilities with cooling water intake structures located in a freshwater (including rivers and streams, the Great Lakes and other lakes) would have the same requirements as under the proposed rule. If a facility chose to comply with Track II, then the facility would have to demonstrate that alternative technologies would reduce impingement and entrainment to levels comparable to those that would be achieved with a closed-loop recirculating system (90% reduction). If such a facility chose to supplement its alternative technologies with restoration measures, it would have to demonstrate the same or substantially similar level of protection. (For additional discussion see the new facility final rule 66 FR 65256, at 65315 columns 1 and 2.)

EPA has estimated that there are 109 facilities located on oceans, estuaries, or tidal rivers that do not have a closed cycle recirculating system and would be required to meet performance standards for reducing impingement mortality and entrainment based on a reduction in intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system. The other 430 facilities would be required to meet the same performance standards in today's proposal.

The potential environmental benefits of this option have been estimated at $87.8 million and $1.24 billion for entrainment reductions annually. Although this option is estimated (a full cost analysis was not done for this option) to be less expensive at a national level than requiring closed-cycle, recirculating cooling systems for all Phase II existing facilities, EPA is not proposing this option. Facilities located on oceans, estuaries, and tidal rivers would incur high capital and operating and maintenance costs for conversions of their cooling water systems. Furthermore, since impacted facilities would be concentrated in coastal

regions, there is the potential for short term energy impacts and supply disruptions in these areas. EPA also invites comment on this option.

3. Intake Capacity Commensurate With Closed-Cycle, Recirculating Cooling System Based on Waterbody Type and Proportion of Waterbody Flow

EPA is also considering a variation on the above approach that would require only facilities withdrawing very large amounts of water from an estuary, tidal river, or ocean to reduce their intake capacity to a level commensurate with that which can be attained by a closed-cycle, recirculating cooling system.

For example, for facilities with cooling water intake structures located in a tidal river or estuary, if the intake flow is greater than 1 percent of the source water tidal excursion, then the facility would have to meet standards for reducing impingement mortality and entrainment based on the performance of wet cooling towers. These facilities would have the choice of complying with Track I or Track II requirements. If a facility on a tidal river or estuary has intake flow equal to or less than 1 percent of the source water tidal excursion, the facility would only be required to meet the performance standards in the proposed rule. These standards are based on the performance of technologies such as fine mesh screens and traveling screens with well-designed and operating fish return systems. The more stringent, closed-cycle, recirculating cooling system based requirements would also apply to a facility that has a cooling water intake structure located in an ocean with an intake flow greater than 500 MGD.

Regulatory language implementing the Waterbody Type and Intake Capacity Based Option could read as follows:

(a)(1) The owner or operator of an existing steam electric power generating facility must comply with:

(i) The requirements of (b)(1) if your cooling water intake structure has a utilization rate less than 15 percent;

(i) The requirements of (b)(2) if your cooling water intake structure withdraws water for use in a closed-cycle, recirculating system;

(ii) The requirements of (b)(3) if your cooling water intake structure is located in a freshwater river or stream;

(iii) The requirements of (b)(4) if your cooling water intake structure is located in a lake (other than one of the Great Lakes) or reservoir;

(iv) The requirements of (b)(5) or (c) if your cooling water intake structure is located in an estuary or tidal river;

(v) The requirements of (b)(6) if your cooling water intake structure is located in one of the Great Lakes;

(vi) The requirements of (b)(7) or (c) if your cooling water intake structure is located in an ocean.

(2) In addition to meeting the requirements of (b) or (c), the owner or operator of an existing steam electric power generating facility must meet any more stringent requirements imposed under (d).

(b) Track I Requirements. Based on the design characteristics of your facility and cooling water intake structure(s) you must meet the requirements of paragraphs (b)(1) through (10).

(1) Requirements for Facilities With a Capacity Utilization Rates Less Than 15 Percent. If you own or operate an existing facility with a cooling water intake structure that has a capacity utilization rate less than 15 percent, you must select and implement design and construction technologies or operational measures to reduce impingement mortality by 80 to 95% for fish and shellfish.

(2) Requirements for Cooling Water Intake Structures that Withdraw Water for Closed-Cycle, Recirculating Systems Only. If you own or operate a cooling water intake structure that withdraws water from an estuary, tidal river, or ocean for a closed-cycle, recirculating system only, you must comply with the requirements in paragraphs (b)(2)(i) and (ii) as follows:

(i) Impingement Design and Construction Technologies or Operational Measures. You must select and implement design and construction technologies or operational measures to minimize impingement mortality for fish and shellfish if:

(A) There are threatened or endangered or otherwise protected Federal, State, or Tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(B) There are migratory and/or sport or commercial species of impingement concern to the Director or any fishery management agency(ies), which pass through the hydraulic zone of influence of the cooling water intake structure; or

(C) It is determined by the Director or any fishery management agency(ies) that the facility contributes unacceptable stress to the protected species, critical habitat of those species, or species of concern.

(ii) Entrainment Design and Construction Technologies or Operational Measures. You must select and implement design and construction technologies or operational measures to minimize entrainment for entrainable life stages of fish and shellfish if:

(A) There are threatened or endangered or otherwise protected Federal, State, or Tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(B) There are or would be undesirable cumulative stressors affecting entrainable life stages of species of concern to the Director or any fishery management agency(ies), and it is determined by the Director or any fishery management agency(ies) that the facility contributes unacceptable stress to these species of concern.

(3) Requirements for Cooling Water Intake Structures Located in Freshwater Rivers or Streams. If you own or operate an existing facility with a cooling water intake structure located in a freshwater river or stream, you must comply with paragraphs (b)(3)(i) or (ii) as follows:

(i) If your total design intake flow is equal to or less than 5 percent of the source water annual mean flow, you must select and implement design and construction technologies or operational measures to reduce impingement mortality by 80 to 95% for all life stages of fish and shellfish; or

(ii) If your total design intake flow is greater than 5 percent of the source water annual mean flow, you must select and implement design and construction technologies or operational measures to reduce impingement mortality by 80 to 95% and entrainment by 60 to 90% for all life stages of fish and shellfish.

(4) Requirements for Cooling Water Intake Structures Located in Lakes (Other Than one of the Great Lakes) or Reservoirs. If you own or operate an existing facility with a cooling water intake structure located in a lake (other than one of the Great Lakes) or reservoir, you must comply with paragraphs (b)(4)(i) and (ii) as follows:

(i) Your total design intake flow must not disrupt the natural thermal stratification or turnover pattern (where present) of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fisheries management agency(ies); and

(ii) You must select and implement design and construction technologies or operational measures to reduce impingement mortality by 80 to 95% for fish and shellfish.

(5) Requirements for Cooling Water Intake Structures Located in Estuaries or Tidal Rivers. If you own or operate an existing facility with a cooling water intake structure located in an estuary or tidal river you must comply with paragraphs (b)(5)(i) or (ii) as follows:

(i) If your total design intake flow over one tidal cycle of ebb and flow is equal to or less than one (1) percent of the volume of the water column within the area centered about the opening of the intake with a diameter defined by the distance of one tidal excursion at the mean low water level, you must select and implement design and construction technologies or operational measures to reduce impingement mortality by 80 to 95% and entrainment by 60 to 90% for all life stages of fish and shellfish; or

(ii) If your total design intake flow over one tidal cycle of ebb and flow is greater than one (1) percent of the volume of the water column within the area centered about the opening of the intake with a diameter defined by the distance of one tidal excursion at the mean low water level, you must meet the requirements in paragraphs (b)(5)(ii)(A) or (B):

(A) Reduce your intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system and select and implement design and construction technologies or operational measures as follows:

(1) Impingement Design and Construction Technologies or Operational Measures. You must select and implement design and construction technologies or operational

measures to minimize impingement mortality for fish and shellfish if:

(i) There are threatened or endangered or otherwise protected Federal, State, or Tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(ii) There are migratory and/or sport or commercial species of impingement concern to the Director or any fishery management agency(ies), which pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) It is determined by the Director or any fishery management agency(ies) that the facility contributes unacceptable stress to the protected species, critical habitat of those species, or species of concern.

(2) Entrainment Design and Construction Technologies or Operational Measures. You must select and implement design and construction technologies or operational measures to minimize entrainment for entrainable life stages of fish and shellfish if:

(i) There are threatened or endangered or otherwise protected Federal, State, or Tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(ii) There are or would be undesirable cumulative stressors affecting entrainable life stages of species of concern to the Director or any fishery management agency(ies), and it is determined by the Director or any fishery management agency(ies) that the facility contributes unacceptable stress to these species of concern.

(B) Comply with the requirements of Track II in (c).

(6) Requirements for Cooling Water Intake Structures Located in One of the Great Lakes. If you own or operate an existing facility with a cooling water intake structure located in one of the Great Lakes you must select and implement design and construction technologies or operational measures to reduce impingement mortality by 80 to 95% and entrainment by 60 to 90% for all life stages of fish and shellfish.

(7) Requirements for Cooling Water Intake Structures Located in an Ocean. If you own or operate an existing facility with a cooling water intake structure located in an ocean you must comply with paragraphs (b)(7)(i) or (ii) as follows:

(i) If your total design intake flow is less than 500 MGD, you must select and implement design and construction technologies or operational measures to reduce impingement mortality by 80 to 95% and entrainment by 60 to 90% for all life stages of fish and shellfish; or

(ii) If your total design intake flow is equal to, or greater than 500 MGD, you must meet the requirements in paragraphs (b)(7)(ii)(A) or (B):

(A) Reduce your intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system and select and implement design and construction technologies or operational measures as follows:

(1) Impingement Design and Construction Technologies or Operational Measures. You must select and implement design and construction technologies or operational measures to minimize impingement mortality for fish and shellfish if:

(i) There are threatened or endangered or otherwise protected Federal, State, or Tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(ii) There are migratory and/or sport or commercial species of impingement concern to the Director or any fishery management agency(ies), which pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) It is determined by the Director or any fishery management agency(ies) that the facility contributes unacceptable stress to the protected species, critical habitat of those species, or species of concern.

(2) Entrainment Design and Construction Technologies or Operational Measures. You must select and implement design and construction technologies or operational measures to minimize entrainment for entrainable life stages of fish and shellfish if:

(i) There are threatened or endangered or otherwise protected Federal, State, or Tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(ii) There are or would be undesirable cumulative stressors affecting entrainable life stages of species of concern to the Director or any fishery management agency(ies), and it is determined by the Director or any fishery management agency(ies) that the facility contributes unacceptable stress to these species of concern.

(B) Comply with the requirements of Track II in (c).

(8) You must submit the application information required;

(9) You must implement the monitoring requirements specified;

(10) You must implement the record-keeping requirements specified;

(c) Track II Requirements. If you are an existing steam electric power generating facility with a cooling water intake structure located in an estuary, tidal river, or ocean that chooses to meet the requirements of Track II in lieu of Track I in (b)(5)(ii) or (b)(7)(ii), you must comply with the following:

(1) You must demonstrate to the Director that the technologies, operational measures, and supplemental restoration measures employed will reduce the level of adverse environmental impact from your cooling water intake structures to a level comparable to that which you would achieve were you to reduce your intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system.

(2) Except as specified in subparagraph (c)(4) below, your demonstration must include a showing that the impacts to fish and shellfish, including important forage and predator species, within the watershed will be comparable to those which would result if you were to reduce your intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system. This showing may include consideration of impacts other than impingement mortality and entrainment.

(3) Restoration Measures. Phase II existing facilities complying with the requirements of Track II may supplement technologies with restoration measures that will result in increases in fish and shellfish if you can demonstrate that they will result in a comparable performance for species that the Director, in consultation with national, State and Tribal fishery management agencies with responsibility for fisheries potentially affected by your cooling water intake structure, identifies as species of concern.

(4) In cases where air emissions and/or energy impacts that would result from reducing your intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system would result in significant adverse impacts on local air quality, or significant adverse impact on local energy markets, you may request alternative requirements.

(5) You must submit the application information required;

(6) You must implement the monitoring requirements specified;

(7) You must implement the record-keeping requirements specified;

EPA notes that of these, some facilities would likely opt to comply through Track II and estimates that 21 facilities would select this option. These facilities would perform site-specific studies and demonstrate compliance using alternative technologies, perhaps supplemented by habitat enhancement or fishery restocking efforts. Assuming as a high impact scenario that all 51 of these facilities install wet cooling towers, the energy impacts associated with these 51 facilities would comprise 0.2 percent of total existing electric generating capacity from facilities with an intake flow of 50 MGD or more. The environmental impacts associated with increased air emissions (SO_2, NO_X, CO_2, and Hg) associated with this option would be a 0.1 percent increase of emissions of these pollutants from the total existing electric generators.

The Nuclear Regulatory Commission estimates that a steam-electric plant utilizing a once-through cooling system would consume approximately 40 percent less water than a comparably sized plant equipped with recirculating wet cooling towers because a wet cooling tower uses a small amount of water many times and evaporates most of this water to provide its cooling (which can sometimes be seen as a white vapor plume). In contrast, a once-through cooling system uses a much larger volume of water, one time. While no cooling water evaporates directly to the air, once the heated water is discharged back into the waterbody, some evaporation occurs. Thus, in some areas, conversion to closed-cycle cooling could raise water quantity issues.

Based on an analysis of data collected through the detailed industry questionnaire and the short technical questionnaire, EPA estimates there are potentially 109 Phase II existing facilities located on estuaries, tidal rivers, or oceans which may incur capital cost under this option. Of these 109 facilities, EPA estimates that 51 would exceed the applicable flow threshold and be required to meet performance standards for reducing impingement mortality and entrainment based on a reduction in intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating system. Of the 58 facilities estimated to fall below the applicable flow threshold, 10 facilities already meet these performance standards and would not require any additional controls, whereas 48 facilities would require entrainment or impingement controls, or both. Because this option would only require cooling tower-based performance standards for facilities located on tidal rivers, estuaries or oceans where they withdraw saline or brackish waters, EPA does not believe that this option would raise any significant water quantity issues.

Total annualized post-tax cost of compliance for the waterbody/capacity-based option is approximately $585 million. Not included in this estimate are 9 facilities that are projected to be baseline closures. Including compliance costs for these 9 facilities would increase the total cost of compliance with this option to approximately $595 million.

EPA also examined the annualized post-tax compliance costs of the waterbody/capacity-based option as a percentage of annual revenues to assess the economic practicability of this alternative option. This analysis was conducted at the facility and firm levels. The revenue estimates are the same as those used in the analysis in Section VI.A.3 above: facility-specific baseline projections from the Integrated Planning Model (IPM) for 2008. The results at the facility level are similar to those of the proposed rule: 355 out of 550 facilities, or 65 percent, would incur annualized costs of less than 0.5 percent of revenues; 60 facilities would incur costs of between 0.5 and 1 percent of revenues; 57 facilities would incur costs of between 1 and 3 percent; and 67 facilities would incur costs of greater than 3 percent. Nine facilities are estimated to be baseline closures, and for one facility, revenues are unknown. Exhibit 4 below summarizes these findings.

EXHIBIT 4.—WATERBODY/CAPACITY-BASED OPTION (FACILITY LEVEL)

Annualized cost-to-revenue ratio	All phase II	Percent of total phase II
< 0.5 %	355	65
0.5–1.0	60	11
1.0–3.0%	57	10
> 3.0 %	67	12
Baseline Closure	9	2
n/a	1	0
Total	550	100

Similar to the preferred option, EPA estimates that the compliance costs for the waterbody/capacity-based option would also be low compared to firm-level revenues. Of the 131 unique parent entities that own the facilities subject to this rule, 108 entities would incur compliance costs of less than 0.5 percent of revenues; 12 entities would incur compliance costs of between 0.5 and 1 percent of revenues; 6 entities would incur compliance costs of between 1 and 3 percent of revenues; and three entities would incur compliance costs of greater than 3 percent of revenues. Two entities only own facilities that are estimated to be baseline closures. The estimated annualized facility compliance costs for this option represent between 0.001 and 5.4 percent of the entities' annual sales revenue. Exhibit 5 below summarizes these findings.

EXHIBIT 5.—WATERBODY/CAPACITY-BASED OPTION (FIRM LEVEL)

Annualized cost-to-revenue ratio	Number of phase II entities	Percent of total phase II
< 0.5 %	108	82
0.5–1.0 %	12	9
1.0–3.0%	6	5
> 3.0 %	3	2
Baseline Closure	2	2
Total	131	100

The results of EPA's approach to estimating national benefits are $79.86 million per year for impingement reduction and $769.0 million annually for entrainment reduction. Additional details of EPA's economic practicability and benefits analysis of this and other options can be found in the Economic and Benefits Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule and the Technical Development Document for the Proposed Section 316(b) Phase II Existing Facilities Rule.

While the national costs of this option are lower than those of requiring wet cooling towers-based performance standard for all facilities located on oceans, estuaries and tidal rivers, the cost for facilities to meet these standards could be substantial if they installed a cooling tower. Under this option, EPA would provide an opportunity to seek alternative requirements to address locally significant air quality or energy impacts. EPA notes that the incremental costs of this option relative to the proposed option ($413 million) significantly outweigh the incremental benefits ($146 million). While EPA is not proposing this option, EPA is considering it for the final rule. To facilitate informed public comment, EPA has drafted sample rule language reflecting this option (see above). EPA invites comment on this alternative technology based option for establishing best technology available for minimizing adverse environmental impacts from cooling water intake structures at Phase II existing facilities.

4. Impingement Mortality and Entrainment Controls Everywhere

Under an additional alternative being considered, EPA would establish national minimum performance requirements for the location, design, construction, and capacity of cooling water intake structures based on the use of design and construction technologies that reduce impingement and entrainment at all Phase II existing facilities without regard to waterbody type and with no site-specific compliance option available. Under this alternative the Agency would set performance requirements based on the use of design and construction technologies or operational measures that reduce impingement and entrainment. EPA would specify a range of impingement mortality and entrainment reduction that is the same as the performance requirements proposed in § 125.94(b)(3) (i.e., Phase II existing facilities would be required to reduce impingement mortality by 80 to 95 percent for fish and shellfish, and to reduce entrainment by 60 to 90 percent for all life stages of fish and shellfish). However, unlike the proposed option, performance requirements under this alternative would apply to all Phase II existing facilities regardless of the category of waterbody used for cooling water withdrawals.

Like the proposed option, the percent impingement and entrainment reduction under this alternative would be relative to the calculation baseline. Thus, the baseline for assessing performance would be an existing facility with a shoreline intake with the capacity to support once-through

cooling water systems and no impingement or entrainment controls. In addition, as proposed, a Phase II existing facility could demonstrate either that it currently meets the performance requirements or that it would upgrade its facility to meet these requirements. Further, under this alternative, EPA would set technology-based performance requirements, but the Agency would not mandate the use of any specific technology.

Unlike the proposed option, this alternative would not allow for the development of best technology available on a site-specific basis (except on a best professional judgment basis). This alternative would not base requirements on the percent of source water withdrawn or restrict disruption of the natural thermal stratification of lakes or reservoirs. It also would impose entrainment performance requirements on Phase II existing facilities located on freshwater rivers or streams, and lakes or reservoirs. Finally, under this alternative, restoration could be used, but only as a supplement to the use of design and construction technologies or operational measures.

This alternative would establish clear performance-based requirements that are simpler and easier to implement that those proposed and are based on the use of available technologies to reduce adverse environmental impact. Such an alternative would be consistent with the focus on use of best technology required under section 316(b). Total annualized post-tax cost of compliance for the modified proposed option is approximately $191 million. Not included in this estimate are 11 facilities that are projected to be baseline closures. Including compliance costs for these 11 facilities would increase the total cost of compliance with this option to approximately $195 million. The benefits calculated for reduced impingement under this option were $64.5 million per year; entrainment reduction benefits were estimated to be $0.65 billion annually.

C. Site-Specific Based Options Under Consideration

1. Sample Site-Specific Rule

EPA also invites comment on site-specific approaches for determining the best technology available for minimizing adverse environmental impact at existing facilities. In general, a site-specific option is a formal process for determining the best technology available for minimizing adverse environmental impact at particular facilities that focuses on the site-specific interactions between cooling water intakes and the affected environment and the costs of implementing controls. This approach would be based on the view that the location of each power plant and the associated intake structure design, construction, and capacity are unique, and that the optimal combination of measures to reflect best technology available for minimizing adverse environmental impact must be determined on a case-by-case basis.

In order to focus public comment, EPA, in consultation with other interested Federal agencies, has drafted sample regulatory text for a site-specific approach, which is set forth below. The Site-Specific Sample Rule omits regulatory text on two key subjects: (1) The definition of adverse environmental impact; and (2) the components of the analysis that is used to determine the best technology available for minimizing adverse environmental impact. Instead, the Sample Rule contains references to the preamble discussion of these subjects (*see* § 125.93, definition of ''adverse environmental impact'' and § 125.94(b)(2), concerning analysis of the best technology available). Regulatory text is not offered on these subjects because the various site-specific approaches described in the discussion following the Sample Rule deal with them in significantly different ways.

Site-Specific Alternative: Sample Rule

Sec.

125.90 What are the purpose and scope of this subpart?
125.91 Who is subject to this subpart?
125.92 When must I comply with this subpart?
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125.98 As an owner or operator of an existing facility, must I perform monitoring?
125.99 As an owner or operator of an existing facility, must I keep records and report?
125.100 As the Director, what must I do to comply with the requirements of this subpart?

Section 125.90 What Are the Purpose and Scope of This Subpart?

(a) This subpart establishes requirements that apply to the location, design, construction, and capacity of cooling water intake structures at existing facilities that have a design intake flow of equal to or greater than 50 million gallons per day (MGD). The purpose of these requirements is to establish the best technology available for minimizing any adverse environmental impact associated with the use of cooling water intake structures. These requirements are implemented through National Pollutant Discharge Elimination System (NPDES) permits issued under section 402 of the Clean Water Act (CWA).

(b) This subpart implements section 316(b) of the CWA for existing facilities that have a design flow of equal to or greater than 50 MGD. Section 316(b) of the CWA provides that any standard established pursuant to sections 301 or 306 of the CWA and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. The process established in this subpart for determining the best technology available for intake design, location, construction, and capacity provides for a case-by-case determination based on the unique, site-specific interactions between intakes and the environment and the costs of implementing controls at existing facilities.

Section 125.91 Who Is Subject to This Subpart?

(a) This subpart applies to an existing facility if it:

(1) Is a point source that uses or proposes to use a cooling water intake structure;

(2) Has at least one cooling water intake structure that uses at least 25 percent of the water it withdraws for cooling purposes as specified in paragraph (c) of this section; and

(3) Has a design intake flow equal to or greater than 50 MGD;

(b) Use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with an independent supplier (or multiple suppliers) of cooling water if the supplier or suppliers withdraw(s) water from waters of the United States. Use of cooling water does not include obtaining cooling water from a public water system or use of treated effluent that otherwise would be discharged to a water of the U.S. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a point source.

(c) The threshold requirement that at least 25 percent of water withdrawn be used for cooling purposes must be measured on an average monthly basis.

Section 125.92 When Must I Comply With This Subpart?

You must comply with this subpart when an NPDES permit containing requirements consistent with this subpart is issued to you.

Section 125.93 What Special Definitions Apply to This Subpart?

The definitions in Subpart I of Part 125 apply to this subpart. The following definitions also apply to this subpart:

Adverse Environmental Impact [Reserved; see discussion at V.C.5.a below.]

Existing facility means any facility that both generates and transmits electric power and any facility that generates electric power but sells it to another entity for transmission. This definition specifically includes (1) any major modification of a facility; (2) any addition of a new unit to a facility for purposes of the same industrial operation; (3) any addition of a unit for purposes of a different industrial operation that uses an existing cooling water intake structure but does not increase the design capacity of the cooling water intake structure; and (4) any facility that is constructed in place of a facility that has been demolished, but that uses an existing cooling water intake structure whose design intake flow has not been increased to accommodate the intake of additional cooling water.

Section 125.94 How Will Requirements Reflecting Best Technology Available for Minimizing Adverse Environmental Impact Be Established for My Existing Facility?

(a)(1) Except as provided in paragraph (a)(2) of this section, an owner or operator of an existing facility covered by this subpart must conduct a baseline biological survey and provide any other information specified in § 125.97 that the Director concludes is necessary for determining the magnitude of any adverse environmental impact occurring at the facility.

(2) A previously conducted section 316(b) demonstration may be used to determine whether the location, design, construction and capacity of the facility's cooling water intake structure reflect best technology available for minimizing adverse environmental impact if it reflects current biological conditions in the water body and the current location and design of the cooling water intake structure. A previously conducted section 316(b) demonstration generally would reflect current conditions or circumstances if:

(i) The previous section 316(b) demonstration used data collection and analytical methods consistent with guidance or requirements of the permitting agency and/or the Administrator;

(ii) The available evidence shows that there have been no significant changes in the populations of critical aquatic species; and

(iii) The owner or operator can show there have been no significant changes in the location, design, construction, and capacity of the facility's cooling water intake structure that would lead to a greater adverse environmental impact.

(b) The determination of best technology available for minimizing adverse environmental impact required by paragraph (c) of this section may be based on:

(1) A previously conducted section 316(b) demonstration that is shown to be still valid in the current circumstances, as described in paragraph (a)(2) of this section; or

(2) An analysis of best technology available based on the Design and Construction Technology Plan, operational measures, and any restoration measures allowed under § 125.95, that are submitted pursuant to § 125.97. This analysis may include use of risk assessment. [See V.C.5.c below for a discussion of possible additional components of this analysis.]

(c) In determining the best technology available for minimizing adverse environmental impact at an existing facility, the Director shall :

(1) Minimize impingement mortality for fish and shellfish;

(2) Minimize entrainment mortality for entrainable life stages of fish and shellfish;

(3) Take into account non-aquatic environmental impacts, including energy requirements, and impacts on local air quality or water resources; and

(4) Not require any technologies for location, design, construction or capacity or operational and/or restoration measures the costs of which would be significantly greater than the estimated benefits of such technology or measures.

(d) The Director may establish more stringent requirements as best technology available for minimizing adverse environmental impact if the Director determines that your compliance with the requirements of paragraph (c) would not ensure compliance with State or other Federal law.

(e) The owner or operator of an existing facility must comply with any permit requirements imposed by the Director pursuant to § 125.100(b) of this section.

Section 125.95 As an Owner or Operator of an Existing Facility, May I Undertake Restoration Measures To Mitigate Adverse Environmental Impact?

(a) An owner or operator of an existing facility may undertake restoration measures (such as habitat improvement and fish stocking) that will mitigate adverse environmental impact from the facility's cooling water intake structure.

(b) In determining whether adverse environmental impact is minimized, the Director must take into account any voluntary restoration measures.

Section 125.96 Will Alternative State Requirements and Methodologies for Determining the Best Technology Available for Minimizing Adverse Environmental Impact Be Recognized?

Notwithstanding any other provisions of this subpart, if a State demonstrates to the Administrator that it has adopted alternative regulatory requirements that will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under this subpart, the Administrator shall approve such alternative regulatory requirements.

Section 125.97 As an Owner or Operator of an Existing Facility, What Must I Collect and Submit When I Apply for My Reissued NPDES Permit?

(a) As an owner or operator of an existing facility covered by this part, you must submit the information required by § 125.94 and this section to the Director when you apply for a reissued NPDES permit in accordance with 40 CFR 122.21.

(b) Biological Survey. (1) The biological survey must include:

(i) A taxonomic identification and characterization of aquatic biological resources including a determination and description of the target populations of concern (those species of fish and shellfish and all life stages that are most susceptible to impingement and entrainment), and a description of the abundance and temporal/spatial characterization of the target populations based on the collection of a sufficient number of years of data to capture the seasonal and diel variations (e.g., spawning, feeding and water column migration) of all life stages of fish and shellfish found in the vicinity of the cooling water intake structure; and

(ii) An identification of threatened or endangered or otherwise protected Federal, state or tribal species that might be susceptible to impingement and entrainment by the cooling water intake structure(s); and

(iii) A description of additional chemical, water quality, and other anthropogenic stresses on the source water body based on available information.

(2) As provided in § 125.94(a)(2) and (d)(1), biological survey data previously produced to demonstrate compliance with section 316(b) of the CWA may be used in the biological survey if the data are representative of current conditions.

(c) Design and Construction Technology Plan. (1) The Design and Construction Technology Plan must explain the technologies and measures you have selected to minimize adverse environmental impact based on information collected for the biological survey.

(2) In-place technologies implemented previously to comply with section 316(b), and information regarding their effectiveness, may be included in the Design and Construction Technology Plan for an existing facility.

(3) Design and engineering calculations, drawings, maps, and costs estimates supporting the technologies and measures you have selected to minimize adverse environmental impact.

(d) Operational Measures. Operational measures that may be proposed include, but are not limited to, seasonal shutdowns or reductions in flow and continuous operation of screens.

(e) Restoration Measures. If you propose to use restoration measures to minimize adverse environmental impact as allowed in § 125.95, you must provide the following information to the Director for review:

(1) Information and data to show that you have coordinated with the appropriate fish and wildlife management agency;

(2) A plan that provides a list of the measures you have selected and will implement and how you will demonstrate that your restoration measures will maintain the fish and shellfish in the water body to the level required to offset mortality from entrainment and impingement; and

(3) Design and engineering calculations, drawings, maps, and costs estimates

supporting the proposed restoration measures.

Section 125.98 As an Owner or Operator of an Existing Facility, Must I Perform Monitoring?

(a) Following issuance of an NPDES permit, an owner or operator of an existing facility must submit to the Director a program for monitoring that will be adequate to verify that the location, design, construction, and capacity of the cooling water intake structure reflect the best technology available for minimizing adverse environmental impact.

(b) The Director may require modifications of the monitoring program proposed by the owner or operator based on, but not limited to, consideration of the following factors:

(1) Whether or not the facility has been determined to cause adverse environmental impacts under § 125.100;

(2) The types of modifications and restoration that are required in the NPDES permit under § 125.100;

(3) The amount and quality of the data or information available on the water body health and quality of the fishery; and

(4) The stability or flux in the environmental factors that influence biological response in the water body.

(c) The monitoring program for an existing facility that the Director has determined is not causing adverse environmental impact must provide for monitoring sufficient for the Director to make the subsequent 5-year permit decision.

(d) The monitoring program for an existing facility that the Director has determined to cause adverse environmental impact must provide for monitoring sufficient to demonstrate that the modifications to facility operations and intake technology and any restoration measures included in the NPDES permit have been effective for minimizing adverse environmental impact. The monitoring must begin during the first year following implementation of the modifications and restoration measures, and must continue until the Director is satisfied that adverse environmental impact caused by the facility's cooling water intake has been minimized.

Section 125.99 As an Owner or Operator of an Existing Facility, Must I Keep Records and Report?

(a) As an owner or operator of an existing facility, you must keep records of all the data used to complete the permit application and show compliance with the requirements in the permit and any compliance monitoring data for a period of at least three (3) years from the date of permit issuance.

(b) The Director may require that these records be kept for a longer period.

Section 125.100 As the Director, What Must I Do To Comply With the Requirements of This Subpart?

(a) Permit Applications. As the Director, you must review materials submitted by the applicant under 40 CFR 122.21(r)(3) and § 125.94 before each permit renewal or reissuance.

(1) After receiving the permit application from the owner or operator of a new facility, the Director must determine if the applicant is subject to the requirements of this subpart.

(2) For each subsequent permit renewal for a covered facility, the Director must review the application materials and monitoring data to determine whether requirements, or additional requirements, for design and construction technologies or operational measures should be included in the permit, as provided in paragraph (b) of this section.

(b) Permitting Requirements. (1) Section 316(b) requirements are implemented for a facility through an NPDES permit. As the Director, you must:

(i) Determine whether the location, design, construction and capacity of the cooling water intake structure at the existing facility reflects best technology available for minimizing adverse environmental impact, based on the information provided under § 125.94(a) and § 125.97 and any other available, relevant information; and

(ii) If the location, design, construction and capacity of the cooling water intake structure at the existing facility does not reflect best technology available for minimizing adverse environmental impact, specify the requirements and conditions for the location, design, construction, and capacity of the cooling water intake structure(s) that must be included in the permit for minimizing adverse environmental impact. This determination must be based on information provided under § 125.94 and § 125.97 and any other available, relevant information.

(2) (i) Before issuing an NPDES permit containing section 316(b) requirements, the Director must consult with and consider the views and any information provided by interested fish and wildlife management agencies.

(ii) If any fish and wildlife management agency having jurisdiction over the water body used for cooling water withdrawal determines that the cooling water intake structure(s) of an existing facility contributes to unacceptable stress to aquatic species or their habitat, the fish and wildlife management agency may recommend design, construction, or operational changes to the Director that will minimize that stress.

(c) Monitoring Requirements. At a minimum, the Director must ensure that the permit requires the permittee to perform the monitoring required in § 125.98. You may modify the monitoring program when the permit is reissued and during the term of the permit based on changes in the physical or biological conditions in the vicinity of the cooling water intake structure.

The Agency invites comment on the above framework as an appropriate approach for implementing section 316(b) as an alternative to today's proposed requirements. The Agency also invites comments on the following site-specific approaches for implementing section 316(b) on a site-specific basis within the general framework set forth in the Sample Rule.

2. Site-Specific Alternative Based on EPA's 1977 Draft Guidance

Since the Fourth Circuit remanded EPA's section 316(b) regulations in 1977, decisions implementing section 316(b) have been made on a case-by-case, site-specific basis. EPA published guidance addressing section 316(b) implementation in 1977. See Draft Guidance for Evaluating the Adverse Impact of Cooling Water Intake Structures on the Aquatic Environment: Section 316(b) P.L. 92–500 (U.S. EPA, 1977). This guidance describes the studies recommended for evaluating the impact of cooling water intake structures on the aquatic environment, and it establishes a basis for determining the best technology available for minimizing adverse environmental impact. The 1977 Section 316(b) Draft Guidance states, ''The environmental-intake interactions in question are highly site-specific and the decision as to best technology available for intake design, location, construction, and capacity must be made on a case-by-case basis.'' (Section 316(b) Draft Guidance, U.S. EPA, 1977, p. 4). This case-by-case approach also is consistent with the approach described in the 1976 Development Document referenced in the remanded regulation.

The 1977 Section 316(b) Draft Guidance recommends a general process for developing information needed to support section 316(b) decisions and presenting that information to the permitting authority. The process involves the development of a site-specific study of the environmental effects associated with each facility that uses one or more cooling water intake structures, as well as consideration of that study by the permitting authority in determining whether the facility must make any changes to minimize adverse environmental impact. Where adverse environmental impact is occurring and must be minimized by application of best technology available, the 1977 guidance suggests a ''stepwise'' approach that considers screening systems, size, location, capacity, and other factors.

Although the Draft Guidance describes the information to be developed, key factors to be considered, and a process for supporting section 316(b) determinations, it does not establish national standards for best technology available to minimize adverse environmental impact. Rather, the guidance leaves the decisions on the appropriate location, design, capacity, and construction of each facility to the permitting authority. Under this framework, the Director determines whether appropriate studies have been performed and whether a given facility has minimized adverse environmental impact.

3. The Utility Water Act Group (UWAG) Approach

The Utility Water Act Group (UWAG), an association of more than 100 individual electric utility companies and three national trade associations of electric utilities, provided EPA with a recommended site-specific regulatory framework, entitled ''316(b) Decision Principles for Existing Facilities.'' UWAG's recommended approach for decision making under section 316(b) includes the following components:

- A definition of ''Adverse Environmental Impact;
- Use of Representative Indicator Species (RIS) for the assessment of adverse environmental impact;
- Making decisions under section 316(b) that complement, but do not duplicate, other Federal, state, and local regulatory programs;
- Use of de minimis criteria to exempt small cooling water users that pose no appreciable risk of causing adverse environmental impact because only a small amount of cooling water is withdrawn from a water body at a location that does not require special protection;
- Determination of adverse environmental impact or its absence using the facility's choice of three methods, either alone or in combination: (1) Use of previously conducted section 316(b) demonstrations that are still valid in light of current circumstances; (2) use of ecological risk assessment by means of demonstration of no appreciable risk of adverse environmental impact using conservative decision criteria; or assessment of risk using a structured decision making process consistent with EPA's Ecological Risk Assessment Guidelines;
- A ''maximize net benefits'' approach for selecting the best technology available for minimizing adverse environmental impact;
- At the option of the permittee, recognition of voluntary enhancements such as fish stocking or habitat improvements; and
- Providing data or information with NPDES permit renewal applications if new information shows that previously conducted section 316(b) demonstrations are no longer scientifically valid.

These features of UWAG's recommended approach are discussed in the Discussion of Site-Specific Approach Issues and Questions for Comment that follows. UWAG's submission is included in the rulemaking record.

4. Site-Specific Alternative Suggested by PSEG

EPA also received a suggested site-specific regulatory framework from the Public Service Electricity and Gas Company (PSEG). The framework includes three alternative decision-making approaches that would allow permittees and permit writers to utilize prior analyses and data that may be appropriate and helpful, consider previous best technology available determinations that were based on these analyses and data, and take into account the benefits of prior section 316(b) implementing actions. The following summary of the framework suggested by PSEG closely tracks PSEG's submission, which is included in the rulemaking record.

PSEG's submission states that EPA guidance and other precedents have identified certain ecological criteria as relevant factors for considering adverse environmental impact, including entrainment and impingement; reductions of threatened, endangered, or other protected species; damage to critical aquatic organisms, including important elements of the food chain; diminishment of a population's compensatory reserve; losses to populations, including reductions of indigenous species populations, commercial fishery stocks, and recreational fisheries; and stresses to overall communities or ecosystems as evidenced by reductions in diversity or other changes in system structure or function. Many existing section 316(b) decisions are based upon extensive data and analyses pertaining to those factors. Those factors would remain applicable for all existing facilities.

Under PSEG's recommended approach, permitting authorities would have the authority to continue to place emphasis on the factors they believe are most relevant to a given situation. For example, when long-term data are available that meet appropriate data quality standards, and when analyses using appropriate techniques such as models that already have been developed to allow population-level analysis of the potential for adverse environmental impact, permit writers would focus on those adverse environmental impact factors related to population-level impacts. In other situations, especially where permittees do not wish to invest the time and financial resources necessary for biological data gathering and analysis, permitting authorities would have the discretion to focus on other factors by applying different decision-making paths.

5. Discussion of Site-Specific Approach Issues and Associated Questions for Comment

The following sections focus on several key aspects of any site-specific approach, specifically requesting comment on an appropriate definition of adverse environmental impact and associated decision-making criteria.

a. Determination of Adverse Environmental Impact

EPA's 1977 Draft Guidance assumes there will be adverse environmental impact whenever there is entrainment or impingement ''damage'' as a result of a cooling water intake structure, and focuses study on the magnitude of the impact to determine the appropriate technologies needed to minimize the impact. The evaluation criteria for assessing the magnitude of an adverse impact are broad and recommend consideration both in terms of absolute damage (e.g., numbers of fish) and percentages of populations. Although the UWAG and PSEG site-specific approaches contain different definitions of the term ''adverse environmental impact,'' there is general agreement among them that the focus should be on the health of critical aquatic populations or ecosystems, rather than on absolute numbers of fish and other aquatic organisms impinged or entrained by the cooling water intake structure. UWAG offered the most detailed and specific recommendations for making a determination of adverse environmental impact.

(1) EPA's 1977 Definition of Adverse Environmental Impact and Examples of Its Current Use

In EPA's 1977 Draft Guidance, adverse environmental impact is defined as follows:

> Adverse environmental impact means the adverse aquatic environmental impact that occurs whenever there will be entrainment or impingement damage as a result of the operation of a specific cooling water intake structure. The critical question is the magnitude of any adverse impact which should be estimated both in terms of short term and long term impact with respect to (1) absolute damage (number of fish impinged or percentage of larvae entrained on a monthly or yearly basis); (2) percentage damage (percentage of fish or larvae in existing populations which will be impinged or entrained, respectively); (3) absolute and percentage damage to any endangered species; (4) absolute and percentage damage to any critical aquatic organism; (5) absolute and percentage damage to commercially valuable and/or sport species yield; and (6) whether the impact would endanger (jeopardize) the protection and propagation of a balanced population of shellfish and fish

in and on the body of water from which the cooling water is withdrawn (long term impact).

Over the past 25 years, permitting agencies have interpreted this definition in a variety of ways. Some agencies consider the absolute number of organisms subjected to impingement and entrainment by facility cooling water intakes. Permitting authorities that evaluate adverse environmental impact by enumerating losses of numbers of fish individuals find this approach removes much of the uncertainty associated with evaluating effects to species at higher organizational levels such as populations, communities, or ecosystems. Other permitting authorities have focused on evaluating effects on populations in determining whether an adverse environmental impact is occurring.

(2) An Alternative Definition

EPA solicits comment on an alternative definition of ''adverse environmental impact'' as follows:

Adverse environmental impact means one or more of the following: entrainment and impingement of significant numbers of a critical aquatic organisms or percentages of aquatic populations; adverse impacts to threatened, endangered or other protected species, or their designated critical habitat; significant losses to populations, including reductions of indigenous species populations, commercial fishery stocks, and recreational fisheries; and stresses to overall communities or ecosystems as evidenced by reductions in diversity or other changes in system structure or function.

(3) Discussion of UWAG Recommendation for Determining Adverse Environmental Impact

UWAG offers the following definition:

Adverse environmental impact is a reduction in one or more representative indicator species (RIS)[61] that (1) creates an unacceptable risk to a population's ability to sustain itself, to support reasonably anticipated commercial or recreational harvests, or to perform its normal ecological function and (2) is attributable to operation of the cooling water intake structure.

In UWAG's view, defining adverse environmental impact in terms of ''unacceptable risk'' combines science with the judgments society makes about the value of different resources. UWAG argues that this recommended definition is scientifically sound and environmentally protective because it focuses on protecting populations or species that are subject to impingement and entrainment by cooling water intake structures and because it requires that the level of population protection be adequate to ensure protection of the integrity of the ecosystem (community structure and function). However, it notes that this definition does not create a ''bright line'' test based on engineering or science. In addition to use of a valid, previously conducted section 316(b) demonstration, UWAG would allow facilities to use two risk assessment approaches to make a demonstration of ''no adverse environmental impact.'' The first approach involves demonstrating that the facility meets one or more of a set of conservative decision criteria. Under the second approach, a facility would cooperate with regulators and stakeholders to determine the benchmarks for a risk analysis to determine whether there is an appreciable risk of adverse environmental impact.

(a) Protective Decision Criteria for Determining Adverse Environmental Impact

UWAG recommends protective decision criteria that it believes are conservative enough to eliminate the risk of adverse environmental impact for all practical purposes. The recommended physical and biological decision criteria are as follows:

Physical Criteria

Locational Criterion: An existing cooling water intake structure would be considered not to create a risk of adverse environmental impact if it withdraws water from a zone of a water body that does not support aquatic life due to anoxia or other reasons, such as lack of habitat, poor habitat, or water quality conditions.

Design Criterion: An existing cooling water intake structure would not be considered to create a risk of adverse environmental impact if it uses wet closed-cycle cooling or technologies that achieve a level of protection reasonably consistent with that achieved by wet closed-cycle cooling. However, wet closed-cycle cooling or reasonably consistent protection would be considered insufficient if permit writers or natural resource agencies identify special local circumstances such as impacts to threatened, endangered, or otherwise protected species or areas designated for special protection.

Proportion of Flow or Volume Criterion: On fresh water rivers, lakes (other than the Great Lakes), and reservoirs, a cooling water intake structure would be considered not to create a risk of adverse environmental impact if it withdraws no more than 5% of either the source water body or the ''biological zone of influence.'' This criterion would apply only to entrainable life stages. Because it might not be appropriate for many RIS to consider the entire source water body in making this decision, determining the appropriate flow or volume would be of critical importance. UWAG recommends how the ''biological zone of influence'' would be determined for different RIS.

Biological Criteria

Percent Population Loss Criterion: On freshwater rivers, lakes (other than the Great Lakes), and reservoirs, a facility would be considered not to create a risk of adverse environmental impact if the cooling water intake structure causes the combined loss, from entrainment and impingement, of (1) no more than 1% of the population of any harvested RIS and (2) no more than 5% of the population of any non-harvested RIS, with fractional losses summed over life stages for the entire lake, reservoir, or river reach included in the evaluation. UWAG explains that the 1%/5% population loss criteria are based in part on the recognition that these percentages are small relative to the inter-annual fluctuations typical of fish populations and also small relative to the compensatory responses typical of many species.

No Significant Downward Trend: On freshwater rivers, lakes (other than the Great Lakes), and reservoirs, a cooling water intake structure would be considered to create no risk of adverse environmental impact if adequate data collected over a representative period of years, including preoperational data, show no statistically significant downward trend in the population abundance of RIS.

The foregoing criteria would be applied independently. Passing a single criterion could serve as the basis for a successful demonstration of no risk of adverse environmental impact for a facility. If population-based biological criteria are used, they would be applied independently to each RIS species, and each species would need to meet the criteria for the facility to demonstrate no risk of adverse environmental impact.

UWAG states that most of these recommended criteria have limitations on their use, such as being limited to certain water body types or to use with either impingeable or entrainable organisms, but not both. Some facilities, therefore, might use the criteria for only

[61] Drawing on the concept of ''critical aquatic organisms''in EPA's 1977 draft guidance, UWAG would define a representative indicator species (RIS) as a species of commercial or recreational importance, a Federal or state threatened or endangered or specially designated species, an important species for ecological community structure or function, or on the basis of species and life stage vulnerability.

some of their RIS and would address the remainder through the structured adverse environmental impact decision making process discussed below.

(b) The Structured Adverse Environmental Impact Decision Making Process Consistent with EPA Ecological Risk Assessment Guidelines

Under this alternative for determining adverse environmental impact, a facility would work with permit writers, resource managers, other appropriate technical experts, and stakeholders to determine what constitutes an ''unacceptable'' risk of adverse environmental impact in a water body. The process would be based on EPA's 1998 Ecological Risk Assessment Guidelines. The key steps would be as follows:

- Stakeholders would be involved in identifying issues of concern caused by the cooling water intake structure relative to RIS. To focus the effort to identify RIS at risk, previous section 316 studies, the results of demonstrations using the criteria discussed above, information on the design and operation of the facility, water body fisheries management data and plans, and other relevant water body information could be used.
- The permit writer, with input from the facility, would then determine what data collection and assessment studies are necessary to address the RIS of concern. Decisions regarding the scope of the assessment would include identification of RIS; study design, sampling methods, locations, and durations; and analytical methods and/or models to be employed.
- The facility and regulators also would identify explicit measurement endpoints and criteria for assessing adverse environmental impact before any studies are conducted. If the studies demonstrate that predetermined endpoints are not exceeded, the intake structure would be considered not to cause adverse environmental impact. If not, the facility would proceed to identify best technology available alternatives or to identify enhancements that would eliminate adverse environmental impact.

(4) Questions for Comment on the Determination of Adverse Environmental Impact

(a) EPA invites public comment on all aspects of the foregoing approaches to defining adverse environmental impact and for making the preliminary determination on adverse environmental impact, and on which approach should be included if the Agency adopts a site-specific approach for the final rule.

(b) Should the final rule adopt the 1977 Draft Guidance approach to defining adverse environmental impact as any entrainment or impingement damage caused by a cooling water intake structure?

(c) Should the final rule state that any impingement and entrainment is an adverse environmental impact and focus site-specific assessment on whether that impact is minimized by technologies already in place or potential changes in technology? Alternatively, should the final rule define adverse environmental impact in terms of population-level or community-level effects?

(d) Should EPA adopt an approach that makes more explicit use of threshold determinations of whether adverse environmental impact is occurring, If so, should EPA adopt any or all of the conservative decision criteria suggested by UWAG in a final rule?

(e) Should the structured risk assessment decision process that UWAG recommends for determining adverse environmental impact be adopted?

b. Use of Previous Section 316(b) Demonstration Studies

The Sample Site-Specific Rule and the PSEG and UWAG approaches would all give the permittee an opportunity to show that a previously conducted section 316(b) demonstration study was conducted in accordance with accepted methods and guidance, reflects current conditions, and supports decisions regarding the existence of adverse environmental impact and the best technology available for minimizing adverse environmental impact.

(1) Sample Site-Specific Rule Approach for Using Previous Demonstration Studies

Sections 125.94(a)(2) and 125.94(c)(1) of the Sample Rule would permit use of a previously conducted section 316(b) demonstration if the previous study was performed using data collection and analytical methods that conformed to applicable guidance or requirements of the permitting agency or EPA and there have been no significant changes to either the aquatic populations affected by the cooling water intake structure or to the design, construction, or operation of the facility. The burden would be on the owner or operator of the facility to show that these conditions were met.

(2) PSEG Recommendation for Using Previous Demonstration Studies

PSEG would permit use of previous section 316(b) determinations that were based upon analysis deemed to be thorough and based on the appropriate statutory factors and detailed, site-specific data and information. In PSEG's view, such prior decisions need not be subject to a complete re-evaluation in subsequent permit renewal proceedings absent indications that the current cooling water intake structure is allowing adverse environmental impacts to occur or that there have been material changes in any of the key factors the agency relied upon in reaching the prior determination.

Under PSEG's approach, if a cooling water intake structure at an existing facility has previously been determined to employ best technology available based upon a diligent review of a section 316(b) demonstration that was conducted in conformance with the 1977 EPA Guidance, then the existing intake would continue to be determined to employ best technology available for the next permit cycle. The permit renewal application would have to include information sufficient to allow the permitting agency to determine that: (1) There has been no material change in the operation of the facility that would affect entrainment or impingement; (2) any in-place technologies have been properly operated, maintained, and are not allowing losses to occur in excess of the levels the agency considered in its prior determination; (3) any conservation or mitigation measures included in prior permits are in place and are producing the intended benefits; (4) the economics of applying a different technology have not changed; and (5) data and/or analyses show that fish species of concern are being maintained or that any declines in those species are not attributable to the cooling water intake structure.

In the Fact Sheet accompanying the draft permit, the permitting agency would be required specifically to: (1) Make a finding of fact that the prior section 316(b) determination had been based upon a demonstration conducted in conformance with the Agency's 1977 Guidance; and (2) identify the data and information that the permittee provided in support of the reaffirmance of its prior section 316(b) determination. Interested third parties as well as Federal, state and interstate resource protection agencies (*e.g.,* National Marine Fisheries Service and the United States Fish and Wildlife Service) would have an opportunity to comment on the draft section 316(b) determination and to challenge the final determination if they were aggrieved by the agency's final decision.

(3) UWAG Recommendation for Using Previous Demonstration Studies

UWAG also would permit use of a previously conducted section 316 demonstration if the past demonstration reflects current biological conditions in the water body and the current location, design, construction, and capacity of the cooling water intake structure. UWAG argues that many States have developed section 316(b) regulatory programs with significant information-gathering requirements and that this information would provide, for many existing facilities, a sufficient basis for determination of compliance with section 316(b). More specifically, UWAG's approach would consider (1) Whether the RIS used in past determinations are still the appropriate ones; (2) whether the data collection and analytical tools used were adequate in light of current circumstances; (3) whether water body biological conditions at the time of the study reflect current conditions; (4) whether the location, design, construction, or capacity of the cooling water intake structure has been altered since the previous section 316(b) demonstration; and (5) other factors that should be considered if there is reason to believe that the previous demonstrations are inadequate.

(4) Questions for Comment on Using Previous Demonstration Studies

EPA invites public comment on whether a final rule should permit the use of a previous section 316(b) demonstration for determining whether there is adverse environmental impact and the best technology available for minimizing adverse environmental impact. If such a provision is included in the final rule, what criteria or conditions should be included to ensure that the previously conducted demonstration is an adequate basis for section 316(b) decisions?

c. Process for Determining the Best Technology Available for Minimizing Adverse Environmental Impact and the Role of Costs and Benefits

Once it is determined that there is adverse environmental impact attributable to a cooling water intake structure, the facility and permitting agency must decide on a site-specific basis what changes to the location, design, construction, or capacity of the intake or what alternative voluntary measures, must be installed and implemented to minimize the impact.

(1) EPA's Draft 1977 Guidance and Development Document

EPA's draft 1977 draft guidance and development document provide guidance on how to select best technology for minimizing adverse environmental impact but are silent on the role of costs and benefits in determining best technology available for minimizing adverse environmental impact. In 1979, the U.S. Court of Appeals for the First Circuit found that cost is an acceptable consideration in section 316(b) determinations. *Seacoast Anti-Pollution League* v. *Costle,* 597 F.2d 306, 311 (1st Cir. 1979). Over the years, section 316(b) determinations have focused on whether the costs of technologies employed would be wholly disproportionate to the environmental gains to be derived from their use. See e.g., *Seacoast Anti-Pollution League* v. *Costle;* Decision of the General Counsel No. 63 (July 29, 1977); Decision of the General Counsel No. 41 (June 1, 1976).

(2) Sample Site-Specific Rule

The Sample Rule would require that the analysis of best technology available for minimizing adverse environmental impact be based on a biological survey of the part of the water body affected by the cooling water intake structure and a Design and Construction Technology Plan submitted by the permittee, together with any voluntary operational measures or restoration measures that would be implemented at the facility. (*See* Sample Rule §§ 125.94, 125.95 and 125.97.)

Examples of appropriate technologies a facility could propose in the Design and Construction Technology Plan include wedgewire screens, fine mesh screens, fish handling and return systems, barrier nets, aquatic filter barrier systems, an increase in the opening of the cooling water intake structure to reduce velocity and, if warranted by site specific conditions, cooling tower technology. Under the Sample Rule, in-place technologies implemented previously to comply with section 316(b), and information regarding their effectiveness, may be included in the Design and Construction Technology Plan. Operational measures that may be proposed include seasonal shutdowns or reductions in flow and continuous operation of screens.

The Sample Rule also would provide that the Director could exclude any design or construction technology if the costs of such technology would be significantly greater than the estimated benefits of the technology (§ 125.94(f)(2)).

(3) Processes Structured on Incremental Cost-Benefit Assessment

EPA solicits comment on whether an evaluation of the cost-effectiveness (i.e., the incremental cost to benefit ratio) of cooling water intake structure technologies and any operational and/or restoration measures offered by the owner or operator of a facility is an appropriate component of the analysis that would be undertaken in a site-specific approach to determining best technology available for minimizing adverse environmental impact. The UWAG and PSEG recommendations for selecting technologies and other measures based on an evaluation of costs and benefits are discussed below.

(A) UWAG Recommendation for a Process

Under the UWAG approach, if the facility is not able to demonstrate that its cooling water intake structure is not causing adverse environmental impact, it would then select and implement the best technology available. As the first step in choosing best technology available, a facility would identify technology alternatives. It would then estimate the costs and benefits of the alternatives. Relevant benefits typically would include preservation of fish and other aquatic life and economic benefits from recreational and commercial fisheries. Relevant costs typically would include the capital cost of constructing a technology, operation and maintenance costs (including energy penalties), and adverse environmental effects such as evaporative loss, salt drift, visible plumes, noise, or land use. For those facilities for which the technologies will lower the generating output of the facility, the cost of replacement power and the environmental effects of increased air pollution and waste generation from generating the replacement power also would be considered.

Facilities then would calculate the net benefits for each technology and rank them by cost-effectiveness. Those with marginal costs greater than marginal benefits would be rejected. The technology with the greatest net benefit would be the ''best'' technology for the site. UWAG believes use of existing EPA cost-benefit calculation methodologies, such as those used for natural resource damage valuation under CERCLA and under NEPA would be sufficient.

(B) PSEG Recommendation for a Process

PSEG suggests two options for determining best technology available where prior section 316(b) determinations were not based upon

data and analyses sufficient to allow a permittee to seek renewal.

Under the first option, the permittee would provide the permit writer with an assessment that would address: (1) The alternative technologies or other measures that are available for addressing the cooling water intake structure's effects, and (2) the incremental costs and benefits of alternative technologies or other measures relative to the existing cooling water intake structure's operation. The application would include: an engineering report identifying the suite of technologies potentially applicable to the facility; an analysis describing the bases for the selection of technologies applicable to the facility; an assessment of the issues associated with retrofitting the facility to include each of the applicable technologies and their costs; and an assessment of the reasonably likely reductions in entrainment and impingement losses that would be achieved if the facility were to be retrofitted to operate with the technology. The application also would include a cost-benefit analysis that would address and assess: the effects of the reductions in entrainment and impingement losses on life stages of the species for which an economic value can be determined utilizing readily available information, such as market values of commercial species, and recreational costs based on methods determined to be appropriate by the Director and the appropriate fisheries management agencies. The Director would then select the best alternative technology or other measures, the costs of which are not wholly disproportionate to the benefits, unless the proposed technology or other measures clearly would not result in any substantial improvement to the species of concern.

In evaluating the benefits of alternative technologies, and in determining whether there is likely to be a substantial improvement to the species of concern, permittees and permitting authorities would undertake the level of biological analysis that was appropriate to the situation, supported by the applicable data, and commensurate with the resources available for developing and reviewing the necessary studies.

PSEG's second option would be appropriate where the permittee elects to undertake an in-depth analysis of the potential adverse environmental impact attributable to its cooling water intake structure, followed by a site-specific determination of the appropriate best technology available to minimize that adverse environmental impact. This path represents the most resource-intensive and scientifically rigorous approach to implementing section 316(b). Under this option, the permittee would provide the permit writer with a detailed assessment that evaluates the effects of the existing cooling water intake structure's operation, and demonstrates the extent to which the operation may be jeopardizing the sustainability of the populations of the species of concern, or assesses other appropriate factors for determining adverse environmental impact. If the permitting agency concurs in an assessment that no adverse environmental impact is being caused by the existing operation, then the existing cooling water intake structure would be deemed to be best technology available. If the assessment demonstrates that the cooling water intake structure is causing adverse environmental impact or the permitting authority rejects the applicant's determination, then the permit applicant would proceed to evaluate alternative technologies or other measures.

(4) Questions for Comment on a Process for Determining the Best Technology Available for Minimizing Adverse Environmental Impact and the Role of Costs and Benefits

EPA invites public comment on the standard that would be included in any site-specific final rule for determining best technology available for minimizing adverse environmental impact, including the appropriate role for a consideration of costs and benefits. EPA invites comment on whether the long-standing ''wholly disproportionate'' cost-to-benefit test is an appropriate measure of costs and benefits in determining best technology available for minimizing adverse environmental impact. EPA also invites comment on the use of the ''significantly-greater'' cost to benefit test in today's sample site-specific rule. EPA also invites comment on whether a test based on the concept that benefits should justify costs would be more appropriate, as is used in various other legal and regulatory contexts (see, e.g., Safe Drinking Water Act Section 1412(b)(6)(A) and Executive Order 12866, Section 1(b)(6)). EPA also invites public comment on whether variances are appropriate and, if so, what test or tests should be used for granting a variance.

d. Use of Voluntary Restoration Measures or Enhancements

The Sample Site-Specific Rule and the UWAG and PSEG approaches would all permit the owner or operator of an existing facility to voluntarily undertake restoration (or enhancement) measures in combination with, or in lieu of, technologies to minimize adverse environmental impact.

Section 125.95 of the Sample Rule provides that an owner or operator of an existing facility may undertake restoration measures, and the Director would be required to take into account the expected benefits of those measures to fish and shellfish in determining whether the facility has minimized adverse environmental impact. The permittee would include in its section 316(b) plan a list of the measures it proposed to implement and the methods for evaluating the effectiveness of the restoration measures.

UWAG gives the following as examples of potential enhancements: (1) Stocking fish to replace impaired RIS; (2) creating or restoring spawning or nursery habitat for RIS; (3) raising the dissolved oxygen in anoxic areas to expand the carrying capacity of the RIS in a water body; and (4) removing obstructions to migratory species. UWAG would require the objectives of particular enhancements to be established in advance, and appropriate monitoring and/or reporting obligations would be included in the facility's permit to confirm that enhancement objectives have been achieved. UWAG argues that using enhancements might lower compliance costs, might possibly be of more benefit to RIS than technologies, and might provide a longer-term benefit to RIS.

EPA invites public comment on whether a final site-specific rule should permit voluntary restoration or enhancement measures to be taken into account in determining compliance with section 316(b) and, if so, what criteria should be included for evaluating the effectiveness of such measures.

e. Consultation With Fish and Wildlife Management Agencies

Because the central focus of any site-specific approach is the effect of the cooling water intake structure on the aquatic populations or ecosystems, it is important that fish and wildlife management agencies with jurisdiction over the affected water body have an opportunity to provide information and views to the Director before section 316(b) determinations are made. The Sample Rule would provide for this in § 125.100(b)(2). The UWAG recommendations also recognize the important role of stakeholders, including fish and wildlife management

agencies, in a structured site-specific alternative (UWAG, pp. 8–9).

EPA invites public comment on the appropriate role of fish and wildlife management agencies if the final rule implements a site-specific approach.

6. Implementation Burden Under Any Site-Specific Approach

Although well-implemented, site-specific approaches for determining best technology available to minimize adverse environmental impact can ensure that technologies are carefully tailored to site-specific environmental needs, EPA also recognizes that site-specific regulatory approaches can lead to difficult implementation challenges for State and Federal permitting agencies. EPA invites comment on the following discussion of the burdens associated with implementing section 316(b) on a site-specific basis, the competing demands on permitting agencies, and resources available to permitting agencies. EPA invites comment on ways to employ a site-specific approach while minimizing implementation burdens on permitting agencies.

The site-specific decision-making process requires each regulated facility to develop, submit, and refine studies that characterize or estimate potential adverse environmental impact. Although some approaches allow facilities to use existing studies in renewal applications, States must still conduct evaluations to ascertain the continued validity of these studies and assess existing conditions in the water body. Such studies can be resource intensive and require the support of a multidisciplinary team. A Director's determinations as to whether the appropriate studies have been performed and whether a given facility has minimized adverse environmental impact have often been subject to challenges that can take significant periods of time to resolve and can impose significant resource demands on permitting agencies, the public, and the permit applicant.

Some examples of the workload that can be required for permitting agencies to implement a site-specific approach follow. Since, 1999, EPA New England has devoted 0.6 full-time employees a year, including a permit writer, a biologist and attorney, to reissuance of a permit for the Pilgrim Nuclear Power Station (PNPS), [62] At the Seabrook Nuclear Power Station, EPA Region I has invested about one full-time employee per year over four years to determine the nature and degree of adverse environmental impacts and the appropriate permit conditions the permit renewal. The State of New York Department of Environmental Conservation's Division of Fish, Wildlife and Marine Resources spent $169,587 in 1997 and $167,564 in 1998 to review cooling systems at steam-motivated electricity generating facilities. The Division estimated a total effort expenditure of approximately 2.2 full-time employees in 1997 and 1998 and 4.3 full-time employees for 2001. These figures do not include the level of effort associated with review time spent by the Division of Environmental Permits, the Division of Water, or the Division of Legal Affairs. (See Docket W–00–03.) Because of workload concerns, some States have requested that EPA adopt regulations that set clear requirements specifying standards of performance, monitoring and compliance. [63]

These levels of burden are of particular concern to the Agency and to some State permitting agencies given the heavy permit workloads, pressure on resources available to permitting agencies, and the complexity of finalizing permits required to address 316(b) requirements. Recent data indicate that most States are struggling to meet their major permits issuance targets set for decreasing the permit backlog. For example, these data indicate that for major facilities engaged in the generation, transmission and/or distribution of electric energy for sale (SIC 4911), the permit backlog is 30.3 percent [64], that is, higher than other categories of major permits (data indicate a backlog of 23.1 percent for major permits in general), [65] In 1998, the EPA Office of Inspector General identified the backlog in issuance of National Pollutant Discharge Elimination System permits as a material weakness pursuant to the Federal Managers' Financial Integrity Act (FMFIA). As part of its Fiscal Year 2001 FMFIA Report, EPA recommended that the permit backlog be identified as a continuing material weaknesses in its programs. EPA's Office of Water is examining strategies to correct this weakness. [66] The evidence does not, however, establish that section 316(b) determinations are a factor in the backlog in issuance of National Pollutant Discharge Elimination System permits.

EPA is also aware that resources available to State permitting agencies are limited. In a recent survey conducted by ECOS (Environmental Council of States) [67] on States environmental agency budget reductions during the current fiscal year and for the upcoming fiscal year, 42 States reported that their agency was asked to cut or reduce their budgets for the current fiscal year. [68] For the following fiscal year, 23 of the responding States expected additional budget cuts. EPA is aware that at least one State, the State of Maryland, has used State law to impose a small surcharge on electric bills in the State to support a State research program, and that funds from that program are used for section 316(b) studies.

EPA seeks additional information and data on the resources necessary and available for the review of section 316(b) determinations in existing facilities' permit renewals.

EPA invites comment on whether the resource requirements of the site-specific approach also have served as a disincentive to a comprehensive revisiting of section 316(b) permit conditions during each renewal (typically every 5 years), despite advances in technologies for reducing impingement mortality and entrainment.

EPA seeks comment on the above discussion of the resource implications of implementing the requirements of section 316(b) on a case-by-case basis. EPA invites comment on how the workload of a site-specific approach could be streamlined so as to provide for the benefits of a site-specific approach (e.g., application of technologies specifically tailored to site-specific conditions) while recognizing the resource constraints faced by so many permitting agencies.

[62] Information provided by EPA Region I. Region I serves as permitting authority for the non-delegated states of Massachusetts and New Hampshire.

[63] See communications from Mr. William McCracken, Chief of the Permits Section, Surface Water Quality Division, Michigan Department of Environmental Quality, January 24, 2002.

[64] Backlog counts for these facilities are based on permits expired as of November 21, 2001 or if the permit expired field in the database is blank.

[65] NPDES Permit Backlog Trend Report: October 31, 2001, issued on November 30, 2001 by EPA's Water Permits Division, US EPA, Washington, DC.

[66] Decision Memorandum from the Deputy Chief Financial Officer of EPA to the Administrator, December 18, 2001.

[67] The Environmental Council Of States is a national non-profit association of state and territorial environmental commissioners. See website: *www.sso.org/ecos/*. *When the Axe Falls: How State Environmental Agencies Deal with Budget Cuts* by R. Steven Brown, Deputy Executive Director and Chief Operating Officer of ECOS. (See Docket for today's proposed rule.)

[68] This state budget outlook is supported by a report published on October 31, 2001, by the National Conference of State Legislatures (NCSL).

D. Why EPA Is Not Considering Dry Cooling Anywhere?

EPA conducted a full analysis for the new facility rule (Phase I) and rejected dry cooling as an economically practicable option on a national basis. Dry cooling systems use either a natural or a mechanical air draft to transfer heat from condenser tubes to air. In conventional closed-cycle recirculating wet cooling towers, cooling water that has been used to cool the condensers is pumped to the top of a recirculating cooling tower; as the heated water falls, it cools through an evaporative process and warm, moist air rises out of the tower, often creating a vapor plume. Hybrid wet-dry cooling towers employ both a wet section and dry section and reduce or eliminate the visible plumes associated with wet cooling towers.

For the new facility rule, EPA evaluated zero or nearly zero intake flow regulatory alternatives, based on the use of dry cooling systems. EPA determined that the annual compliance cost to industry for this option would be at least $490 million. EPA based the costs on 121 facilities having to install dry cooling. The cost for Phase II existing facilities would be significantly higher. EPA estimates that 539 Phase II existing facilities would be subject to this proposal. The cost would be significantly higher because existing facilities have less flexibility, thus incurring higher compliance costs (capital and operating) than new facilities. For example, existing facilities might need to upgrade or modify existing turbines, condensers, and/or cooling water conduit systems, which typically imposes greater costs than use of the same technology at a new facility. In addition, retrofitting a dry cooling tower at an existing facility would require shutdown periods during which the facility would lose both production and revenues, and decrease the thermal efficiency of an electric generating facility.

The disparity in costs and operating efficiency of dry cooling systems compared with wet cooling systems is considerable when viewed on a nationwide or regional basis. For example, under a uniform national requirement based on dry cooling, facilities in the southern regions of the U.S. would be at an unfair competitive disadvantage compared to those in cooler northern climates. Even under a regional subcategorization strategy for facilities in cool climatic regions of the U.S., adoption of a minimum requirement based on dry cooling could impose unfair competitive restrictions for steam electric power generating facilities. This relates primarily to the elevated capital and operating costs associated with dry cooling. Adoption of requirements based on dry cooling for a subcategory of facilities under a particular capacity would pose similar competitive disadvantages for those facilities.

EPA does not consider dry cooling a reasonable option for a national requirement, nor for subcategorization under this proposal, because the technology of dry cooling carries costs that are sufficient to cause significant closures for Phase II existing facilities. Dry cooling technology would also have a significant detrimental effect on electricity production by reducing energy efficiency of steam turbines. Unlike a new facility that can use direct dry cooling, an existing facility that retrofits for dry cooling would most likely use indirect dry cooling which is much less efficient than direct dry cooling. In contrast to direct dry cooling, indirect dry cooling does not operate as an air-cooled condenser. In other words, the steam is not condensed within the structure of the dry cooling tower, but instead indirectly through an indirect heat exchanger. Therefore, the indirect dry cooling system would need to overcome additional heat resistance in the shell of the condenser compared to the direct dry cooling system. Ultimately, the inefficiency penalties of indirect dry cooling systems will exceed those of direct dry cooling systems in all cases.

Although the dry cooling option is extremely effective at reducing impingement and entrainment and would yield annual benefits of $138.2 million for impingement reductions and $1.33 billion for entrainment reductions, it does so at a cost that would be unacceptable. EPA recognizes that dry cooling technology uses extremely low-level or no cooling water intake, thereby reducing impingement and entrainment of organisms to dramatically low levels. However, EPA interprets the use of the word ''minimize'' in section 316(b) in a manner that allows EPA the discretion to consider technologies that very effectively reduce, but do not completely eliminate, impingement and entrainment and therefore meet the requirements of section 316(b). Although EPA has rejected dry cooling technology as a national minimum requirement, EPA does not intend to restrict the use of dry cooling or to dispute that dry cooling may be the appropriate cooling technology for some facilities. For example, facilities that are repowering and replacing the entire infrastructure of the facility may find that dry cooling is an acceptable technology in some cases. A State may choose to use its own authorities to require dry cooling in areas where the State finds its fishery resources need additional protection above the levels provided by these technology-based minimum standards.

E. What Is the Role of Restoration and Trading?

1. Restoration Measures

Restoration measures, as used in the context of section 316(b) determinations, include practices that seek to conserve fish or aquatic organisms, compensate for lost fish or aquatic organisms, or increase or enhance available aquatic habitat used by any life stages of entrained or impinged species. Such measures have been employed in some cases in the past as one of several means of fulfilling the requirements imposed by section 316(b). Examples of restoration measures that have been included as conditions of permits include creating, enhancing, or restoring wetlands; developing or operating fish hatcheries or fish stocking programs; removing impediments to fish migration; and other projects designed to replace fish or restore habitat valuable to aquatic organisms. Restoration measures have been used, however, on an inconsistent and somewhat limited basis in the context of the 316(b) program. Their role under section 316(b) has never been explicitly addressed in EPA regulations or guidance until EPA promulgated the final section 316(b) regulations for new facilities, which is discussed below in more detail. Prior to the section 316(b) new facility regulations, restoration projects were undertaken as part of section 316(b) determinations at Phase II existing facilities and in permitting actions where the cost of the proposed technology was considered to be wholly disproportionate to the demonstrated environmental benefits that could be achieved. Often such cases involved situations where retrofitting with a technology such as cooling towers was under consideration. In addition to the role for restoration outlined as part of the today's proposed rule (see Section VI.A. above), EPA invites comment on the following alternatives for restoration as part of regulations for Phase II existing facilities.

a. The Role of Restoration in the Section 316(b) New Facility Regulations

The final rule for new facilities includes restoration measures as part of Track II. EPA did not include restoration in Track I because it was

intended to be expeditious and provide certainty for the regulated community and a streamlined review process for the permitting authority. To do this for new facilities, EPA defined the best technology available for minimizing adverse environmental impact in terms of reduction of impingement and entrainment, a relatively straightforward metric for environmental performance of cooling water intake structures. In contrast, restoration measures in general require complex and lengthy planning, implementation, and evaluation of the effects of the measures on the populations of aquatic organisms or the ecosystem as a whole.

EPA included restoration measures in Track II to the extent that the Director determines that the measures taken will maintain the fish and shellfish in the waterbody in a manner that represents performance comparable to that achieved in Track I. Applicants in Track II need not undertake restoration measures, but they may choose to undertake such measures. Thus, to the extent that such measures achieve performance comparable to that achieved in Track I, it is within EPA's authority to authorize the use of such measures in the place of Track I requirements. This is similar to the compliance alternative approach EPA took in the effluent guidelines program for Pesticide Chemicals: Formulating, Packaging and Repackaging. There EPA established a numeric limitation but also a set of best management practices that would accomplish the same numeric limitations. See 61 FR 57518, 57521 (Nov. 6, 1997). EPA believed that section 316(b) of the Clean Water Act provided EPA with sufficient authority to allow the use of voluntary restoration measures in lieu of the specific requirements of Track I where the performance is substantially similar under the principles of *Chevron USA* v. *NRDC,* 467 U.S. 837, 844–45 (1984). In section 316(b) of the Clean Water Act, Congress is silent concerning the role of restoration technologies both in the statute and in the legislative history, either by explicitly authorizing or explicitly precluding their use. In the context of the new facility rule EPA also believes that appropriate restoration measures or conservation measures that are undertaken on a voluntary basis by a new facility to meet the requirements of that rule fall within EPA's authority to regulate the ''design'' of cooling water intake structures. *Bailey* v. *U.S.,* 516 U.S. 137 (1995) (In determining the meaning of words used in a statute, the court considers not only the bare meaning of the word, but also its placement and purpose in the statutory scheme.)

In the new facility rule EPA recognized that restoration measures have been used at existing facilities implementing section 316(b) on a case-by-case, best professional judgment basis as an innovative tool or as a tool to conserve fish or aquatic organisms, compensate for the fish or aquatic organisms killed, or enhance the aquatic habitat harmed or destroyed by the operation of cooling water intake structures. Under Track II, that flexibility will continue to be available to new facilities to the extent that they can demonstrate performance comparable to that achieved in Track I. For example, if a new facility that chooses Track II is on an impaired waterbody, that facility may choose to demonstrate that velocity controls in concert with measures to improve the productivity of the waterbody will result in performance comparable to that achieved in Track I. The additional measures may include such things as reclamation of abandoned mine lands to eliminate or reduce acid mine drainage along a stretch of the waterbody, establishment of riparian buffers or other barriers to reduce runoff of solids and nutrients from agricultural or silvicultural lands, removal of barriers to fish migration, or creation of new habitats to serve as spawning or nursery areas. Another example might be a facility that chooses to demonstrate that flow reductions and less protective velocity controls, in concert with a fish hatchery to restock fish being impinged and entrained with fish that perform a similar function in the community structure, will result in performance comparable to that achieved in Track I.

Finally, in the new facility rule, EPA recognized that it may not always be possible to establish quantitatively that the reduction in impact on fish and shellfish is comparable using the types of measures discussed above as would be achieved in Track I, due to data and modeling limitations. Despite such limitations, EPA stated that there may be situations where a qualitative demonstration of comparable performance could reasonably assure substantially similar performance. For that reason, EPA provided, in § 125.86 of the new facility rule, that the Track II Comprehensive Demonstration Study should show that either: (1) The Track II technologies would result in reduction in both impingement mortality and entrainment of all life stages of fish and shellfish of 90 percent or greater of the reduction that would be achieved through Track I (quantitative demonstration) or, (2) if consideration of impacts other than impingement mortality and entrainment is included, the Track II technologies would maintain fish and shellfish in the waterbody at a substantially similar level to that which would be achieved under Track I (quantitative or qualitative demonstration).

b. Restoration Approaches Being Considered for the Existing Facilities Rule

In the existing facilities rule, EPA is proposing to allow restoration as one means of satisfying the compliance requirements for any one of the three alternatives in § 125.94(a). The demonstration a facility would make to show that the restoration measures provide comparable performance to design and construction technologies and/or operational measures would be similar to the demonstration that a facility would make under Track II in the new facility rule. EPA is also inviting comment on other restoration approaches it is considering. These include discretionary and mandatory regulatory approaches involving restoration measures as well as restoration banking, which are discussed below.

(1) Discretionary Restoration Approaches

An approach being considered by EPA would provide the Director with the discretion to specify appropriate restoration measures under section 316(b), but would not require that he or she do so. This approach is consistent with several precedents in which the permitting authority allowed the use of restoration measures when the cost to retrofit an existing facility's cooling water intake structures with control technologies was determined to be wholly disproportionate to the benefits the control technology would provide (e.g., John Sevier, Crystal River, Chalk Point, Salem). [69]

(2) Mandatory Restoration Approach

Under this approach, the use of restoration measures would be required as an element of a section 316(b) determination in all cases or in some defined set of cases (e.g., for intake structures located on oceans, estuaries,

[69] *In re* Tennessee Valley Authority John Sevier Steam Plant, NPDES Permit No. TN0005436 (1986); *In re* Florida Power Corp. Crystal River Power Plant Units 1, 2, & 3, NPDES Permit FL0000159 (1988); Chalk Point, MDE, State of Maryland, Discharge Permit, Potomac Electric Power Co., State Discharge Permit No. 81–DP–0627B, NPDES Permit No. MD0002658B (1987, modified 1991); Draft NJDEP Permit Renewal Including Section 316(a) Variance Determination and Section 316(b) BTA Decision: NJDEP Permit No. NJ0005622 (1993).

or tidal rivers). Restoration would be required to compensate for organisms that were not protected following facility installation of control technologies. Phase II existing facilities with cooling water intake structures would be required to implement some form of restoration measures in addition to implementing direct control technologies to minimize adverse environmental impact. Under this approach, an existing facility would submit a plan to restore fish and shellfish to the extent necessary for offsetting fish and shellfish entrainment and impingement losses estimated to continue to occur after any required control technology is installed. This restoration plan would be reviewed and approved by the Director and incorporated in the permit. This is similar to the mitigation sequence used under CWA section 404, wherein environmental impacts are avoided and minimized prior to consideration of compensatory mitigation measures although in section 404, not all projects require mitigation. The development of restoration measures applicable to a cooling water intake structure would focus on the unique situation faced by each facility and would allow for review and comment by the permitting agency and the public.

(3) Restoration Banking

Restoration plans could potentially use a banking mechanism similar to those used in the CWA section 404 program, that would allow the permittee to meet requirements by purchasing restoration credits from an approved bank. For example, should wetlands restoration be an appropriate mechanism for offsetting the adverse impact caused by a cooling water intake structure, the permittee could purchase credits from an existing wetlands mitigation bank established in accordance with the *Federal Guidance for the Establishment, Use and Operation of Mitigation Banks* (50 FR 58605; November 28, 1995). As in the CWA section 404 program, public or private entities could establish and operate the banks providing mitigation for impacts under 316(b). EPA views the use of restoration banking for the purposes of this proposed rule as one way to facilitate compliance and reduce the burden on the permit applicant, while at the same time potentially enhancing the ecological effectiveness of the required restoration activities.

2. Entrainment Trading

Under § 125.90(d) of today's proposed rule, States may adopt alternative regulatory requirements that will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment specified in the proposed § 125.94. EPA is considering an approach for implementing section 316(b) that would allow specific Phase II existing facilities to trade entrainment reductions to achieve an overall standard of performance for entrainment reduction in a watershed at a lower cost through a voluntary State or authorized Tribal section 316(b) trading program. EPA believes such an approach might be appropriate in light of section 316(b)'s objective of minimizing adverse environmental impact. The goal of the trading approach is to provide an incentive for some Phase II existing facilities to implement more protective technologies than required by today's proposed rule, resulting in credits that can be traded with other facilities that may not find the most protective technologies economically practicable.

EPA acknowledges that the trading framework that EPA is contemplating under section 316(b) differs from previous trading strategies implemented by EPA because it involves trading living resources rather than pollutant loads. Because this is a novel approach to trading, it raises many questions. For example, how would the program address concerns that some species have greater economic value than others, or the counter-argument that some species may not be economically valuable but nonetheless have high ecological value? What is an appropriate spatial scale under which trading can occur to ensure protection of water quality and aquatic organisms? The following section addresses these questions and others and seeks comment on the appropriate elements of a trading approach under section 316(b) that would conserve and protect water quality and aquatic resources.

a. Entrainment Reduction vs. Impingement Reduction as a Basis for Trading

Entrainment and impingement are the main causes of adverse environmental impact from cooling water intake withdrawals. However, impingement reduction technologies are relatively inexpensive compared to entrainment reduction (see Chapter 2 of the Technical Development Document for the New Facility Rule, EPA–821–R–01–036, November 2001). Impingement reduction measures include decreasing intake velocities and installation of traveling screens with fish baskets and fish return systems. The implementation of a section 316(b) trading program for impingement may not justify the cost of monitoring susceptible species and administrating the program. EPA believes that a trading program that focuses on entrainment is more viable. However, EPA requests comment on whether to extend trading to include impingement of aquatic organisms.

In contrast to impingement controls, entrainment reduction technologies can be relatively expensive. Section 316(b) trading would enable smaller facilities that cannot afford to install more costly technologies to reduce their costs by trading with other Phase II existing facilities that face relatively lower costs of entrainment reduction. For the purpose of a section 316(b) trading program, an entrainment reduction performance standard for a watershed would be set by the authorized State or Tribe within the range of 60 to 90 percent for all life stages of entrained fish and shellfish. The performance standard would be set to reflect site-specific facility and ecological characteristics. All facilities located in the watershed would need to reach the performance standard through the installation of technologies to reduce entrainment (or, potentially, restoration measures to compensate for entrainment losses at the facility). A facility that can afford to implement technologies to reduce entrainment above the performance standard would have entrainment reduction credits to sell to other facilities that cannot afford or choose not to meet the performance standard by technology alone. EPA notes that in § 125.94(c) of today's proposed rule, Phase II existing facilities may request a site-specific determination of best technology available if the costs of compliance with the applicable performance standards are significantly greater than the costs EPA considered when establishing the performance standards or significantly greater than site-specific benefits. If a section 316(b) trading program was available, these facilities could potentially have a lower cost option for meeting the applicable performance standard for their respective waterbodies by purchasing credits from another facility that implements more protective technologies. EPA seeks comment on whether a section 316(b) trading program would generally afford greater watershed protection by increasing the number of facilities meeting the performance standard and whether consideration of credit purchases should be mandatory prior to the Director setting alternative requirements.

b. What Should Be the Spatial Scale for Trading?

EPA is considering limiting the zone within which trading may occur among Phase II existing facilities subject to section 316(b). Due to site-specific differences in species and life stages of entrained organisms, the scale of the trading zone would be set to minimize these differences as much as possible. Trading would be most protective if it occurred among Phase II existing facilities that generally entrain the same species and life stages at relatively similar densities per unit flow through the facility. Thus, EPA would prefer that trades be conducted by Phase II existing facilities sited in waterbodies that share similar ecological characteristics, regardless of the relative geographic proximity of the facilities to each other. EPA is also considering limiting trades to specific waterbodies, specific watersheds, or general waterbody types (tidal rivers, estuaries, oceans). Preliminary EPA analyses indicate that some of these options may increase the number of Phase II existing facilities eligible to trade and thus may produce sufficient opportunities to reduce the cost of meeting the performance standard, allowing for a broader range of trades.

(1) Specific Waterbody

If section 316(b) trades for Phase II existing facilities were limited on an individual waterbody basis, EPA estimates that there would be a total of 132 Phase II existing facilities in 40 specific waterbodies eligible to trade. In order to be eligible to trade, each facility involved in the trade would need to be located on the same waterbody and required to meet the performance standard of the waterbody. Further limits would have to be placed on trading in very large waterbodies (e.g., Mississippi River, Pacific Ocean, Atlantic Ocean) to ensure that the facilities are within similar climatic zones, and thus entrain similar species. Allowing trading among Phase II existing facilities and those that may be subject to Phase III regulations for cooling water intake structures could increase opportunities for facilities to trade intake control requirements.

(2) Specific Watershed

By limiting trading on a watershed basis, the problems posed by very large waterbodies are eliminated; however, the zone may include different types of waterbodies that may harbor different species of organisms. Hydrologic Unit Codes (HUC) were developed by the United States Geological Survey (USGS) to divide the conterminous United States by drainage basins. As the number of digits in the code increases, the drainage basin delineation becomes more refined. Eight-digit codes represent the fourth level of classification in the hierarchy of hydrologic units, where each code represents all or part of a surface drainage basin. There are 2,150 eight-digit HUCs in the conterminous United States. In order to be eligible to trade under this approach, all facilities involved in the trade would be located in the same eight-digit HUC. EPA invites comment on these and other potential trading zones for section 316(b) trading for Phase II existing facilities.

(3) General Waterbody Type

EPA is also considering a site-specific approach that would require facilities to study and provide data on the numbers, life stages, and species of organisms entrained in order to be properly matched for trading with another Phase II existing facility on the same waterbody type (e.g., tidal river, estuary, ocean, Great Lake) which entrains the similar numbers, life stages, and species of organisms. EPA seeks comment on this approach which allows trades to occur among facilities on the same general waterbody type, but not necessarily the same waterbody.

c. What Should Be the Unit (Credit) for Trading?

A trading option requires a definition of the trading commodity and the unit, or credit, that would be traded. In contrast to pollutant-specific trading, which is normally based on the pounds of a single pollutant released into the environment or reduced from a source, trading of entrained species can involve a variety of fish and shellfish species and their life stages, and may be highly variable among facilities. Therefore, it could be difficult to define a trading unit and substantial oversight would be needed under any of these trading units to determine if the trade complied with the underlying performance standards from year to year, or another appropriate period. In developing this proposal, EPA considered a variety of potential trading credits and invites comment on these and other potential trading units. EPA is specifically interested in comments on whether entrainment trading should be species-specific, have weighted values for different species, or simply be net biomass entrainment expressed in mass. EPA is also considering use of restoration measures in conjunction with any of the trading units discussed below. Please see section VI.E.1 of the preamble to today's proposed rule for additional information and discussion on restoration.

(1) Species Density

Trading based on the density of entrained species life stages (the number of eggs, larvae, juvenile and small fish for all fish and shellfish species entrained per unit of flow through a facility) is EPA's preferred approach because it would account for differences among facilities in the number of organisms entrained per unit flow and would, in a sense, standardize entrainment losses with intake flow withdrawals. Under this approach, trading would be restricted to those Phase II existing facilities sited at waterbodies with similar ecological zones, such as the transitional zone between saline and freshwater portions of an estuary. Because many aquatic species tend to inhabit specific zones within a waterbody during their life histories, restricting trade to individual zones would ensure that similar species at similar densities are traded. In order for a trade to occur, the facilities involved must historically entrain similar species. Under this approach the comparable worth of the unit of flow would be dependent upon the density of the species entrained (see example below). Thus, if a facility entrains twice as many organisms as another facility, its flow would be worth comparably twice as much. This approach would ensure that all species entrained are protected, but may limit the number of trades possible. It is possible that use of this approach may lead to over-protection or under-protection of some species since the average density of all fish and shellfish would be used rather than the density for individual species.

(2) Species Counts

Another option for a trading unit is entrained organism counts by species, life stage, and size. These types of measurements are routinely collected as part of historical facility demonstration studies. This option would be protective of all life stages independently, but would require significant expenditures of time and resources. Entrained organisms would need to be identified to fairly precise taxonomic levels and organized by life stage and size classes. This option would best address the question of different economic values versus ecological values of species since it would allow different monetary values to be set for each species. Although this option would allow for comparable species-by-species trading among Phase II existing facilities, EPA is concerned that it may also result in

complex trading transactions. Also, the number of each species entrained by a facility can vary substantially each year for many reasons, including facility outages and extreme weather events. Substantial oversight might be needed to determine if the trade achieved the underlying technology-based performance standard from year to year, or other appropriate period, for compliance.

(3) Biomass

Another potential measure that can be used for trading is the biomass of entrained organisms. Biomass is defined as the weight of living material (plant and animal) and can be measured in pounds or kilograms. Measuring the biomass of organisms entrained by facility intakes would be relatively fast and easy to quantify. However, the pound/kilogram as a unit of measurement does not take into account species variations found at different facility locations and within multiple waterbody types. Thus, as a result of adopting this unit of measurement, it would be impossible to distinguish between different species, or even different kingdoms. Because the weights of all entrained organisms are combined into a total mass, biomass measurement may not be equally protective of all species and life stages, and larger, heavier organisms may bias final results. Over time, biomass trading may upset the natural equilibrium of certain species and/or impact the functionality of the entire ecosystem should some species be entrained more frequently than others. However, EPA invites comment on whether biomass trading might be limited to certain zones of certain waterbodies or waterbody types, in a manner similar to that described above for species-density trading to address some of these concerns.

d. Example of Section 316(b) Trading Under EPA's Preferred Alternative (Species Density)

Facility A is an existing 750 MGD facility located in an estuary. Facility B is an existing 350 MGD facility located at the mouth of the same estuary. The performance standard for this estuary has been set by the authorized State or Tribe at a 75 percent reduction of entrainment for all facilities. Facility A determines that it can install a cooling tower at relatively low cost. The installation of the cooling tower reduces the facility's flow by 95 percent. Using the standard assumption that entrained organisms behave like passive water molecules, this flow reduction will, on a long-term average basis, reduce entrainment by 95 percent at Facility A. In effect, Facility A has reduced its entrainment by 20 percent more than it needs to in order to provide its share toward meeting the performance standard of 75 percent for the estuary. Because of its small size, Facility B determines that it is not cost effective to reduce entrainment by 75 percent. Instead, Facility B chooses to install fine mesh wedgewire screens, which reduce its entrainment by 60 percent. Facility B could possibly make up for the remaining 15 percent of its share to meet the estuary's performance standard by trading.

Based on historical monitoring data, Facility A entrains alewife, Atlantic croaker, Atlantic menhaden, bay anchovy, blueback herring, silversides, spot, striped bass, weakfish and white perch. The average number, across many years of data, of all life stages of all species entrained is 417,210 fish per day. Per gallon of water used, it entrains 0.000556 fish (417,210/750,000,000).

Facility B also entrains alewife, Atlantic croaker, Atlantic menhaden, bay anchovy, blueback herring, silversides, spot, striped bass, weakfish, and white perch as determined by historical monitoring data. Facility B historically entrains the same species of fish as Facility A as they withdraw water from the same waterbody. The average number, across many years of data, of all life stages of all species entrained is 322,620 fish per day. Per gallon of water used, it entrains 0.000922 fish (322,620/350,000,000). Based on density, Facility B entrains 1.658 times as many fish as Facility A per unit flow (0.000922/0.000556). This is the average density ratio of organisms entrained.

Facility B needs to make up for 15 percent of its share toward the estuary's performance standard for entrainment reduction. Again, using the standard assumption that entrained organisms behave like passive water molecules, the simplified 1:1 relationship between flow and entrainment from Facility A is also used for Facility B in this example. Therefore, Facility B needs to compensate for the environmental effects caused by 15 percent of its flow, or 52,500,000 gallons of resource use (0.15 * 350,000,000). Since Facility A has reduced entrainment 20 percent more than required, it has 150,000,000 gallons of resource use available for trading (0.20 * 750,000,000). A trade could be made between these two facilities because they are located on the same waterbody, they both must install entrainment controls, and the same species are present in their respective entrainment numbers. The average density ratio of organisms entrained multiplied by the gallons of resource use needed by Facility B would equal the gallons of resource use that Facility B would need to buy from Facility A in order to make up for the difference in the density of the species the two facilities entrain. Based on the discrepancy in the average density of organisms entrained as calculated above, in order to trade with Facility A, Facility B must purchase entrainment credits for 1.658 times as many gallons as it needs. Thus, Facility B needs to purchase 87,045,000 gallons of resource use from Facility A (1.658 * 52,500,000).

e. Trading Option for New Facilities

EPA is considering extending a section 316(b) trading program beyond the Phase II rule for existing electric generation facilities. Those facilities that are covered by the Phase I rule (new facilities) might be allowed to participate in a section 316(b) trading program. New facilities could implement technological controls beyond what is required under the Phase I rule. In general, if more facilities were allowed to trade, there would be an increased degree of competitiveness in trading and it would become easier to meet the performance standard because entrainment reductions would be shared by multiple facilities. EPA invites comment on the option of extending a section 316(b) trading program to new facilities.

f. Voluntary Adoption of Trading by Authorized States and Tribes

Under EPA's preferred alternative for section 316(b) trading, authorized States or Tribes would decide whether to voluntarily adopt a section 316(b) trading program. EPA notes that authorized States and Tribes would first need to adopt the appropriate legal authority to conduct a section 316(b) trading program. In general, EPA believes that States and Tribes have a better understanding of the dynamics, value, and overall quality of their local waterbodies based on assigned designated uses, 305(b) monitoring reports, and other relevant information and studies compiled over time. Thus, authorized States or Tribes may be in a better position to judge whether or not to develop and implement a section 316(b) trading program. Although EPA acknowledges that a nationally-run section 316(b) trading program may enhance uniformity, EPA is concerned that a national program may not be feasible because of differences in species; habitats; waterbody characteristics; and the variety, nature, and magnitude of environmental impacts from cooling water intake

structures found across the United States. EPA seeks comment on whether a national registry of trades and associated national trading guidance would be appropriate.

A voluntary program would be administered by the authorized State or Tribe. Authorized States and Tribes that participate could allow trading among facilities to meet the entrainment reduction performance standard. Key environmental and natural resource agencies, industry and its trade associations, and local environmental groups involved in the protection of the watershed would participate in the authorized State or Tribal section 316(b) trading program through the public comment process. The program would also include consultation with from relevant Federal, State and authorized Tribal resource agencies and neighboring authorized States and Tribes where interstate waters are affected (similar to stakeholder involvement under the NPDES permitting program).

g. When Would the Permits Be Reissued to Trading Partners?

If trades under section 316(b) are done on a watershed basis, and permits are synchronized, then permits would be reissued to trading partners at the same time according to the permitting authority's standard permit renewal cycle (e.g., every 5 years). With permitting authorities that have moved toward a watershed permitting strategy, synchronizing the permit renewal process for all trading partners in a geographic area reduces some administrative cost and burden on the permitting authorities.

Alternatively, a trading arrangement may not be specified in the permit. Instead, the permit would include the performance standard and a requirement to meet that standard. Under this approach, trades could occur between permitting cycles. Another option would allow trading of entrainment units between Phase II existing facilities within permit cycles at the discretion of each authorized State or Tribal permitting authority. A disadvantage to this approach is the additional administrative burden borne by the permitting authorities. EPA seeks comment on how to harmonize the reissuance of permits with trading among Phase II existing facilities under section 316(b).

h. Implementation and Enforcement Issues for Section 316(b) Trading

The concept of a section 316(b) trading program for Phase II existing facilities presents many challenges for the permitting program at the Federal, State, or authorized Tribe level. These challenges include development of implementation guidance, incorporation of a section 316(b) trade tracking system within EPA's Permit Compliance System or through some other tracking mechanism, self-reporting on compliance with trade agreements (similar to the self-reporting conducted through use of Discharge Monitoring Reports), determination of the administrative cost and burden of such a trading program and EPA oversight of whether regulatory requirements for impingement and entrainment reduction are met. EPA invites comment on these unique challenges and any others regarding implementation, compliance assessment, and enforcement of a section 316(b) trading program.

VII. Implementation

As in the new facility rule, section 316(b) requirements for Phase II existing facilities would be implemented through the NPDES permit program. Today's proposal would establish application requirements in § 125.95, monitoring requirements in § 125.96, and recordkeeping and reporting requirements in § 125.97 for Phase II existing facilities that have a design intake flow of 50 MGD or more. The proposed regulations also require the Director to review application materials submitted by each regulated facility and include monitoring and recordkeeping requirements in the permit (§ 125.98). EPA will develop a model permit and permitting guidance to assist Directors in implementing these requirements after they are finalized. In addition, the Agency will develop implementation guidance for owners and operators that will address how to comply with the application requirements, the sampling and monitoring requirements, and the recordkeeping and reporting requirements in these proposed regulations.

A. When Does the Proposed Rule Become Effective?

Phase II existing facilities subject to today's proposed rule would need to comply with the Subpart J requirements when an NPDES permit containing requirements consistent with Subpart J is issued to the facility. See proposed § 125.92. Under existing NPDES program regulations, this would occur when an existing NPDES permit is reissued or, when an existing permit is modified or revoked and reissued.

B. What Information Must I Submit to the Director When I Apply for My Reissued NPDES Permit?

The NPDES regulations that establish the application process at 40 CFR 122.21(d)(2) generally require that facilities currently holding a permit submit information and data 180 days prior to the end of the permit term, which is five years. If you are the owner or operator of a facility that is subject to this proposed rule, you would be required to submit the information that is required under 40 CFR 122.21(r)(2), (3), and (5) and § 125.95 of today's proposed rule with your application for permit reissuance. This section provides a general discussion of the proposed application requirements for Phase II existing facilities at the outset and then goes into more detail in subsequent subsections. The Director would review the information you provide in your application including the information submitted in compliance with 40 CFR 122.21(r) and § 125.95 and would confirm whether your facility should be regulated as an existing facility under these proposed regulations or as a new facility under regulations that were published on December 19, 2001 (66 FR 65256) and establish the appropriate requirements to be applied to the cooling water intake structure(s).

Today's proposed rule would modify regulations at 40 CFR 122.21(r) to require existing facilities to prepare and submit some of the same information required for new facilities. The proposed application requirements would require owners or operators of Phase II existing facilities to submit two general categories of information when they apply for a reissued NPDES permit. The general categories of information would include (1) Physical data to characterize the source waterbody in the vicinity where the cooling water intake structures are located (40 CFR 122.21(r)(2)) and (2) data to characterize the design and operation of the cooling water intake structures (40 CFR 122.21(r)(3)). Unlike the new facilities, however, Phase II existing facilities would not be required to submit the Source Water Baseline Biological Characterization Data required under 40 CFR 122.21(r)(4)). Today's proposed rule would add a new requirement at 40 CFR 122.21(r)(5) to require a facility to submit information describing the design and operating characteristics of its cooling water systems and how they relate to the cooling water intake structures at the facility.

In addition, today's proposed rule would require all Phase II existing facilities to submit the information

required under § 125.95. In general, the proposed application requirements in § 125.95 require all Phase II existing facility applicants, except those that already use a closed-cycle, recirculating cooling system, to submit a Comprehensive Demonstration Study (§ 125.95(b)). This study includes a proposal for information collection; source waterbody information; a characterization of impingement morality and entrainment; a proposal for technologies, operational measures, restoration measures and estimated efficacies; and a plan to conduct monitoring to demonstrate that the proposed technologies and measures achieve the performance levels that were estimated. The following describes the proposed application requirements in more detail.

1. Source Water Physical Data (40 CFR 122.21(r)(1)(ii))

Under the proposed requirements at 40 CFR 122.21(r)(1)(ii), Phase II existing facilities subject to this proposed rule would be required to provide the source water physical data specified at 40 CFR 122.21(r)(2) in their application for a reissued permit. These data are needed to characterize the facility and evaluate the type of waterbody and species potentially affected by the cooling water intake structure. The Director would use this information to evaluate the appropriateness of the design and construction technologies proposed by the applicant.

The applicant would be required to submit the following specific data: (1) A narrative description and scale drawings showing the physical configuration of all source waterbodies used by the facility, including areal dimensions, depths, salinity and temperature regimes, and other documentation; (2) an identification and characterization of the source waterbody's hydrological and geomorphological features, as well as the methods used to conduct any physical studies to determine the intake's zone of influence and the results of such studies; and (3) locational maps.

2. Cooling Water Intake Structure Data (40 CFR 122.21(r)(1)(ii))

Under the proposed requirements at 40 CFR 122.21(r)(1)(ii), Phase II existing facilities would be required to submit the cooling water intake structure data specified at 40 CFR 122.21(r)(3) to characterize the cooling water intake structure and evaluate the potential for impingement and entrainment of aquatic organisms. Information on the design of the intake structure and its location in the water column would allow the permit writer to evaluate which species or life stages would potentially be subject to impingement and entrainment. A diagram of the facility's water balance would be used to identify the proportion of intake water used for cooling, make-up, and process water. The water balance diagram also provides a picture of the total flow in and out of the facility, allowing the permit writer to evaluate compliance with the performance standards.

The applicant would be required to submit the following specific data: (1) A narrative description of the configuration of each of its cooling water intake structures and where they are located in the waterbody and in the water column; (2) latitude and longitude in degrees, minutes, and seconds for each of its cooling water intake structures; (3) a narrative description of the operation of each of your cooling water intake structures, including design intake flows, daily hours of operation, number of days of the year in operation, and seasonal operation schedules, if applicable; (4) a flow distribution and water balance diagram that includes all sources of water to the facility, recirculating flows, and discharges; and (5) engineering drawings of the cooling water intake structure.

3. Phase II Existing Facility Cooling Water System Description (40 CFR 122.21(r)(1)(ii))

Under the proposed requirements at 40 CFR 122.22(r)(1)(ii), Phase II existing facilities would be required to submit the cooling water system data specified at 40 CFR 122.21(r)(5) to characterize the operation of cooling water systems and their relationship to the cooling water intake structures at the facility. Also proposed to be required is a description of the design intake flow that is attributed to each system and the number of days of the year in operation and any seasonal operation schedules, if applicable. This information would be used by the applicant and the Director in determining the appropriate standards that can be applied to the Phase II facility. Facilities that have closed-cycle, recirculating cooling water systems will be determined to have met the performance standards in § 125.94 if all of their systems are closed-cycle, recirculating cooling systems. These facilities are not required to submit a Comprehensive Demonstration Study. Additionally, if only a portion of the total design intake flow is water withdrawn for a closed-cycle, recirculating cooling system, such facilities may use the reduction in impingement mortality and entrainment that is attributed to the reduction in flow in complying with the performance standards in § 125.94(b).

4. Comprehensive Demonstration Study (§ 125.95(b))

Proposed application requirements at § 125.95(b) would require all existing facilities except those deemed to have met the performance standard in § 125.94(b)(1) (reduced intake capacity to a level commensurate with the use of a closed-cycle, recirculating cooling water system) to perform and submit to the Director the results of a Comprehensive Demonstration Study, including data and detailed analyses to demonstrate that you will meet applicable requirements in § 125.94.

The proposed Comprehensive Demonstration Study has seven components.

- Proposal for Information Collection;
- Source Waterbody Flow Information;
- Impingement Mortality and Entrainment Characterization Study;
- Design and Construction Technology Plan;
- Information to Support Proposed Restoration Measures;
- Information to Support Site-specific Determination of Best Technology Available for Minimizing Adverse Environmental Impact; and
- Verification Monitoring Plan.

The information required under each of these components of the Comprehensive Demonstration Study may not be required to be submitted by all Phase II existing facilities. Required submittals for your facility would depend on the compliance option you have chosen. All Phase II existing facilities, except those deemed to have met the performance standard in § 125.94(b)(1), would be required to submit a Proposal for Information Collection; a Source Waterbody Flow Information; an Impingement Mortality and Entrainment Characterization Study; a Design and Construction Technology Plan; and a Verification Monitoring Plan. Only those Phase II existing facilities that propose to use restoration measures in whole or in part to meet the performance standards in § 125.94 would be required to submit the Information to Support Proposed Restoration Measures. Only those facilities who choose to demonstrate that a site-specific standard is appropriate for their site would be required to submit Information to Support Site-specific Determination of Best Technology Available for Minimizing Adverse Environmental Impact.

a. Proposal for Information Collection

Before performing the study you would be required to submit to the Director for review and approval, a proposal stating what information would be collected to support the study (see § 125.96(b)(1)). This proposal would provide: (1) A description of the proposed and/or implemented technology(ies) and/or supplemental restoration measures to be evaluated; (2) a list and description of any historical studies characterizing impingement and entrainment and/or the physical and biological conditions in the vicinity of the cooling water intake structures and their relevance to this proposed study. If you propose to use existing data, you must demonstrate the extent to which the data are representative of current conditions and that the data were collected using appropriate quality assurance/quality control procedures; (3) a summary of any past, ongoing, or voluntary consultations with appropriate Federal, State, and Tribal fish and wildlife agencies that are relevant to this study and a copy of written comments received as a result of such consultation; and (4) a sampling plan for any new field studies you propose to conduct in order to ensure that you have sufficient data to develop a scientifically valid estimate of impingement and entrainment at your site. The sampling plan would document all methods and quality assurance/quality control procedures for sampling and data analysis. The sampling and data analysis methods you propose must be appropriate for a quantitative survey and must take into account the methods used in other studies performed in the source waterbody. The sampling plan would include a description of the study area (including the area of influence of the cooling water intake structure), and provide taxonomic identifications of the sampled or evaluated biological assemblages (including all life stages of fish and shellfish).

The proposed rule does not specify particular timing requirements for your information collection proposal, but does require review and approval of the proposal by the Director. In general, EPA expects that it would be submitted well in advance of the other permit application materials, so that if the Director determined that additional information was needed to support the application, the facility would have time to collect this information, including additional monitoring as appropriate. In some cases, however, where the facility intends to rely on existing data and there has been no change in conditions at the site since the last permit renewal, a long lead time might not be necessary. This would most likely be the case for subsequent permit renewals following the first renewal after the Phase II requirements go into effect. EPA requests comment on whether it should specify a particular time frame for submitting the information collection proposal, or alternatively, whether it should remove the requirement for approval by the Director.

b. Source Waterbody Flow Information

Under the proposed requirements at § 125.95(b)(2)(i), Phase II existing facilities, except those deemed to meet the performance standard in § 125.94(b)(1), with cooling water intake structures that withdraw cooling water from freshwater rivers or streams would be required to provide the mean annual flow of the waterbody and any supporting documentation and engineering calculations that allow a determination of whether they are withdrawing less than or greater than five (5) percent of the annual mean flow. This would provide information needed to determine which requirements (§ 125.94(b)(2) or (3)) would apply to the facility. The documentation might include either publicly available flow data from a nearby U.S. Geological Survey (USGS) gauging station or actual instream flow monitoring data collected by the facility. The waterbody flow should be compared with the total design flow of all cooling water intake structures at the regulated facility.

Under the proposed requirements at § 125.95(b)(2)(ii), Phase II existing facilities subject to the proposed rule with cooling water intake structures that withdraw cooling water from a lake or reservoir and that propose to increase the facility's design intake flow would be required to submit a narrative description of the waterbody thermal stratification and any supporting documentation and engineering calculations to show that the increased flow meets the requirement not to disrupt the natural thermal stratification or turnover pattern (where present) of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency(ies) (§ 125.94(b)(4)(ii)). Typically, this natural thermal stratification would be defined by the thermocline, which may be affected to a certain extent by the withdrawal of cooler water and the discharge of heated water into the system. This information demonstrates to the permit writer that any increase in design intake flow is maintaining the thermal stratification or turnover pattern (where present) of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency(ies).

c. Impingement Mortality and Entrainment Characterization Study (§ 125.95(b)(3))

The proposed regulations would require that you submit the results of an Impingement Mortality and Entrainment Characterization Study in accordance with § 125.96(b)(3). This characterization would include: (1) Taxonomic identifications of those species of fish and shellfish and their life stages that are in the vicinity of the cooling water intake structure and are most susceptible to impingement and entrainment; (2) a characterization of these species of fish and shellfish and life stages, including a description of the abundance and temporal/spatial characteristics in the vicinity of the cooling water intake structure, based on the collection of a sufficient number of years of data to characterize annual, seasonal, and diel variations in impingement mortality and entrainment (e.g., related to climate/weather differences, spawning, feeding and water column migration); and (3) documentation of the current impingement mortality and entrainment of all life stages of fish and shellfish at the facility and an estimate of impingement mortality and entrainment under the calculation baseline. This documentation may include historical data that are representative of the current operation of the facility and of biological conditions at the site. Impingement mortality and entrainment samples to support the calculations required in § 125.95(b)(4)(iii) and (b)(5)(ii) must be collected during periods of representative operational flows for the cooling water intake structure and the flows associated with the samples must be documented. In addition, this study must include an identification of species that are protected under Federal, State, or Tribal law (including threatened or endangered species) that might be susceptible to impingement and entrainment by the cooling water intake structure(s). The Director might coordinate a review of your list of threatened, endangered, or other protected species with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, or other relevant agencies to ensure that potential

impacts to these species have been addressed.

d. Design and Construction Technology Plan (§ 125.96(b)(4))

If you choose to use existing and/or proposed design and construction technologies or operational measures in whole or in part to meet the requirements of § 125.94, proposed § 125.95(b)(4) would require that you develop and submit a Design and Construction Technology Plan with your application that demonstrates that your facility has selected and would implement the design and construction technologies necessary to reduce impingement mortality and/or entrainment to the levels required. The Agency recognizes that selection of the specific technology or group of technologies for your site would depend on individual facility and waterbody conditions.

Phase II existing facilities seeking to avoid entrainment reduction requirements because their capacity utilization rate is less than 15 percent, would also be required to calculate and submit the capacity utilization rate and supporting data and calculations. The data being requested include (1) the average annual net generation of the facility in (Mwh) measured over a five year period (if available) and representative of operating conditions and (2) the net capacity of the facility (in MW). These data are needed to determine whether the facility has less than a 15 percent utilization rate and would only be required to reduce impingement mortality in accordance with § 125.94(b)(1).

In its application, a Phase II existing facility choosing to use design and construction technologies or operational measures to meet the requirements of § 125.94 would be required to describe the technology(ies) or operational measures they would implement at the facility to reduce impingement mortality and entrainment based on information that demonstrates the efficacy of the technologies for those species most susceptible. Examples of appropriate technologies would include, but are not limited to, wedgewire screens, fine mesh screens, fish handling and return systems, barrier nets, aquatic filter barrier systems, enlargement of the cooling water intake structure to reduce velocity. Examples of operational measures include, but are not limited to, seasonal shutdowns or reductions in flow, and continuous operations of screens, etc.

Phase II existing facilities that are required to meet the proposed ranges to reduce impingement mortality by 80 to 95 percent and entrainment by 60 to 90 percent would be required to provide calculations estimating the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would be achieved through the use of existing and/or proposed technologies or operational measures. In determining compliance with any requirements to reduce impingement mortality or entrainment, you must first determine the calculation baseline against which to assess the total reduction in impingement mortality and entrainment. The calculation baseline is defined § 125.93 as an estimate of impingement mortality and entrainment that would occur at your site assuming you had a shoreline cooling water intake structure with an intake capacity commensurate with a once-through cooling water system and with no impingement and/or entrainment reduction controls. Reductions in impingement mortality and entrainment from this calculation baseline as a result of any design and construction technologies already implemented at your facility would be added to the reductions expected to be achieved by any additional design and construction technologies that would be implemented in order to determine compliance with the performance standards. Facilities that recirculate a portion of their flow may take into account the reduction in impingement mortality and entrainment associated with the reduction in flow when determining the net reduction associated with existing technology and operational measures. This estimate must include a site-specific evaluation of the suitability of the technology(ies) based on the species that are found at the site, and/or operational measures and may be determined based on representative studies (i.e., studies that have been conducted at cooling water intake structures located in the same waterbody type with similar biological characteristics) and/or site-specific technology prototype studies.

If your facility already has some existing impingement mortality and entrainment controls, you would need to estimate the calculation baseline. This calculation baseline could be estimated by evaluating existing data from a facility nearby without impingement and/or entrainment control technology (if relevant) or by evaluating the abundance of organisms in the source waterbody in the vicinity of the intake structure that may be susceptible to impingement and/or entrainment. The proposed rule would specifically require that the following information be submitted in the Design and Construction Technology Plan: (1) A narrative description of the design and operation of all design and construction technologies existing or proposed to reduce impingement mortality; (2) a narrative description of the design and operation of all design and construction technologies existing or proposed to reduce entrainment; (3) calculations of the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would be achieved by the technologies and operational measures you have selected based on the Impingement Mortality and Entrainment Characterization Study in § 125.95(b)(3); (4) documentation which demonstrates that you have selected the location, design, construction, and capacity of the cooling water intake structure that reflects the best technology available for meeting the applicable requirements in § 125.94; and (5) design calculations, drawings, and estimates to support the narrative descriptions required by steps (1) and (2) above.

Today's proposed rule allows for the Director to evaluate, with information submitted in your application, the performance of any technologies you may have implemented in previous permit terms. Additional or different design and construction technologies may be required if the Director determines that the initial technologies you selected and implemented would not meet the requirements of § 125.94.

e. Information To Support Proposed Restoration Measures (§ 125.94(b)(5))

Under proposed § 125.94(d), Phase II existing facilities subject to the proposed rule may propose to implement restoration measures in lieu of or in combination with design and construction or operational measures to meet the performance standards in § 125.94(b) or site-specific requirements imposed under § 125.94(c). Facilities proposing to use restoration measures would be required to submit the following information to the Director for review as proposed in § 125.95(b)(5). The Director must approve any use of restoration measures.

First, the Phase II existing facility must submit a list and narrative description of the restoration measures the facility has selected and proposes to implement. This list and description should identify the species and other aquatic resources targeted under any restoration measures. The facility also must submit a summary of any past, ongoing, or voluntary consultation with appropriate Federal, State, and Tribal fish and wildlife agencies regarding the

proposed restoration measures that is relevant to the Comprehensive Demonstration Study and a copy of any written comments received as a result of such consultation.

Second, the facility must submit a quantification of the combined benefits from implementing design and construction technologies, operational measures and/or restoration measures and the proportion of the benefits that can be attributed to each. This quantification must include: (1) The percent reduction in impingement mortality and entrainment that would be achieved through the use of any design and construction technologies or operational measures that the facility has selected (i.e., the benefits that would be achieved through impingement and entrainment reduction); (2) a demonstration of the benefits that could be attributed to the restoration measures selected; and (3) a demonstration that the combined benefits of the design and construction technology(ies), operational measures, and/or restoration measures would maintain fish and shellfish at a level comparable to that which you would achieve were you to implement the requirements of § 125.94. They also must establish that biotic community structure and function would be maintained to a level comparable or substantially similar to that which would be achieved through § 125.94 (b) or (c).

If it is not possible to demonstrate quantitatively that restoration measures such as creation of new habitats to serve as spawning or nursery areas or establishment of riparian buffers would achieve comparable performance, a facility may make a qualitative demonstration that such measures would maintain fish and shellfish in the waterbody at a level substantially similar to that which would be achieved under § 125.94. Any qualitative demonstration must be sufficiently substantive to support a demonstration under § 125.94(d).

Third, the facility must submit a plan for implementing and maintaining the efficacy of the restoration measures it has selected as well as supporting documentation to show that the restoration measures, or the restoration measures in combination with design and construction technology(ies) and operational measures, would maintain the fish and shellfish in the waterbody, including the community structure and function, to a level comparable or substantially similar to that which would be achieved through § 125.94(b) and (c). This plan should be sufficient to ensure that any beneficial effects would continue for at least the term of the permit.

Finally, the facility must provide design and engineering calculations, drawings, and maps documenting that the proposed restoration measures would meet the restoration performance standard at § 125.94(d).

The proposed regulations at § 125.98(b)(1)(ii) would require that this information be reviewed by the Director to determine whether the documentation demonstrates that the proposed restoration measures, in conjunction with design and construction technologies and operational measures would maintain the fish and shellfish in the waterbody to a level substantially similar to that which would be achieved under § 125.94.

f. Information To Support Site-Specific Determination of Best Technology Available for Minimizing Adverse Environmental Impact

Under the third compliance option, the owner or operator of a Phase II existing facility may demonstrate to the Director that a site-specific determination of best technology available is appropriate for the cooling water intake structures at that facility if the owner or operator can meet one of the two cost tests specified under § 125.94(c)(1). To be eligible to pursue this approach, the Phase II existing facility must first demonstrate to the Director either (1) that its cost of compliance with the applicable performance standards specified in § 125.94(b) would be significantly greater than the costs considered by the Administrator in establishing such performance standards, or (2) that the existing facility's costs would be significantly greater than benefits of complying with the performance standards at the facility's site. A discussion of applying this cost test is provided in Section VI.A of this proposed rule. Where a Phase II existing facility demonstrates that it meets either of these cost tests, the Director must make a site-specific determination of best technology available for minimizing adverse environmental impact. This determination would be based on less costly design and construction technologies, operational measures, and/or restoration measures proposed by the facility and approved by the Director. The Director can approve less costly technologies to the extent justified by the significantly greater cost, and could determine that technologies and measures in addition to those already in place are not justified because of the significantly greater cost.

A Phase II existing facility that meets one of the two cost tests described above must select less costly design and construction technologies, operational measures, and/or restoration measures that would minimize adverse environmental impact to the extent justified by the significantly greater cost. In order to do this, Phase II existing facilities that pursue this option would have to assess the nature and degree of adverse environmental impact associated with their cooling water intake structures, and then identify the best technology available to minimize such impact. Phase II existing facilities would assess adverse environmental impact associated with their cooling water intake structures in the Comprehensive Demonstration Study that would be required to be submitted to the Director under § 125.95(b). This study would include source waterbody flow information, and a characterization of impingement mortality and entrainment, as described in this section of this preamble.

Such facilities also must submit to the Director for approval a Site-Specific Technology Plan. This plan would be based on the Comprehensive Cost Evaluation Study and, for those facilities seeking a site-specific determination of best technology available based on costs significantly greater than benefits, a valuation of monetized benefits (see Section VI.A). It would describe the design and operation of all design and construction technologies, operational measures, and restoration measures selected, and provide information that demonstrates the effectiveness of the selected technologies or measures for reducing the impacts on the species of concern. Existing facilities would be required to submit design calculations, drawings, and estimates to support these descriptions. This plan also would need to include engineering estimates of the effectiveness of the technologies or measures for reducing impingement mortality and entrainment of all life stages of fish and shellfish. It also would need to include a site-specific evaluation of the suitability of the technologies or measures for reducing impingement mortality and entrainment based on representative studies and/or site-specific technology prototype studies. Again, design calculations, drawings and estimates would be required to support such estimates. If a Phase II existing facility intends to use restoration measures in its site-specific approach, it also must submit the information required under

§ 125.95(b)(5). See preamble Section VII.B.4.e. Finally, the Site-Specific Technology Plan would have to include documentation that the technologies, operational measures or restoration measures selected would reduce impingement mortality and entrainment to the extent necessary to satisfy the requirements of § 125.94 (i.e., the level of performance would be reduced only to the extent justified by the significantly greater cost).

g. Verification Monitoring Plan

Finally, proposed § 125.95(b)(7) would require all Phase II existing facilities, except those deemed to meet the performance standard in § 125.94(b)(1), to submit a Verification Monitoring Plan to measure the efficacy of the implemented design and construction technologies, operational measures, and restoration measures. The plan would include a monitoring study lasting at least two years to verify the full-scale performance of the proposed or already implemented technologies and of any additional operational and restoration measures. The plan would be required to describe the frequency of monitoring and the parameters to be monitored and the bases for determining these. The Director would use the verification monitoring to confirm that the facility is meeting the level of impingement mortality and entrainment reduction expected and that fish and shellfish are being maintained at the level expected (as required in § 125.94(b)). Verification monitoring would be required to begin once the technologies, operational measures, or supplemental restoration measures are implemented and continue for a sufficient period of time (but at least two years) to demonstrate that the facility is reducing impingement mortality and entrainment to the level of reduction required at § 125.94(b) or (c).

C. How Would the Director Determine the Appropriate Cooling Water Intake Structure Requirements?

The Director's first step would be to determine whether the facility is covered by this rule. If the answer to all the following questions is yes, the facility would be required to comply with the requirements of this proposed rule.

(1) Does the facility both generate and transmit electric power or generate electric power but sell it to another entity for transmission?

(2) Is the facility an ''existing facility'' as defined in § 125.93?

(3) Does the facility withdraw cooling water from waters of the U.S.; *or* does the facility obtain cooling water by any sort of contract or arrangement with an independent (supplier or multiple suppliers) of cooling water if the supplier(s) withdraw(s) water from waters of the U.S. and is not a public water system?

(4) Is at least 25 percent of the water withdrawn by the facility used for cooling purposes?

(5) Does the facility have a design intake flow of 50 million gallons or more per day (MGD)? [70]

(6) Does the facility discharge pollutants to waters of the U.S., including storm water-only discharges, such that the facility has or is required to have an NPDES permit?

The Director's second step would be to determine whether the facility proposes to comply by demonstrating that its existing design and construction technologies, operational measures, or restoration measures meet the proposed performance standards (Option 1); by implementing design and construction technologies, operational measures, or restoration measures that, in combination with existing technologies and operational measures, meet the proposed performance standards (Option 2); or by seeking a site-specific determination of best technology available to minimize adverse environmental impact (Option 3) (see, § 125.98(1)). The Director also would need to determine whether the facility's utilization rate is less than 15 percent, since such facilities are only subject to impingement mortality performance requirements.

Where a Phase II existing facility selects Option 1 and chooses to demonstrate that its existing design and construction technologies, operational measures, or restoration measures meet the proposed performance standards, the Director would verify either that the existing facility satisfies the reduced intake capacity requirement, or that the facility meets the impingement and entrainment reduction and other requirements. Facilities that have closed-cycle, recirculating cooling water systems would meet the reduced intake capacity requirement, and would not be subject to further performance standards. Other methods of reducing intake capacity also could be used but would need to be commensurate with the level that can be attained by a closed-cycle, recirculating cooling water system.

Under Option 1, to verify that existing controls meet the impingement and entrainment reduction requirements in the proposed rule, the Director would need to (1) verify the facility's baseline calculation; (2) confirm the location of the facility's cooling water intake structure(s); (3) verify the withdrawal percentage of mean annual flow; (4) review impingement and/or entrainment rates or estimates; and (5) consider any use of restoration. These same steps also would be part of determining requirements under Options 2 and 3, as discussed below.

The Director would initially review and verify the calculation baseline estimate submitted by the facility under § 125.95(b)(iii). This estimate must be consistent with the proposed definition of the term ''calculation baseline'' and must be representative of current biological conditions at the facility. The Director would then review the information that the facility provides to validate the source waterbody type in which the cooling water intake structure is located (freshwater river or stream; lake or reservoir; or estuary, tidal river, ocean, or Great Lake). The Director would review the supporting material the applicant provided in the permit application to document the physical placement of the cooling water intake structure. For existing facilities with one or more cooling water intake structures located in a freshwater river or stream, the Director would need to determine whether the facility withdraws more or less than five percent of the mean annual flow, which determines whether impingement, or impingement and entrainment controls would apply. For facilities with cooling water intake structures located on lakes or reservoirs other than a Great Lake for which the facility seeks to increase the design flow, the Director would need to determine whether the increased intake flow would disrupt the natural thermal stratification or turnover pattern of the source waterbody. In making this determination the Director would need to consider anthropogenic factors that can influence the occurrence and location of a thermocline, and would need to coordinate with appropriate Federal, State, or Tribal fish and wildlife agencies to determine if the disruption is beneficial to the management of the fisheries. Both of these determinations would be based on the source waterbody flow information required under proposed § 125.95(b)(2).

For Phase II existing facilities that use or propose to implement restoration measures to meet the requirements of § 125.94(b), the Director would review the evaluation of any current or proposed restoration measures submitted under proposed

[70] If the answer is no to these flow parameters and yes to all the other questions, the Director would use best professional judgment on a case-by-case basis to establish permit conditions that ensure compliance with section 316(b).

§ 125.95(b)(5). The Director could gather additional information and solicit input for the review from appropriate fishery management agencies as necessary. The Director would need to determine whether the current or proposed measures would maintain the fish and shellfish in the waterbody at comparable levels to those that would be achieved under § 125.94, as well as review and approve the proposed Verification and Monitoring Plan to ensure the restoration measures meet § 125.94(d) and 125.95(b)(3).

Finally, the Director would review impingement and/or entrainment data or estimates to determine whether in-place or identified controls achieve the performance standards proposed for the different categories of source waterbodies. This step would involve comparing the calculation baseline with the impingement and/or entrainment data or estimates provided as part of the Comprehensive Demonstration Study required under § 125.95(b) and the Impingement Mortality and Entrainment Characterization Study required under § 125.95(b)(3). It may also entail considering whether, how, and to what extent restoration would allow the facility to meet applicable performance standards.

If the Director determines that the Comprehensive Demonstration Study submitted does not demonstrate that the technologies, operational measures, and supplemental restoration measures employed would achieve compliance with the applicable performance standards, the Director may issue a permit requiring such compliance. If such studies are approved and a permit is issued but the Director later determines, based on the results of subsequent monitoring, that the technologies, operational measures, and supplemental restoration measures did not meet the rule standards, the Director could require the existing facility to implement additional technologies and operational measures as necessary to meet the rule requirements. In general, this would occur at the next renewal of the permit. The Director would also review the facility's Technology Verification Plan for post-operational monitoring to demonstrate that the technologies are performing as predicted.

Under compliance Option 2, the same general steps would be followed as described above for assessing compliance of existing controls with applicable performance standards except that under this option the Phase II existing facility would be demonstrating that the technologies and measures identified would meet (rather than currently meet) the applicable performance standards. This review would also be based on data submitted in the Comprehensive Demonstration Study required under § 125.95(b).

These same basic steps also apply to facilities seeking to comply under Option 3, however, the Director must make two additional determinations under this option, including whether the facility meets one of the applicable cost tests and whether any alternative requirements are justified by significantly greater costs. Under Option 3, a Director must first determine whether a Phase II existing facility satisfies either of the cost tests proposed at § 125.94(c). Phase II existing facilities seeking to comply under this option are required to submit a Comprehensive Cost Evaluation Study under § 125.95(b)(6), which includes data that document the cost of implementing design and construction technologies or operational measures to meet the requirements of § 125.94, as well as the costs of alternative technologies or operational measures proposed. The Director would need to review these data, including detailed engineering cost estimates, and compare these with the costs the Agency considered in establishing these requirements. Where the Director finds that the facility's cost of implementation are significantly greater than those considered during rule development, he or she must approve site-specific requirements and could approve alternative technologies or operational measures. Such alternative technologies or operational measures could be those proposed by the facility in the Site-Specific Technology Plan, but less protective requirements would have to be justified by the significantly greater costs.

Where a Phase II existing facility seeks site-specific requirements based on facility costs that are significantly greater than the environmental benefits of compliance, the facility must submit a Valuation of Monetized Benefits of Reducing Impingement and Entrainment. The Director must review this valuation to determine whether it fully values the impacts of the cooling water intake structures at issue, as required in § 125.95(b)(6)(ii), and whether the facility's cost of implementation are significantly greater than the environmental benefits of complying with the requirements of § 125.94. If the Director determines that the implementation costs are significantly greater than the environmental benefits, the Director must approve site-specific requirements and could approve alternative technologies or operational measures. Such alternative technologies or operational measures could be those proposed by the facility in the Site-Specific Technology Plan, but less protective requirements would have to be justified by the significantly greater costs. EPA is interested in ways to decrease application review time and make this process both efficient and effective.

D. What Would I Be Required To Monitor?

Proposed § 125.96 provides that Phase II existing facilities would have to perform monitoring to demonstrate compliance with the requirements of § 125.94 as prescribed by the Director. In establishing such monitoring requirements, the Director should consider the need for biological monitoring data, including impingement and entrainment sampling data sufficient to assess the presence, abundance, life stages, and mortality (including eggs, larvae, juveniles, and adults) of aquatic organisms (fish and shellfish) impinged or entrained during operation of the cooling water intake structure. These data could be used by the Director in developing permit conditions to determine whether requirements, or additional requirements, for design and construction technologies or operational measures should be included in the permit. The Director should ensure, where appropriate, that any required sampling would allow for the detection of any annual, seasonal, and diel variations in the species and numbers of individuals that are impinged or entrained. The Director should also consider if a reduced frequency in biological monitoring may be justified over time if the supporting data show that the technologies are consistently performing as projected under all operating and environmental conditions and less frequent monitoring would still allow for the detection of any future performance fluctuations. The Director should further consider whether weekly visual or remote or similar inspections should be required to ensure that any technologies that have been implemented to reduce impingement mortality or entrainment are being maintained and operated in a manner that ensures that they function as designed. Monitoring requirements could be imposed on Phase II existing facilities that have been deemed to meet the performance standard in § 125.94(b)(1) to the extent consistent with the provisions of the NPDES program.

E. How Would Compliance Be Determined?

This proposed rule would be implemented by the Director placing conditions consistent with this proposed rule in NPDES permits. To demonstrate compliance, the proposed rule would require that the following information be submitted to the Director:

- Data submitted with the NPDES permit application to show that the facility is in compliance with location, design, construction, and capacity requirements;
- Compliance monitoring data and records as prescribed by the Director.

Proposed § 125.97 would require existing facilities to keep records and report compliance monitoring data in a yearly status report. In addition, Directors may perform their own compliance inspections as deemed appropriate (see CFR 122.41).

F. What Are the Respective Federal, State, and Tribal Roles?

Section 316(b) requirements are implemented through NPDES permits. Today's proposed regulations would amend 40 CFR 123.25(a)(36) to add a requirement that authorized State and Tribal programs have sufficient legal authority to implement today's requirements (40 CFR part 125, subpart J). Therefore, today's proposed rule would affect authorized State and Tribal NPDES permit programs. Under 40 CFR 123.62(e), any existing approved section 402 permitting program must be revised to be consistent with new program requirements within one year from the date of promulgation, unless the NPDES-authorized State or Tribe must amend or enact a statute to make the required revisions. If a State or Tribe must amend or enact a statute to conform with today's proposed rule, the revision must be made within two years of promulgation. States and Tribes seeking new EPA authorization to implement the NPDES program must comply with the requirements when authorization is requested.

EPA recognizes that some States have invested considerable effort in developing section 316(b) regulations and implementing programs. EPA is proposing regulations that would allow States to continue to use these programs by including in this national rule a provision that allows States to use their existing program if the State establishes that such programs would achieve comparable environmental performance. Specifically, the proposed rule would allow any State to demonstrate to the Administrator that it has adopted alternative regulatory requirements that would result in environmental performance within each relevant watershed that is comparable to the reductions in impingement mortality and entrainment that would be achieved under § 125.94. EPA invites comment on such ''functionally equivalent'' programs. In particular, EPA invites comment on the proposed alternative and on decision criteria EPA should consider in determining whether a State program is functionally equivalent. If EPA adopts such an approach, the Agency would also need to specify the process through which an existing State program is evaluated and whether such process can occur under the existing State program regulations or whether additional regulations to provide the evaluation criteria are needed.

Finally, EPA invites comment on the role of restoration and habitat enhancement projects as part of any ''functionally equivalent'' State programs.

In addition to updating their programs to be consistent with today's proposed rule, States and Tribes authorized to implement the NPDES program would be required to implement the cooling water intake structure requirements following promulgation of the proposed regulations. The requirements would have to be implemented upon the issuance or reissuance of permits containing the requirements of proposed subpart J. Duties of an authorized State or Tribe under this regulation may include

- Review and verification of permit application materials, including a permit applicant's determination of source waterbody classification and the flow or volume of certain waterbodies at the point of the intake;
- Determination of the standards in § 125.94 that apply to the facility;
- Verification of a permit applicant's determination of whether it meets or exceeds the applicable performance standards;
- Verification that a permit applicant's Design and Construction Technology Plan demonstrates that the proposed alternative technologies would reduce the impacts to fish and shellfish to levels required;
- Verification that a permit applicant meets the cost test and that permit conditions developed on a site-specific basis are justified based on documented costs, and, if applicable, benefits;
- Verification that a permit applicant's proposed restoration measures would meet regulatory standards;
- Development of draft and final NPDES permit conditions for the applicant implementing applicable section 316(b) requirements pursuant to this rule; and
- Ensuring compliance with permit conditions based on section 316(b) requirements.

EPA would implement these requirements where States or Tribes are not authorized to implement the NPDES program. EPA also would implement these requirements where States or Tribes are authorized to implement the NPDES program but do not have sufficient authority to implement these requirements.

G. Are Permits for Existing Facilities Subject to Requirements Under Other Federal Statutes?

EPA's NPDES permitting regulations at 40 CFR 122.49 contain a list of Federal laws that might apply to federally issued NPDES permits. These include the Wild and Scenic Rivers Act, 16 U.S.C. 1273 *et seq.*; the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*; the Endangered Species Act, 16 U.S.C. 1531 *et seq.*; the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*; and the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* See 40 CFR 122.49 for a brief description of each of these laws. In addition, the provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, relating to essential fish habitat might be relevant. Nothing in this proposed rulemaking would authorize activities that are not in compliance with these or other applicable Federal laws.

H. Alternative Site-Specific Requirements

Today's proposed rule would establish national requirements for Phase II existing facilities. EPA has taken into account all the information that it was able to collect, develop, and solicit regarding the location, design, construction, and capacity of cooling water intake structures at these existing facilities. EPA concludes that these proposed requirements would reflect the best technology available for minimizing adverse environmental impact on a national level. In some cases, however, data that could affect the economic practicability of requirements might not have been available to be considered by EPA during the development of today's proposed rule. Therefore, where a facility's cost would be significantly greater than the cost considered by EPA in establishing the applicable performance standards, proposed § 125.94(c)(2) would require the Director

to make a site-specific determination of the best technology available based on less costly design and construction technologies, operational measures, and/or restoration measures. Less costly technologies or measures would be allowable to the extent justified by the significantly greater cost. Similarly, § 125.94(c)(3) provides that where an existing facility's cost would be significantly greater than the benefits of complying with the applicable performance standards, the Director must make a site-specific determination of the best technology available based on less costly technologies or measures. These provisions would allow the Director, in the permit development process, to set alternative best technology available requirements that are less stringent than the nationally applicable requirements.

Under proposed § 125.94(c), alternative requirements would not be granted based on a particular facility's ability to pay for technologies that would result in compliance with the requirements of proposed § 125.94. Thus, so long as the costs of compliance are not significantly greater than the costs EPA considered and determined to be economically practicable, and are not significantly greater than the benefits of compliance with the proposed performance standards, the ability of an individual facility to pay in order to attain compliance with the rule would not support the imposition of alternative requirements. Conversely, if the costs of compliance for a particular facility are significantly higher than those considered by EPA in establishing the presumptive performance standards, then regardless of the facility's ability to afford the significantly higher costs, the Director should make a site-specific determination of best technology available based on less costly technologies and measures to the extent justified by the significantly higher costs.

The burden is on the person requesting the site-specific alternative requirement to demonstrate that alternative requirements should be imposed and that the appropriate requirements of proposed § 125.94 have been met. The person requesting the site-specific alternative requirements should refer to all relevant information, including the support documents for this proposed rulemaking, all associated data collected for use in developing each requirement, and other relevant information that is kept on public file by EPA.

VIII. Economic Analysis

EPA used an electricity market model, the Integrated Planning Model 2000 (IPM 2000), to identify potential economic and operational impacts of various regulatory options considered for proposal. Analyzed characteristics include changes in capacity, generation, revenue, cost of generation, and electricity prices. These changes are identified by comparing two scenarios: (1) The base case scenario (in the absence of Section 316(b) regulation); and (2) the post compliance scenario (after the implementation of Section 316(b) regulation). The results of these comparisons were used to assess the impacts of the proposed rule and two of the five alternative regulatory options considered by EPA. The following sections present EPA's economic analyses of the proposed rule and the alternative options.

A. Proposed Rule

Today's proposed rule would provide three compliance options for Phase II existing facilities. Such facilities could: (1) Demonstrate that their existing cooling water intake structure design and construction technologies, operational measures, and/or restoration measures meet the proposed performance standards; (2) implement design and construction technologies, operational measures, and/or restoration measures that meet the proposed performance standards; or (3) where the facility can demonstrate that its costs of complying with the proposed performance standards are significantly greater than either the costs EPA considered in establishing these requirements or the benefits of meeting the performance standards, seek a site-specific determination of best technology available to minimize adverse environmental impact. The applicable performance standards are described in Section VI.A., above.

Section VIII.A.1 below presents the analysis of national costs associated with the proposed section 316(b) Phase II Rule. Section VIII.A.2 presents a discussion of the impact analysis of the proposed rule at the market level and for facilities subject to this rule.

1. Costs

EPA estimates that facilities subject to this proposed rule will incur annualized post-tax compliance costs of approximately $178 million. These costs include one-time technology costs of complying with the rule, annual operating and maintenance costs, and permitting costs (including initial permit costs, annual monitoring costs, and repermitting costs). This cost estimate does not include the costs of administering the rule by permitting authorities and the federal government. Also excluded are compliance costs for 11 facilities that are projected to be baseline closures (see discussion below). Including compliance costs for projected baseline closure facilities would result in a total annualized compliance cost of approximately $182 million.

2. Economic Impacts

EPA used an electricity market model to account for the dynamic nature of the electricity market when analyzing the potential economic impacts of Section 316(b) regulation. The IPM 2000 is a long-term general equilibrium model of the domestic electric power market which simulates the least-cost dispatch solution for all generation assets in the market given a suite of user-specified constraints.[71] The impacts of compliance with a given regulatory option are defined as the difference between the model output for the base case scenario and the model output for the post-compliance scenario.[72]

Due to the lead time required in running an integrated electricity market model, EPA first completed an electricity market model analysis of two options with costs higher than those in today's proposed option: the ''Closed-Cycle, Recirculating Wet Cooling based on Waterbody type and Intake Capacity'' Option (waterbody/capacity-based option) and the ''Closed-Cycle, Recirculating Wet Cooling Everywhere'' Option (all cooling towers option). Both of the analyzed options are more stringent in aggregate than the proposed rule and provide a ceiling on its potential economic impacts. Because of limited time after final definition of the rule as proposed herein, EPA was unable to rerun the IPM model with an analytic option that completely matches the proposed rule's specifications. As a result, EPA adopted a two-step approach for the aggregate impact analysis. First, EPA identified that for certain regional electricity markets that

[71] For a more detailed description of IPM 2000 see the EBA document.

[72] The IPM model simulates electricity market function for a period of 25 years. Model output is provided for five user specified model run years. EPA selected three run years to provide output across the ten year compliance period for the rule. Analyses of regulatory options are based on output for model run years which reflect a scenario in which all facilities are operating in their post-compliance condition. Options requiring the installation of cooling towers are analyzed using output from model run year 2013. All other options are analyzed using output from model run years 2008. See the EBA document for a detailed discussion of IPM 2000 model run years.

do not have any facilities costed with a closed-cycle recirculating cooling water system, the waterbody/capacity-based option, as analyzed, matches the technology compliance requirements of the proposed rule.[73] These are the North American Electric Reliability Council (NERC) regions that do not border oceans and estuaries: ECAR, MAIN, MAPP, SPP.[74] Accordingly, EPA was able to interpret the results of the IPM analysis for the waterbody/capacity-based option for these four NERC regions as representative of the proposed rule in these regions. As shown below, EPA found very small or no impacts in these NERC regions. Second, EPA identified and compared data relevant to determination of rule impacts for these four NERC regions and the remaining NERC regions for which the IPM analysis would not be indicative of the proposed rule. Finding no material differences in these underlying characteristics between the two groups of NERC regions, EPA concluded that the finding of no significant impacts from the IPM-based analysis of the four NERC regions identified above, could also be extended to the remaining six NERC regions. Therefore, EPA believes that the proposed option, which would apply the same requirements (e.g., based on technologies such as fine mesh screens, filter fabric barrier nets, or fish return systems) to facilities in all NERC regions, would, in total, have very small or no impacts. The remainder of this section presents an assessment of the impacts of the proposed rule using the market and Phase II existing facility-level results from the IPM 2000 analysis of the alternative waterbody/capacity-based option for these four NERC regions. A more detailed analysis of all NERC regions under the alternative waterbody/capacity-based option is presented in Section VIII.B.2 below.

i. Market Level Impacts

This section presents the results of the IPM 2000 analysis for the four NERC regions with no cooling tower requirements under the alternative waterbody/capacity-based option: ECAR, MAIN, MAPP, and SPP.[75] As indicated above, the compliance requirements of this analyzed option are identical to those of the proposed rule for these four regions. Given the similarity in compliance requirements and the limited electricity exchanges between NERC regions modeled in IPM 2000, EPA concludes that the impacts modeled for the alternative waterbody/capacity-based option would be representative of potential impacts associated with the proposed rule for each of these regions.

Five measures developed from the IPM 2000 output are used to assess market level impacts associated with Section 316(b) regulation: (1) Total capacity, defined as the total available capacity of all facilities not identified as either baseline closures or economic closures resulting from the regulatory option; (2) new capacity, defined as total capacity additions from new facilities; (3) total generation, calculated as the sum of generation from all facilities not identified as baseline closures or economic closures resulting from the regulatory option; (4) production costs per MWh of generation, calculated as the sum of total fuel and variable O&M costs divided by total generation; and (5) energy prices, defined as the prices received by facilities for the sale of electricity. Exhibit 6 presents the base case and post compliance results for each of these economic measures.

EXHIBIT 6.—MARKET-LEVEL IMPACTS OF THE PROPOSED RULE

[Four Nerc Regions; 2008]

NERC region	Base case	Option 1	Difference	% Change
(ECAR)				
Total Capacity (MW)	118,390	118,570	180	0.2
New Capacity (MW)	8,310	8,490	180	2.2
Total Generation (GWh)	649,140	649,140	0	0.0
Production Costs ($2001/MWh)	$12.53	$12.53	$0.00	0.0
Energy Prices ($2001/MWh)	$22.58	$22.56	($0.02)	−0.1
(MAIN)				
Total Capacity (MW)	60,230	60,210	−20	0.0
New Capacity (MW)	6,540	6,530	−10	−0.2
Total Generation (GWh)	284,920	284,860	−60	0.0
Production Costs ($2001/MWh)	$12.29	$12.29	$0.00	0.0
Energy Prices ($2001/MWh)	$22.54	$22.55	$0.01	0.0
(MAPP)				
Total Capacity (MW)	35,470	35,470	0	0.0
New Capacity (MW)	2,760	2,760	0	0.0
Total Generation (GWh)	179,110	179,170	60	0.0
Production Costs ($2001/MWh)	$11.67	$11.68	$0.01	0.0
Energy Prices ($2001/MWh)	$22.25	$22.20	($0.05)	−0.2
(SPP)				
Total Capacity (MW)	49,110	49,110	0	0.0
New Capacity (MW)	160	160	0	0.0

[73] While the compliance requirements are identical under the proposed rule and the alternative waterbody/capacity-based option, permitting costs associated with the proposed rule are higher than those for the alternative option analyzed using the IPM 2000. The cost differential averages approximately 30 percent of total compliance costs associated with the alternative option. Despite the higher permitting costs, EPA concludes that the results of the alternative analysis are representative of impacts that could be expected under the proposed rule.

[74] ECAR (East Central Area Reliability Coordination Agreement) includes the states of Kentucky, Ohio, and West Virginia, and portions of Michigan, Maryland, Virginia, and Pennsylvania. MAIN (Mid-America Interconnected Network, Inc.) includes the state of Illinois and portions of Missouri, Wisconsin, Iowa, Minnesota and Michigan. MAPP (Mid-Continent Area Power Pool) includes the states of Nebraska and North Dakota, and portions of Iowa, South Dakota, Wisconsin, Montana and Minnesota. SPP (Southwest Power Pool) includes the states of Kansas and Oklahoma, and portions of Arkansas, Louisiana, Texas, and New Mexico.

[75] The market level results include results for all units located in each of the four NERC regions including facilities both in scope and out of scope of the alternative waterbody/capacity-based option.

EXHIBIT 6.—MARKET-LEVEL IMPACTS OF THE PROPOSED RULE—Continued

[Four Nerc Regions; 2008]

NERC region	Base case	Option 1	Difference	% Change
Total Generation (GWh)	217,670	217,750	80	0.0
Production Costs ($2001/MWh)	$14.43	$14.43	$0.00	0.0
Energy Prices ($2001/MWh)	$25.00	$24.99	($0.01)	0.0%

The results presented in Exhibit 6 reveal no significant changes in any of the economic measures used to assess the impacts of the alternative waterbody/capacity-based option in any of the four NERC regions.[76] One region, SPP, experienced no change of any consequence to any of the five impact measures as a result of the alternative option. Post compliance changes in total capacity and new capacity were experienced in both ECAR and MAIN. Each of these measures decreased by insignificant amounts in MAIN while ECAR experienced a slight increase of 0.2 percent in total capacity and a slightly larger increase of 2.2 percent in new capacity additions. While the slight increases in total and new capacity seen in ECAR did not result in changes in either generation or production costs, energy prices did decrease slightly. Energy prices also decreased slightly in MAPP despite no appreciable difference in any other measure for that region. Based on these results, EPA concludes that there are no significant impacts associated with the proposed section 316(b) Phase II Rule in these regions.

While the waterbody/capacity-based option, as analyzed in IPM, matches the technology specifications of the proposed rule for the four regions discussed above, this is not the case for the other six NERC regions: ERCOT, FRCC, MAAC, NPCC, SERC, and WSCC.[77] Under the waterbody/capacity-based option, as analyzed, some facilities in these regions were analyzed with more stringent and costly compliance requirements, including recirculating wet cooling towers, than would required by the proposed rule. As a result, the IPM waterbody/capacity-based option overstates the expected rule impacts in these remaining six regions. To provide an alternative approach to estimating the rule's impacts in these regions, EPA compared characteristics relevant to the determination of rule impacts for the four NERC regions explicitly analyzed in the IPM analysis and the six NERC regions for which the IPM analysis otherwise overstates impacts. EPA found no material differences between the two groups of regions in (1) the percentage of total base case capacity subject to the proposed rule, (2) the ratio of the annualized compliance costs of the proposed rule to total base case generation, and (3) the compliance requirements of the proposed rule (see Exhibit 7 below). EPA therefore concludes that the results for the four regions would be representative of the other NERC regions as well.[78]

EXHIBIT 7.—COMPARISON OF COMPLIANCE REQUIREMENTS BY NERC REGION—2008

NERC region	Percent of total capacity subject to the rule	Total annualized compliance cost per MWh generation ($2001)	Percentage of facilities subject to each compliance requirement—proposed rule				
			Total facilities	Both impingement and entrainment controls	Entrainment controls only (percent)	Impingement controls only (percent)	None (percent)
ECAR	66.5	0.05	99	32.4	7.1	23.9	36.6
MAIN	60.9	0.04	49	30.6	6.1	22.7	40.7
MAPP	42.1	0.04	42	9.5	7.1	28.5	54.8
SPP	40.7	0.03	32	12.6	0.0	46.9	40.5
Average	57.1	0.04		24.8	5.8	27.8	41.5
ERCOT	57.8	0.04	51	2.0	11.8	60.8	25.5
FRCC	49.8	0.07	30	40.0	13.3	16.7	30.0
MAAC	50.7	0.06	43	26.2	19.1	28.8	25.9
NPCC	49.6	0.08	54	22.1	34.2	16.5	27.1
SERC	53.8	0.03	95	16.8	7.4	31.6	44.2
WSCC	18.3	0.02	33	52.9	3.0	16.6	27.5
Average	43.6	0.04		22.8	14.6	30.3	32.3
Average of All NERC Regions	47.7	0.04		23.6	10.9	29.3	36.2

[76] In addition to the five impact measures presented in Exhibit 6, EPA utilized IPM 2000 to identify changes in other economic and operational characterisitcs, including revenues, average fuel costs, changes in repowering, and the number and capacity of facilities identfiied as economic closures. The IPM results showed no economic closures and no changes in repowering associated with compliance with the alternative waterbody/capacity-based option in any of the four NERC regions presented in Exhibit 6. For a detailed discussion of the results of the IPM 2000 analysis of the alternative waterbody/capacity based option see section VIII.B.2 and the EBA document.

[77] The six other NERC regions are: Electric Reliability Council of Texas (ERCOT), Florida Reliability Coordinating Council (FRCC), Mid Atlantic Area Council (MAAC), Northeast Power Coordination Council (NPCC), Southeastern Electricity Reliability Council (SERC), and Western Systems Coordinating Council (WSCC).

[78] The comparison presented in Exhibit 7 includes information for facilities modeled in IPM 2000 only. Of the 539 existing facilities subject to the section 316(b) Phase II rule, nine are not modeled in the IPM 2000: Three facilities are in Hawaii, and one is in Alaska. Neither state is represented in the IPM 2000. One facility is identified as an ''Unspecified Resource'' and does not report on any EIA forms. Four facilities are on-site facilities that do not provide electricity to the grid. The 530 existing facilities were weighted to account for facilities not sampled and facilities that did not respond to the EAP's industry survey and thus represent a total of 540 facilities industry-wide.

Exhibit 7 indicates that, on average, the percentage of total capacity is slightly higher and the percentage of facilities subject to the proposed rule is slightly lower in the four analyzed NERC regions compared to the other six regions. In addition, the average annualized compliance costs per MWh of generation is very similar in all NERC regions. Based on this comparison and the limited amount electricity exchanges between regions modeled in IPM 2000, EPA concluded that the analysis of impacts under the proposed rule for the four NERC regions is representative of likely impacts in the other NERC regions. As the analysis of the impacts of the alternative waterbody/capacity-based option revealed no significant impacts at the market level, EPA concluded that there would be no significant impacts on any NERC region associated with the proposed rule.

ii. Impacts on Facilities Subject to the Proposed Rule

This section presents the results of the facility impact analysis for the proposed rule, again using the IPM 2000 analysis of the alternative waterbody/capacity-based option for the four NERC regions where the compliance requirements of the proposed rule and the analyzed option are identical.[79] EPA used the IPM 2000 results to analyze two potential facility level impacts of the proposed section 316(b) Phase II Rule: (1) potential changes in the economic and operational characteristics of the group of Phase II existing facilities and (2) potential changes to individual facilities within the group of Phase II existing facilities.

EPA used output from model run year 2008 to develop four measures used to identify changes in the economic and operational characteristics of the group of Phase II existing facilities. These measures include: (1) Total capacity, defined as the total available capacity of all facilities not identified as either baseline closures or economic closures resulting from the regulatory option; (2) total generation, calculated as the sum of generation from all facilities not identified as baseline closures or economic closures resulting from the regulatory option; (3) revenues, calculated as the sum of energy and capacity revenues; and (4) production costs per MWh of generation, calculated as the sum of total fuel and variable O&M costs divided by total generation. Exhibit 8 presents the base case and post compliance results for each of these economic measures.

EXHIBIT 8.—IMPACTS ON PHASE II EXISTING FACILITIES OF THE PROPOSED RULE

[Four NERC Regions; 2008]

	Base case	Proposed rule	Difference	% Change
(ECAR)				
Total Capacity (MW)	78,710	78,710	0.00	0.0
Total Generation (GWh)	515,020	515,030	10.00	0.0
Revenues (Million $2001)	$17,650	$17,650	0.00	0.0
Production Costs ($2001/MWh)	$12.34	$12.34	0.00	0.0
(MAIN)				
Total Capacity (MW)	36,700	36,700	0.00	0.0
Total Generation (GWh)	226,360	226,350	−10.00	0.0
Revenues (Million $2001)	$7,890	$7,890	0.00	0.0
Production Costs ($2001/MWh)	$11.74	$11.74	0.00	0.0
(MAPP)				
Total Capacity (MW)	14,920	14,920	0.00	0.0
Total Generation (GWh)	103,430	103,470	40.00	0.0
Revenues (Million $2001)	$3,420	$3,420	0.00	0.0
Production Costs ($2001/MWh)	$11.78	$11.78	0.00	0.0
(SPP)				
Total Capacity (MW)	19,990	19,990	0.00	0.0
Total Generation (GWh)	112,250	112,350	100.00	0.1
Revenues (Million $2001)	$3,930	$3,930	0.00	0.0
Production Costs ($2001/MWh)	$13.32	$13.34	0.01	0.1

Note: Total capacity, total generation, and revenues have been rounded to the closest 10.

The results for the four NERC regions presented in Exhibit 8 reveal no significant changes in any of the economic measures used to assess the impacts of the alternative waterbody/capacity-based option to the group of Phase II existing facilities. None of the four NERC regions analyzed experienced any post compliance change in either capacity or revenues. Further, while there were some variations in total generation derived from Phase II existing facilities in these regions, no region experienced an increase or decrease in generation of more than one tenth of one percent. Similarly, there was no significant change to the production costs of Phase II existing facilities in any of the analyzed regions. Given EPA's earlier noted finding of no material differences between these four NERC regions and the remaining six NERC regions in important characteristics relevant to rule impacts, EPA again concluded that the finding of no significant impact for these four regions could be extended to the remaining six regions. As a result, EPA concludes that the proposed rule will not pose significant impacts in any NERC region.

While the group of Phase II existing facilities as a whole is not expected to experience impacts under the proposed rule, it is possible that there would be shifts in economic performance among individual facilities subject to this rule. To examine the range of possible impacts to individual Phase II existing facilities, EPA analyzed facility-specific changes in generation, production costs, capacity utilization, revenue, and

[79] These results only pertain to the steam electric component of the Phase II existing facilities and thus do not provide complete measures for facilities with both steam electric and non-steam electric generation.

operating income. Exhibit 9 presents the number of Phase II existing facilities located in the four analyzed NERC regions by category of change for each economic measure.

EXHIBIT 9.—OPERATIONAL CHANGES AT PHASE II EXISTING FACILITIES FROM THE PROPOSED RULE

[Four NERC Regions; 2008]

Economic measures	Reduction		Increase		No change
	0–1%	1%	0–1%	1%	
Change in Generation	2	0	1	2	218
Change in Production Costs	0	0	27	0	178
Change in Capacity Utilization	2	0	2	1	218
Change in Revenue	56	0	44	2	121
Change in-Operating Income	66	0	58	1	98

Note: IPM 2000 output for run year 2008 provides data for 223 Phase II existing facilities located in the four NERC regions with identical compliance requirements under the alternative option and proposed rule. Eighteen facilities had zero generation in either the base case or post compliance scenario. As such it was not possible to calculate production costs in dollars per MWh of generation for these facilities. For all measures, the percentages used to assign facilities to impact categories have been rounded to the nearest 10th of a percent.

Exhibit 9 shows that there is almost no shift in economic activity between facilities subject to this rule in the four analyzed NERC regions. No facility experiences a decrease in generation, capacity utilization, revenues, or operating income, or an increase in production costs of more than one percent. These findings, together with the findings from the comparison of compliance costs and requirements across all regions above, further confirm EPA's conclusion that the proposed rule would not result in economic impacts to Phase II existing facilities located in the four analyzed NERC regions.

B. Alternative Regulatory Options

EPA is considering four alternative options that would establish substantive requirements for best technology available for minimizing adverse environmental impact by specific rule rather than by site-specific analysis. These include: (1) Requiring existing facilities located on estuaries and tidal rivers to reduce intake capacity commensurate with the use of a closed-cycle recirculating cooling system; (2) requiring all Phase II existing facilities to reduce intake capacity commensurate with the use of closed-cycle, recirculating cooling systems; (3) requiring all Phase II existing facilities to reduce impingement and entrainment to levels established based on the use of design and construction (e.g., fine mesh screens, fish return systems) or operational measures; and (4) requiring all existing facilities to reduce their intake capacity to a level commensurate with the use of a dry cooling system.

EPA conducted an electricity market model analysis of alternative options one and two as defined above. Section VIII.B.1 below presents the national costs of these two alternative regulatory options considered by EPA. Section VIII.B.2 discusses the impacts associated with these two alternative regulatory options.

1. Costs

EPA estimated total national annualized post-tax cost of compliance for two alternative options: (1) The ''Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System based on Waterbody Type/Capacity'' Option (waterbody/capacity-based option) and (2) the ''Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System for All Facilities'' Option (all closed-cycle option). The estimated total annualized post-tax cost of compliance for the waterbody/capacity-based option is approximately $585 million. EPA further estimates that the total annualized post-tax cost of compliance for the all cooling tower option is approximately $2.26 billion. Not included in either estimate are 9 facilities that are projected to be baseline closures. Including compliance costs for these 9 facilities would increase the total cost of compliance with the waterbody/capacity-based option to approximately $595 million, and to roughly $2.32 billion for the all cooling tower option.

2. Economic Impacts

As stated in Section VIII.A.2 above, EPA used the IPM 2000 electricity market model to assess impacts associated with the proposed rule and regulatory options. These impacts are assessed by comparing model output for the base case and post compliance scenarios for each regulatory option. In support of this rule, EPA completed an electricity market model analysis of two post compliance scenarios: (1) The ''Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System based on Waterbody Type/Capacity'' Option (waterbody/capacity-based option) and (2) the ''Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System for All Facilities'' Option (all closed-cycle option). This section presents the results of the IPM 2000 analysis of these two post-compliance scenarios.

a. Intake Capacity Commensurate With Closed-Cycle, Recirculating Cooling System Based on Waterbody Type/Capacity

This section presents the market level and Phase II existing facility level impacts of the alternative waterbody/capacity-based option. This option would require facilities that withdraw water from an estuary, tidal river, or ocean and that meet certain intake flow requirements, to reduce their intake capacity to a level that can be attained by a closed-cycle, recirculating cooling system. This requirement would be met within five to ten years of promulgation of the final rule (2004 to 2012) depending on when a permittee's first NPDES permit after promulgation expires. The impacts of compliance with this option are calculated using base case and post compliance results for model run year 2013. This run year reflects the long-term operational changes of the regulatory option with all in-scope facilities operating in their post compliance condition.

(1) Market Level Impacts

EPA used five measures to identify changes to economic and operational characteristics of existing facilities and assess market level impacts due to compliance with the alternative waterbody/capacity-based option: (1) Capacity retirements, calculated as the total capacity of facilities identified as economic closures due to the alternative

option; (2) capacity retirements as a percentage of baseline capacity; (3) post compliance changes in total production costs per MWh, where production costs are calculated as the sum of total fuel and variable O&M costs divided by total generation; (4) post compliance changes in energy price, where energy prices are defined as the prices received by facilities for the sale of electric generation; and (5) post compliance changes in capacity price, where capacity prices are defined as the price paid to facilities for making unloaded capacity available as reserves to ensure system reliability. Exhibit 10 presents the market level summary of these impact measures by NERC region.

EXHIBIT 10.—MARKET-LEVEL IMPACTS OF THE ALTERNATIVE WATERBODY/CAPACITY-BASED OPTION (2013)

NERC region	Baseline capacity (MW)	Capacity closures (MW)	Closures as % of baseline capacity	Change in production cost ($/MWh) (percent)	Change in energy price ($/MWh) (percent)	Change in capacity price ($/MWh) (percent)
ECAR	122,080	0	0.0	0.0	0.0	−0.2
ERCOT	80,230	0	0.0	0.0	0.0	−0.2
FRCC	52,850	0	0.0	0.4	0.5	−2.0
MAAC	65,270	0	0.0	0.7	0.6	−1.5
MAIN	61,380	0	0.0	0.2	0.1	−0.1
MAPP	36,660	0	0.0	0.0	0.0	−0.1
NPCC	74,080	840	1.1	0.5	−0.3	13.2
SERC	205,210	0	0.0	0.1	0.0	0.0
SPP	51,380	0	0.0	0.0	0.0	0.0
WSCC	173,600	2,170	1.3	1.9	−0.1	2.0
Total	922,740	3,010	0.3	0.5	n/a	n/a

Note: Baseline Capacity and Closure Capacity have been rounded to the nearest 10 MW.

Exhibit 10 shows that with the exception of an increase in the capacity price paid in NPCC, no significant change in market-level operation would result from the alternative waterbody/capacity-based option. Two of the ten NERC regions modeled, NPCC and WSCC, would experience economic closures of existing facilities as a result of the alternative option. However, these closures represent an insignificant percentage of total baseline capacity in these regions (1.1 percent and 1.3 percent respectively). Of the capacity retirements in NPCC, 400 MW would be nuclear capacity and 440 MW would be oil/gas-fired capacity. The vast majority of the closures in WSCC, 2,150 MW, represents nuclear capacity. Six NERC regions would experience slight increases in production costs per MWh. Production cost per MWh in WSCC would increase the most, by almost 2 percent. In addition, three NERC regions would experience a slight increase in energy price while NPCC and WSCC both would both see a slight decrease in post compliance energy prices due to the economic closure of existing capacity. Further, NPCC and WSCC are the only regions that would experience an increase in capacity price. The increase in capacity prices would be the highest in NPCC with 13.2 percent.

(2) Phase II Existing Facility Level Impacts

The IPM 2000 results from model run year 2013 were used to analyze two potential facility level impacts associated with the alternative waterbody/capacity-based option: (1) Potential changes in the economic and operational characteristics of the group of Phase II existing facilities and (2) potential changes to individual facilities within the group of Phase II existing facilities. EPA analyzed economic closures and changes in production costs to assess impacts to all Phase II existing facilities resulting from the alternative option. Exhibit 11 below presents the results from this analysis, by NERC region.

EXHIBIT 11.—IMPACTS ON PHASE II EXISTING FACILITIES OF THE ALTERNATIVE WATERBODY/CAPACITY-BASED OPTION (2013)

NERC region	Baseline capacity (MW)	Closure Analysis			Change in production cost ($/MWh) (percent)
		# Facilities	Capacity (MW)	Percent of baseline capacity	
ECAR	78,680	0	0	0.0	−0.1
ERCOT	42,330	0	0	0.0	0.0
FRCC	24,460	0	0	0.0	0.7
MAAC	30,310	0	0	0.0	0.0
MAIN	33,650	0	0	0.0	0.0
MAPP	14,900	0	0	0.0	0.0
NPCC	36,360	(1)	650	1.8	−0.2
SERC	100,780	0	0	0.0	0.0
SPP	19,990	0	0	0.0	0.0
WSCC	30,110	2	2,170	7.2	3.9
Total	411,570	1	2,820	0.7	−0.3

Note: Baseline Capacity and Closure Capacity have been rounded to the nearest 10 MW.

Exhibit 11 shows that impacts under the waterbody/capacity-based option would be small. Similar to the market level, WSCC and NPCC are the only regions that would experience capacity retirements at Phase II existing facilities under this regulatory option. It should be noted that retirements presented in these exhibits are net retirements, accounting for both a potential increase and decrease in the number of retirements, post compliance. For example, NPCC is projected to experience a capacity loss of 650 MW under this option. However, one facility fewer than under the base case is projected to retire: Two facilities that would have retired in the baseline remain operational under the analyzed option, because their compliance costs are low compared to that of other facilities in the same region and they would therefore become relatively more profitable. WSCC is the other region with projected Phase II retirements under this option. The combined capacity retirements of both regions would be 2,820 MW, or 0.7 percent of all Phase II capacity.

While the group of Phase II existing facilities as a whole is not expected to experience impacts under the waterbody/capacity-based option, it is possible that there would be shifts in economic performance among individual facilities subject to this rule. To assess potential distributional effects, EPA analyzed facility-specific changes in generation, production costs, capacity utilization, revenue, and operating income. Exhibit 12 presents the total number of Phase II existing facilities with different degrees of change in each of these measures. [80]

EXHIBIT 12.—OPERATIONAL CHANGES AT PHASE II EXISTING FACILITIES FROM THE WATERBODY/CAPACITY-BASED OPTION (2013)

Economic measures	Reduction			Increase			No change
	0–1%	1–3%	>3%	0–1%	1–3%	>3%	
Change in Generation	7	17	21	4	4	9	444
Change in Production Costs	6	5	1	13	16	3	380
Change in Capacity Utilization	10	7	12	7	3	5	462
Change in Revenue	57	43	17	48	15	20	306
Change in Operating Income	75	42	10	46	15	22	296

Note: IPM 2000 output for model run year 2013 provides output for 506 Phase II existing facilities. Eighty-two facilities had zero generation in either the base case or post compliance scenario. As such it was not possible to calculate production costs in dollars per MWh of generation for these facilities. For all measures percentages used to assign facilities to impact categories have been rounded to the nearest 10th of a percent.

Exhibit 12 indicates that the majority of Phase II existing facilities would not experience changes in generation, production costs, or capacity utilization due to compliance with the alternative option. Of those facilities with changes in post compliance generation and capacity utilization, most would experience decreases in these measures. In addition, while approximately 40 percent of Phase II existing facilities would experience an increase or decrease in revenues and/or operating income, the magnitude of such changes would be small.

Under the alternative waterbody/capacity-based option, facilities withdrawing water from an estuary, tidal river, or ocean are required to meet standards for reducing impingement mortality and entrainment based on the performance of wet cooling towers. These facilities would have the choice to comply with Track I or Track II requirements. Facilities that choose to comply with Track I would be required to reduce their intake flow to a level commensurate with that which can be attained by a closed-cycle, recirculating system. Facilities that choose to comply with Track II would have to demonstrate that alternative technologies would reduce impingement and entrainment to comparable levels that would be achieved with a closed-cycle recirculating system. EPA's estimation of impacts associated with the alternative waterbody/capacity-based option is based on an electricity market model analysis that assumes all facilities withdrawing water from an estuary, tidal river, or ocean choose to comply with the requirements of Track I. While these impacts represent the worst case scenario under this option, it is reasonable to assume that a number of facilities would choose to comply with the requirements of Track II. EPA therefore also considered an additional scenario in which 33 of the 54 existing facilities costed with a cooling tower, or 61 percent, would choose to comply with the requirements of Track II. While this scenario was not explicitly analyzed, the absence of significant impacts under the more expensive scenario, where all 54 facilities are costed with cooling towers, suggests the alternative scenario would have similar or lower impacts.

b. Intake Capacity Commensurate with Closed-Cycle, Recirculating Cooling System for All Facilities

This section presents the market level and Phase II existing facility level impacts of the closed-cycle, recirculating wet cooling everywhere option. This option requires that existing facilities with a design intake flow 50 MGD or more reduce their total design intake flow to a level that can be attained by a closed-cycle recirculating cooling water system. In addition, facilities in specified circumstances would have to install design and construction technologies to minimize impingement mortality and entrainment. Existing facilities would be required to comply within five to ten years of promulgation of the final rule (2004 to 2012) depending on when a permittee's first NPDES permit after promulgation expires. The impacts of compliance with this option are calculated using base case and post compliance results for model run year 2013 in order to reflect the long-term operational changes of the rule with all in-scope facilities operating in their post compliance condition.

[80] Note that the facility-level exhibit excludes in-scope facilities with significant status changes (including baseline closures, avoided closures, and facilities that repower) to allow for a better comparison of operational changes as a result of the analyzed option. Status changes are discussed separately in this section and the supporting Economic and Benefits Analysis Document.

(1) Market Level Impacts

EPA used IPM output to examine changes to economic and operational characteristics of existing facilities and to assess market level impacts due to compliance with the all cooling towers option. The measures used to assess market level responses to this option include capacity retirements, capacity retirements as a percentage of baseline capacity, and post compliance changes in total production costs per MWh, energy price, and capacity price. Exhibit 13 presents the market level summary of these impact measures by NERC region.

EXHIBIT 13.—MARKET-LEVEL IMPACTS OF THE ALTERNATIVE ALL COOLING TOWERS OPTION (2013)

NERC region	Baseline capacity (MW)	Capacity closures (MW)	Closures as % of baseline capacity percent	Change in production cost ($/MWh) percent	Change in energy price ($/MWh) percent	Change in capacity price ($/MWh) percent
ECAR	122,080	2,190	1.8	2.4	1.9	0.7
ERCOT	80,230	510	0.6	0.3	0.4	−0.1
FRCC	52,850	90	0.2	0.7	1.1	−3.8
MAAC	65,270	0	0.0	1.8	0.6	−0.2
MAIN	61,380	490	0.8	2.3	0.9	0.3
MAPP	36,660	0	0.0	1.0	0.1	3.0
NPCC	74,080	890	1.2	1.0	0.1	16.6
SERC	205,210	0	0.0	1.2	0.4	0.0
SPP	51,380	20	0.0	0.5	0.3	−0.7
WSCC	173,600	2,370	1.4	1.9	0.1	1.0
Total	922,740	6,560	0.7	1.4		

Note: Baseline Capacity and Closure Capacity have been rounded to the nearest 10 MW.

Exhibit 13 indicates that, of the ten NERC regions modeled, only MAAC, MAPP, and SERC would not experience economic closures of existing capacity as a result of the all cooling towers option. ECAR and WSCC would experience the highest closures with 2,370 MW and 2,190 MW, respectively. Of the 6,560 MW of capacity projected to retire as a result of this option, 5,150 MW, or 79 percent, would be nuclear capacity. The remainder would be oil/gas steam capacity. In addition, every NERC region would experience an increase in both production costs per MWh and energy prices. The increases in production costs would range from a 0.3 percent increase in ERCOT to an increase of more than 2 percent in ECAR. The most substantial changes would occur in the prices paid for capacity reserves. The highest capacity price increase would occur in NPCC with 16.6 percent.

(2) Phase II Existing Facility Level Impacts:

As with the alternative waterbody/capacity-based option analysis, the IPM 2000 results from model run year 2013 were used to analyze two potential facility level impacts associated with the alternative all cooling towers option: (1) Potential changes in the economic and operational characteristics of the Phase II existing facilities and (2) potential changes to individual facilities within the group of Phase II existing facilities. EPA analyzed economic closures and changes in production costs to assess impacts to all Phase II existing facilities resulting from the alternative option. Exhibit 14 below presents the results from this analysis, by NERC region.

EXHIBIT 14.—IMPACTS ON PHASE II EXISTING FACILITIES OF THE ALTERNATIVE ALL COOLING TOWERS OPTION (2013)

NERC region	Baseline capacity	Closure analysis			Change in production Cost ($/MWh) (percent)
		# Facilities	Capacity (MW)	Percent of baseline capacity	
ECAR	78,680	1	2,060	2.6	1.4
ERCOT	42,330	1	420	1.0	−0.5
FRCC	24,460	0	0	0.0	0.8
MAAC	30,310	0	0	0.0	−1.0
MAIN	33,650	0	490	1.5	1.4
MAPP	14,900	0	0	0.0	1.3
NPCC	36,360	0	720	2.0	−0.3
SERC	100,780	0	0	0.0	1.0
SPP	19,990	1	20	0.1	0.1
WSCC	30,110	2	2,170	7.2	2.6
Total	411,570	5	5,880	1.4	−0.2

Note: Baseline Capacity and Closure Capacity have been rounded to the nearest 10 MW.

Exhibit 14 shows that economic impacts under the all cooling tower option would be higher than under the proposed rule and the alternative waterbody/capacity-based option. Overall, seven Phase II existing facilities would retire under this option. An additional two facilities that retire in the base case would find it profitable to remain operating under this option. The net retirements are therefore five facilities and 5,880 MW of capacity. ECAR would experience the highest impact with capacity closures of over 2,000 MW while WSCC would experience the highest percentage retirement, with 7.2 percent of its total Phase II capacity.

While the group of Phase II existing facilities as a whole is not expected to experience impacts under the all

cooling towers option, it is possible that this option would lead to shifts in economic performance among individual facilities subject to this rule. To identify these shifts, EPA analyzed facility-specific changes in generation, production costs, capacity utilization, revenue, and operating income. Exhibit 15 presents the total number of Phase II existing facilities with different degrees of change in each of these measures.

EXHIBIT 15.—OPERATIONAL CHANGES AT PHASE II EXISTING FACILITIES FROM THE ALL COOLING TOWERS OPTION (2013)

Economic Measures	Reduction			Increase			No Change
	0 – 1%	1 – 3%	> 3%	0 – 1%	1–3%	> 3%	
Change in Generation	18	251	53	3	4	22	151
Change in Production Costs	16	12	4	64	257	17	51
Change in Capacity Utilization	15	25	25	8	12	15	402
Change in Revenue	154	121	55	88	39	35	10
Change in-Operating Income	118	160	50	83	47	29	15

Note: IPM 2000 output for model run year 2013 provides output for 502 Phase II existing facilities. Eighty-one facilities had zero generation in either the base case or post compliance scenario. As such it was not possible to calculate production costs in dollars per MWh of generation for these facilities. For all measures percentages used to assign facilities to impact categories have been rounded to the nearest 10th of a percent.

Exhibit 15 indicates that under the all cooling tower option, more facilities would experience changes in their operations and economic performance than under the other two analyzed options. For example, 322 out of 502 facilities, or 64 percent, would experience a reduction in generation.[81] In addition, 328 facilities would experience a reduction in operating income while 338 facilities would see their production cost per MWh increase. However, some facilities subject to today's rule would also benefit from regulation under this option: 162 facilities would experience an increase in revenues and 159 would experience an increase in operating income.

IX. Benefit Analysis

A. Overview of Benefits Discussion

This section presents EPA's estimates of the national environmental benefits of the proposed section 316(b) regulations for Phase II existing facilities. The benefits occur due to the reduction in impingement and entrainment at cooling water intake structures affected by this rulemaking. Impingement and entrainment kills or injures large numbers of aquatic organisms. By reducing the levels of impingement and entrainment, today's proposed rule would increase the number of fish, shellfish, and other aquatic life in local aquatic ecosystems. This, in turn, will directly and indirectly improve direct use benefits such as those associated with recreational and commercial fisheries. Other types of benefits, including ecological and nonuse values, would also be enhanced. The text below provides an overview of types and sources of benefits anticipated, how these benefits were estimated, what level of benefits have been estimated for the proposed rule, and how benefits compare to costs. Additional detail and EPA's complete benefits assessment can be found in the EBA for the proposed rule.

B. The Physical Impacts of Impingement and Entrainment

Impingement and entrainment can have adverse impacts on many kinds of aquatic organisms, including fish, shrimp, crabs, birds, sea turtles, and marine mammals. Adult fish and larger organisms are trapped against intake screens, where they often die from the immediate impact of impingement, residual injuries, or from exhaustion and starvation. Entrained organisms that are carried through the facility's intakes die from physical damage, thermal shock, or chemical toxicity induced by antifouling agents.

The extent of harm to aquatic organisms depends on species characteristics, the environmental setting in which the facilities are located, and facility location, design, and capacity. Species that spawn in nearshore areas, have planktonic eggs and larvae, and are small as adults experience the greatest impacts, since both new recruits and reproducing adults are affected (e.g., bay anchovy in estuaries and oceans). In general, higher impingement and entrainment are observed in estuaries and near coastal waters because of the presence of spawning and nursery areas. By contrast the young of freshwater species are epibenthic and/or hatchel from attached egg masses rather than existing as free-floating individuals, and therefore freshwater species may be less susceptible to entrainment.

The likelihood of impingement and entrainment also depends on facility characteristics. If the quantity of water withdrawn is large relative to the flow of the source waterbody, a larger number of organisms will be affected. Intakes located in nearshore areas tend to have greater ecological impacts than intakes located offshore, since nearshore areas are usually more biologically productive and have higher concentrations of aquatic organisms.

In general, the extent and value of reducing impingement and entrainment at existing cooling water intake structure locations depends on intake and species characteristics that influence the intensity, time, and spatial extent of interactions of aquatic organisms with a facility's cooling water intake structure and the physical, chemical, and biological characteristics of the source waterbody. A once-through cooling system withdraws water from a source waterbody, circulates it through the condenser system, and then discharges the water back to the waterbody without recirculation. By contrast, closed-cycle cooling systems (which are one part of the basis for best technology available in some circumstances) withdraw water from the source waterbody, circulate the water through the condensers, and then sends it to a cooling tower or cooling pond before recirculating it back through the condensers. Because cooling water is recirculated, closed-cycle systems generally reduce the water flow from 72 percent to 98 percent, thereby using only 2 percent to 28 percent of the water used by once-through systems. It is generally assumed that this would result in a comparable reduction in impingement and entrainment.

[81] As explained earlier, facilities with significant status changes (including baseline closures, avoided closures, and facilities that repower) are excluded from this comparison.

C. Impingement and Entrainment Impacts and Regulatory Benefits are Site-Specific

Site-specific information is critical in predicting benefits, because studies at existing facilities demonstrate that benefits are highly variable across facilities and locations. Even similar facilities on the same waterbody can have very different impacts depending on the aquatic ecosystem in the vicinity of the facility and intake-specific characteristics such as location, design, construction, and capacity.

Some of the important factors that make benefits highly site-specific include important differences across the regulated facilities themselves. Many of these facility-specific characteristics that affect benefits add additional stressors to the aquatic systems in which they operate. Benefits occur through the reduction of the stressors through the application of impingement and entrainment reduction technologies. Stressor-related factors that make benefits site-specific include:

- Cooling water intake structure size and scale of operation (e.g., flow volume and velocity)
- Cooling water intake structure technologies and/or operational practices in place (if any) for impingement and entrainment reduction at baseline (i.e., absent any new regulations)
- Cooling water intake structure intake location in relation to local zones of ecological activity and significance (e.g., depth and orientation of the intake point, and its distance from shore)
- Cooling water intake structure flow volumes in relation to the size of the impacted waterbody

Many of the key factors that make impingement and entrainment impacts site-specific reflect the receptors exposed to the stressor-related impacts. Receptors include the types of waterbodies impacted, the aquatic species that are affected in those waterbodies, and the people who use and/or value the status of the water resources and aquatic ecosystems affected. Receptor-oriented factors that make impingement and entrainment impacts highly site-specific include:

- The aquatic species present near a facility
- The ages and life stages of the aquatic species present near the intakes
- The timing and duration of species' exposure to the intakes
- The ecological value of the impacted species in the context of the aquatic ecosystem
- Whether any of the impacted species are threatened, endangered, or otherwise of special concern and status (e.g., depleted commercial stocks)
- Local ambient water quality issues that may also affect the fisheries and their uses

All of these factors, as well as several others, have important impacts on the level and significance of impingement and entrainment. These factors determine baseline impacts, and the size and value of regulation-related reductions in those impacts.

The regulatory framework proposed by EPA recognizes the site-specific nature of impingement and entrainment impacts and is designed to accommodate these factors to the greatest degree practicable in a national rulemaking. For example, EPA's proposed regulatory approach accounts for the types of waterbodies that a cooling water intake structure impacts, the proportion of the source water flow supplied to the cooling water intake structure, and technological design parameters related to the impingement and entrainment from the intake. The Agency's benefits analysis attempts to accommodate and reflect these site-specific parameters.

D. Data and Methods Used to Estimate Benefits

To estimate the economic benefits of reducing impingement and entrainment at existing cooling water intake structures, all the beneficial outcomes need to be identified and, where possible, quantified and assigned appropriate monetary values. Estimating economic benefits can be challenging because of the many steps that need to be analyzed to link a reduction in impingement and entrainment to changes in impacted fisheries and other aspects of relevant aquatic ecosystems, and then to link these ecosystem changes to the resulting changes in quantities and values for the associated environmental goods and services that ultimately are linked to human welfare.

The benefit estimates for this rule are derived from a series of case studies from a range of waterbody types at a number of locations around the country including:

- The Delaware Estuary (Mid-Atlantic Estuaries)
- The Ohio River (Large Freshwater Rivers)
- Tampa Bay (Gulf Coast Estuaries)
- New England Coast (Oceans)
- Mount Hope Bay, New England (North Atlantic Estuaries)
- San Francisco Bay/Delta (Pacific Coast Estuaries)
- The Great Lakes

The following sections describe the methods used by EPA used to evaluate impingement and entrainment impacts at section 316(b) case study Phase II existing facilities and to derive an economic value associated with any such losses.

1. Estimating Losses of Aquatic Organisms

The first set of steps in estimating the benefits of the proposed rule involves estimating the magnitude of impingement and entrainment. EPA's analysis involved compiling facility-reported empirical impingement and entrainment counts and life history information for affected species. Life history data typically included species-specific growth rates, the fractional component of each life stage vulnerable to harvest, fishing mortality rates, and natural (nonfishing) mortality rates.

It is important to note that impingement and entrainment monitoring data are often limited to a subset of species, and monitoring is often of very limited duration (e.g., confined to a single year). This implies that the magnitude of impingement and entrainment is often underestimated. In addition, in many cases data are over two decades old (e.g., from 1979). Therefore the data may not always reflect current fishery conditions, including changes in fisheries due to water quality improvements since the monitoring period. The limited temporal extent of the data also omits the high variability often seen in aquatic populations. If data are collected only in a year of low abundance, impingement and entrainment rates will also be low, and may not reflect the long term average. The data also may not represent potential cumulative long-term impacts of impingement and entrainment.

In EPA's analysis of impingement and entrainment impacts, these facility-derived impingement and entrainment counts were modeled with relevant life history data to derive estimates of age 1 equivalent losses (the number of individuals that would have survived to age 1 if they had not been impinged and entrained by facility intakes), foregone fishery yield (the amount in pounds of commercial and recreational fish and shellfish that is not harvested due to impingement and entrainment losses) and foregone production (losses of impinged and entrained forage species that are not commercial or recreational fishery targets but serve as valuable components of aquatic food webs, particularly as an important food supply to other aquatic species including commercial and recreational species).

2. Estimating Baseline Losses and the Economic Benefits of the Proposed Rule

Given the projected physical impact on aquatic organisms (losses of age 1 equivalents resulting from impingement and entrainment), the second set of steps in the benefits analysis entails assigning monetary values to the estimated losses. These economic loss estimates are subsequently converted into estimated benefits for the proposed rule by examining the extent to which impingement and entrainment is reduced by adoption of the best technology available in accordance with the options defined in this proposed rule.

Economic benefits can be broadly defined according to several categories of goods and services furnished by the impacted species, including those that pertain to the direct use or indirect use of the impacted resources. There also are benefits that are independent of any current or anticipated use (direct or indirect) of the resource; these are known as nonuse or passive use values. The benefits can be further categorized according to whether or not affected goods and services are traded in the market. ''Direct use'' benefits include both ''market'' commodities (e.g., commercial fisheries) and ''nonmarket'' goods (e.g., recreational angling). Indirect use benefits also can be linked to either market or nonmarket goods and services '' for example, the manner in which reduced impingement and entrainment-related losses of forage species leads through the aquatic ecosystem food web to enhance the biomass of species targeted for commercial (market) and recreational (nonmarket) uses. ''Nonuse'' benefits include only ''nonmarketed'' goods and services, reflecting human values associated with existence and bequest motives.

The economic value of benefits is estimated using a range of traditional methods, with the specific approach being dependent on the type of benefit category, data availability, and other suitable factors. Accordingly, some benefits are valued using market data (e.g., for commercial fisheries), and others are valued using secondary nonmarket valuation data (e.g., benefits transfer of nonmarket valuation studies of the value of recreational angling). Some benefits are described only qualitatively, because it was not feasible to derive reliable quantitative estimates of the degree of impact and/or the monetary worth of reducing those impacts. In addition, some nonmarket benefits are estimated using primary research methods. Specifically, recreational values are estimated for some of the case studies (those that are examined on a watershed-scale) using a Random Utility Model (RUM). Also, some benefits estimates are developed using habitat restoration costing or similar approaches that use replacement costs as a proxy for beneficial values. Variations of these general methodologies have been applied to better reflect site-specific circumstances or data availability.

In the case of forage species, benefits valuation is challenging because these species are not targeted directly by commercial or recreational anglers and have no direct use values that can be observed in markets or inferred from revealed actions of anglers. Therefore, two general approaches were used to translate estimated impingement and entrainment losses to forage species into monetary values. The first approach examines replacement costs as a proxy for the value of estimated forage species losses (expressed as the total number of age 1 equivalents) and was valued based on hatchery costs. This approach does not take into consideration ecological problems associated with introducing hatchery fish into wild populations. The second approach used two distinct estimates of trophic transfer efficiency to relate foregone forage production to foregone commercial and recreational fishery yields. A portion of total forage production has relatively high trophic transfer efficiency because it is consumed directly by harvested species. The remaining portion of total forage production has low trophic transfer efficiency because it reaches harvested species indirectly following multiple interactions at different parts of the food web. Ultimately, the production foregone approach assigns a value to reduced forage species losses based on their indirect contribution to higher commercial and recreational fishery values.

Benefits analyses for rulemakings under the Clean Water Act have been limited in the range of benefits addressed, which has hindered EPA's ability to compare the benefits and costs of rules comprehensively. The Agency is working to improve its benefits analyses, including applying methodologies that have now become well established in the natural resources valuation field, but have not been used previously in the rulemaking process. EPA was particularly interested in expanding its benefits analysis for this rule to include more primary research along with the use of secondary (e.g., benefits transfer) methods to estimate recreation benefits. EPA has therefore expanded upon its traditional methodologies in the benefits analysis for this proposed rule by applying an original travel cost study using data from the National Marine Fishery Service in the Delaware and Tampa Estuaries and data from the National Recreational Demand Survey (NDS) in Ohio in a Random Utility Model (RUM) of recreational behavior, to estimate the changes in consumer valuation of water resources that would result from reductions in impingement and entrainment-related fish losses. These studies are presented in detail in the Case Study Document.

The Agency also improved its analyses by performing several Habitat-Based Replacement Cost analyses. A complete Habitat-Based Replacement Cost analysis develops values for impingement and entrainment losses based on the combined costs for implementing habitat restoration actions, administering the programs, and monitoring the increased production after the restoration actions. These costs are developed by identifying the preferred habitat restoration alternative for each species with impingement and entrainment, and then scaling the level of habitat restoration until the losses across all species have been offset fully by expected increases in the production of those species. The total value of the impingement and entrainment losses is then calculated as the sum of the costs across the categories of preferred habitat restoration alternatives. An in-depth discussion of the Habitat-Based Replacement Cost methodology is in Chapter A11 of the Case Study Document. Examples of estimating benefits using the Habitat-Based Replacement Cost methodology can be found in the case studies for the Pilgrim Nuclear facility (Part G) and the Brayton Point facility (Part F). A stream-lined version of the methodology can be found in the J.R. Whiting case study (Part H) and the Monroe case study (Part I) of the Case Study Document.

The primary strength of the Habitat-Based Replacement Cost method is the explicit recognition that impingement and entrainment losses have impacts on all components of the aquatic ecosystem, and the public's use and enjoyment of that ecosystem, beyond that estimated by reduced commercial and recreational fish catches. Results depend on the quality of the impingement and entrainment data collected, the availability of data on the habitat requirements of impinged or entrained species, and the program for defining expected production increases for species following implementation of restoration activities.

3. EPA's Estimates of Impingement and Entrainment Losses and Benefits Probably are Underestimates

EPA's estimates of fish losses due to impingement and entrainment, and of the benefits of the proposed regulations, are subject to considerable uncertainties. As a result, the Agency's benefits estimates could be either over- or under-estimated. However, because of the many factors omitted from the analysis (typically because of data limitations) and the manner in which several key uncertainties were addressed, EPA believes that its analysis is likely to lead to a potentially significant underestimate of baseline losses and, therefore lead to understated estimates of regulatory benefits.

Several of the key factors that are likely to lead EPA's analysis to underestimate benefits include:

Data Limitations

• EPA's analysis is based on facility-provided biological monitoring data. These facility-furnished data typically focus on a subset of the fish species impacted by impingement and entrainment, resulting in an underestimate of the total magnitude of losses.

• Industry biological studies often lack a consistent methodology for monitoring impingement and entrainment. Thus, there are often substantial uncertainties and potential biases in the impingement and entrainment estimates. Comparison of results between studies is therefore very difficult and sometimes impossible, even among facilities that impinge and entrain the same species.

• The facility-derived biological monitoring data often pertain to conditions existing many years ago (e.g., the available biological monitoring often was conducted by the facilities 20 or more years ago, before activities under the Clean Water Act had improved aquatic conditions). In those locations where water quality was relatively degraded at the time of monitoring relative to current conditions, the numbers and diversity of fish are likely to have been depressed during the monitoring period, resulting in low impingement and entrainment. In most of the nation's waters, current water quality and fishery levels have improved, so that current impingement and entrainment losses are likely to be greater than available estimates for depressed populations.

Estimated Technology Effectiveness

• The only technology effectiveness that is certain is reductions in impingement and entrainment with cooling towers.

• Potential latent mortality rates are unknown for most technologies.

• Installed technologies may not operate at the maximum efficiency assumed by EPA in its estimates of technology effectiveness.

Potential Cumulative Impacts

• Impingement and entrainment impacts often have cumulative impacts that are usually not considered. Cumulative impacts refer to the temporal and spatial accumulation of changes in ecosystems that can be additive or interactive. Cumulative impacts can result from the effects of multiple facilities located within the same waterbody and from individually minor but collectively significant impingement and entrainment impacts taking place over a period or time.

• Relatively low estimates of impingement and entrainment impacts may reflect a situation where cumulative impingement and entrainment impacts (and other stresses) have appreciably reduced fishery populations so that there are fewer organisms present in intake flows.

• In many locations (especially estuary and coastal waters), many fish species migrate long distances. As such, these species are often subject to impingement and entrainment risks from a large number cooling water intake structures. EPA's analyses reflect the impacts of a limited set of facilities on any given fishery, whereas many of these fish are subjected to impingement and entrainment at a greater number of cooling water intake structures than are included in the boundaries of the Agency's case studies.

Recreational Benefits

• The proportion of impingement and entrainment losses of fishery species that were valued as lost recreational catch was determined from stock-specific fishing mortality rates, which indicate the fraction of a stock that is harvested. Because fishing mortality rates are typically less than 20%, a large proportion of the losses of fishery species were not valued in the benefits transfer and RUM analyses.

• Only selected species were evaluated because impingement and entrainment or valuation data were limited.

• In applying benefits transfer to value the benefits of improved recreational angling, the Agency only assigned a monetary benefit to the increases in consumer surplus for the baseline number of fishing days. Changes in participation (except where the RUM is estimated) are not considered. Thus, benefits will be understated if participation increases in response to increased availability of fishery species as a result of reduced impingement and entrainment. This approach omits the portion of recreational fishing benefits that arise when improved conditions lead to higher levels of participation. Empirical evidence suggests that the omission of increased angling days can lead to an underestimate of total recreational fishing benefits. Where EPA has been able to apply its RUM analyses, the recreational angling benefits are more indicative of the full range of beneficial angling outcomes.

Secondary (Indirect) Economic Impacts

Secondary impacts, are not calculated (effects on marinas, bait sales, property values, and so forth are not included, even though they may be significant and applicable on a regional scale).

Commercial Benefits

• The proportion of impingement and entrainment losses of fishery species that were valued as lost commercial catch was determined from stock-specific fishing mortality rates, which indicate the fraction of a stock that is harvested. Because fishing mortality rates are typically less than 20%, a large proportion of the losses of fishery species were not valued in the benefits transfer analyses.

• In most cases, invertebrate species (e.g, lobsters, mussels, crabs, shrimp) were not included because of a lack of impingement and entrainment data and/or life history information.

• Impingement and entrainment impacts and associated reductions in fishery yields are probably understated even for those species EPA could evaluate because of a lack of monitoring data to capture population variability and cumulative impingement and entrainment impacts over time.

• Current fishing mortality rates (and resulting estimates of yield) often reflect depleted fisheries, not what the fisheries should or could be if not adversely impacted by impingement and entrainment and other stressors. As such, yield estimates may be artificially low because of significantly curtailed recreational and/or commercial catch of key species impinged and entrained (e.g., winter flounder in Mount Hope Bay).

Forage Species

• Forage species often make up the predominant share of losses due to impingement and entrainment. However, impingement and entrainment

losses of forage species are usually not known because many facility studies focus on commercial and recreational fishery species only.

• Even when forage species are included in loss estimates, the monetary value assigned to forage species is likely to be understated because the full ecological value of the species as part of the food web is not considered.

• Forage losses are often valued at only a fraction of their potential full value because of partial ''replacement'' cost (even if feasible to replace).

• Low production foregone assumptions (no inherent value, only added biomass to landed recreational and commercial species is considered).

• In one valuation approach EPA applied to forage species, only the small share of these losses are valued—namely the contribution of the forage species to the increased biomass of landed recreational and commercial species.

• This does not apply to benefits derived by the Habitat-Based Replacement Cost approach, which provides a more comprehensive indication of the benefits of reducing impingement and entrainment on all species, including forage fish. EPA has applied this approach to a limited number of settings, and in those settings the findings suggest benefits appreciably greater than derived from the more traditional, partial benefits approaches applied by the Agency.

Nonuse Benefits

• Nonuse benefits are most likely understated using the 50 percent rule because the recreational values used are likely to be understated.

• The 50 percent rule itself is conservative (e.g., only reflects nonuse component of total value to recreational users. It does not reflect any nonuse benefits to recreational nonusers).

• Impacts on threatened and endangered species are not fully captured.

Incidental Benefits

• EPA has not accounted for thermal impact reductions, which will be incidental benefits in places where once-through facilities are replaced with recirculating water regimes.

E. Summary of Benefits Findings: Case Studies

As noted above, EPA developed benefits estimates for various case studies, and key results are described below.

1. The Delaware Estuary (Mid-Atlantic Estuaries)

The results of EPA's evaluation of impingement and entrainment rates at cooling water intake structures in the Delaware Estuary transition zone indicate that cumulative impacts can be substantial. EPA's analysis shows that even when losses at individual facilities appear insignificant, the total of all impingement and entrainment impacts on the same fish populations can be sizable. For example, nearly 44,000 age 1 equivalents of weakfish are lost as a result of entrainment at Hope Creek, which operates with closed-cycle cooling and therefore has relatively low entrainment rates. However, the number of total weakfish age 1 equivalents lost as a result of entrainment at all transition zone cooling water intake structures is over 2.2 million individuals. Cumulative impacts of all species at Delaware Estuary transition zones facilities is 14.3 million age 1 equivalent fish impinged per year and entrainment is 616 million age 1 equivalent fish entrained per year.

EPA has conservatively estimated cumulative impacts on Delaware Estuary species by considering the impingement and entrainment impacts of only transition zone cooling water intake structures. In fact, many of the species affected by cooling water intake structures within the transition zone move in and out of this area, and therefore may be exposed to many more cooling water intake structures than considered here. Regardless of the geographic extent of an evaluation of cumulative impacts, it is important to consider how impingement and entrainment rates relate to the relative abundance of species in the source waterbody. Thus, low impingement and entrainment does not necessarily imply low impact, since it may reflect low population abundance, which can result from numerous natural and anthropogenic factors, including long-term impingement and entrainment impacts of multiple cooling water intake structures. On the other hand, high population abundance in the source waterbody and associated high impingement and entrainment may reflect waterbody improvements that are independent of impacts from or improvements in cooling water intake structure technologies. High levels of impingement and entrainment impacts on a species may also indicate a high susceptibility of that given species to cooling water intake structure effects.

In addition to estimating the physical impact of impingement and entrainment in terms of numbers of fish lost because of the operation of all in scope and out-of-scope cooling water intake structures in the Delaware Estuary transition zone, EPA also examined the estimated economic value of the losses from impingement and entrainment. The estimated cumulative impact of impingement and entrainment at the 12 cooling water intake structures located in the Delaware case study area was based on data available for the Salem facility and then extrapolated to the other facilities on the basis of flow. Average losses at all transition zone cooling water intake structures from impingement are valued (using benefits transfer) at between roughly $0.5 million and $1.1 million per year, and between approximately $23.9 million and $49.5 million per year for entrainment (all in 2001$). Average losses at the four in scope facilities (using benefits transfer combined with RUM recreation estimates) range from $0.5 million to $0.8 million per year for impingement and from $26.0 to $46.2 million per year for entrainment (all in 2001$) (see Exhibit 13).

In this estuarine setting, benefits attributed to reducing losses due to both impingement and entrainment may be quite large in terms of numbers of fish and in terms of the portion of benefits that could be monetized. Entrainment losses are over 40 times greater than impingement losses. This reflects the typical richness of estuary waters as important nursery locations for early life stages of many important aquatic species, coupled with the significant adverse impact that entrainment can have on such life stages. This result indicates the relative importance of entrainment controls in estuary areas.

EXHIBIT 13.—BASELINE IMPACTS (ANNUAL AVERAGE) AT FOUR IN SCOPE FACILITIES IN THE TRANSITION ZONE OF THE DELAWARE ESTUARY

	Impingement	Entrainment
Four In Scope Facilities		
a. age 1 equivalent fish lost	>14.3 mil/yr	>616 mil/yr.

EXHIBIT 13.—BASELINE IMPACTS (ANNUAL AVERAGE) AT FOUR IN SCOPE FACILITIES IN THE TRANSITION ZONE OF THE DELAWARE ESTUARY—Continued

	Impingement	Entrainment
b. # lbs lost to landed fishery	>438,000 lbs/yr	>16 mil lbs/yr.
c. $ value of loss (2001$)	$0.5 mil–$0.8 mil	$26.0 mil—$46.2 mil.

In part, EPA's recreational benefits estimates for the Delaware Estuary is based on a RUM analysis of recreational fishing benefits from reduced impingement and entrainment. The RUM application in the Delaware Estuary focuses on weakfish and striped bass fishing valuation. Several recreational fishing studies have valued weakfish and striped bass, but values specific to these studies are not available. The study area includes recreational fishing sites at the Delaware River Estuary and the Atlantic coasts of Delaware and New Jersey.

EPA uses data for this case study from the Marine Recreational Fishery Statistics Survey (MRFSS), combined with the 1994 Add-on MRFSS Economic Survey (AMES). The study uses MFRSS information on angler characteristics and angler preferences, such as where they go fishing and what species they catch, to infer their values for changes in recreational fishing quality. EPA estimated angler behavior using a RUM for single-day trips. The study used standard assumptions and specifications of the RUM model that are readily available from the recreation demand literature. Among these assumptions are that anglers choose fishing mode and then the site in which to fish; and that anglers' choice of target species is exogenous to the model. EPA modeled an angler's decision to visit a site as a function of site-specific cost, fishing trip quality, presence of boat launching facilities, and water quality.

The quality of a recreational fishing trip is expressed in terms of the number of fish caught per hour of fishing. Catch rate is the most important attribute of a fishing site from the angler's perspective. This attribute is also a policy variable of concern because catch rate is a function of fish abundance, which may be affected by fish mortality caused by impingement and entrainment.

The Agency combined the estimated model coefficients with the estimated changes in impingement and entrainment associated with various cooling water intake structure technologies to estimate per trip welfare losses from impingement and entrainment at the cooling water intake structures located in the Delaware Estuary transition zone. The estimated economic values of recreational losses from impingement and entrainment at the 12 cooling water intake structures located in the case study area are $0.75, $2.04, and $9.97 per trip for anglers not targeting any particular species and anglers targeting weakfish and striped bass, respectively (all in 2001$). EPA then estimated benefits of reducing impingement and entrainment of two species —weakfish and striped bass—at the four in scope cooling water intake structures in the case study area. The estimated values of an increase in the quality of fishing sites from reducing impingement and entrainment at the in scope cooling water intake structures are $0.52, $1.40 and $6.90 per trip for no target anglers and anglers targeting weakfish and striped bass, respectively (all in 2001$).

EPA also examined the effects of changes in fishing circumstances on fishing participation during the recreational season. First, the Agency used the negative binomial form of the Poisson model to model an angler's decision concerning the number of fishing trips per recreation season. The number of fishing trips is modeled as function of the individual's socioeconomic characteristics and estimates of individual utility derived from the site choice model. The Agency then used the estimated model coefficients to estimate percentage changes in the total number of recreational fishing trips due to improvements in recreational site quality. EPA combined fishing participation data for Delaware and New Jersey obtained from MFRSS with the estimated percentage change in the number of trips under various policy scenarios to estimate changes in total participation stemming from changes in the fishing site quality in the study area. The MRFSS fishing participation data include information on both single-day and multiple-day trips. The Agency assumed that per day welfare gain from improved fishing site quality is independent of trip length. EPA therefore calculated total fishing participation for this analysis as the sum of the number of single day trips and the number of fishing days corresponding to multiple day trips. Analysis results indicate that improvements in fishing site quality from reducing impingement and entrainment at all in scope facilities will increase the total number of fishing days in Delaware and New Jersey by 9,464.

EPA combined fishing participation estimates with the estimated per trip welfare gain under various policy scenarios to estimate the value to recreational anglers of changes in catch rates resulting from changes in impingement and entrainment in the Delaware Estuary transition zone. EPA calculated low and high estimates of economic values of recreational losses from impingement and entrainment by multiplying the estimated per trip welfare gain by the baseline and policy scenario number of trips, respectively. The estimated recreational losses (2001$) to Delaware and New Jersey anglers from impingement and entrainment of 2 species at all Phase II existing facilities in the transitional estuary, and all facilities in the transitional estuary range from $0.2 to $0.3 and from $7.2 to $13.2 million, respectively. Using similar calculations, the Agency estimated that reducing impingement and entrainment of weakfish and striped bass at the four in scope cooling water intake structures in the transition zone will generate $5.2 to $9.3 million (2001$) annually, in recreational fishing benefits alone, to Delaware and New Jersey anglers.

In interpreting the results of the case study analysis, it is important to consider several critical caveats and limitations of the analysis. For example, in the economic valuation component of the analysis, valuation of impingement and entrainment losses is often complicated by the lack of market value for forage species, which may comprise a large proportion of total losses. EPA estimates that more than 500 million age 1 equivalents of bay anchovy may be lost to entrainment at transition zone cooling water intake structure each year (over 85 percent of the total of over 616 million estimated lost age 1 individuals for all species combined). Bay anchovy has no direct market value, but it is nonetheless a critical component of estuarine food webs. EPA included forage species impacts in the economic benefits calculations, but the final

estimates may well underestimate the full value of the losses imposed by impingement and entrainment. Thus, on the whole, EPA believes the estimates developed here probably underestimate the economic benefits of reducing impingement and entrainment in the Delaware transition zone.

2. Ohio River (Large Rivers)

EPA evaluated the impacts of impingement and entrainment using facility-generated data at 9 cooling water intake structures along a 500 mile stretch of the Ohio River, spanning from the western portion of Pennsylvania, along the southern border of Ohio, and into eastern Indiana. The results were then extrapolated to the 20 other in scope facilities along this stretch of the river (a total of 29 facilities are expected to be in scope for this rulemaking, and another 19 facilities are out-of-scope).

To estimate impingement and entrainment impacts for the Ohio, EPA evaluated the available impingement and entrainment monitoring data at 9 case study facilities (W.C. Beckjord, Cardinal, Clifty Creek, Kammer, Kyger Creek, Miami Fort, Philip Sporn, Tanners Creek, and WH Sammis). The results from these 9 facilities with impingement and entrainment data were then extrapolated to the remaining in scope facilities to derive an impingement and entrainment baseline for all facilities subject to the proposed rule (additional extrapolations were also made to out-of-scope facilities so that total impingement and entrainment could be estimated as well). The extrapolations were made on the basis of relative operating size (operating MGD) and by river pool (Hannibal, Markland, McAlpine, New Cumberland, Pike Island, and Robert C. Byrd pools).

The results indicate that impingement at all facilities (in scope and out-of-scope) causes the mortality of approximately 11.6 million fish (age 1 equivalents) per year. This translates into over 1.11 million pounds of fishery production foregone per year, and over 15,000 pounds of lost fishery yield annually.

For in scope facilities only, the results indicate that impingement causes the mortality of approximately 11.3 million fish (age 1 equivalents) per year (97.8 percent of all impingement). This translates into nearly 1.09 million pounds of fishery production foregone per year, and nearly 15,000 pounds of lost fishery yield annually (98.1 percent and 97.1 percent of the total, respectively).

For entrainment, the results indicate that all facilities combined (in scope and out-of-scope) cause the mortality of approximately 24.4 million fish (age 1 equivalents) per year. This translates into over 10.08 million pounds of fishery production foregone per year, and over 39,900 pounds of lost fishery yield annually.

For in scope facilities only, the results indicate that entrainment causes the mortality of approximately 23.0 million fish (age 1 equivalents) per year (94.2 percent of all entrainment). This translates into nearly 9.89 million pounds of fishery production foregone per year, and over 39,000 pounds of lost fishery yield annually (98.1 percent and 97.7 percent of the total, respectively).

In addition to estimating the physical impact of impingement and entrainment in terms of numbers of fish lost because of the operation of all in scope and out-of-scope cooling water intake structures in the Ohio River case study area, EPA also estimated the baseline economic value of the losses from impingement and entrainment. The economic value of these losses is based on benefits transfer-based values applied to losses to the recreational fishery, nonuse values, and the partial value of forage species impacts (measured as partial as replacement costs or production foregone). This provides an indication of the estimated cumulative impact of impingement and entrainment at the all in scope and out-of-scope cooling water intake structures in the case study area, based on data available for the 9 case study facilities with usable impingement and entrainment data, and then extrapolated to the other facilities on the basis of flow and river pool.

Average historical losses from all in scope facilities in the case study area for impingement are valued using benefits transfer at between roughly $0.1 million and $1.4 million per year (in 2001$). Average historical losses from entrainment are valued using benefits transfer at between approximately $0.8 million and $2.4 million per year (all in 2001$) for in scope facilities.

EPA also estimated a random utility model (RUM) to provide primary estimates of the recreational fishery losses associated with impingement and entrainment in the Ohio River case study area. This primary research results supplement the benefits transfer estimates derived by EPA. The average annual recreation-related fishery losses at all facilities in the case study amount to approximately $8.4 million (in 2001$) per year (impingement and entrainment impacts combined). For the in scope facilities covered by the proposed Phase II rule, the losses due to impingement and entrainment were estimated via the RUM to amount to approximately $8.3 million per year (in 2001$). Results for the RUM analysis were merged with the benefits transfer-based estimates in a manner that avoids double counting, and indicate that baseline losses at in scope facilities amount to between $3.5 million and $4.7 million per year for impingement and between $9.3 and $9.9 million per year for entrainment (in 2001$) (see Exhibit 14).

EXHIBIT 14.—BASELINE IMPACTS (ANNUAL AVERAGE) IN THE OHIO RIVER AT IN SCOPE FACILITIES

	Impingement	Entrainment
29 In Scope Facilities		
a. age 1 equivalent fish lost	> 11.3 mil/yr	> 23.0 mil/yr
b. # lbs lost to landed fishery	> 1.1 mil lbs/yr	> 9.9 mil lbs/yr
c. $ value of loss (2001$)	$3.5 mil—$4.7 mil/yr	$9.3 mil—$9.9 mil/yr

In interpreting the results of the case study analysis, it is important to consider several critical caveats and limitations of the analysis. In the economic valuation component of the analysis, valuation of impingement and entrainment losses is often complicated by the lack of market value for forage species, which may comprise a large proportion of total losses. Forage species have no direct market value, but are nonetheless a critical component of aquatic food webs. EPA included forage species impacts in the economic benefits calculations, but because techniques for valuing such losses are limited, the final estimates may well underestimate the full ecological and economic value of these losses.

In addition, the Ohio River case study is intended to reflect the level of impingement and entrainment, and

hence the benefits associated with reducing impingement and entrainment impacts, for cooling water impact structures along major rivers of the U.S. However, there are several factors that suggest that the Ohio River case study findings may be a low-end scenario in terms of estimating the benefits of the proposed regulation at facilities along major inland rivers of the U.S. These factors include the following:

- The impingement and entrainment data developed by the facilities were limited to one year only, and are from 1977 (nearly 25 years ago) and pertain to a period of time when water quality in the case study area was worse than it is currently. This suggests that the numbers of impinged and entrained fish today (the regulatory baseline) would be appreciably higher than observed in the data collection period. In addition, the reliance on a monitoring period of one year or less implies that the naturally high variability in fishery populations is not captured in the analysis, and the results may reflect a year of above or below average impingement and entrainment.
- The Ohio River is heavily impacted by numerous significant anthropogenic stressors in addition to impingement and entrainment. The river's hydrology has been extensively modified by a series of 20 dams and pools, and the river also has been extensively impacted by municipal and industrial wastewater discharges along this heavily populated and industrialized corridor. To the degree to which these multiple stressors were atypically extensive along the Ohio River (in 1977) relative to those along other cooling water intake structure-impacted rivers in the U.S. (in 2002), the case study will yield smaller than typical impingement and entrainment impact estimates.
- The Ohio River is very heavily impacted by cumulative effects of impingement and entrainment over time and across a large number of cooling water intake structures. The case study segment of the river has 29 facilities that are in scope for the Phase II rulemaking, plus an additional 19 facilities that are out of scope. Steam electric power generation accounted for 5,873 MGD of water withdrawal from the river basin, more than 90 percent of the total surface water withdrawals, according to 1995 data from USGS.

In conclusion, several issues and limitations in the impingement and entrainment data for the Ohio case study (e.g., the reliance on data for one year, nearly 25 years ago), and the many stressors that affect the river (especially in the 1977 time frame), suggest that the results obtained by EPA underestimate the benefits of the rule relative to current Ohio River conditions. The results are also likely to underestimate the benefits value of impingement and entrainment reductions at other inland river facilities.

3. San Francisco Bay/Delta (Pacific Coast Estuaries)

The results of EPA's evaluation of impingement and entrainment of striped bass, and threatened and endangered and other special status fish species at the Pittsburg and Contra Costa facilities in the San Francisco Bay/Delta demonstrate the significant economic benefits that can be achieved if losses of highly valued species are reduced by the proposed section 316(b) rule. The benefits were estimated by reference to other programs already in place to protect and restore the declining striped bass population and threatened and endangered fish species of the San Francisco Bay/Delta region. The special status species that were evaluated included delta smelt, threatened and endangered runs of chinook salmon and steelhead, sacramento splittail, and longfin smelt.

Based on limited facility data, EPA estimates that the striped bass recreational catch is reduced by about 165,429 fish per year due to impingement at the two facilities and 185,073 fish per year due to entrainment. Estimated impingement losses of striped bass are valued at between $379,000 and $589,000 per year, and estimated entrainment losses are valued at between $2.58 million to $4.01 million per year (all in 2001$).

EPA estimates that the total loss of special status fish species at the two facilities is 145,003 age 1 equivalents per year resulting from impingement and 269,334 age 1 equivalents per year due to entrainment. Estimated impingement losses of these species are valued at between $12.38 million and $42.65 million per year, and estimated entrainment losses are valued at between $23.1 million and $79.2 million per year (all in 2001$).

The estimated value of the recreational losses and the special status species losses combined range from $12.8 million to $43.2 million per year for impingement and from $25.6 million to $83.2 million per year for entrainment (all in 2001$) (see Exhibit 15).

EXHIBIT 15.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR SPECIAL STATUS FISH SPECIES AT 2 FACILITIES IN THE SAN FRANCISCO BAY/DELTA

	Impingement	Entrainment
Two In Scope Facilities		
a. age 1 equivalent fish lost	> 145,000/yr	> 269,000/yr
b. number of striped bass lost to recreational catch	165,429	185,073
c. $ value of combined loss (2001$)	$12.8 mil—$43.2 mil/yr	$25.6 mil—$83.2 mil/yr

In interpreting these results, it is important to consider several critical caveats and limitations of the analysis. No commercial fisheries losses or non-special status forage species losses are included in the analysis. Recreational losses are analyzed only for striped bass. There are also uncertainties about the effectiveness of restoration programs in terms of meeting special status fishery outcome targets.

It is also important to note that under the Endangered Species Act, losses of all life stages of endangered fish are of concern, not simply losses of adults. However, because methods are unavailable for valuing losses of fish eggs and larvae, EPA valued the losses of threatened and endangered species based on the estimated number of age 1 equivalents that are lost. Because the number of age 1 equivalents can be substantially less than the original number of eggs and larvae lost to impingement and entrainment, and because the life history data required to calculate age 1 equivalent are uncertain for these rare species, this method of quantifying impingement and entrainment losses may result in an underestimate of the true benefits to society of the proposed section 316(b) regulation.

4. The Great Lakes

EPA examined the estimated economic value of impingement and entrainment at J.R. Whiting before installation of a deterrent net to reduce impingement to estimate the historical losses of the facility and potential impingement and entrainment damages at other Great Lakes facilities that do not employ technologies to reduce impingement or entrainment. Average impingement without the net is valued at between $0.4 million and $1.2 million per year, and average entrainment is valued at between $42,000 and $1.7 million per year (all in 2001$) (see Exhibit 16).

The midpoints of the pre-net results from the benefits transfer approach were used as the lower ends of the valuations losses. The upper ends of the valuation of losses reflect results of the Habitat-based Replacement Cost (HRC) method for valuing impingement and entrainment losses. HRC-based estimates of the economic value of impingement and entrainment losses at J.R. Whiting were included with the transfer-based estimates to provide a better estimate of loss values, particularly for forage species for which valuation techniques are limited. The HRC technique is designed to provide a more comprehensive, ecological-based valuation of impingement and entrainment losses than valuation by traditional commercial and recreational impacts methods. Losses are valued on the basis of the combined costs for implementing habitat restoration actions, administering the programs, and monitoring the increased production after the restoration actions. In a complete HRC, these costs are developed by identifying the preferred habitat restoration alternative for each species with impingement and entrainment losses and then scaling the level of habitat restoration until the losses across all the species in that category have been offset by expected increases in production of each species. The total value of impingement and entrainment losses at the facility is then calculated as the sum of the costs across the categories of preferred habitat restoration alternatives.

The HRC method is thus a supply-side approach for valuing impingement and entrainment losses in contrast to the more typically used demand-side valuation approaches (e.g., commercial and recreational fishing impacts valuations). An advantage of the HRC method is that the HRC values can easily address losses for species lacking a recreational or commercial fishery value (e.g., forage species that typically are a large proportion of impingement and entrainment impacts, but that are not readily valued in a traditional benefits analysis). Further, the HRC explicitly recognizes and captures the fundamental ecological relationships between impinged and entrained organisms and their surrounding environment by valuing losses through the cost of the actions required to provide an offsetting increase in the existing populations of those species in their natural environment.

Impingement losses at J.R. Whiting with an aquatic barrier net are estimated to be reduced by 92 percent, while entrainment losses are not significantly affected. Thus, losses with a net are valued at between $29,000 and $99,000 for impingement and between $42,000 and $1.7 million per year for entrainment (all in 2001$) (see Exhibit 17).

EXHIBIT 16.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR J.R. WHITING WITHOUT NET

	Impingement	Entrainment
One Great Lakes Facility		
a. age 1 equivalent fish lost	>1.8 mil/yr	>290,000/yr.
b. # lbs lost to landed fishery	>21.4 mil lbs/yr	> 404,000 lbs/yr.
c. $ value of loss (2001$)	$0.4 mil–$1.2 mil/yr	$42,000–$1.7 mil/yr.

EXHIBIT 17.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR J.R. WHITING WITHOUT NET

	Impingement	Entrainment
One Great Lakes Facility		
a. age 1 equivalent fish lost	>0.1 mil/yr	>290,000/yr.
b. # lbs lost to landed fishery	>1.7 mil lbs/yr	>404,000 lbs/yr.
c. $ value of loss (2001$)	$29,000–$99,000/yr	$42,000–$1.7 mil/yr.

5. Tampa Bay

To evaluate potential impingement and entrainment impacts of cooling water intake structures in estuaries of the Gulf Coast and Southeast Atlantic, EPA evaluated impingement and entrainment rates at the Big Bend facility in Tampa Bay. EPA estimated that the impingement impact of Big Bend is 420,000 age 1 equivalent fish and over 11,000 pounds of lost fishery yield per year. The entrainment impact is 7.71 billion age 1 equivalent fish and over nearly 23 million pounds of lost fishery yield per year. Extrapolation of these losses to other Tampa Bay facilities indicated a cumulative impingement impact of 1 million age 1 fish (27,000 pounds of lost fishery yield) and a cumulative entrainment impact of 19 billion age 1 equivalent fish (56 million pounds of lost fishery yield) each year.

The results of EPA's evaluation of the dollar value of impingement and entrainment losses at Big Bend, as calculated using benefits transfer, indicate that baseline economic losses range from $61,000 to $67,000 per year for impingement and from $7.1 million to $7.4 million per year for entrainment (all in 2001$). Baseline economic losses using benefits transfer for all in scope facilities in Tampa Bay (Big Bend, PL Bartow, FJ Gannon, and Hookers Point) range from $150,000 to $165,000 for impingement and from $17.5 million to $18.5 million per year for entrainment (all in 2001$).

EPA also developed a random utility model (RUM) approach to estimate the effects of improved fishing opportunities due to reduced impingement and entrainment in the Tampa Bay Region. Cooling water intake structures withdrawing water from Tampa Bay impinge and entrain many of the species sought by recreational

anglers. These species include spotted seatrout, black drum, sheepshead, pinfish, and silver perch. The study area includes Tampa Bay itself and coastal sites to the north and south of Tampa Bay.

The study's main assumption is that anglers will get greater satisfaction, and thus greater economic value, from sites where the catch rate is higher, all else being equal. This benefit may occur in two ways: first, an angler may get greater enjoyment from a given fishing trip when catch rates are higher, and thus get a greater value per trip; second, anglers may take more fishing trips when catch rates are higher, resulting in greater overall value for fishing in the region.

EPA's analysis of improvements in recreational fishing opportunities in the Tampa Bay Region relies on a subset of the 1997 Marine Recreational Fishery Statistics Survey (MRFSS) combined with the 1997 Add-on MRFSS Economic Survey (AMES) and the follow-up telephone survey for the Southeastern United States. The Agency evaluated five species and species groups in the model: drums (including red and black drum), spotted seatrout, gamefish, snapper-grouper, and all other species. Impingement and entrainment was found to affect black drum, spotted seatrout, and sheepshead which is included in the snapper-grouper species category.

EPA estimated both a random utility site choice model and a negative binomial trip participation model. The random utility model assumes that anglers choose the site that provides them with the greatest satisfaction, based on the characteristics of different sites and the travel costs associated with visiting different sites. The trip participation model assumes that the total number of trips taken in a year are a function of the value of each site to the angler and characteristics of the angler.

To estimate changes in the quality of fishing sites under different policy scenarios, EPA relied on the recreational fishery landings data by State and the estimates of recreational losses from impingement and entrainment on the relevant species at the Tampa Bay cooling water intake structures. The Agency estimated changes in the quality of recreational fishing sites under different policy scenarios in terms of the percentage change in the historic catch rate. EPA divided losses to the recreational fishery from impingement and entrainment by the total recreational landings for the Tampa Bay area to calculate the percent change in historic catch rate from baseline losses (i.e., eliminating impingement and entrainment completely).

The results show that anglers targeting black drum have the largest per trip welfare gain ($7.18 in 2001$) from eliminating impingement and entrainment in the Tampa region. Anglers targeting spotted seatrout and sheepshead have smaller per-trip gains ($1.80 and $1.77 respectively, in 2001$). The large gains for black drum are due to the large predicted increase in catch rates. In general, based on a hypothetical one fish per trip increase in catch rate, gamefish and snapper-grouper are the most highly valued fish in the study area, followed by drums and spotted seatrout.

EPA calculated total economic values by combining the estimated per trip welfare gain with the total number of trips to sites in the Tampa Bay region. EPA used the estimated trip participation model to estimate the percentage change in the number of fishing trips with the elimination of impingement and entrainment. These estimated percentage increases are 0.93 percent for anglers who target sheepshead, 0.94 percent for anglers who target spotted seatrout, and 3.82 percent for anglers who target black drum.

If impingement and entrainment is eliminated in the Tampa region, total benefits are estimated to be $2,428,000 per year at the baseline number of trips, and $2,458,000 per year at the predicted increased number of trips (all in 2001$). At the baseline number of trips, the impingement and entrainment benefits to black drum anglers are $270,000 per year; benefits to spotted seatrout anglers are $2,016,000 per year; and benefits to sheepshead anglers are $143,000 per year (all in 2001$).

Results for the RUM analysis were merged with the benefits transfer-based estimates to create an estimate of recreational fishery losses from impingement and entrainment in a manner that avoids double counting of the recreation impacts. Baseline economic losses combining both approaches for all in scope facilities in Tampa Bay (Big Bend, PL Bartow, FJ Gannon, and Hookers Point) range from $0.80 million to $0.82 million for impingement and from $20.0 million to $20.9 million per year for entrainment (all in 2001$) (see Exhibit 18).

For a variety of reasons, EPA believes that the estimates developed here underestimate the value of impingement and entrainment losses at Tampa Bay facilities. EPA assumed that the effects of impingement and entrainment on fish populations are constant over time (i.e., that fish kills do not have cumulatively greater impacts on diminished fish populations). EPA also did not analyze whether the number of fish affected by impingement and entrainment would increase as populations increase in response to improved water quality or other improvements in environmental conditions. In the economic analyses, EPA also assumed that fishing is the only recreational activity affected.

EXHIBIT 18.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR TAMPA BAY

	Impingement	Entrainment
Four In Scope Facilities		
a. age 1 equivalent fish lost	>1 mil/yr	>19 billion/yr.
b. # lbs lost to landed fishery	>27,000 lbs/yr	>56 million lbs/yr.
c. $ value of loss (2001$)	$0.80 mil–$0.82 mil/yr	$20.0 mil–$20.9 mil/yr.

6. Brayton Point

EPA evaluated cumulative impingement and entrainment impacts at the Brayton Point Station facility in Mount Hope Bay in Somerset, Massachusetts. EPA estimates that the cumulative impingement impact is 69,300 age 1 equivalents and 5,100 pounds of lost fishery yield per year. The cumulative entrainment impact amounts to 3.8 million age 1 equivalents and 70,400 pounds of lost fishery yield each year.

The results of EPA's evaluation of the dollar value of impingement and entrainment losses at Brayton Point (as calculated using benefits transfer) indicate that baseline economic losses range from $7,000 to $12,000 per year for impingement and from $166,000 to

$303,000 per year for entrainment (all in 2001$).

EPA also developed an Habitat-based Replacement Cost (HRC) analysis to examine the costs of restoring impingement and entrainment losses at Brayton Point. These HRC estimates were merged with the benefits transfer results to develop a more comprehensive range of loss estimates. The HRC results were used as an upper bound and the midpoint of the benefits transfer method was used as a lower bound (HRC annualized at 7 percent over 20 years). Combining both approaches, the value of impingement and entrainment losses at Brayton Point range from approximately $9,000 to $890,00 per year for impingement, and from $0.2 million to $28.3 million per year for entrainment (all in 2001$) (see Exhibit 19).

For a variety of reasons, EPA believes that the estimates developed here underestimate the total economic benefits of reducing impingement and entrainment at Brayton Point. EPA assumed that the effects of impingement and entrainment on fish populations are constant over time (i.e., that fish kills do not have cumulatively greater impacts on diminished fish populations). EPA also did not analyze whether the number of fish affected by impingement and entrainment would increase as populations increase in response to improved water quality or other improvements in environmental conditions. In the economic analyses, EPA also assumed that fishing is the only recreational activity affected.

EXHIBIT 19.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR BRAYTON POINT

	Impingement	Entrainment
One In Scope Facility		
a. age 1 equivalent fish lost	>69,300/yr	>3.8 mil/yr.
b. # lbs lost to landed fishery	>5,100 lbs/yr	>70,400 lbs/yr.
c. $ value of loss (2001$)	$9,000–$890,000/yr	$0.2 mil–$28.3 mil/yr.

7. Seabrook Pilgrim

The results of EPA's evaluation of impingement and entrainment rates at Seabrook and Pilgrim indicate that impingement and entrainment at Seabrook's offshore intake is substantially less than impingement and entrainment at Pilgrim's nearshore intake. Impingement per MGD averages 68 percent less and entrainment averages 58 percent less at Seabrook. The species most commonly impinged at both facilities are primarily winter flounder, Atlantic herring, Atlantic menhaden, and red hake. These are species of commercial and recreational interest. However, the species most commonly entrained at the facilities are predominately forage species. Because it is difficult to assign an economic value to such losses, and because entrainment losses are much greater than impingement losses, the benefits of an offshore intake or other technologies that may reduce impingement and entrainment at these facilities are likely to be underestimated. There also are several important factors in addition to the intake location (nearshore versus offshore) that complicate the comparison of impingement and entrainment at the Seabrook facility to impingement and entrainment at Pilgrim (e.g., entrainment data are based on different flow regimes, different years of data collection, and protocols for reporting monitoring results).

Average impingement losses at Seabrook are valued at between $3,500 and $5,200 per year, and average entrainment losses are valued at between $142,000 and $315,000 per year (all in 2001$) (see Exhibit 20). Average impingement losses at Pilgrim are valued at between $3,300 and $5,000 per year, and average entrainment losses are valued at between $523,500 and $759,300 per year (all in 2001$). These values reflect estimates derived using benefits transfer.

EPA also developed an HRC analysis to examine the costs of restoring impingement and entrainment losses at Pilgrim. Using the HRC approach, the value of impingement and entrainment losses at Pilgrim are approximately $507,000 for impingement, and over $9.3 million per year for entrainment (HRC annualized at 7 percent over 20 years) (all in 2001$). These HRC estimates were merged with the benefits transfer results to develop a more comprehensive range of loss estimates.

These HRC estimates were merged with the benefits transfer results to develop a more comprehensive range of loss estimates. The HRC results were used as an upper bound and the midpoint of the benefits transfer method was used as a lower bound (HRC annualized at 7 percent over 20 years). Combining both approaches, the value of impingement and entrainment losses at Pilgrim range from approximately $4,000 to $507,00 per year for impingement, and from $0.6 million to $9.3 million per year for entrainment (all in 2001$) (see Exhibit 21).

EXHIBIT 20.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR SEABROOK

	Impingement	Entrainment
One In Scope Facility: Seabrook		
a. age 1 equivalent fish lost	> 1.8 mil/yr	> 290,000/yr
b. # lbs lost to landed fishery	> 21.4 mil lbs/yr	> 404,000 lbs/yr
c. $ value of loss (2001$)	$3,000–$5,000	$142,000–$315,000

EXHIBIT 21.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR PILGRIM

	Impingement	Entrainment
One In Scope Facility: Pilgrim Losses Using Benefits Transfer		
a. age 1 equivalent fish lost	> 1.8 mil/yr	> 290,000/yr

EXHIBIT 21.—BASELINE IMPACTS (ANNUAL AVERAGE) FOR PILGRIM—Continued

	Impingement	Entrainment
b. # lbs lost to landed fishery	> 21.4 mil lbs/yr	> 404,000 lbs/yr
c. $ value of loss (2001$)	$3,000–$5,000/yr	$0.5 mil–$0.7 mil/yr
Pilgrim Losses Using HRC as Upper Bounds and Benefits Transfer Midpoints as Lower		
a. age 1 equivalent fish lost	> 1.8 mil/yr	> 290,000/yr
b. # lbs lost to landed fishery	> 21.4 mil lbs/yr	> 404,000 lbs/yr
c. $ value of loss (2001$)	$4,000–$507,000/yr	$0.6 mil–$9.3 mil/yr

8. Monroe

EPA estimates that the baseline impingement losses at the Monroe facility are 35.8 million age 1 equivalents and 1.4 million pounds of lost fishery yield per year. Baseline entrainment impacts amount to 11.6 million age 1 equivalents and 608,300 pounds of lost fishery yield each year.

The results of EPA's evaluation of the dollar value of baseline impingement and entrainment losses at Monroe (as calculated using benefits transfer) indicate that baseline economic losses range from $502,200 to $981,750 per year for impingement and from $314,600 to $2,298,500 per year for entrainment (all in 2001$).

EPA also developed an HRC analysis to examine the costs of restoring impingement and entrainment losses at Pilgrim. These HRC estimates were merged with the benefits transfer results to develop a more comprehensive range of loss estimates. These HRC estimates were merged with the benefits transfer results to develop a more comprehensive range of loss estimates. The HRC results were used as an upper bound and the midpoint of the benefits transfer method was used as a lower bound (HRC annualized at 7 percent over 20 years). Combining both approaches, the value of impingement and entrainment losses at Monroe range from approximately $0.7 million to $5.6 per year for impingement, and from $1.3 million to $13.9 million per year for entrainment (all in 2001$) (see Exhibit 22).

For a variety of reasons, EPA believes that the estimates developed here underestimate the total economic benefits of reducing impingement and entrainment at the Monroe facility. EPA assumed that the effects of impingement and entrainment on fish populations are constant over time (i.e., that fish kills do not have cumulatively greater impacts on diminished fish populations). EPA also did not analyze whether the number of fish affected by impingement and entrainment would increase as populations increase in response to improved water quality or other improvements in environmental conditions. In the economic analyses, EPA also assumed that fishing is the only recreational activity affected.

EXHIBIT 22.—BASELINE LOSSES AT (ANNUAL AVERAGE) MONROE (USING HRC VALUES AS UPPER BOUNDS)

	Impingement	Entrainment
One In Scope Facility		
a. age 1 equivalent fish lost	> 1.8 mil/yr	> 290,000/yr
b. # lbs lost to landed fishery	> 21.4 mil lbs/yr	> 404,000 lbs/yr
c. $ value of loss (2001$)	$0.7 mil–$5.6 mil	$1.3 mil–$13.9 mil

F. Estimates of National Benefits

1. Methodology

In order to compare benefits to costs for a national rulemaking such as the section 316(b) proposed rule for Phase II existing facilities, there is a need to generate national estimates of both costs and benefits. This section describes the methodology EPA has developed to provide national estimates of benefits.

Because benefits are very site-specific, there are limited options for how EPA can develop national-level benefits estimates from a diverse set of over 500 regulated entities. EPA could only develop a limited number of case studies, and to interpret these cases in a national context, the Agency identified a range of settings that reflect the likely benefits potential of a given type of facility (and its key stressor-related attributes) in combination with the waterbody characteristics (receptor attributes) in which it is located. Benefits potential settings can thus be defined by the various possible combinations of stressor (facility) and receptor (waterbody, etc) combinations.

Ideally, case studies would be selected to represent each of these ''benefits potential'' settings and then could be used to extrapolate to like-characterized facility-waterbody setting cooling water intake structure sites. However, data limitations and other considerations precluded EPA from developing enough case studies to reflect the complete range of benefits-potential settings. Data limitations also made it difficult to reliably assign facilities to the various benefits potential categories.

Based on the difficulties noted above, EPA adopted a more practical, streamlined extrapolation version of its preferred approach, as this is the only viable approach available to the Agency. To develop a feasible, tractable manner for developing national benefits estimates from a small number of case study investigations, EPA made its national extrapolations on the basis of a combination of three relevant variables: (1) The volume of water (operational flow) drawn by a facility; (2) the level of recreational angling activity within the vicinity of the facility; and (3) the type of waterbody on which the facility is located. Extrapolations were then made across facilities according to their respective waterbody type.

The first of these variables—operational flow (measured as millions of gallons per day, or MGD)—reflects the degree of stress caused by a facility. The second variable —the number of angler days in the area (measured as the number of recreational angling days within a 120 mile radius) — reflects the degree to which there is a demand

(value) by local residents to use the fishery that is impacted. The third variable—waterbody type (e.g., estuary, ocean, freshwater river or lake, or Great Lakes)—reflects the types, numbers, and life stages of fish and other biological receptors that are impacted by the facilities. Accordingly, the extrapolations based on these three variables reflect the key factors that affect benefits: the relevant stressor, the biological receptors, and the human demands for the natural resources and services impacted.

Flow: The flow variable the Agency developed is the monetized benefits per volume of water flowing through cooling water intake structures, in specific, applying a metric of ''dollars per million gallons per day'' ($/MGD), where MGD levels are based on average operational flows as reported by the facilities in the EPA Section 316(b) Detailed Questionnaire and Short Technical Questionnaire responses, or through publically available data.

Angler days. The angler day variable the Agency used is based on data developed by the U.S. Fish and Wildlife Survey as part of its 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation. These data were interpreted within a GIS-based approach to estimate the level of recreational angling pursued by populations living within 120 miles of each facility (additional detail is provided in the EBA).

In developing the index, EPA used a GIS analysis to identify counties within a 120 mile radius of each facility. The area for each facility included the county the facility is located in and any other county with 50 percent or more of its population residing within 120 miles of the facility. EPA estimated angling activity levels for two types of angling days for each county: freshwater angling days and saltwater angling days. Estimated angling days for the appropriate waterbody type were summed across all counties in a facility's area to yield estimated angling days near the facility. For each type of angling, EPA estimated angling days by county residents as a percentage of the State angling days by residents 16 years and older reported in the 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (USFWS, 1997). Angling days in each State were partitioned into days by urban anglers and days by rural anglers based on the U.S. percentages reported in the 1996 National Survey.

For urban counties,

Angling Days = State Urban Angling Days * County Pop/State Pop in Urban Counties

For rural counties,

Angling Days = State Rural Angling Days * County Pop/State Pop in Rural Counties

EPA determined urban and rural population by State by summing the 1999 county populations for the State's urban and rural counties respectively. EPA determined each county's urban/rural status using definitions developed by the U.S. Department of Agriculture (as included in NORSIS 1997). These index values are based upon the estimated number of angling days by residents living near the facility. The index value for each facility is a measure of the facility's share of the total angling days estimated at all in scope facilities located on a similar waterbody.

The analysis then proceeded by waterbody type.

Estuaries

National baseline losses and benefits for estuaries were based on the Salem and Tampa Bay case studies. The case studies were extrapolated to other facilities on the basis of regional fishery types, in an effort to reflect the different types of fisheries that are impacted in various regions of the country's coastal waters. As such, the Tampa Bay case study results were applied to estuary facilities located in Florida and other Gulf Coast States, and the Salem results were applied to all remaining estuary facilities (note that the Salem results used for the extrapolation differ from the case study results presented above in order to reflect losses without a screen currently in place at the facility). Ideally, a West Coast facility would have served as the basis of extrapolation to estuarine facilities along the Pacific Coast, but EPA could not develop a suitable case study for that purpose in time for this proposal. However, EPA intends to develop such a western estuary case study and report its findings in an anticipated forthcoming Notice of Data Availability.

In order to extrapolate baseline losses from the Salem and Big Bend facilities to all in scope facilities on estuaries, EPA calculated an index of angling activity for each of these in scope facilities. The angling index is a percentage value that ranges from 0 to 1. Dividing baseline losses at a facility by the index value provides an estimate of total baseline losses at all in scope facilities located on waterbodies in the same category.

Rivers and Lakes

EPA combined rivers, lakes and reservoirs into one class of freshwater-based facilities (Great Lakes are not included in this group, and were considered separately). The waterbody classifications for freshwater rivers and lakes/reservoirs were grouped together for the extrapolation due to similar ecological and hydrological characteristics of freshwater systems used as cooling water. The majority of these hydrologic systems have undergone some degree of modification for purposes such as water storage, flood control, and navigation. The degree of modification can vary very little or quite dramatically. A facility falling into the lake/reservoir category may withdraw cooling water from a lake that has been reclassified as a reservoir due to the addition of an earthen dam, or from a reservoir created by the diversion of a river through a diversion canal for use as a cooling lake. The species composition and ecology of these two waterbodies may vary greatly. While the ecology of river systems and lakes or reservoirs are considerably different, due to structural modifications these two classifications may be quite similar ecologically depending on the waterbody in question. For example, many river systems, including the Ohio River, are now broken up into a series of navigational pools controlled by dams that may function more similarly to a reservoir than a naturally flowing river.

Baseline losses and benefits in the Ohio case study were based on 29 in scope facilities in the Ohio River case study area. The Agency extrapolated these losses to all in scope facilities on other freshwater rivers, lakes, and reservoirs.

Oceans and Great Lakes

Oceans and Great Lakes estimates were based on extrapolations from the Pilgrim and JR Whiting facility case studies, respectively. For these two facilities (and their associated waterbody types), the valuation method applied by EPA in the national extrapolations was based on the Habitat-based Replacement Cost approach, which reflects values for addressing a much greater number of impacted species (not just the small share that are recreational or commercial species that are landed by anglers). For example, at JR Whiting, the benefits transfer approach developed values for recreational angling amounted to only 4 percent of the estimated total impingement losses, and reflected only 0.02 percent of the age 1 fish lost due to impingement. At Pilgrim, the benefits transfer approach reflected recreational losses for only 0.5 percent of the entrained age 1 equivalent fish at that site. Because the Agency was able to

develop HRC values for these sites and recreational fishery impacts were such a small part of the impacts, EPA extrapolated only based on HRC estimates and used only the flow-based (MGD) index for oceans and the Great Lakes.

Results

The results of the index calculations for operational flow and angling effort used for extrapolating case study baseline losses to national baseline losses for all in scope facilities are reported in Exhibit 23 below.

EXHIBIT 23.—FLOW AND ANGLING INDICES

Waterbody Type	Based on	Normalized MGD percent	Percent of in scope angling base
Estuary-N. Atlantic	Salem	4.39	2.10
Estuary-S. Atlantic	4 Tampa Bay facilities	19.24	20.28
Freshwater systems	29 Ohio River facilities	9.30	12.34
Great Lake	JR Whiting	3.92	13.89
Ocean	Pilgrim	3.42	6.54

Waterbody

EPA further tailored its extrapolation approach, so that monetized benefits estimates are based on available data for similar types of waterbody settings. Thus, for example, the case study results for the Salem facility (located in the Delaware Estuary) and the Tampa facilities are applied (on a per MGD and angling day index basis) only to other facilities located in estuary waters. Likewise, results from Ohio River facilities are applied to inland freshwater water cooling water intake structures (excluding facilities on the Great Lakes), and losses estimated for the Pilgrim facility are applied to facilities using ocean waters at their intakes, and results for J.R. Whiting are used for the Great Lakes facilities.

As noted above, the waterbody classifications for freshwater rivers and lakes or reservoirs were grouped together for the extrapolation due to similar ecological and hydrological characteristics of freshwater systems used as cooling water. The majority of these hydrologic systems have undergone some degree of modification for purposes such as water storage, flood control, and navigation. Due to structural modifications, these freshwater waterbody types be quite similar ecologically. For example, many river systems, including the Ohio River, are now broken up into a series of navigational pools controlled by dams that may function more similarly to a reservoir than a naturally flowing river.

The natural species distribution, genetic movement, and seasonal migration of aquatic organisms that may be expected in a natural system is affected by factors such as dams, stocking of fish, and water diversions. Since the degree of modification of inland waterbodies and the occurrence of fish stocking could not be determined for every cooling water source, the waterbody categories ''freshwater rivers'', and ''lakes/reservoirs'' were grouped together.

The facilities chosen for extrapolation are expected to have relatively average benefits per MGD and angling day index, for their respective waterbody types. Benefits per MGD and angling day index are not expected to be extremely high or low relative to other facilities. EPA was careful not to use facilities that were unusual in this regard. Salem is located in the transitional zone of the estuary, a lesser productive part of the estuary.

The use of flow and angler day basis for extrapolation has some practical advantages and basis in logic; however, it also has some less than fully satisfactory implications. The advantages of using this extrapolation approach include:

- Feasibility of application, because the extrapolation relies on waterbody type, angler demand, and MGD data that are available for all in scope facilities.
- Selectively extrapolating case study results to facilities on like types of waterbodies reflects the type of aquatic setting impacted, which is intended to capture the number and types of species impacted by impingement and entrainment at such facilities (i.e., impacts at facilities on estuaries are more similar to impacts at other estuary-based cooling water intake structures than they are to facilities on inland waters).
- Flow in MGD is a useful proxy for the scale of operation at cooling water intake structures, a variable that typically will have a large impact on baseline losses and potential regulatory benefits.
- While there may be a high degree of variability in the actual losses (and benefits) per MGD across facilities that impact similar waterbodies, the extrapolations are expected to be reasonably accurate on average for developing an order-of-magnitude national-level estimate of benefits.
- The recreational participation level (angler day) variable provides a logical basis to reflect the extent of human user demands for the fishery and other resources affected by impingement and entrainment.
- The estimates are not biased in either direction.

Some of the disadvantages of the use of extrapolating results on the basis of waterbody type, recreational angling day data, and operational flows (MGD) include:

- The approach may not reflect all of the variability that exists in impingement and entrainment impacts (and monetized losses or benefits) within waterbody classifications. For example, within and across U.S. estuaries, there may be different species, numbers of individuals, and life stages present at different cooling water intake structures.
- The approach may not reflect all of the variability that exists in impingement and entrainment impacts (and monetized losses or benefits) across operational flow levels (MGD) at different facilities within a given waterbody type.

Extrapolating to national benefits according to flow (MGD), angling levels, and waterbody type, as derived from estimates for a small number of case studies, may introduce inaccuracies into national estimates. This is because the three variables used as the basis for the extrapolation (MGD, recreational angling days, and waterbody type) may not account for all of the variability expected in site-specific benefits levels. The case studies may not reflect the average or ''typical'' cooling water intake structures impacts on a given type of waterbody (i.e., the extrapolated results might under- or over-state the physical and dollar value of impacts per MGD and fishing day index, by

waterbody type). The inaccuracies introduced to the national-level estimates by this extrapolation approach are of unknown magnitude or direction (i.e., the estimates may over- or understate the anticipated national-level benefits), however EPA has no data to indicate that the case study results are atypical for each waterbody type.

2. Results of National Benefits Extrapolation

National benefits for 3 regulatory compliance options were estimated for the 539 facilities found to be in scope of the section 316(b) Phase II rulemaking. The benefits estimates were derived in a multi-step process that used operational flows and the recreational fishing index as the basis for extrapolating case study results to the national level.

In the first step, EPA used the baseline losses (dollars per year) derived from the analysis of facilities examined in the case studies. In some instances, the case study facilities had already implemented some measures to reduce impingement and/or entrainment. In such cases, baseline losses as appropriate to the national extrapolation were estimated using data for years prior to the facilities' actions (e.g., based on impingement and entrainment before the impingement deterrent net was installed at JR Whiting). These pre-action baselines provide a basis for examining other facilities that have not yet taken actions to reduce impingement and/or entrainment. Baseline losses at the selected case study facilities are summarized in Exhibit 24.

EXHIBIT 24.—BASELINE LOSSES FROM SELECTED CASE STUDIES

[Baseline losses from selected case studies, values in thousands of 2001$]

Case study	Impingement			Entrainment		
	Low	Mid	High	Low	Mid	High
Salem	$528	$704	$879	$16,766	$23,657	$30,548
Brayton	9	450	890	235	14,261	28,288
Contra Costa	2,666	5,726	8,785	6,413	13,630	20,847
Pittsburgh	10,096	22,268	34,440	19,166	40,760	62,354
4 Tampa Bay Facilities	801	809	817	20,007	20,454	20,901
29 Ohio Facilities	3,452	4,052	4,652	9,257	9,584	9,912
Monroe	742	3,190	5,639	1,307	7,604	13,902
JR Whiting	358	797	1,235	42	873	1,703
Pilgrim Nuclear	4	256	507	642	4,960	9,279

In the second step, EPA extrapolated the baseline dollar loss estimates from the case study models to all of the remaining 539 facilities by multiplying the index of operational flow for each facility by the estimated dollar losses at baseline per unit flow, based on each facility's source waterbody type, were extrapolated. This resulted in a national estimate of baseline monetizable losses for all 539 in scope facilities as summarized in Exhibit 25.

EXHIBIT 25.—BASELINE LOSSES EXTRAPOLATED TO ALL IN SCOPE FACILITIES USING MGD ONLY

[Baseline losses extrapolated to all in scope facilities—MGD only, values in thousands of 2001$]

Facility	Case study	Impingement			Entrainment		
		Low	Mid	High	Low	Mid	High
Estuary, Non Gulf							
Salem	Delaware	$528	$704	$879	$16,766	$23,657	$30,548
Brayton Point	Brayton	9	450	890	235	14,261	28,288
Contra Costa	California	2,666	5,726	8,785	6,413	13,630	20,847
Pittsburgh	California	10,096	22,268	34,440	19,166	40,760	62,354
All Other In Scope		11,167	14,875	18,583	354,346	499,991	645,636
All 78 In Scope		24,467	44,022	63,578	396,925	592,298	787,672
Estuary, Gulf Coast							
4 Tampa Facilities	Tampa Bay	801	809	817	20,007	20,454	20,901
All Other In Scope		3,361	3,395	3,429	83,982	85,857	87,732
All 30 In Scope		4,162	4,204	4,247	103,989	106,311	108,633
Freshwater							
29 Ohio Facilities	Ohio	3,452	4,052	4,652	9,257	9,584	9,912
Monroe	Monroe	742	3,190	5,639	1,307	7,604	13,902
All Other In Scope		33,317	39,111	44,906	89,348	92,514	95,679
All 393 In Scope		37,511	46,353	55,196	99,911	109,702	119,493
Great Lake							
JR Whiting	JR Whiting	358	797	1,235	42	873	1,703
All Other In Scope		8,774	19,523	30,271	1,025	21,385	41,745
All 16 In Scope		9,132	20,319	31,506	1,067	22,257	43,448

EXHIBIT 25.—BASELINE LOSSES EXTRAPOLATED TO ALL IN SCOPE FACILITIES USING MGD ONLY—Continued

[Baseline losses extrapolated to all in scope facilities—MGD only, values in thousands of 2001$]

Facility	Case study	Impingement			Entrainment		
		Low	Mid	High	Low	Mid	High
Ocean							
Pilgrim Nuclear	Pilgrim	4	256	507	642	4,960	9,279
All Other In Scope		115	7,219	14,323	18,127	140,146	262,165
All 22 In Scope		119	7,475	14,830	18,769	145,106	271,444
Total All Facilities							
All 539 In Scope		75,390	122,374	169,357	620,661	975,675	1,330,690

In the third step, the Agency extrapolated baseline losses from the case studies were also developed using the angling index values for each case study. The calculation of the index is described above. The results are summarized in Exhibit 26.

EXHIBIT 26.—BASELINE LOSSES EXTRAPOLATED—ANGLING DAYS ONLY

[Values in thousands of 2001$]

Facility	Case Study	Impingement			Entrainment		
		Low	Mid	High	Low	Mid	High
Estuary, Non Gulf							
Salem	Delaware	$528	$704	$879	$16,766	$23,657	$30,548
Brayton Point	Brayton	9	450	890	235	14,261	28,288
Contra Costa	California	2,666	5,726	8,785	6,413	13,630	20,847
Pittsburgh	California	10,096	22,268	34,440	19,166	40,760	62,354
All Other In Scope		23,840	31,755	39,671	756,471	1,067,399	1,378,327
All 78 In Scope		37,139	60,903	84,667	799,050	1,159,706	1,520,363
Estuary, Gulf Coast							
4 Tampa Facilities	Tampa Bay	$801	$809	$817	$20,007	$20,454	$20,901
All Other In Scope		3,148	3,180	3,212	78,664	80,421	82,177
All 30 In Scope		3,949	3,989	4,029	98,672	100,875	103,078
Freshwater							
29 Ohio Facilities	Ohio	$3,452	$4,052	$4,652	$9,257	$9,584	$9,912
Monroe	Monroe	742	3,190	5,639	1,307	7,604	13,902
All Other In Scope		23,203	27,238	31,273	62,224	64,429	66,633
All 393 In Scope		27,396	34,480	41,564	72,787	81,617	90,447
Great Lake							
JR Whiting	JR Whiting	$358	$797	$1,235	$42	$873	$1,703
All Other In Scope		2,231	4,965	7,698	261	5,438	10,616
All 16 In Scope		2,589	5,761	8,933	302	6,311	12,319
Ocean							
Pilgrim Nuclear	Pilgrim	$4	$256	$507	$642	$4,960	$9,279
All Other In Scope		56	3,529	7,001	8,861	68,504	128,147
All 22 In Scope		60	3,784	7,508	9,502	73,464	137,426
Total All Facilities							
All 539 In Scope		$71,134	$108,918	$146,701	$980,314	$1,421,974	$1,863,633

As a fourth step, EPA calculated the average baseline losses of the flow-based results and the angling-based results. This develops results that reflect an equal-weighted extrapolation measure of each case study facility's baseline loss, based on it's percent share of flow and recreational fishing relative to all in scope facilities in each waterbody type. The results of this average are reported in Exhibit 27.

EXHIBIT 27.—BASELINE LOSSES EXTRAPOLATED TO ALL IN SCOPE FACILITIES—MEANS OF MGD AND ANGLING

[Values in thousands of 2001$]

Facility	Case Study	Impingement			Entrainment		
		Low	Mid	High	Low	Mid	High
Estuary, Non Gulf							
Salem	Delaware	$528	$704	$879	$16,766	$23,657	$30,548
Brayton Point	Brayton	9	450	890	235	14,261	28,288
Contra Costa	California	2,666	5,726	8,785	6,413	13,630	20,847
Pittsburgh	California	10,096	22,268	34,440	19,166	40,760	62,354
All Other In Scope		17,503	23,315	29,127	555,409	783,695	1,011,981
All 78 In Scope		30,803	52,463	74,122	597,988	876,002	1,154,017
Estuary. Gulf Coast							
4 Tampa Facilities	Tampa Bay	$801	$809	$817	$20,007	$20,454	$20,901
All Other In Scope		3,255	3,288	3,321	81,323	83,139	84,955
All 30 In Scope		4,055	4,097	4,138	101,330	103,593	105,856
Freshwater							
29 Ohio Facilities	Ohio	$3,452	$4,052	$4,652	$9,257	$9,584	$9,912
Monroe	Monroe	742	3,190	5,639	1,307	7,604	13,902
All Other In Scope		28,260	33,175	38,089	75,786	78,471	81,156
All 393 In Scope		32,453	40,417	48,380	86,349	95,660	104,970
Great Lake							
JR Whiting	JR Whiting	$358	$797	$1,235	$42	$873	$1,703
All Other In Scope		5,503	12,244	18,985	643	13,412	26,180
All 16 In Scope		5,861	13,040	20,220	685	14,284	27,884
Ocean							
Pilgrim Nuclear	Pilgrim	$4	$256	$507	$642	$4,960	$9,279
All Other In Scope		86	5,374	10,662	13,494	104,325	195,156
All 22 In Scope		90	5,629	11,169	14,135	109,285	204,435
Total All Facilities							
All 539 In Scope		$73,262	$115,642	$158,029	$800,487	$1,198,824	$1,597,162

In the fifth step, EPA selected the set of extrapolation values the Agency believes are the most reflective of the baseline loss scenarios that applied in each waterbody type. For estuaries and freshwater facilities, EPA used the midpoint of its loss estimates of impingement and entrainment at the case study facilities, and then applied the average of the MGD- and angler-based extrapolation results. This provides estimates of national baseline losses that reflect the broadest set of values and parameters (i.e., the full range of loss estimates, plus the application of all three extrapolation variables).

For oceans and the Great Lakes, EPA developed national-scale estimates using its HRC-based loss estimates, because EPA was able to develop HRC estimates for these sites, and because these HRC values are more comprehensive than the values derived using the more traditional benefits transfer approach. The HRC estimates cover losses for a much larger percentage of fish lost due to impingement and entrainment, whereas the benefits transfer approach addressed losses only for a small share of the impacted fish. Since recreational fish impacts were an extremely small share of the total fish impacts at these sites, EPA extrapolated the HRC findings using only the MGD-based index (i.e., the angler-based index was not relevant).

The results of EPA's assessment of its best estimates for baseline losses due to impingement and entrainment are shown in Exhibit 28.

EXHIBIT 28.—BEST ESTIMATE BASELINE LOSSES

[Best estimate baseline losses, values in thousands of 2001$]

Facility	Case study	Impingement	Entrainment
Salem	Delaware	$704	$23,657
Brayton Point	Brayton	450	14,261
Contra Costa	California	5,726	13,630
Pittsburgh	California	22,268	40,760
All Other In Scope		23,315	783,695
All 78 In Scope		52,463	876,002

EXHIBIT 28.—BEST ESTIMATE BASELINE LOSSES—Continued

[Best estimate baseline losses, values in thousands of 2001$]

Facility	Case study	Impingement	Entrainment
Estuary and Gulf Coast			
4 Tampa Facilities	Tampa Bay	$809	$20,454
All Other In Scope		3,288	83,139
All 30 In Scope		4,097	103,593
Freshwater			
29 Ohio Facilities	Ohio	$4,052	$9,584
Monroe	Monroe	3,190	7,604
All Other In Scope		30,891	73,069
All 393 In Scope		38,133	90,258
Great Lake			
JR Whiting	JR Whiting	$1,235	$1,703
All Other In Scope		30,271	41,745
All 16 In Scope		31,506	43,448
Ocean			
Pilgrim Nuclear	Pilgrim	$507	$9,279
All Other In Scope		14,323	262,165
All 22 In Scope		14,830	271,444
Total All Facilities			
All 539 In Scope		$141,029	$1,384,745

In the sixth and final step, EPA estimated the potential benefits of each regulatory option by applying a set of estimated percent reductions in baseline losses. The percent reduction in baseline losses for each facility reflects EPA assessment of (1) regulatory baseline conditions at the facility (i.e., current practices and technologies in place), and (2) the percent reductions in impingement and entrainment that EPA estimated would be achieved at each facility that the Agency believes would be adopted under each regulatory option. The options portrayed in the Exhibits correspond to the following technical descriptions of each alternative:

Option 1 requires all Phase II existing facilities located on different categories of waterbodies to reduce intake capacity commensurate with the use of closed-cycle, recirculating cooling water systems based on location and the percentage of the source waterbody they withdraw for cooling;

Option 2 is variation of Option 1, but embodies a two-track approach whereby some facilities may use site-specific studies to comply using alternative approaches;

Option 3 (the Agency's preferred option) requires all Phase II existing facilities to reduce impingement and entrainment to levels established based on the use of design and construction or operational measures, except for facilities that are below flow thresholds for lakes and rivers;

Option 3a is a variation of Option 3, wherein all Phase II existing facilities are required to reduce impingement and entrainment to levels established based on the use of design and construction or operational measures;

Option 4 requires all Phase II existing facilities to reduce intake capacity commensurate with the use of closed-cycle, recirculating cooling water systems;

Option 5 requires that all Phase II existing facilities reduce intake capacity commensurate with the use of dry cooling systems.

The results of EPA approach to estimating national benefits are shown in Exhibits 29 through 32 (note that the percent reductions shown in these exhibits are the flow-weighted average reductions across all facilities in each waterbody category for each regulatory option).

EXHIBIT 29.—IMPINGEMENT BENEFITS FOR VARIOUS OPTIONS—BY REDUCTION LEVEL

Waterbody Type	Facility	Baseline impingement loss	Percentage Reductions					
			OPTION 1 percent	OPTION 2 percent	OPTION 3 percent	OPTION 3a percent	OPTION 4 percent	OPTION 5 percent
Estuary—NonGulf	All 78 In Scope	$52,463	64.5	47.5	33.2	25.0	40.9	97.5
Estuary—Gulf	All 30 In Scope	4,097	63.2	45.9	26.5	30.0	45.3	96.7
Freshwater	All 393 In Scope	40,417	47.3	47.3	47.3	46.7	59.0	98.0
Great Lake	All 16 In Scope	31,506	80.0	80.0	80.0	77.0	88.6	96.3
Ocean	All 22 In Scope	14,830	73.2	59.0	50.6	47.2	59.7	88.8
ALL	All 539 In Scope	143,312						

EXHIBIT 30.—IMPINGEMENT BENEFITS FOR VARIOUS OPTIONS—BY BENEFIT LEVEL

Waterbody type	Facility	Baseline impingement loss	Benefits (Values in thousands of 2001$)					
			OPTION 1	OPTION 2	OPTION 3	OPTION 3a	OPTION 4	OPTION 5
Estuary—NonGulf	All 78 In Scope	$52,463	$33,834	$24,909	$17,418	$13,125	$21,470	$51,141
Estuary—Gulf	All 30 In Scope	4,097	2,588	1,882	1,087	1,230	1,856	3,961
Freshwater	All 393 In Scope	40,417	19,117	19,117	19,117	18,855	23,828	39,605
Great Lake	All 16 In Scope	31,506	25,205	25,205	25,205	24,260	27,900	30,326
Ocean	All 22 In Scope	14,830	10,849	8,746	7,503	6,995	8,858	13,168
ALL	All 539 In Scope	143,312	91,593	79,858	70,329	64,465	83,911	138,201

EXHIBIT 31.—ENTRAINMENT BENEFITS FOR VARIOUS OPTIONS—BY REDUCTION LEVEL

Waterbody type	Facility	Baseline loss	Entrainment percentage reductions					
			OPTION 1 percent	OPTION 2 percent	OPTION 3 percent	OPTION 3a percent	OPTION 4 percent	OPTION 5 percent
Estuary—NonGulf	All 78 In Scope	$876,002	67.2	59.1	48.5	47.1	79.2	97.5
Estuary—Gulf	All 30 In Scope	103,593	66.9	52.3	47.0	47.8	79.3	96.7
Freshwater	All 393 In Scope	95,660	12.4	12.4	12.4	44.2	72.7	98.0
Great Lake	All 16 In Scope	43,448	57.8	57.8	57.8	57.8	88.6	96.3
Ocean	All 22 In Scope	271,444	74.2	58.9	45.0	45.0	74.1	88.8
ALL	All 539 In Scope	1,390,147						

EXHIBIT 32.—ENTRAINMENT BENEFITS FOR VARIOUS OPTIONS—BY BENEFIT LEVEL

Waterbody type	Facility	Baseline loss	Entrainment benefit (Values in thousands of 2001$)					
			OPTION 1	OPTION 2	OPTION 3	OPTION 4	OPTION 5	OPTION 6
Estuary—NonGulf	All 78 In Scope	$876,002	$588,552	$517,960	$424,708	$412,696	$693,420	$853,940
Estuary—Gulf	All 30 In Scope	103,593	69,324	54,206	48,645	49,508	82,186	100,175
Freshwater	All 393 In Scope	95,660	11,883	11,883	11,883	42,277	69,575	93,738
Great Lake	All 16 In Scope	43,448	25,092	25,092	25,092	25,092	38,474	41,820
Ocean	All 22 In Scope	271,444	201,301	159,809	122,098	122,098	201,025	241,020
ALL	All 539 In Scope	1,390,147	896,152	768,950	632,426	651,671	1,084,681	1,330,694

In addition, EPA developed a more generic illustration of potential benefits, based on a broad range (from 10 percent to 90 percent) of potential reductions in impingement and entrainment. These illustrative results are shown in Exhibit 33. Finally, the benefits estimated for Option 3, the Agency's preferred option, are detailed in Exhibit 34.

EXHIBIT 33.—SUMMARY OF POTENTIAL BENEFITS ASSOCIATED WITH VARIOUS IMPINGEMENT AND ENTRAINMENT REDUCTION LEVELS

Reduction level percent		Benefits (values in thousands of 2001$)	
		Impingement	Entrainment
10	All 539 In Scope	$14,331	$139,015
20	All 539 In Scope	28,662	278,029
30	All 539 In Scope	42,994	417,044
40	All 539 In Scope	57,325	556,059
50	All 539 In Scope	71,656	695,073
60	All 539 In Scope	85,987	834,088
70	All 539 In Scope	100,319	973,103
80	All 539 In Scope	114,650	1,112,118
90	All 539 In Scope	128,981	1,251,132

EXHIBIT 34.—SUMMARY OF BENEFITS FROM IMPINGEMENT CONTROLS ASSOCIATED WITH OPTION 3

Waterbody type	Facility	Benefits (values in thousands of 2001$)	
		Impingement	Entrainment
Estuary—NonGulf	All 78 In Scope	$17,418	$424,708
Estuary—Gulf	All 30 In Scope	1,087	48,645
Freshwater	All 393 In Scope	19,117	11,883

EXHIBIT 34.—SUMMARY OF BENEFITS FROM IMPINGEMENT CONTROLS ASSOCIATED WITH OPTION 3—Continued

Waterbody type	Facility	Benefits (values in thousands of 2001$)	
		Impingement	Entrainment
Great Lake	All 16 In Scope	25,205	25,092
Ocean	All 22 In Scope	7,503	122,098
ALL	All 539 In Scope	70,329	632,426

Under today's proposal, facilities can choose the Site-Specific Determination of Best Technology Available in § 125.94(a) in which a facility can demonstrate to the Director that the cost of compliance with the applicable performance standards in § 125.94(b) would be significantly greater than the costs considered by EPA when establishing these performance standards, or the costs would be significantly greater than the benefits of complying with these performance standards. EPA expects that if facilities were to choose this approach, then the overall national benefits of this rule will decrease markedly. This is because under this approach facilities would choose the lowest cost technologies possible and not necessarily the most effective technologies to reduce impingement and entrainment at the facility.

X. Administrative Requirements

A. E.O. 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The order defines a ''significant regulatory action'' as one that is likely to result in a rule that may:

- Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this proposed rule is a ''significant regulatory action.'' As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. EPA has prepared an Information Collection Request (ICR) document (EPA ICR No. 2060.01) and you may obtain a copy from Susan Auby by mail at Collection Strategies Division; U.S. Environmental Protection Agency (2822); 1200 Pennsylvania Ave., NW.; Washington, DC 20007, by e-mail at *auby.susan@epamail.epa.gov,* or by calling (202) 260–49011. You also can download a copy off the Internet at *http://www.epa.gov/icr.* The information collection requirements relate to existing electric generation facilities with design intake flows of 50 million gallons per day or more collecting information for preparing comprehensive demonstration studies, monitoring of impingement and entrainment, verifying compliance, and preparing yearly reports.

The total burden of the information collection requirements associated with today's proposed rule is estimated at 4,251,240 hours. The corresponding estimates of cost other than labor (labor and non-labor costs are included in the total cost of the proposed rule discussed in Section VIII of this preamble) is $191 million for 539 facilities and 44 States and one Territory for the first three years after promulgation of the rule. Non-labor costs include activities such as capital costs for remote monitoring devices, laboratory services, photocopying, and the purchase of supplies. The burden and costs are for the information collection, reporting, and recordkeeping requirements for the three-year period beginning with the assumed effective date of today's rule. Additional information collection requirements will occur after this initial three-year period as existing facilities continue to be issued permit renewals and such requirements will be counted in a subsequent information collection request. EPA does not consider the specific data that would be collected under this proposed rule to be confidential business information. However, if a respondent does consider this information to be confidential, the respondent may request that such information be treated as confidential. All confidential data will be handled in accordance with 40 CFR 122.7, 40 CFR part 2, and EPA's Security Manual Part III, Chapter 9, dated August 9, 1976.

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

Compliance with the applicable information collection requirements imposed under this proposed rule (see §§ 122.21(r), 125.95, 125.96, 125.97, and 125.98) is mandatory. Existing facilities would be required to perform several data-gathering activities as part of the permit renewal application process. Today's proposed rule would require several distinct types of information collection as part of the NPDES renewal application. In general, the information would be used to identify which of the requirements in today's proposed rule apply to the existing facility, how the existing facility would meet those requirements, and whether the existing facility's cooling water intake structure reflects the best technology available for minimizing environmental impact.

Categories of data required by today's proposed rule follow.

- Source waterbody data for determining appropriate requirements to apply to the facility, evaluating ambient conditions, and characterizing potential for impingement and entrainment of all life stages of fish and shellfish by the cooling water intake structure;
- Intake structure data, consisting of intake structure design and a facility water balance diagram, to determine appropriate requirements and characterize potential for impingement and entrainment of all life stages of fish and shellfish;
- Information on design and construction technologies implemented to ensure compliance with applicable requirements set forth in today's proposed rule; and
- Information on supplemental restoration measures proposed for use with or in lieu of design and construction technologies to minimize adverse.

In addition to the information requirements of the permit renewal application, NPDES permits normally specify monitoring and reporting requirements to be met by the permitted entity. Existing facilities that fall within the scope of this proposed rule would be required to perform biological monitoring as required by the Director to demonstrate compliance, and visual or remote inspections of the cooling water intake structure and any additional technologies. Additional ambient water quality monitoring may also be required of facilities depending on the specifications of their permits. The facility would be expected to analyze the results from its monitoring efforts and provide these results in an annual status report to the permitting authority. Finally, facilities would be required to maintain records of all submitted documents, supporting materials, and monitoring results for at least three years. (Note that the Director may require that records be kept for a longer period to coincide with the life of the NPDES permit.)

All impacted facilities would carry out the specific activities necessary to fulfill the general information collection requirements. The estimated burden includes developing a water balance diagram that can be used to identify the proportion of intake water used for cooling, make-up, and process water. Facilities would also gather data to calculate the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would be achieved by the technologies and operational measures they select. The burden estimates include sampling, assessing the source waterbody, estimating the magnitude of impingement mortality and entrainment, and reporting results in a comprehensive demonstration study. The burden also includes conducting a pilot study to evaluate the suitability of the technologies and operational measures based on the species that are found at the site.

Some of the facilities (those choosing to use restoration measures to maintain fish and shellfish) would need to prepare a plan documenting the restoration measures they would implement and how they would demonstrate that the restoration measures were effective. The burden estimates incorporate the cost of preparing calculations, drawings, and other materials supporting the proposed restoration measures, as well as performing monitoring to verify the effectiveness of the restoration measures.

Some facilities may choose to request a site-specific determination of BTA because of costs significantly greater than those EPA considered in establishing the performance standards or because costs are significantly greater than the benefits of complying with the performance standards. These facilities must perform a comprehensive cost evaluation study and/or a valuation of the monetized benefits of reducing impingement and entrainment, as well as submitting a site-specific technology plan characterizing the design and construction technologies, operational measures and restoration measures they have selected.

Exhibit 35 presents a summary of the maximum burden estimates for a facility to prepare a permit application and monitor and report on cooling water intake structure operations as required by this rule.

EXHIBIT 35.—MAXIMUM BURDEN AND COSTS PER FACILITY FOR NPDES PERMIT APPLICATION AND MONITORING AND REPORTING ACTIVITIES

Activities	Burden (hr)	Labor cost	Other direct costs (lump sum) [a]
Start-up activities	43	$1,964	$50
Permit application activities	242	9,071	500
Source water baseline biological characterization data	265	10,622	750
Proposal for collection of information for comprehensive demonstration study [b]	271	11,407	1,000
Source waterbody flow information	116	3,794	100
Design and construction technology plan	146	5,260	50
Impingement mortality and entrainment characterization study[b]	5,264	289,061	13,000
Evaluation of potential cooling water intake structure effects[b]	2,578	144,838	500
Information for site-specific determination of BTA	692	32,623	200
Site-specific technology plan	177	6,963	75
Verification monitoring plan	128	5,489	1,000
Subtotal	9,922	521,092	17,225
Biological monitoring (impingement sampling)	388	20,973	650
Biological monitoring (entrainment sampling)	776	42,044	4,000
Visual or remote inspections [c]	253	8,994	100
Verification study [d]	122	5,927	500
Yearly status report activities	324	14,906	750
Subtotal	1,863	92,844	$6,000

[a] Cost of supplies, filing cabinets, photocopying, boat renting, etc.

[b] The Impingement Mortality and Entrainment Characterization Study and Evaluation of Potential CWIS Effects also have capital, O&M and contracted service costs associated with them.
[c] Remote monitoring equipment also has capital and O&M costs associated with it.
[d] The verification monitoring also has contracted services associated with it.

EPA believes that all 44 States and one Territory with NPDES permitting authority will undergo start-up activities in preparation for administering the provisions of the proposed rule. As part of these start-up activities, States and Territories are expected to train junior technical staff to review materials submitted by facilities, and then use these materials to evaluate compliance with the specific conditions of each facility's NPDES permit.

Each State's/Territory's actual burden associated with reviewing submitted materials, writing permits, and tracking compliance depends on the number of new in-scope facilities that will be built in the State/Territory during the ICR approval period. EPA expects that State and Territory technical and clerical staff will spend time gathering, preparing, and submitting the various documents. EPA's burden estimates reflect the general staffing and level of expertise that is typical in States/Territories that administer the NPDES permitting program. EPA considered the time and qualifications necessary to complete various tasks such as reviewing submitted documents and supporting materials, verifying data sources, planning responses, determining specific permit requirements, writing the actual permit, and conferring with facilities and the interested public. Exhibit 36 provides a summary of the maximum burden estimates for States/Territories performing various activities with the proposed rule.

EXHIBIT 36.—ESTIMATING STATE/TERRITORY MAXIMUM BURDEN AND COSTS FOR ACTIVITIES

Activities	Burden (hr)	Labor cost	Other direct costs (lump sum) [a]
Start-up activities (per State/Territory)	100	$3,496	$50
State/Territory permit issuance activities (per facility)	811	32,456	300
Verification study review (per facility)	21	689	50
Review of alternative regulatory requirements (per facility)	192	6,237	50
Annual State/Territory activities (per facility)	50	1,662	50
Subtotal	1,174	44,540	500

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15.

EPA requests comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, Collection Strategies Division; U.S. Environmental Protection Agency (2822); 1200 Pennsylvania Ave., NW. Washington, DC 20460; and to the Office of Information and Regulatory Affairs; Office of Management and Budget; 725 17th Street, NW.; Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Because OMB is required to make a decision concerning the ICR between 30 and 60 days after April 9, 2002, a comment is best assured of having its full effect if OMB receives it by May 9, 2002. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Unfunded Mandates Reform Act

1. UMRA Requirements

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant intergovernmental mandates, and informing, educating, and advising small governments on compliance with regulatory requirements.

EPA estimated total annualized (post-tax) costs of compliance for the proposed rule to be $182 million ($2001). Of this total, $153 million is incurred by the private sector and $19.6 million is incurred by State and local governments that operate in-scope facilities.[82] Permitting authorities incur an additional $3.6 million to administer the rule, including labor costs to write permits and to conduct compliance monitoring and enforcement activities. EPA estimates that the highest

[82] In addition, 13 facilities owned by Tennessee Valley Authority (TVA), a federal entity, incur $9.8 million in compliance costs. The costs incurred by the federal government are not included in this section.

undiscounted cost incurred by the private sector in any one year is approximately $480 million in 2005. The highest undiscounted cost incurred by government sector in any one year is approximately $42 million in 2005. Thus, EPA has determined that this rule contains a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Accordingly, EPA has prepared a written statement under § 202 of UMRA, which is summarized below.

2. Analysis of Impacts on Government Entities

Governments may incur two types of costs as a result of the proposed regulation: (1) Direct costs to comply with the rule for facilities owned by government entities; and (2) administrative costs to implement the regulation. Both types of costs are discussed below.

a. Compliance Costs for Government-Owned Facilities

Exhibit 37 below provides an estimate of the number of government entities that operate facilities subject to the proposed rule, by ownership type and size of government entity. The exhibit shows that 23 large government entities operate 43 facilities subject to the proposed regulation. There are 22 small government entities that operate 22 facilities subject to regulation. No small government entity operates more than one affected facility. Of the 65 facilities that are owned by government entities, 48 are owned by municipalities, eight are owned by political subdivisions, seven are owned by state governments, and two are owned by municipal marketing authorities.

EXHIBIT 37.—NUMBER OF GOVERNMENT ENTITIES AND GOVERNMENT-OWNED FACILITIES

Ownership type	Number of government entities (by size)			Number of facilities (by government entity size)		
	Large	Small	Total	Large	Small	Total
Municipality	16	19	35	29	19	48
Municipal marketing authority	0	2	2	0	2	2
State Government	4	0	4	7	0	7
Political Subdivision	3	1	4	7	1	8
Total	23	22	45	43	22	65

Exhibit 38 summarizes the annualized compliance costs incurred by State, local, and Tribal governments for the proposed rule. The exhibit shows that the estimated annualized compliance costs for all government-owned facilities are $19.6 million. The 43 facilities owned by large governments would incur costs of $13.6 million; the 22 facilities owned by small governments would incur costs of $6 million.

EXHIBIT 38.—NUMBER OF REGULATED GOVERNMENT-OWNED FACILITIES AND COMPLIANCE COSTS BY SIZE OF GOVERNMENT FOR PROPOSED RULE

Size of Government	Number of facilities subject to regulation	Compliance costs (million $2001)
Facilities Owned by Large Governments	43	$13.6
Facilities Owned by Small Governments	22	6.0
All Government-Owned Facilities	65	19.6

EPA's analysis also considered whether the proposed rule may significantly or uniquely affect small governments. EPA estimates that 22 facilities subject to the proposed rule are owned by small governments (i.e., governments with a population of less than 50,000). The total compliance cost for all the small government-owned facilities incurring costs under the proposed rule is $6.0 million, or approximately $273,000 per facility. The highest annualized compliance costs for a government-owned facility is $965,000. In comparison, all non-government-owned facilities subject to this rule are expected to incur annualized compliance costs of $176 million, or $330,000 per facility. The highest annualized cost for a facility not owned by a small government is $4.3 million. EPA therefore concludes that these costs do not significantly or uniquely affect small governments. The *Economic and Benefits Assessment* provides more detail on EPA's analysis of impacts on governments.

b. Administrative Costs

The requirements of Section 316(b) are implemented through the NPDES (National Pollutant Discharge Elimination System) permit program. Forty-five states and territories currently have NPDES permitting authority under section 402(b) of the Clean Water Act (CWA). EPA estimates that states and territories will incur four types of costs associated with implementing the requirements of the proposed rule: (1) Start-up activities; (2) first permit issuance activities; (3) repermitting activities, and (4) annual activities. EPA estimates that the total annualized cost for these activities will be $3.6 million. Exhibit 39 below presents the annualized costs of the major administrative activities.

EXHIBIT 39.—ANNUALIZED GOVERNMENT ADMINISTRATIVE COSTS (MILLION $2001)

Activity	Cost
Start-up Activities	$0.02
First Permit Issuance Activities	1.61
Repermitting Activities	1.05
Annual Activities	0.94
Total	3.62

3. Consultation

EPA consulted with State governments and representatives of local governments in developing the regulation. The outreach activities are discussed in Section XI.E (E.O. 13131 addressing Federalism) of this preamble.

4. Alternatives Considered

In addition to the proposed rule, EPA considered and analyzed several alternative regulatory options to determine the best technology available for minimizing adverse environmental impact. EPA selected the proposed rule because it meets the requirement of section 316(b) of the CWA that the location, design, construction, and capacity of CWIS reflect the BTA for minimizing AEI, and it is economically practicable.

D. Regulatory Flexibility Act as Amended by SBREFA (1996)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

After considering the economic impacts of today's proposed rule on small entities, the Agency certifies that this action will not have a significant economic impact on a substantial number of small entities for reasons explained below.

For the purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business according to Small Business Administration (SBA) size standards; (2) a small governmental jurisdiction that is a government of a city, county; town, school district or special district with a population of less than 50,000; and (3) a small organization that is a not-for-profit enterprise which is independently owned and operated and is not dominant in its field. The SBA thresholds define minimum employment, sales revenue, or MWh output sizes below which an entity qualifies as small. The thresholds used in this analysis are firm-level four-digit Standard Industrial Classification (SIC) codes.[83] Exhibit 40 below presents the SBA size standards used in this analysis.

EXHIBIT 40.—UNIQUE PHASE II ENTITY SMALL BUSINESS SIZE STANDARDS (BY STANDARD INDUSTRY CLASSIFICATION CODES (SIC)) [84]

SIC code	SIC description	SBA size standard
1311	Crude Petroleum and Natural Gas	500 Employees
3312	Steel Works, Blast Furnaces (Including Coke Ovens), and Rolling Mills.	1,000 Employees.
4911	Electric Services	4 million MWh.
4924	Natural Gas Distribution	500 Employees.
4931	Electric and Other Services Combined	$5.0 Million.
4932	Gas and Other Services Combined	$5.0 Million.
4939	Combination Utilities, NEC	$5.0 Million.
4953	Refuse Systems	$10.0 Million.
6512	Operators of Nonresidential Buildings	$5.0 Million.
8711	Engineering Services	$6.0 Million.

[84] Information Source: U.S. Small Business Administration, Office of Size Standards, Exhibit of Size Standards (www.sba.gov/regulations/siccodes/siccodes.html)

EPA used publicly available data from the 1999 Forms EIA–860A and EIA–860B as well as information from EPA's 2000 Section 316(b) Industry Survey to identify the parent entities of electric generators subject to this proposed rule. EPA also conducted research to identify recent changes in ownership, including the current owner of each generator, and each owner's primary SIC code, sales revenues, employment, and/or electricity sales. Based on the parent entity's SIC code and the related size standard set by the SBA, EPA identified facilities that are owned by small entities.

Based on this analysis, EPA expects this proposed rule to regulate only a small absolute number of facilities owned by small entities, representing only 1.3 percent of all facilities owned by small entities in the electric power industry. EPA has estimated that 28 in-scope electric generators owned by small entities would be regulated by this proposed rule. Of the 28 generators, 19 are projected to be owned by a municipality, six by a rural electric cooperative, two by a municipal marketing authority, and one by a political subdivision.

Only facilities with design intake flows of 50 MGD or more are subject to this rule. In addition, only a small percentage of all small entities in the electric power industry, 1.3 percent, is subject to this rule. Finally, of the 28 small entities, two entities would incur annualized post-tax compliance costs of greater than three percent of revenues; nine would incur compliance costs of between one and three percent of revenues; and the remaining 17 small entities would incur compliance costs of less than one percent of revenues. The estimated compliance costs that facilities owned by small entities would likely incur represent between 0.12 and 5.29 percent of the entities' annual sales revenue.

Exhibit 41 summarizes the results of Regulatory Flexibility Act analysis. From the small absolute number of facilities owned by small entities that would be affected by the proposed rule, the low percentage of all small entities, and the very low impacts, EPA concludes that the proposed rule will not have a significant economic impact on a substantial number of small entities.

EXHIBIT 41.—SUMMARY OF RFA ANALYSIS

Type of Entity	(A) Number of in-scope facilities owned by small entities	(B) Number of small entities with in-scope facilities	(C) Total number of small entities	(D) Percent of small entities in-scope of rule [(B)/(C)]	(E) Annual compliance costs/annual sales revenue
Municipality	19	19	1,110	1.7	0.4 to 5.3%

[83] The North American Industry Classification System (NAICS) replaced trhe Standard Industrial Classification (SIC) System as of October 1, 2000. The data sources EPA used to identify the parent entities of the facilities subject to this rule did not provide NAICS codes at the time of analysis.

EXHIBIT 41.—SUMMARY OF RFA ANALYSIS—Continued

Type of Entity	(A) Number of in-scope facilities owned by small entities	(B) Number of small entities with in-scope facilities	(C) Total number of small entities	(D) Percent of small entities in-scope of rule [(B)/(C)]	(E) Annual compliance costs/annual sales revenue
Municipal Marketing Authority	2	2	22	9.1	0.1 to 0.1%
Rural Electric Cooperative	6	6	877	0.7	0.2 to 0.5%
Political Subdivision	1	1	104	1.0	1.2 to 1.2%
Other Types	0	0	97	0.0	n/a
Total	28	28	2,210	1.3	0.1–5.3%

The *Economic and Benefits Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule* presents more detail on EPA's small entity analysis in support of this proposed rule.

E. E.O. 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. E.O. 12898 provides that each Federal agency must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

Today's final rule would require that the location, design, construction, and capacity of cooling water intake structures (CWIS) at Phase II existing facilities reflect the best technology available for minimizing adverse environmental impact. For several reasons, EPA does not expect that this final rule would have an exclusionary effect, deny persons the benefits of the participating in a program, or subject persons to discrimination because of their race, color, or national origin.

To assess the impact of the rule on low-income and minority populations, EPA calculated the poverty rate and the percentage of the population classified as non-white for populations living within a 50-mile radius of each of the 539 in-scope facilities. The results of the analysis, presented in the EBA, show that the populations affected by the in-scope facilities have poverty levels and racial compositions that are quite similar to the U.S. population as a whole. A relatively small subset of the facilities are located near populations with poverty rates (24 of 539, or 4.5%), or non-white populations (101 of 539, or 18.7%), or both (13 of 539, or 2.4%), that are significantly higher than national levels. Based on these results, EPA does not believe that this rule will have an exclusionary effect, deny persons the benefits of the NPDES program, or subject persons to discrimination because of their race, color, or national origin.

In fact because EPA expects that this final rule would help to preserve the health of aquatic ecosystems located in reasonable proximity to Phase II existing facilities, it believes that all populations, including minority and low-income populations, would benefit from improved environmental conditions as a result of this rule. Under current conditions, EPA estimates approximately 2.2 billion fish (expressed as age 1 equivalents) of recreational and commercial species are lost annually due to impingement and entrainment at the 529 in scope Phase II existing facilities. Under the Agency's preferred option, over 1.2 billion individuals of these commercially and recreationally sought fish species (age 1 equivalents) will now survive to join the fishery each year (435 million fish due to reduced impingement impacts, and 789 million fish due to reduced entrainment). These additional 1.2 billion fish will provide increased opportunities for subsistence anglers to increase their catch, thereby providing some benefit to low income households located near regulation-impacted waters.

F. E.O. 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe might have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health and safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This proposed rule is an economically significant rule as defined under Executive Order 12866. However, it does not concern an environmental health or safety risk that would have a disproportionate effect on children. Therefore, it is not subject to Executive Order 13045.

G. E.O. 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes.''

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes,

as specified in Executive Order 13175. EPA's analyses show that no facility subject to this proposed rule is owned by tribal governments. This proposed rule does not affect Tribes in any way in the foreseeable future. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

H. E.O. 13158: Marine Protected Areas

Executive Order 13158 (65 FR 34909, May 31, 2000) requires EPA to ''expeditiously propose new science-based regulations, as necessary, to ensure appropriate levels of protection for the marine environment.'' EPA may take action to enhance or expand protection of existing marine protected areas and to establish or recommend, as appropriate, new marine protected areas. The purpose of the Executive Order is to protect the significant natural and cultural resources within the marine environment, which means ''those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands thereunder, over which the United States exercises jurisdiction, consistent with international law.''

This proposed rule recognizes the biological sensitivity of tidal rivers, estuaries, oceans, and the Great Lakes and their susceptibility to adverse environmental impact from cooling water intake structures. This proposal provides the most stringent requirements to minimize adverse environmental impact for cooling water intake structures located on these types of water bodies, including potential reduction of intake flows to a level commensurate with that which can be attained by a closed-cycle recirculating cooling system for facilities that withdraw certain proportions of water from estuaries, tidal rivers, and oceans.

EPA expects that this proposed rule will reduce impingement and entrainment at facilities with design intake flows of 50 MGD or more. The rule would afford protection of aquatic organisms at individual, population, community, or ecosystem levels of ecological structures. Therefore, EPA expects today's proposed rule would advance the objective of the Executive Order to protect marine areas.

I. E.O. 13211: Energy Effects

Executive Order 13211 on ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' requires EPA to prepare a Statement of Energy Effects when undertaking regulatory actions identified as ''significant energy actions.'' For the purposes of Executive Order 13211, ''significant energy action'' means (66 FR 28355; May 22, 2001):

> any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking:
>
> (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and
>
> (ii) Is likely to have a significant adverse effect on the supply, distribution, or use of energy; or
>
> (2) That is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

For those regulatory actions identified as ''significant energy actions,'' a Statement of Energy Effects must include a detailed statement relating to (1) any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies), and (2) reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.

This proposed rule does not qualify as a ''significant energy action'' as defined in Executive Order 13211 because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The proposed rule does not contain any compliance requirements that would directly reduce the installed capacity or the electricity production of U.S. electric power generators, for example through parasitic losses or auxiliary power requirements. In addition, based on the estimated costs of compliance, EPA currently projects that the rule will not lead to any early capacity retirements at facilities subject to this rule or at facilities that compete with them. As described in detail in Section VIII, EPA estimates small effects of this rule on installed capacity, generation, production costs, and electricity prices. EPA's therefore concludes that this proposed rule will have small energy effects at a national, regional, and facility-level. As a result, EPA did not prepare a Statement of Energy Effects. EPA recognizes that some of the alternative regulatory options discussed in the preamble would have much larger effects and might well quality as ''significant energy actions'' under Executive Order 13211. If EPA decides to revise the proposed requirements for the final rule, it will reconsider its determination under Executive Order 13211 and prepare a Statement of Energy Effects as appropriate.

For more detail on the potential energy effects of this proposed rule or the alternative regulatory options considered by EPA, see Section VIII above or the *Economic and Benefits Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule.*

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995, Pub. L. 104–113, Sec. 12(d) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget (OMB), explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rule does not involve such technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. EPA welcomes comments on this aspect of the proposed rule and, specifically, invites the public to identify potentially applicable voluntary consensus standards and to explain why such standards should be used in this proposed rule.

K. Plain Language Directive

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. We invite your comments on how to make this proposed rule easier to understand. For example: Have we organized the material to suit your needs? Are the requirements in the rule clearly stated? Does the rule contain technical language or jargon that is not clear? Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand? Would more (but shorter) sections be better? Could we improve clarity by adding tables, lists, or diagrams? What else could we do to make the rule easier to understand?

L. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. Policies

that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Rather, this proposed rule would result in minimal administrative costs on States that have an authorized NPDES program. EPA expects an annual burden of 146,983 hours with an annual cost of $41,200 (non-labor costs) for States to collectively administer this proposed rule. EPA has identified 65 Phase II existing facilities that are owned by federal, state or local government entities. The annual impacts on these facilities is not expected to exceed 2,252 burden hours and $56,739 (non-labor costs) per facility.

The proposed national cooling water intake structure requirements would be implemented through permits issued under the NPDES program. Forty-three States and the Virgin Islands are currently authorized pursuant to section 402(b) of the CWA to implement the NPDES program. In States not authorized to implement the NPDES program, EPA issues NPDES permits. Under the CWA, States are not required to become authorized to administer the NPDES program. Rather, such authorization is available to States if they operate their programs in a manner consistent with section 402(b) and applicable regulations. Generally, these provisions require that State NPDES programs include requirements that are as stringent as Federal program requirements. States retain the ability to implement requirements that are broader in scope or more stringent than Federal requirements. (See section 510 of the CWA.)

Today's proposed rule would not have substantial direct effects on either authorized or nonauthorized States or on local governments because it would not change how EPA and the States and local governments interact or their respective authority or responsibilities for implementing the NPDES program. Today's proposed rule establishes national requirements for Phase II existing facilities with cooling water intake structures. NPDES-authorized States that currently do not comply with the final regulations based on today's proposal might need to amend their regulations or statutes to ensure that their NPDES programs are consistent with Federal section 316(b) requirements. See 40 CFR 123.62(e). For purposes of this proposed rule, the relationship and distribution of power and responsibilities between the Federal government and the States and local governments are established under the CWA (e.g., sections 402(b) and 510); nothing in this proposed rule would alter that. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with State governments and representatives of local governments in developing the proposed rule. During the development of the proposed section 316(b) rule for new facilities, EPA conducted several outreach activities through which State and local officials were informed about this proposal and they provided information and comments to the Agency. The outreach activities were intended to provide EPA with feedback on issues such as adverse environmental impact, BTA, and the potential cost associated with various regulatory alternatives.

EPA has made presentations on the section 316(b) rulemaking effort in general at eleven professional and industry association meetings. EPA also conducted two public meetings in June and September of 1998 to discuss issues related to the section 316(b) rulemaking effort. In September 1998 and April 1999, EPA staff participated in technical workshops sponsored by the Electric Power Research Institute on issues relating to the definition and assessment of adverse environmental impact. EPA staff have participated in other industry conferences, met upon request on numerous occasions with industry representatives, and met on a number of occasions with representatives of environmental groups.

In the months leading up to publication of the proposed Phase I rule, EPA conducted a series of stakeholder meetings to review the draft regulatory framework for the proposed rule and invited stakeholders to provide their recommendations for the Agency's consideration. EPA managers have met with the Utility Water Act Group, Edison Electric Institute, representatives from an individual utility, and with representatives from the petroleum refining, pulp and paper, and iron and steel industries. EPA conducted meetings with environmental groups attended by representatives from between 3 and 15 organizations. EPA also met with the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and, with the assistance of ASIWPCA, conducted a conference call in which representatives from 17 states or interstate organizations participated. EPA also met with OMB and utility representatives and other federal agencies (the Department of Energy, the Small Business Administration, the Tennessee Valley Authority, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service and the Department of Interior's U.S. Fish and Wildlife Service). After publication of the proposed Phase I rule, EPA continued to meet with stakeholders at their request.

EPA received more than 2000 comments on the Phase I proposed rule and NODA. In some cases these comments have informed the development of the Phase II rule proposal.

In January, 2001, EPA also attended technical workshops organized by the Electric Power Research Institute and the Utilities Water Action Group. These workshops focused on the presentation of key issues associated with different regulatory approaches considered under the Phase I proposed rule and alternatives for addressing 316(b) requirements.

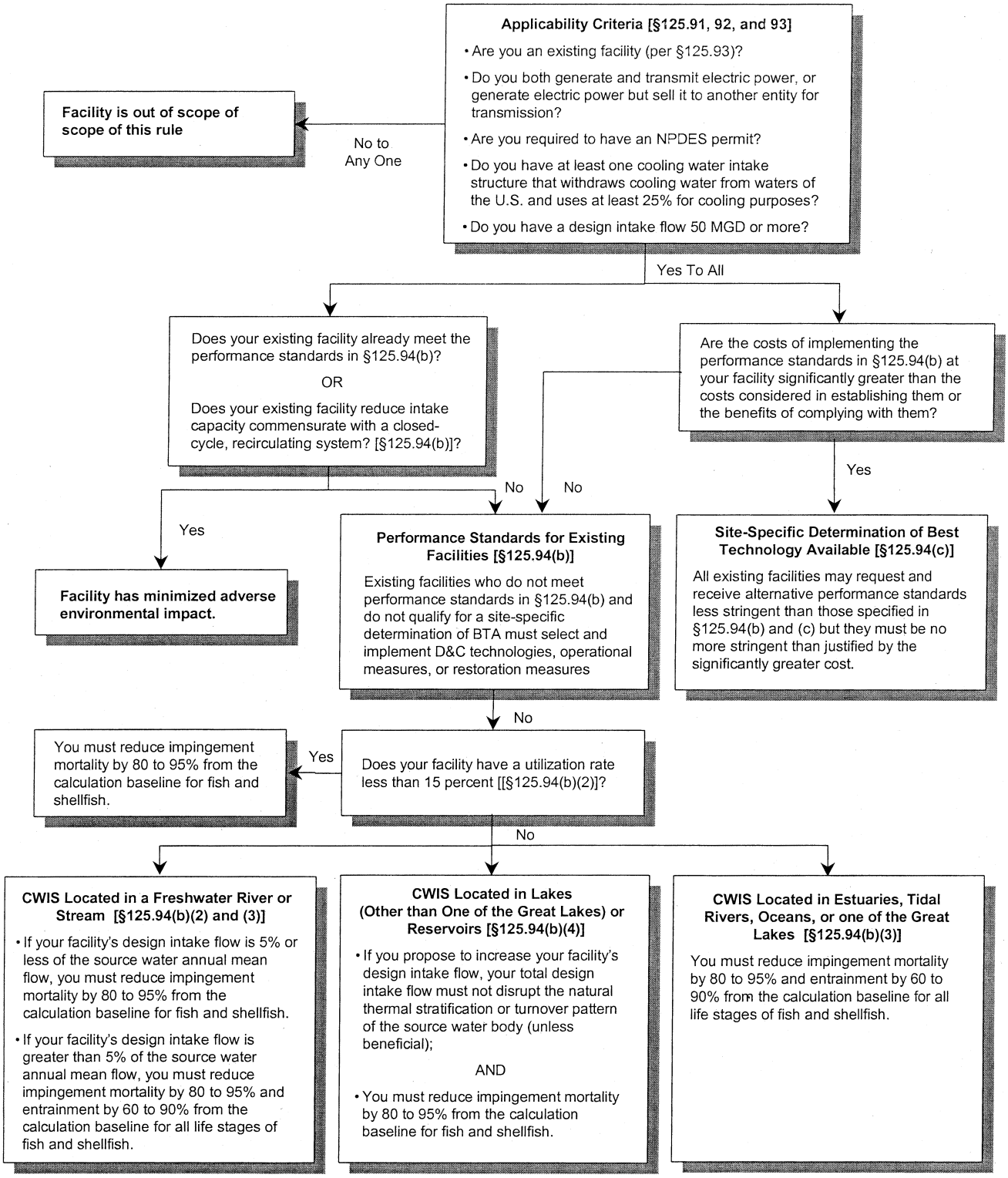
On May 23, 2001, EPA held a day-long forum to discuss specific issues associated with the development of regulations under section 316(b). At the meeting, 17 experts from industry, public interest groups, States, and academia reviewed and discussed the Agency's preliminary data on cooling water intake structure technologies that are in place at existing facilities and the costs associated with the use of available technologies for reducing impingement and entrainment. Over 120 people attended the meeting.

Finally, in August 21, 2001, EPA staff participated in a technical symposium sponsored by the Electric Power Research Institute in association with the American Fisheries Society on issues relating to the definition and assessment of adverse environmental impact for section 316(b) of the CWA.

In the spirit of this Executive Order and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

BILLING CODE 6560–50–P

APPENDIX 1.—SECTION 316(B) PHASE II EXISTING FACILITY RULE FRAMEWORK



CWIS = cooling water intake structure

MGD = million gallons per day

D&C = design and construction

BILLING CODE 6560–50–C

List of Subjects

40 CFR Part 9

Reporting and recordkeeping requirements.

40 CFR Part 122

Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 123

Administrative practice and procedure, Confidential business information, Hazardous substances, Indian-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 125

Cooling Water Intake Structure, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: February 28, 2002.

Christine Todd Whitman,

Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671, 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

2. In § 9.1 the table is amended by revising the entry for ''122.21(r)'' and by adding entries in numerical order under the indicated heading to read as follows:

§ 9.1 OMB approvals under the Paper Work Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * * * *	
EPA Administered Permit Programs: The National Pollutant Discharge Elimination System	
* * * * * * *	
122.21(r)	2040–0241, xxxxx–xxxxx
* * * * * * *	
Criteria and Standards for the National Pollutant Discharge Elimination System	
* * * * * * *	
125.95	xxxx–xxxx
125.96	xxxx–xxxx
125.97	xxxx–xxxx
125.98	xxxx–xxxx
* * * * * * *	

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section § 122.21 by revising paragraph (r) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25)

* * * * *

(r) *Applications for facilities with cooling water intake structures—(1)(i) New facilities with new or modified cooling water intake structures.* New facilities with cooling water intake structures as defined in part 125, subpart I of this chapter must report the information required under paragraphs (r)(2), (3), and (4) of this section and § 125.86 of this chapter. Requests for alternative requirements under § 125.85 of this chapter must be submitted with your permit application.

(ii) *Phase II existing facilities.* Phase II existing facilities as defined in part 125, subpart J of this chapter must report the information required under paragraphs (r)(2), (3), and (5) of this section and § 125.95 of this chapter. Requests for site-specific determination of best technology available for minimizing adverse environmental impact under § 125.94(c) of this chapter must be submitted with your permit application.

(2) *Source Water Physical Data* including:

(i) A narrative description and scaled drawings showing the physical configuration of all source water bodies used by your facility, including areal dimensions, depths, salinity and temperature regimes, and other documentation that supports your determination of the water body type where each cooling water intake structure is located;

(ii) Identification and characterization of the source waterbody's hydrological and geomorphological features, as well as the methods you used to conduct any physical studies to determine your intake's area of influence within the waterbody and the results of such studies; and

(iii) Locational maps.

(3) *Cooling Water Intake Structure Data* including:

(i) A narrative description of the configuration of each of your cooling water intake structures and where it is located in the water body and in the water column;

(ii) Latitude and longitude in degrees, minutes, and seconds for each of your cooling water intake structures;

(iii) A narrative description of the operation of each of your cooling water intake structures, including design intake flows, daily hours of operation, number of days of the year in operation and seasonal changes, if applicable;

(iv) A flow distribution and water balance diagram that includes all sources of water to the facility, recirculating flows, and discharges; and

(v) Engineering drawings of the cooling water intake structure.

(4) *Source Water Baseline Biological Characterization Data.* This information is required to characterize the biological community in the vicinity of the cooling water intake structure and to characterize the operation of the cooling water intake structures. The Director may also use this information in subsequent permit renewal proceedings to determine if your Design and Construction Technology Plan as required in § 125.86(b)(4) should be revised. This supporting information must include existing data (if they are available). However, you may supplement the data using newly conducted field studies if you choose to do so. The information you submit must include:

(i) A list of the data in paragraphs (r)(4)(ii) through (vi) of this section that are not available and efforts made to identify sources of the data;

(ii) A list of species (or relevant taxa) for all life stages and their relative abundance in the vicinity of the cooling water intake structure;

(iii) Identification of the species and life stages that would be most susceptible to impingement and entrainment. Species evaluated should include the forage base as well as those most important in terms of significance to commercial and recreational fisheries;

(iv) Identification and evaluation of the primary period of reproduction, larval recruitment, and period of peak abundance for relevant taxa;

(v) Data representative of the seasonal and daily activities (e.g., feeding and water column migration) of biological organisms in the vicinity of the cooling water intake structure;

(vi) Identification of all threatened, endangered, and other protected species that might be susceptible to impingement and entrainment at your cooling water intake structures;

(vii) Documentation of any public participation or consultation with Federal or State agencies undertaken in development of the plan; and

(viii) If you supplement the information requested in paragraph (r)(4)(i) of this section with data collected using field studies, supporting documentation for the Source Water Baseline Biological Characterization must include a description of all methods and quality assurance procedures for sampling, and data analysis including a description of the study area; taxonomic identification of sampled and evaluated biological assemblages (including all life stages of fish and shellfish); and sampling and data analysis methods.

The sampling and/or data analysis methods you use must be appropriate for a quantitative survey and based on consideration of methods used in other biological studies performed within the same source water body. The study area should include, at a minimum, the area of influence of the cooling water intake structure.

(5) *Phase II Existing Facility Cooling Water System Data.* Phase II existing facilities, as defined in part 125, subpart J of this chapter, must provide the following information:

(i) A narrative description of the operation of each of your cooling water systems, relationship to cooling water intake structures, proportion of the design intake flow that is used in the system, number of days of the year in operation and seasonal changes, if applicable;

(ii) Engineering calculations and supporting data to support the description required by paragraph (r)(5)(i) of this section.

3. Section 122.44 is amended by revising paragraph (b)(3) to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(3) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I and J of this chapter.

* * * * *

PART 123—STATE PROGRAM REQUIREMENTS

1. The authority citation for part 123 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 123.25 is amended by revising paragraph (a)(4) (a) and (36) to read as follows:

§ 123.25 Requirements for permitting.

(a) * * *

(4) § 122.21 (a) (b), (c)(2), (e) (k), (m) (p), and (r)—(Application for a permit);

* * * * *

(36) Subparts A, B, D, H, I, and J of part 125 of this chapter;

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et.seq;* Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

2. Section 124.10 is amended by revising paragraph (d)(1)(ix) to read as follows:

§ 124.10 Public notice of permit actions and public comment period.

* * * * *

(d) * * *

(1) * * *

(ix) Requirements applicable to cooling water intake structures under section 316(b) of the CWA, in accordance with part 125, subparts I and J of this chapter.

* * * * *

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 125 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*; unless otherwise noted.

2. Section 125.83 is amended by revising the definition of cooling water as follows:

§ 125.83 What special definitions apply to this subpart?

* * * * *

Cooling water means water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content. The intended use of the cooling water is to absorb waste heat rejected from the process or processes used, or from auxiliary operations on the facility's premises. Cooling water that is used in a manufacturing process either before or

after it is used for cooling is considered process water for the purposes of calculating the percentage of a new facility's intake flow that is used for cooling purposes in §§ 125.81(c) and 125.91(c).

* * * * *

3. Add subpart J to part 125 to read as follows:

Subpart J—Requirements Applicable to Cooling Water Intake Structures for ''Phase II Existing Facilities'' Under Section 316(b) of the Act

Sec.
125.90 What are the purpose and scope of this subpart?
125.91 What is a Phase II existing facility subject to this subpart?
125.92 When must I comply with this subpart?
125.93 What special definitions apply to this subpart?
125.94 How will requirements reflecting best technology available for minimizing adverse environmental impact be established for my Phase II existing facility?
125.95 As an owner or operator of a Phase II existing facility, what must I collect and submit when I apply for my reissued NPDES permit?
125.96 As an owner or operator of a Phase II existing facility, what monitoring must I perform?
125.97 As an owner or operator of a Phase II existing facility, what records must I keep and what information must I report?
125.98 As the Director, what must I do to comply with the requirements of this subpart?

Subpart J—Requirements Applicable to Cooling Water Intake Structures for ''Phase II Existing Facilities'' Under Section 316(b) of the Act

§ 125.90 What are the purpose and scope of this subpart?

(a) This subpart establishes requirements that apply to the location, design, construction, and capacity of cooling water intake structures at existing facilities that are subject to this subpart (Phase II existing facilities). The purpose of these requirements is to establish the best technology available for minimizing adverse environmental impact associated with the use of cooling water intake structures. These requirements are implemented through National Pollutant Discharge Elimination System (NPDES) permits issued under section 402 of the Clean Water Act (CWA).

(b) This subpart implements section 316(b) of the CWA for Phase II existing facilities. Section 316(b) of the CWA provides that any standard established pursuant to sections 301 or 306 of the CWA and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

(c) Existing facilities that are not subject to this subpart must meet requirements under section 316(b) of the CWA determined by the Director on a case-by-case, best professional judgment (BPJ) basis.

(d) Notwithstanding any other provision of this subpart, if a State demonstrates to the Administrator that it has adopted alternative regulatory requirements that will result in environmental performance within a watershed that is comparable to the reductions of impingement mortality and entrainment that would otherwise be achieved under § 125.94, the Administrator shall approve such alternative regulatory requirements.

(e) Nothing in this subpart shall be construed to preclude or deny the right of any State or political subdivision of a State or any interstate agency under section 510 of the CWA to adopt or enforce any requirement with respect to control or abatement of pollution that is not less stringent than those required by Federal law.

§ 125.91 What is a ''Phase II Existing Facility'' subject to this subpart?

(a) This subpart applies to an existing facility, as defined in § 125.93, if it:

(1) Is a point source that uses or proposes to use a cooling water intake structure;

(2) Both generates and transmits electric power, or generates electric power but sells it to another entity for transmission;

(3) Has at least one cooling water intake structure that uses at least 25 percent of the water it withdraws for cooling purposes as specified in paragraph (c) of this section; and

(4) Has a design intake flow of 50 million gallons per day (MGD) or more. Facilities that meet these criteria are referred to as ''Phase II existing facilities.''

(b) In the case of a cogeneration facility that shares a cooling water intake structure with another existing facility, only that portion of the cooling water intake flow that is used in the cogeneration process shall be considered for purposes of determining whether the 50 MGD and 25 percent criteria in paragraphs (a)(3) and (4) of this section are met.

(c) Use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with an independent supplier (or multiple suppliers) of cooling water if the supplier or suppliers withdraw(s) water from waters of the United States. Use of cooling water does not include obtaining cooling water from a public water system or use of treated effluent that otherwise would be discharged to a water of the U.S. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a point source.

(d) Whether or not 25 percent of water withdrawn is used for cooling purposes must be measured on an average monthly basis. The 25 percent threshold is met if any monthly average of cooling water over any 12 month period is 25 percent or more of the total water withdrawn.

§ 125.92 When must I comply with this subpart?

You must comply with this subpart when an NPDES permit containing requirements consistent with this subpart is issued to you.

§ 125.93 What special definitions apply to this subpart?

The definitions in Subpart I of Part 125, except the definitions of *cooling water* and *existing facility,* apply to this subpart. The following definitions also apply to this subpart:

Administrator means the same as defined in 40 CFR 122.2.

All life stages means eggs, larvae, juveniles, and adults.

Calculation baseline means an estimate of impingement mortality and entrainment that would occur at your site assuming you had a shoreline cooling water intake structure with an intake capacity commensurate with a once-through cooling water system and with no impingement and/or entrainment reduction controls.

Capacity utilization rate means the ratio between the average annual net generation of the facility (in MWh) and the total net capability of the facility (in MW) multiplied by the number of available hours during a year. The average annual generation must be measured over a five year period (if available) of representative operating conditions.

Cogeneration facility means a facility that operates equipment used to produce, from the same fuel source: electric energy used for industrial, commercial, and/or institutional purposes at one or more host facilities and/or for sale to another entity for transmission; and forms of useful thermal energy (such as heat or steam), used for industrial commercial,

institutional, heating, and/or cooling purposes at one or more host facilities.

Cooling water means water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content. The intended use of the cooling water is to absorb waste heat rejected from the process or processes used, or from auxiliary operations on the facility's premises. Cooling water that is used in a manufacturing process either before or after it is used for cooling is considered process water for the purposes of calculating the percentage of a facility's intake flow that is used for cooling purposes in § 125.91(c).

Diel means sample variation in organismal abundance and density over a 24-hour period due to the influence of water movement and changes in light intensity.

Director means the same as defined in 40 CFR 122.2.

Existing facility means any facility that commenced construction before January 17, 2002; and

(1) Any modification of such a facility;

(2) Any addition of a unit at such a facility for purposes of the same industrial operation;

(3) Any addition of a unit at such a facility for purposes of a different industrial operation, if the additional unit uses an existing cooling water intake structure and the design capacity of the intake structure is not increased; or

(4) Any facility constructed in place of such a facility, if the newly constructed facility uses an existing cooling water intake structure whose design intake flow is not increased to accommodate the intake of additional cooling water.

Once-through cooling water system means a system designed to withdraw water from a natural or other water source, use it at the facility to support contact and/or noncontact cooling uses, and then discharge it to a water body without recirculation. Once-through cooling systems sometimes employ canals/channels, ponds, or non-recirculating cooling towers to dissipate waste heat from the water before it is discharged.

Phase II existing facility means any existing facility that meets the criteria specified in § 125.91.

§ 125.94 How will requirements reflecting best technology available for minimizing adverse environmental impact be established for my Phase II existing facility?

(a) You may choose one of the following three alternatives for establishing best technology available for minimizing adverse environmental impact at your site:

(1) You may demonstrate to the Director that your existing design and construction technologies, operational measures, and/or restoration measures meet the performance standards specified in paragraph (b) of this section;

(2) You may demonstrate to the Director that you have selected design and construction technologies, operational measures, and/or restoration measures that will, in combination with any existing design and construction technologies, operational measures, and/or restoration measures, meet the performance standards specified in paragraph (b) of this section; or

(3) You may demonstrate to the Director that a site-specific determination of best technology available for minimizing adverse environmental impact is appropriate for your site in accordance with paragraph (c) of this section.

(b) *Performance Standards.* If you choose the alternative in paragraphs (a)(1) or (a)(2) of this section, you must meet the following performance standards:

(1) You must reduce your intake capacity to a level commensurate with the use of a closed-cycle, recirculating cooling system; or

(2) You must reduce impingement mortality of all life stages of fish and shellfish by

80 to 95 percent from the calculation baseline if your facility has a capacity utilization rate less than 15 percent, or your facility's design intake flow is 5 percent or less of the mean annual flow from a freshwater river or stream; or

(3) You must reduce impingement mortality of all life stages of fish and shellfish by

80 to 95 percent from the calculation baseline, and you must reduce entrainment of all life stages of fish and shellfish by 60 to 90 percent from the calculation baseline if your facility has a capacity utilization rate of 15 percent or greater and withdraws cooling water from a tidal river or estuary, from an ocean, from one of the Great Lakes, or your facility's design intake flow is greater than 5 percent of the mean annual flow of a freshwater river or stream; or

(4) If your facility withdraws cooling water from a lake (other than one of the Great Lakes) or reservoir:

(i) You must reduce impingement mortality of all life stages of fish and shellfish by

80 to 95 percent from the calculation baseline; and

(ii) If you propose to increase your facility's design intake flow, your increased flow must not disrupt the natural thermal stratification or turnover pattern (where present) of the source water, except in cases where the disruption is determined by any Federal, State or Tribal fish or wildlife management agency(ies) to be beneficial to the management of fisheries.

(c)(1) *Site-Specific Determination of Best Technology Available.* If you choose the alternative in paragraph (a)(3) of this section, you must demonstrate to the Director that your costs of compliance with the applicable performance standards in paragraph (b) of this section would be significantly greater than the costs considered by the Administrator when establishing such performance standards, or that your costs would be significantly greater than the benefits of complying with such performance standards at your site.

(2) If data specific to your facility indicate that your costs would be significantly greater than those considered by the Administrator in establishing the applicable performance standards, the Director shall make a site-specific determination of best technology available for minimizing adverse environmental impact that is based on less costly design and construction technologies, operational measures, and/or restoration measures to the extent justified by the significantly greater cost. The Director's site-specific determination may conclude that design and construction technologies, operational measures, and/or restoration measures in addition to those already in place are not justified because of significantly greater costs.

(3) If data specific to your facility indicate that your costs would be significantly greater than the benefits of complying with such performance standards at your facility, the Director shall make a site-specific determination of best technology available for minimizing adverse environmental impact that is based on less costly design and construction technologies, operational measures, and/or restoration measures to the extent justified by the significantly greater costs. The Director's site-specific determination may conclude that design and construction technologies, operational measures, and/or restoration measures in addition to those already in place are not justified because the costs would be significantly greater than the benefits at your facility.

(d) *Restoration Measures.* In lieu of, or in combination with, reducing impingement mortality and entrainment

by implementing design and construction technologies or operational measures to comply with the performance standards specified in paragraph (b) of this section or the Director's determination pursuant to paragraph (c) of this section, you may, with the Director's approval, employ restoration measures that will result in increases in fish and shellfish in the watershed. You must demonstrate to the Director that you are maintaining the fish and shellfish within the waterbody, including community structure and function, to a level comparable to those that would result if you were to employ design and construction technologies or operational measures to meet that portion of the requirements of paragraphs (b) or (c) of this section that you are meeting through restoration. Your demonstration must address species that the Director, in consultation with Federal, State, and Tribal fish and wildlife management agencies with responsibility for fisheries and wildlife potentially affected by your cooling water intake structure, identifies as species of concern.

(e) *More Stringent Standards.* The Director may establish more stringent requirements as best technology available for minimizing adverse environmental impact if the Director determines that your compliance with the applicable requirements of paragraphs (b) and (c) of this section would not meet the requirements of other applicable Federal, State, or Tribal law.

(f) If the Nuclear Regulatory Commission has determined that your compliance with this subpart would result in a conflict with a safety requirement established by the Commission, the Director shall make a site-specific determination of best technology available for minimizing adverse environmental impact that is less stringent than the requirements of this subpart to the extent necessary for you to comply with the Commission's safety requirement.

(g) You must submit the application information required in § 125.95, implement the monitoring requirements specified in § 125.96, and implement the record-keeping requirements specified at § 125.97.

§ 125.95 As an owner or operator of a Phase II existing facility, what must I collect and submit when I apply for my reissued NPDES permit?

(a) You must submit to the Director the application information required by 40 CFR 122.21(r)(2), (3) and (5) and the Comprehensive Demonstration required by paragraph (b) of this section at least 180 days before your existing permit expires, in accordance with § 122.21(d)(2).

(b) *Comprehensive Demonstration Study.* All facilities except those deemed to have met the performance standards in accordance with § 125.94(b)(1), must submit a Comprehensive Demonstration Study (Study). This information is required to characterize impingement mortality and entrainment, the operation of your cooling water intake structures, and to confirm that the technology(ies), operational measures, and/or restoration measures you have selected and/or implemented at your cooling water intake structure meet the applicable requirements of § 125.94. The Comprehensive Demonstration Study must include:

(1) *Proposal For Information Collection.* You must submit to the Director for review and approval a description of the information you will use to support your Study. The proposal must include:

(i) A description of the proposed and/or implemented technology(ies), operational measures, and/or restoration measures to be evaluated in the Study;

(ii) A list and description of any historical studies characterizing impingement and entrainment and/or the physical and biological conditions in the vicinity of the cooling water intake structures and their relevance to this proposed Study. If you propose to use existing data, you must demonstrate the extent to which the data are representative of current conditions and that the data were collected using appropriate quality assurance/quality control procedures;

(iii) A summary of any past, ongoing, or voluntary consultation with appropriate Federal, State, and Tribal fish and wildlife agencies that is relevant to this Study and a copy of written comments received as a result of such consultation; and

(iv) A sampling plan for any new field studies you propose to conduct in order to ensure that you have sufficient data to develop a scientifically valid estimate of impingement and entrainment at your site. The sampling plan must document all methods and quality assurance/quality control procedures for sampling and data analysis. The sampling and data analysis methods you propose must be appropriate for a quantitative survey and include consideration of the methods used in other studies performed in the source waterbody. The sampling plan must include a description of the study area (including the area of influence of the cooling water intake structure), and provide a taxonomic identification of the sampled or evaluated biological assemblages (including all life stages of fish and shellfish).

(2) *Source Waterbody Flow Information.* You must submit to the Director the following source waterbody flow information:

(i) If your cooling water intake structure is located in a freshwater river or stream, you must provide the annual mean flow of the waterbody and any supporting documentation and engineering calculations to support your analysis of which requirements specified in § 125.94(b)(2) or (3) would apply to your facility based on its water intake flow in proportion to the mean annual flow of the river or steam; and

(ii) If your cooling water intake structure is located in a lake (other than one of the Great Lakes) or reservoir and you propose to increase your facility's design intake flow, you must provide a narrative description of the thermal stratification in the water body, and any supporting documentation and engineering calculations to show that the natural thermal stratification and turnover pattern will not be disrupted by the increased flow in a way that adversely impacts water quality or fisheries.

(3) *Impingement Mortality and Entrainment Characterization Study.* You must submit to the Director an Impingement Mortality and Entrainment Characterization Study whose purpose is to provide information to support the development of a calculation baseline for evaluating impingement mortality and entrainment and to characterize current impingement mortality and entrainment. The Impingement Mortality and Entrainment Characterization Study must include:

(i) Taxonomic identifications of those species of fish and shellfish and their life stages that are in the vicinity of the cooling water intake structure and are most susceptible to impingement and entrainment;

(ii) A characterization of those species of fish and shellfish and life stages pursuant to paragraph (b)(3)(i) of this section, including a description of the abundance and temporal/spatial characteristics in the vicinity of the cooling water intake structure, based on the collection of a sufficient number of years of data to characterize annual, seasonal, and diel variations in impingement mortality and entrainment (e.g., related to climate/weather differences, spawning, feeding and water column migration);

(iii) Documentation of the current impingement mortality and entrainment of all life stages of fish and shellfish at

your facility and an estimate of impingement mortality and entrainment under the calculation baseline. The documentation may include historical data that are representative of the current operation of your facility and of biological conditions at the site. Impingement mortality and entrainment samples to support the calculations required in paragraph (b)(4)(iii) and (b)(5)(ii) of this section must be collected during periods of representative operational flows for the cooling water intake structure and the flows associated with the samples must be documented;

(iv) An identification of species that are protected under Federal, State, or Tribal law (including threatened or endangered species) that might be susceptible to impingement and entrainment by the cooling water intake structure(s).

(4) *Design and Construction Technology Plan.* If you choose to use design and construction technologies or operational measures in whole or in part to meet the requirements of § 125.94, you must submit a Design and Construction Technology Plan to the Director for review and approval. In the plan you must provide the capacity utilization rate for your facility and provide supporting data (including the average annual net generation of the facility (in Mwh) measured over a five year period (if available) of representative operating conditions and the total net capacity of the facility (in MW)) and calculations. The plan must explain the technologies and operational measures you have in place or have selected to meet the requirements in § 125.94. (Examples of potentially appropriate technologies may include, but are not limited to, wedgewire screens, fine mesh screens, fish handling and return systems, barrier nets, aquatic filter barrier systems, and enlargement of the cooling water intake structure opening to reduce velocity. Examples of potentially appropriate operational measures may include, but are not limited to, seasonal shutdowns or reductions in flow, and continuous operations of screens.) The plan must contain the following information:

(i) A narrative description of the design and operation of all design and construction technologies or operational measures (existing and proposed), including fish handling and return systems, that you have in place or will use to meet the requirements to reduce impingement mortality of those species expected to be most susceptible to impingement, and information that demonstrates the efficacy of the technology for those species;

(ii) A narrative description of the design and operation of all design and construction technologies or operational measures (existing and proposed) that you have in place or will use to meet the requirements to reduce entrainment of those species expected to be the most susceptible to entrainment, if applicable, and information that demonstrates the efficacy of the technology for those species;

(iii) Calculations of the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would be achieved by the technologies and operational measures you have selected based on the Impingement Mortality and Entrainment Characterization Study in paragraph (b)(3) of this section. In determining compliance with any requirements to reduce impingement mortality or entrainment, you must assess the total reduction in impingement mortality and entrainment against the calculations baseline determined in paragraph (b)(3) of this section. Reductions in impingement mortality and entrainment from this calculation baseline as a result of any design and construction technologies and operational measures already implemented at your facility should be added to the reductions expected to be achieved by any additional design and construction technologies and operational measures that will be implemented, and any increases in fish and shellfish within the waterbody attributable to your restoration measures. Facilities that recirculate a portion of their flow may take into account the reduction in impingement mortality and entrainment associated with the reduction in flow when determining the net reduction associated with existing technology and operational measures. This estimate must include a site-specific evaluation of the suitability of the technology(ies) based on the species that are found at the site, and/or operational measures and may be determined based on representative studies (i.e., studies that have been conducted at cooling water intake structures located in the same waterbody type with similar biological characteristics) and/or site-specific technology prototype studies;

(iv) Documentation which demonstrates that the location, design, construction, and capacity of the cooling water intake structure technologies you have selected reflect best technology available for meeting the applicable requirements in § 125.94;

(v) Design calculations, drawings, and estimates to support the descriptions required by paragraphs (b)(4)(ii) and (iii) of this section.

(5) *Information to Support Proposed Restoration Measures.* If you propose to use restoration measures to meet the performance standards in § 125.94, you must submit the following information with your application for review and approval by the Director:

(i) A list and narrative description of the restoration measures you have selected and propose to implement;

(ii) A quantification of the combined benefits from implementing design and construction technologies, operational measures and/or restoration measures and the proportion of the benefits that can be attributed to each. This quantification must include: the percent reduction in impingement mortality and entrainment that would be achieved through the use of any design and construction technologies or operational measures that you have selected (i.e., the benefits you would achieve through impingement and entrainment reduction); a demonstration of the benefits that could be attributed to the restoration measures you have selected; and a demonstration that the combined benefits of the design and construction technology(ies), operational measures, and/or restoration measures will maintain fish and shellfish at a level comparable to that which would be achieved under § 125.94. If it is not possible to demonstrate quantitatively that restoration measures such as creation of new habitats to serve as spawning or nursery areas or establishment of riparian buffers will achieve comparable performance, you may make a qualitative demonstration that such measures will maintain fish and shellfish in the waterbody at a level substantially similar to that which would be achieved under § 125.94;

(iii) A plan for implementing and maintaining the efficacy of the restoration measures you have selected and supporting documentation to show that the restoration measures, or the restoration measures in combination with design and construction technology(ies) and operational measures, will maintain the fish and shellfish in the waterbody, including the community structure and function, to a level comparable or substantially similar to that which would be achieved through § 125.94(b) or (c);

(iv) A summary of any past, ongoing, or voluntary consultation with appropriate Federal, State, and Tribal fish and wildlife agencies regarding the proposed restoration measures that is relevant to this Study and a copy of any written comments received as a result of such consultation; and

(v) Design and engineering calculations, drawings, and maps documenting that your proposed restoration measures will meet the restoration performance standard at § 125.94(d).

(6) *Information to Support Site-specific Determination of Best Technology Available for Minimizing Adverse Environmental Impact.* If you have chosen to request a site-specific determination of best technology available for minimizing adverse environmental impact pursuant to § 125.94(c) because of costs significantly greater than those EPA considered in establishing the requirements at issue, or because costs are significantly greater than the benefits of complying with the otherwise applicable requirements of § 125.94(b) and (e) at your site, you must provide the following additional information with your application for review by the Director:

(i) *Comprehensive Cost Evaluation Study.* You must perform and submit the results of a Comprehensive Cost Evaluation Study. This information is required to document the costs of implementing your Design and Construction Plan under § 125.95(b)(4) above and the costs of the alternative technologies and operational measures you propose to implement at your site. You must submit detailed engineering cost estimates to document the costs of implementing the technologies or operational measures in your Design and Construction Plan.

(ii) *Valuation of the Monetized Benefits of Reducing Impingement and Entrainment.* If you are seeking a site-specific determination of best technology available for minimizing adverse environmental impact because of costs significantly greater than the benefits of complying with the otherwise applicable requirements of § 125.94(b) and (e) at your site, you must use a comprehensive methodology to fully value the impacts of impingement mortality and entrainment at your site and the benefits achievable by compliance with the applicable requirements of § 125.94. The benefit study must include a description of the methodology used, the basis for any assumptions and quantitative estimates, and an analysis of the effects of significant sources of uncertainty on the results of the study.

(iii) *Site-Specific Technology Plan.* Based on the results of the Comprehensive Cost Evaluation Study and the valuation of the monetized benefits of reducing impingement and entrainment required by paragraphs (b)(7))(i) and (ii) of this section, you must submit a Site-Specific Technology Plan to the Director for review and approval. The plan must contain the following information:

(A) A narrative description of the design and operation of all design and construction technologies and operational measures, and restoration measures (existing and proposed) that you have selected in accordance with § 125.94(d), and information that demonstrates the efficacy of the technology for those species;

(B) An engineering estimate of the efficacy of the proposed and/or implemented technologies or operational measures for reducing impingement mortality and entrainment of all life stages of fish and shellfish. This estimate must include a site-specific evaluation of the suitability of the technologies or operational measures for reducing impingement mortality and entrainment based on representative studies (e.g., studies that have been conducted at cooling water intake structures located in the same waterbody type with similar biological characteristics) and/or site-specific technology prototype studies;

(C) Documentation which demonstrates that the technologies, operational measures, or restoration measures selected would reduce impingement mortality and entrainment to the extent necessary to satisfy the requirements of § 125.94; and

(D) Design calculations, drawings, and estimates to support the descriptions required by paragraphs (b)(6)(iii)(A) and (B) of this section.

(7) *Verification Monitoring Plan.* You must include in the Study a plan to conduct, at a minimum, two years of monitoring to verify the full-scale performance of the proposed or implemented technologies, operational measures, or restoration measures. The verification study must begin once the technologies, operational measures, and restoration measures are implemented and continue for a period of time that is sufficient to demonstrate that the facility is reducing the level of impingement and entrainment to the levels documented pursuant to paragraphs (b)(4)(iii), (b)(5)(ii), and/or (b)(6)(iii)(B) of this section. The plan must describe the frequency of monitoring and the parameters to be monitored and the basis for determining the parameters and the frequency and duration for monitoring. The plan must also describe the information to be included in a yearly status report to the Director. The Director will use the verification monitoring to confirm that you are meeting the applicable requirements of § 125.94.

§ 125.96 As an owner or operator of a Phase II existing facility, what monitoring must I perform?

As an owner or operator of a Phase II existing facility, you must perform monitoring as specified by the Director to demonstrate compliance with the applicable requirements of § 125.94.

§ 125.97 As an owner or operator of a Phase II existing facility, what records must I keep and what information must I report?

As an owner or operator of a Phase II existing facility you are required to keep records and report information and data to the Director as follows:

(a) You must keep records of all the data used to complete the permit application and show compliance with the requirements of § 125.94, any supplemental information developed under § 125.95, and any compliance monitoring data conducted under § 125.96, for a period of at least three (3) years. The Director may require that these records be kept for a longer period.

(b) You must provide annually to the Director a status report that includes appropriate monitoring data as specified by the Director.

§ 125.98 As the Director, what must I do to comply with the requirements of this subpart?

(a) *Permit Application.* As the Director, you must review materials submitted by the applicant under 40 CFR 122.21(r) and § 125.95 before each permit renewal or reissuance.

(1) After receiving the permit application from the owner or operator of a Phase II existing facility, the Director must determine which of the standards specified in § 125.94 to apply to the facility. In addition, the Director must review materials to determine compliance with the applicable standards.

(2) At each permit renewal, the Director must review the application materials and monitoring data to determine whether requirements, or additional requirements, for design and construction technologies or operational measures should be included in the permit.

(b) *Permitting Requirements.* Section 316(b) requirements are implemented for a facility through an NPDES permit. As the Director, you must consider the information submitted by the Phase II existing facility in its permit application, and determine the appropriate requirements and conditions to include in the permit based on the alternative for establishing best technology available chosen by the facility. The following requirements must be included in each permit:

(1) *Cooling Water Intake Structure Requirements.* The permit conditions must include the performance standards that implement the requirements of § 125.94(b)(2), (3), and (4); § 125.94(c)(1) and (2); § 125.94(d); § 125.94(e); and § 125.94(f). In determining compliance with the flow requirement in § 125.94(b)(4)(ii), the Director must consider anthropogenic factors (those not considered ''natural'') unrelated to the Phase II existing facility's cooling water intake structure that can influence the occurrence and location of a thermocline. These include source water inflows, other water withdrawals, managed water uses, wastewater discharges, and flow/level management practices (e.g., some reservoirs release water from deeper bottom layers). The Director must coordinate with appropriate Federal, State, or Tribal fish or wildlife agencies to determine if any disruption is beneficial to the management of fisheries.

(i) You must review the Design and Construction Technology Plan required in § 125.96(b)(4) to evaluate the suitability and feasibility of the technology or operational measures proposed to meet the requirements of § 125.94. In each reissued permit, you must include a condition requiring the facility to reduce impingement mortality and entrainment commensurate with the implementation of the technologies in the permit. In considering a permit application, the Director must review the performance of the technologies implemented and require additional or different design and construction technologies, if needed, to meet the impingement mortality and entrainment reduction requirements for all life stages of fish and shellfish. In addition, you may consider any chemical, water quality, and other anthropogenic stresses on the source waterbody in order to determine whether more stringent conditions are needed to comply with the requirements of other applicable Federal, State, or Tribal law in accordance with § 125.94(e).

(ii) If you determine that restoration measures are appropriate at the Phase II existing facility, you must review the Information to Support Proposed Restoration Measures required under § 125.95(b)(5) and determine whether the proposed measures, alone or in combination with design and construction technologies and operational measures, will maintain the fish and shellfish in the waterbody at a comparable level to that which would be achieved under § 125.94. If the application includes a qualitative demonstration for restoration measures that will result in increases in fish and shellfish that are difficult to quantify, you must determine whether the proposed measures will maintain fish and shellfish in the waterbody at a level substantially similar to that which would be achieved under § 125.94. You must also review and approve the proposed Verification Monitoring Plan submitted under § 125.95(b)(7) and require that the monitoring continue for a sufficient period of time to demonstrate that the restoration measures meet the requirements of § 125.94(d).

(iii) For a facility that requests requirements based on site-specific best technology available for minimizing adverse environmental impact, you must review the application materials and any other information you may have that would be relevant to a determination of whether alternative requirements are appropriate for the facility. If you determine that alternative requirements are appropriate, you must make a site-specific determination of best technology available for minimizing adverse environmental impact in accordance with § 125.95(c).

(2) *Monitoring Conditions.* The permit must require the permittee to perform the monitoring required in § 125.96. In determining applicable monitoring requirements, the Director must consider the facility's verification monitoring plan, as appropriate. You may modify the monitoring program when the permit is reissued and during the term of the permit based on changes in physical or biological conditions in the vicinity of the cooling water intake structure.

(3) *Record Keeping and Reporting.* At a minimum, the permit must require the permittee to report and keep records as required by § 125.97.

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Part III

Department of the Treasury

Office of Thrift Supervision

12 CFR Parts 563b, 574, and 575

Mutual Savings Associations, Mutual Holding Company Reorganizations, and Conversions From Mutual to Stock Form; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 563b, 574, and 575

[No. 2002–11]

RIN 1550–AB24

Mutual Savings Associations, Mutual Holding Company Reorganizations, and Conversions From Mutual to Stock Form

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS) proposes to amend its regulations on the mutual-to-stock conversion process and portions of its regulations on mutual holding company reorganizations. This document is a re-proposal (Re-proposal) of the Notice of Proposed Rulemaking (First Proposal) published July 12, 2000. OTS extensively modified the First Proposal as a result of the public comments it received and seeks public comment on those revisions. As part of a wholesale review of treatment of mutual institutions, OTS separately has modified its examination and supervisory policies to address many of the concerns mutual institutions have raised with OTS over the years.

This Re-proposal includes modifications to the provisions addressing business plans. In addition, it addresses certain matters involving conversions from the mutual to the stock form, by, among other things, adding demand account holders to the definition of savings account holders, allowing accelerated vesting in management benefit plans for changes of control, adding rules to establish charitable organizations, and clarifying the policy on the amount of proceeds allowed to be retained at the holding company level. We are also requesting comment regarding certain additional proposed changes to the OTS Mutual Holding Company Regulations.

DATES: Written comments must be received on or before May 9, 2002.

ADDRESSES: *Mail:* Send comments to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention Docket No. 2002–11.

Delivery: Hand deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention Regulation Comments, Chief Counsel's Office, Docket No. 2002–11.

Facsimiles: Send facsimile transmissions to FAX Number (202) 906–6518, Attention Docket No. 2002–11.

E-Mail: Send e-mails to *regs.comment@ots.treas.gov,* Attention Docket No. 2002–11, and include your name and telephone number.

Public Inspection: Comments and the related index will also be posted on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reference Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) Appointments will be scheduled on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date a request is received.

FOR FURTHER INFORMATION CONTACT: David A. Permut, Senior Attorney, (202) 906–7505; Gary Jeffers, Senior Attorney, (202) 906–6457, Business Transactions Division, Chief Counsel's Office; or Mary Jo Johnson, Project Manager, (202) 906–5739, Supervision Policy, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to its broad authority to regulate mutual savings associations, authorize mutual holding company (MHC) reorganizations, and regulate mutual-to-stock conversions of savings associations under the Home Owners' Loan Act (HOLA),[1] on July 12, 2000, OTS published an Interim Final Rule (Interim Rule), revising OTS repurchase restrictions applicable to recently converted institutions, changing OTS policy on waivers of dividends by MHCs and making certain technical changes to the regulations as a result of the passage of the Gramm-Leach-Bliley Act of 1999 (GLB Act).[2] On the same day, OTS published a Notice of Proposed Rulemaking, proposing changes to OTS rules governing stock conversions and MHCs.[3]

OTS undertook these actions based on numerous discussions with the management of mutual institutions, its experience with the conversion process, and developments in the marketplace regarding MHC reorganizations and mutual-to-stock conversions. OTS also reviewed its policies, practices, and regulations to assess whether additions or revisions were necessary.

To respond completely to all the suggestions for change, OTS developed a comprehensive regulatory strategy governing mutual institutions, MHC reorganizations, and the mutual-to-stock conversion process. This comprehensive strategy includes: (1) New policy and examination guidance; (2) these re-proposed regulations for the mutual-to-stock conversion process and MHC minority stock offerings; and (3) revisions to the application forms used for the mutual-to-stock conversion process.

Since the First Proposal was published over 18 months ago, OTS has issued guidance covering several areas of concern to commenters. To enable the public to consider the interaction between that guidance and the changes OTS is making to the First Proposal, OTS is publishing this Re-proposal to seek further comment.

II. Policy Guidance

In the First Proposal, OTS indicated it would issue policy guidance in certain areas regarding mutual associations in connection with the changes to the MHC and conversion regulations. OTS has developed new examination guidance to address many of the concerns mutual associations raised, within the context of safe and sound operations. OTS has also enhanced its off-site monitoring systems to provide examiners with comparative peer groups of similarly situated mutual associations.

Accordingly, OTS has separately issued the following new or revised guidance:

- Regulatory Bulletin 27b on Compensation. This revised bulletin clarifies that mutual associations are subject to and governed by the same prudential standards as stock associations. OTS intends this guidance to enhance the ability of mutual associations to provide competitive compensation plans to attract and retain qualified management and staff.
- Thrift Activities Handbook Section 110, Capital Stock and Ownership. This revised handbook section includes a new section on mutual associations that differentiates them from stock associations, particularly by discussing member rights and ownership differences.
- Thrift Activities Handbook Section 430, Operations Analysis. This revised handbook section includes: a new section on the importance of capital for mutual associations; information on

[1] 12 U.S.C. 1464(a), (i) and (p) and 1467a(o).

[2] 65 FR 43088.

[3] 65 FR 43092.

Return On Assets (ROA) for all savings associations; a new section on evaluation of earnings in different structures (mutual associations, stock associations, subchapter S corporations, Internet operations); and information on the new mutual-only ratios in the Uniform Thrift Performance Report (UTPR) and how examiners can appropriately compare mutual and stock associations so that peer groups are more appropriate.

The revised examination procedures will improve supervision of mutual associations. They will be targeted more directly to the quality of operations, risk management, capital needs and formation, and internal controls, enabling examiners to gauge the overall financial condition of mutual associations more effectively. OTS is changing its off-site monitoring systems to allow examiners to conduct financial analyses for mutual institutions by comparing them with mutual institutions instead of stock institutions.

In addition, for mutual associations seeking to augment their capital base, OTS is exploring the feasibility and utility of various capital-raising alternatives, such as the use of subordinated debt instruments, mutual capital certificates, non-withdrawable accounts, trust preferred securities, and other financing transactions.

III. Summary of Comments

OTS received 46 comment letters on the First Proposal and the Interim Rule. Three were requests to extend the comment period.[4] Five individuals, ten law firms, 14 thrifts, 15 trade groups, and the Federal Deposit Insurance Corporation (FDIC) submitted comments. OTS participated in meetings on the regulations sponsored by America's Community Bankers on September 12 (attended by 24 attorneys), September 28 (conference telephone call with representatives from 45 mutual institutions, two outside counsel, representatives of the FDIC and the Board of Governors of the Federal Reserve System (Federal Reserve)), and November 3 (with representatives of the FDIC and the Federal Reserve). OTS also held focus group meetings with executives from mutual savings associations in Washington on January 8, 2001, and in Boston on February 26, 2001, to listen to the views of mutual institutions on specific questions raised in the preamble to the proposed regulation. Issues raised by commenters are discussed in the item-by-item summary below.

IV. Item-by-Item Summary

A. General

The greatest number of comments on the First Proposal and the most substantial concerns expressed by the commenters involved the business plan, Regional Office non-objection to the business plan, and the pre-filing meeting requirements. While the Re-proposal requires pre-filing meetings, in response to the comments, OTS has revised when pre-filing meetings must be held and has eliminated the requirement to obtain OTS non-objection to conversion business plans before filing. Similarly, OTS has revised the business plan standards to be addressed by converting associations and considered in OTS review in response to the comments.

B. Pre-filing Meeting

Under the First Proposal, OTS would have required each association contemplating a conversion to meet with the appropriate Regional Office, in a pre-filing meeting, to discuss the proposed business plan. The board of directors, or a committee of the board including outside directors, were encouraged to attend the meeting. The association would then have submitted the proposed business plan at least 30 days prior to submitting its conversion application, and would have needed to receive the non-objection of the Regional Director to the business plan before submitting either an application to convert to stock form or a notice to reorganize to MHC form if the reorganization included a stock issuance.

A number of commenters opposed the pre-filing meeting in its entirety, although two commenters, both regulators, supported such meetings. One commenter suggested that depositors, consumer advocates, or other interested parties be invited to the pre-filing meeting. Several commenters opposed both the pre-filing meeting and the pre-approval of the business plan as intrusive and a source of unnecessary delay and expense. A number of commenters thought OTS was requiring the whole board to attend the pre-filing meeting at the Regional Office with all of the costs of attending such a meeting falling on the association.

It has been OTS' normal practice to discuss a savings association's conversion plans with the board of directors. Therefore, a pre-filing meeting does not result in any additional burden. In response to the concerns expressed by the commenters about the expense of the meeting, OTS notes that, if the board desires, OTS will send a representative from the Regional Office to the association to meet with the board of directors. To ensure that such a meeting occurs early in the process, however, OTS expects to meet with the board of directors at least ten days prior to the passage of a Plan of Conversion or Plan of Reorganization. At that time, OTS would expect the board of directors to have prepared a short, written strategic plan for OTS to review and discuss with the board at the meeting. OTS reiterates that the purpose of this meeting is not to substitute the agency's judgment for that of the directors. OTS merely proposes to require the board to articulate its plans for the association and the implications of those plans before any process actually begins and before the institution spends significant funds.

C. Prior OTS Non-Objection to Business Plan

The First Proposal provided that applicants could not submit a conversion application until the converting association had submitted, and OTS had advised the association that it had not objected to, the association's business plan. Many commenters objected to this requirement, asserting that the requirement added delay and expense to the conversion process, was unduly burdensome, or gave the Regional Director the ability to prevent a conversion if the Regional Director disagreed with the business plan.

Although OTS does not believe the prior non-objection requirement would be as burdensome in practice as anticipated by certain commenters, the Re-proposal does not require OTS non-objection to the business plan prior to an association filing a conversion application. Under the Re-proposal, business plans must be filed at the time a conversion application is submitted, or the application will be rejected as materially deficient. As a practical matter, however, OTS strongly encourages submission of business plans before the application filing to help ensure timely approval of the conversion application.

D. Business Plan Standards

The First Proposal provided that a converting association's business plan must, among other things: (i) Clearly and completely describe projected operations, including the deployment of conversion proceeds; (ii) demonstrate that the plan of conversion will substantially serve to meet credit and

[4] On October 10, 2000, OTS extended the comment period on the two regulations from October 10, 2000 to November 9, 2000. 65 FR 60123.

lending needs in the proposed market area; (iii) demonstrate a reasonable need for new capital to support projected operations and activities; (iv) describe the association's experience with prior growth, expansion, or other activities similar to those proposed in the business plan; (v) describe the risks associated with the plan; (vi) demonstrate adequate expertise and staffing to manage growth prudently; and (vii) demonstrate that the association will achieve a reasonable return on equity. The First Proposal also provided that the association could not project stock repurchases, returns of capital, or extraordinary dividends in the business plan.

All commenters who discussed the business plan opposed the proposed business plan requirements. Four commenters supported the concept of business plan guidance in the regulations but were opposed to the specific guidance OTS provided. The various commenters asserted: (i) The creation of a business plan is management's responsibility, and OTS should not second-guess management, further, a limited number of commenters questioned OTS's authority to impose business plan standards; (ii) business plans based on Return On Equity (ROE) are inappropriate and would not work for most associations, and the proposed ROE criterion would have caused 85 percent of conversions prior to 2000 to be disapproved; (iii) it is inappropriate for OTS to determine how much capital must be invested in what type of community development activities; (iv) the business plan standards were seriously flawed, unattainable, arbitrary, unrealistic, or protectionist; (v) the business plan created a ''needs'' test for conversions; (vi) the First Proposal would chill management decision making; (vii) the First Proposal would create a moratorium on conversions; (viii) the First Proposal would cause unnecessary delays or would be unduly burdensome; (ix) the business plan requirements would penalize associations in slow growth areas, would not work for small thrifts, would prejudice capital raising, or ignore investor needs; (x) the business plan disallows use of stock repurchases as a legitimate business management tool, which is inconsistent with the Interim Rule eliminating restrictions on repurchases during the second and third years after conversion; (xi) the First Proposal penalizes management for lack of experience; and (xii) the First Proposal lacks flexibility.

Neither the First Proposal nor the Re-proposal were intended to create a ''needs'' test or a moratorium on conversions, and in OTS' view, the regulations do not establish such a test or impose a moratorium. As to the comments regarding OTS' conversion authority in general, OTS has for decades had significant regulations governing all aspects of the conversion process, and the HOLA explicitly provides that ''conversions shall be subject to such regulations as the Director shall prescribe.'' [5]

OTS, as the safety and soundness regulator of savings associations, believes the specific requirements are appropriate to ensure that an association contemplating such a significant transaction, with considerable ramifications regarding capital, management, and business operations, has considered the consequences of the transaction in its business plan. Accordingly, the Re-proposal continues to include a business plan requirement, and sets forth the factors OTS will consider in evaluating business plans.[6]

Several of the comments demonstrate that commenters believed the various factors in the First Proposal were separate standards that had to be satisfied for approval of a conversion. The Re-proposal clarifies that OTS will weigh all of the factors together, and no single factor will determine whether a business plan is acceptable. For example, lack of management experience with past growth will not be as significant if the business plan demonstrates realistic deployment of the conversion proceeds for new growth, such as enhancing ways to meet increased credit and lending needs in the market.

OTS recognizes that commenters were concerned about reliance on ROE as a test to determine whether to approve a business plan. OTS reiterates that in evaluating ROE as a factor in the business plan, ROE in the first years after conversion will not be given as much weight as the association's ROE near the end of the three-year business plan period, when the association has had time to deploy most, if not all of the conversion proceeds.

As for stock repurchases, today's Re-proposal permits stock repurchases to be included in the business plan. A business plan that contemplates stock repurchases as the primary use of new capital, however, will not be regarded favorably. OTS recognizes that some stock repurchases may occur, although the Re-proposal continues to limit stock repurchases in the first year following conversion. OTS will view a return of capital to shareholders (such as a special dividend) in the first year following conversion to be a material deviation from the business plan that requires the prior written approval of the Regional Director.

E. MHCs and Mutuality

In the preamble to the First Proposal, OTS asked a series of questions about what OTS could do to enhance the attractiveness of the MHC charter. OTS also specifically stated that it encouraged savings associations that were considering conversion to stock form to first carefully consider the choice of an MHC charter as an interim step. In addition, OTS specifically proposed certain changes to the MHC regulations to permit the issuance of additional stock benefit plans, easier voting requirements, and a number of other innovations that OTS thought would enhance the attractiveness of the MHC option. Taken together, these steps appeared to many commenters as expressing an agency bias for the MHC form. Many commenters expressed their disagreement with this perceived agency bias, believed OTS was putting a moratorium on stock conversions, or argued OTS was impinging on the freedom of savings associations to choose their form of charter.

OTS suggestions on enhancing the MHC charter were intended to expand the options available to a mutual association, not to give preference to one form of charter over another.

The MHC is an alternative for mutual associations that are contemplating conversion to stock form. The MHC structure retains the benefits and essential nature of the mutual charter, while providing greater access to capital markets. In addition, in section 401(b) of the GLB Act,[7] Congress expanded the investment and activities authority of MHCs to include the activities of financial holding companies. OTS amended the MHC regulations to reflect those changes.[8] OTS is re-proposing significant enhancements to the MHC form to make it a long-term alternative to full conversion.

OTS also continues to encourage mutual associations seeking new capital to seriously consider the MHC form of reorganization with a limited stock issuance, rather than a full conversion. This is a particularly useful alternative for mutual associations that have no immediate plans for deployment of substantial amounts of new capital.

[5] 12 U.S.C. 1464(i)(1).

[6] OTS notes that there is no requirement to submit a business plan for an MHC reorganization without a stock issuance.

[7] Pub. L. 106–102, 113 Stat. 1338 (1999).

[8] 65 FR 43088, Jul. 12, 2000.

F. Mutual Capital Questions

OTS asked a number of questions in the preamble to the First Proposal regarding capital for mutual associations. OTS observed that mutual associations could currently raise additional capital in a number of ways that did not involve conversion to stock form. These methods included mutual capital certificates, subordinated debt, trust preferred securities, or the formation of real estate investment trusts (REITs). OTS asked if there were other methods of raising capital and why the methods mentioned were not widely used. While no written comments were received on this issue, attendees at the two focus group meetings indicated these methods of raising additional capital were generally considered too expensive for a mutual association to undertake, particularly for smaller associations. OTS is exploring, among other approaches, the possibility of mutual associations participating with other mutual associations in larger capital offerings to reduce the costs.

The preamble to the First Proposal requested comment on whether OTS should issue guidance regarding capital distributions by mutual associations. A number of commenters addressed this issue, all suggesting OTS not issue guidance in this area because they felt this should be a business decision of the association. OTS generally agrees and, therefore, OTS does not propose to issue guidance on capital distributions by mutual associations as part of this proposal.[9]

G. Stock Repurchases

In the Interim Rule, OTS revised its regulations to eliminate restrictions on stock repurchases by converted savings associations after the first year following conversion. The rule change was made in part to bring OTS policy closer to that of the FDIC on this subject. Several commenters expressed appreciation that the rules of the two agencies would now be similar. Almost all the other commenters on this issue supported OTS changes, although one commenter suggested repurchase limitations should be eliminated completely. A number of the commenters suggested that there should be no restrictions on repurchases for associations completing second step stock conversions, because those companies had been public for some period of time prior to full conversion to stock form.

The Re-proposal is consistent with the Interim Rule. *See* §§ 563b.510 and 563b.515. OTS is also re-proposing corresponding amendments to the MHC regulations at § 575.11(c). In response to the comment that associations that engage in second step stock conversions should receive different treatment, OTS believes that fully converted companies should receive the same treatment whether they reach that status in one step or two. In addition, OTS believes it is in the best interest of applicants to have similar treatment of stock repurchases among the agencies regulating the conversion process.

As a matter of policy, OTS has taken the position that stock repurchases for management benefit plans that have been ratified by shareholders in the first year following conversion do not count toward the repurchase limitations in § 563b.3(g). The Re-proposal, at new § 563b.510, clarifies this point. However, OTS would still require prior notification of any repurchases in the first year following conversion, even if they are not subject to OTS approval under the repurchase limitations. One commenter inquired whether a stock repurchase more than one year after conversion would require Regional Director approval as a material deviation from the business plan. OTS believes that it may constitute a material deviation, depending on what the business plan disclosed. However, current MHC regulations permit purchases of stock in the open market for tax-qualified or non-tax-qualified employee stock benefit plans to be excluded from the repurchase limitations.[10] The Re-proposal will extend this exclusion from the repurchase limitations to fully converted companies. OTS notes that the FDIC permits purchases for employee stock benefit plans to be excluded from the repurchase limitations for fully converted companies.

H. Dividend Waivers

The Interim Rule revised OTS policy on dividend waivers for MHCs. Prior OTS policy had adjusted exchange ratios for excessive dividends in conversions of MHCs to stock form. No adjustment is now required, and § 575.11(d)(3) was amended to reflect this change in OTS policy. Most commenters supported this change in OTS policy although two opposed the change because of the potential conflict of interest for directors and officers making the decision to waive or not waive dividends. The Re-proposal is unchanged from the Interim Rule. OTS believes there is always a potential conflict of interest for directors and officers who make financial decisions where they may personally benefit. OTS may take enforcement action if it discovers wrongdoing. OTS notes that the waiver of dividends results in more capital at the savings association, enhancing the safety and soundness of the savings association.

I. Charitable Organizations

The First Proposal included provisions regarding the establishment of a charitable organization in connection with a mutual-to-stock conversion. The provisions included discussing the purpose of the charitable organization, voting foundation shares in the same ratio as all other shares voted on proposals considered by shareholders, reserving board seats for an independent director and a director from the association, and dealing with conflicts of interest. The Re-proposal also specifies the conditions for approval including examination by OTS at foundation expense, submission of annual reports, and compliance with all laws necessary to maintain the foundation's tax-exempt status.

All commenters on this aspect of the First Proposal were in favor of the proposed regulations, although one commenter thought OTS should require a separate vote of the minority shareholders to establish a foundation in second step conversions. OTS already requires a separate minority shareholder vote in such transactions and has included that requirement in the Re-proposal. One commenter asserted that 10–25% of the proceeds from every mutual-to-stock conversion should be required to be placed in a charitable organization. OTS does not believe it is a regulatory function to determine the amount of proceeds that must be placed in a charitable organization. In response to the comments, OTS has included the charitable organization provisions in the Re-proposal, and proposes several technical amendments suggested by one commenter to clarify that annual reports and the percentage of contributed proceeds must comply with the Internal Revenue Code (IRC). Upon effectiveness of a final regulation, waivers from certain provisions in the current conversion regulations now routinely requested in a conversion with a charitable foundation would no longer be necessary.

OTS takes this opportunity to state that in situations where a foundation becomes a holder of more than 10% of an institution's common stock, *e.g.,* if the institution repurchases stock, causing the foundation's ownership percentage to increase, OTS will

[9] Any capital distribution by mutual associations remains subject to the capital distribution regulations at 12 CFR part 563, subpart E.

[10] *See* 12 CFR 575.11(c)(1)(iv).

consider waivers of the Control Regulations, 12 CFR part 574 and the concerted action presumptions in those regulations.

J. Policy on Acquisitions

Current OTS regulation § 563b.3(i)(3) provides that no person or company may acquire more than 10 percent of any class of equity security of a recently converted association for three years following conversion without OTS approval. OTS enacted this rule principally to provide a reasonable period of time for a recently converted association to deploy its new capital prudently according to the plan described in the offering documents, to acclimate to operating as a public company, and to do both without the distraction of considering takeover proposals. (*See* approval standards at current § 563b.3(i)(5) or proposed § 563b.525(d).)

In the First Proposal, OTS noted that it intended to closely review applications under the existing standards to make sure all criteria are fully met before approving acquisitions within the first three years following conversion.

A number of commenters suggested that the OTS statement that it intended to implement its current regulation was inappropriate, that these decisions were the responsibility of the board of directors, not the regulator, and that a three-year restriction on acquisitions was too inflexible. Three commenters thought OTS should implement a five-year restriction on acquisitions. After considering the comments, for the reasons stated above, OTS is re-proposing the regulation as originally proposed.

K. Demand Account Holders

In the First Proposal, OTS proposed to allow demand account holders to be considered eligible account holders for purposes of determining subscription rights in a conversion. Many applicants incorrectly believe that demand account holders are already eligible account holders. Others have requested OTS waivers to allow demand account holders to be included in the subscription. OTS routinely granted the waivers. In order to end the confusion regarding this issue, OTS proposed revising the regulations to include demand account holders in the subscription priorities. None of the commenters objected to this provision. OTS has included the original proposal in this Re-proposal.

L. Management Stock Benefit Plans

In the First Proposal, OTS proposed changing the regulations to allow for accelerated vesting for management stock benefit plans in the event of a change of control. Currently, the regulations only allow acceleration for death or disability. Most commenters in this area agreed with this change, although three suggested OTS add retirement at least one year following conversion as another reason for allowing acceleration.

The Re-proposal is unchanged from the First Proposal. OTS believes that it is appropriate that the bases for acceleration, such as death, disability, or change of control of the savings association, not be within the individual's control. Therefore, the Re-proposal does not provide for accelerated vesting based on retirement.

One commenter suggested that because the National Association of Securities Dealers Automated Quotation system (NASDAQ) requires a vote for certain stock benefit plans, OTS did not need to duplicate that requirement.[11] OTS notes, however, that not all converting associations and MHCs engaging in stock issuances are listed on the NASDAQ. Smaller associations, in particular, cannot meet NASDAQ listing requirements. Therefore, OTS believes it is appropriate to continue to include voting requirements in OTS regulations. Several commenters suggested that OTS should follow NASDAQ voting requirements (a majority of those voting at a legally called meeting) to approve benefit plans. OTS believes, however, that a majority of shareholders (not merely a majority of those voting) must ratify stock benefit plans because issuance of stock to such plans dilutes their ownership interests. OTS notes that while NASD Rule § 4350 requires shareholder ratification of certain stock benefit plans, OTS currently requires shareholder ratification of plans adopted only within the first year following conversion. The First Proposal revised the section on management benefit plans to clarify that an association must present to shareholders for ratification any material amendments to previously approved management recognition plans, stock option plans, or other benefit plans that occur more than one year after conversion and that are inconsistent with the regulation. One commenter objected to this proposed revision as overly intrusive. However, OTS believes the regulation is an appropriate measure of regulatory oversight and is re-proposing it as proposed.

To reduce burden, the First Proposal had proposed a possible check-off box on stock order forms to vote for or against stock benefit plans, when purchasing stock in MHC stock issuances. One of the commenters pointed out that a check-off box would violate NASD rules requiring NASD notification for stock benefit plans.[12] Accordingly, the Re-proposal does not include that feature of the First Proposal.

While most commenters supported expansion of option plan opportunities for MHCs, several commenters were opposed to any options for management based on conflicts of interest or a view that benefit plans were a way for management to enrich itself. One commenter suggested management benefit plans should be limited to 2% of the stock issued. In response to those comments, OTS is adding a clarification to the Re-proposal that OTS will not approve management benefit plans that in the aggregate award more than 25% of the number of shares ultimately issued in the public offering to minority shareholders. The 25% restriction does not include ESOP shares allocated to managers. OTS believes management benefit plans that are reasonable, present no safety or soundness concerns, and are ratified by the shareholders, are not objectionable. Most companies use such plans to attract qualified executives and to reward management for performing well. Therefore, OTS is re-proposing most of the proposed changes except as noted above. One commenter asked if treasury stock could be used to fund benefit plans. OTS allows treasury stock to be used for this purpose.

OTS received no comments on the First Proposal's revisions to the regulations to clarify that OTS will allow dividend equivalent rights, dividend adjustment rights, or other similar provisions that permit cash payments, adjustment of the number of shares, or exercise price of options as a result of stock dividends or splits, in management recognition plans, stock option plans, or other stock benefit plans. OTS is including these revisions in the Re-proposal. OTS does not believe these types of provisions, which are common in option plans, unduly

[11] *See* NASD Manual & Notices to Members, § 4350(i), *Qualitative Listing Requirements for Nasdaq National Market and Nasdaq SmallCap Market Issues Except for Limited Partnerships traded on the Nasdaq National Market, Shareholder Approval* (2001).

[12] *See* NASD Manual & Notices to Members, § 4310(c)(17), *Qualification Requirements for Domestic and Canadian Securities* (2001).

benefit recipients, as long as these provisions do not violate OTS vesting requirements or pricing requirements for options. *See* proposed § 563b.500.

OTS also proposes to add a provision that clarifies a supervisory policy requiring exercise or forfeiture of stock benefits in certain circumstances, such as if an association becomes critically undercapitalized. *See* proposed § 563b.500.

M. Holding Company Proceeds

The First Proposal stated that at least 50% of the gross proceeds in a mutual-to-stock conversion must be infused into the converting savings association, and more must be infused if OTS concludes, for supervisory reasons, that a larger capital infusion is necessary. The First Proposal inadvertently referenced 50% of gross proceeds, instead of net proceeds. The Re-proposal clarifies that 50% of the net proceeds must be infused into the savings association. One commenter suggested that all the proceeds should go to the savings association. Several others suggested OTS should maintain more flexibility and make a determination on an acceptable amount of proceeds retained by the holding company, based upon what the business plan proposed. OTS has determined that the 50% limitation works well, but will examine every conversion on a case-by-case basis to determine if the limitation is appropriate in that case.

N. Mutual Holding Company Revisions

1. General

The Interim Rule revised the MHC regulations in accordance with the GLB Act and revised OTS treatment of MHC dividend waivers. The First Proposal included changes to the MHC regulations conforming to changes made to the conversion regulations. In the First Proposal, OTS also proposed to increase the size of stock benefit plans that associations (or mid-tier holding companies) under the MHC format could enact. Most commenters were in favor of this idea although two opposed any benefit plans for management. OTS is re-proposing the changes as proposed, with certain technical revisions, and with the additional 25% limitation discussed earlier. One commenter asked OTS to clarify that the proposed rules, if finalized, would apply to existing MHCs. In response to that comment, OTS takes this opportunity to indicate that the Re-proposal, if finalized, will be applicable to future stock issuances by existing associations or mid-tier holding companies in the MHC format. OTS will also permit the use of repurchased shares to attain the new limits.

In the First Proposal, OTS also proposed allowing the adoption of additional stock option plans without the need to issue stock to all categories of subscribers. The Re-proposal retains this provision. OTS notes that adoption of additional plans still requires filing an application with OTS, registering additional stock where appropriate, and shareholder ratification of additional plans. Among the factors OTS will consider when reviewing additional plans are the purpose for creating the additional plans, management ratings, or supervisory problems at the converted savings association. As noted earlier, commenters were in favor of a check-off approval for benefit plans, but OTS is not re-proposing this item because of the NASD rule restrictions.

Three commenters urged OTS to change its policy on the chartering of savings association subsidiaries of MHCs, or holding companies inserted in between MHCs and their savings association subsidiaries (Mid-tiers). Currently Mid-tiers must be chartered by OTS. The commenters argued that regular holding companies are state-chartered, so Mid-tiers should also be state-chartered. OTS notes, however, that Mid-tiers are MHCs, and MHCs, by statute, must be federally chartered.[13] One commenter asked if OTS would allow Mid-tiers to adopt limited liability bylaws. Although such institutions are federally chartered, OTS has allowed the adoption of limited liability bylaws on a case-by-case basis for other federal associations and, therefore, would consider this for Mid-tiers.

OTS also asked for comments on the possibility of not requiring a vote of the members for a simple reorganization to MHC form, without a stock issuance. Nine commenters favored such a change and three opposed it. OTS believes such a change may be beneficial to associations considering a charter change to MHC form, but believes a statutory change is necessary to accomplish this objective. OTS will consider seeking statutory changes in this area.

One commenter asked if OTS would consider an abbreviated application for MHC reorganizations without a stock issuance. OTS already allows abbreviated applications for such reorganizations. These applications, however, are subject to the Bank Merger Act, which contains statutory time frames.

[13] *See* 12 U.S.C. 1467a(o)(7).

2. Acquisitions of Mutual Holding Company Structures

Recently, companies in several MHC structures have entered into transactions, or have received offers to enter into transactions, in which an unrelated mutual savings association, mutual savings bank, or MHC would acquire the target MHC, mid-tier holding company, and subsidiary association. In these transactions, the mid-tier association's minority shareholders have been offered cash, and the majority mutual interest would become part of the acquiring mutual entity. Some of these transactions have been friendly, and others have been hostile acquisition proposals. In the context of these transactions, MHCs and their subsidiary entities have asked: (i) whether mid-tier holding companies (or, if there is no mid-tier holding company, the subsidiary savings association) may adopt the pre-approved charter provisions set forth at 12 CFR 552.4(b)(8), such as the charter provision prohibiting acquisitions of, and offers to acquire, more than ten percent of any class of equity security of the entity for five years; and (ii) whether OTS applies 12 CFR 563b.3(i)(3) to savings association subsidiaries or mid-tier holding companies that have issued stock within the previous three years.

The purposes of the regulatory post-conversion acquisition restriction at 12 CFR 563b.3(i)(3) and the charter provisions in 12 CFR 552.4(a)(8) are to provide recently converted associations a period of time in which to deploy conversion proceeds into productive assets, to permit management to focus on the task of investing conversion proceeds and managing their institution, and to protect against acquisition efforts that may have the potential to disrupt operations in the critical time period after conversion.[14] In addition, the charter provisions are designed to allow converted associations more discretion in managing their affairs.[15]

Recently completed or proposed transactions have demonstrated that takeover pressures now exist in the context of MHC structures. Minority stockholders have sought to pressure MHC structures to be acquired by mutual institutions or other MHC structures. In light of recent takeover attempts, and particularly in light of the hostile situations that have developed, OTS has determined to allow the post-

[14] *See, e.g.*, Federal Home Loan Bank Board (FHLBB) Resolution No. 85–80 (Jan. 31, 1985), Resolution No, 84–400 (Aug. 2, 1984), Resolution No. 84–90 (Feb. 23, 1984), and Resolution No. 76–848 (Nov. 10, 1976).

[15] FHLBB Resolution No. 84–90 (Aug. 2, 1984).

conversion anti-takeover restrictions in the charter of a mid-tier stock holding company. These restrictions would be consistent with the purposes of those provisions generally and give a newly converted MHC time to deploy its new capital and adjust to managing its institution in the MHC environment.[16]

Accordingly, OTS is allowing mid-tier holding companies to include the provisions set forth at 12 CFR 552.4(b)(8) in their charters. In addition, OTS proposes to apply § 563b.3(i)(3) to mid-tier holding companies and subsidiary stock institutions that complete initial stock offerings under § 575.7. OTS requests comment on whether it should apply § 563b.3(i)(3) in the context of Mid-tiers and MHC savings association subsidiaries.

3. ''Second Step Conversions'' of MHCs

Section 575.12 of the MHC regulations generally governs the conversion of MHCs to stock form (frequently called ''second step conversions''). In all such transactions to date, OTS staff has required that the majority of the minority shares of the Mid-tier or savings association subsidiary, as the case may be, vote in favor of the second step conversion, in addition to votes otherwise required. OTS staff has imposed this requirement because the minority shareholders received different treatment in the second step conversion than the majority interest. The minority shareholders received stock in an amount to be determined under an ''exchange ratio'', while the majority interest (the mutual depositors) received rights to subscribe to the remaining shares to be issued in the transaction, at the offering price. OTS staff concluded that the requirement was appropriate in order to help ensure the fairness of the transaction. OTS proposes to include this requirement, which has been applicable to every second step conversion to date, in the MHC regulations, at 12 CFR 575.12(a)(3).

O. Supervisory Conversions

To conform the language in OTS regulations more closely to sec. 5(o) of the HOLA, the statute governing supervisory conversions, OTS proposed certain changes to the regulatory language regarding Voluntary Supervisory Conversions. The revised language can be found at §§ 563b.625 and 563b.630 of the Re-proposal.

P. Merger Conversions

One commenter requested OTS to address whether there is any change in OTS policy on merger conversions. OTS policy on merger conversions was articulated in the preamble to the OTS conversion regulation of 1994, 59 FR 61247, 61254, Nov. 30, 1994. In that regulation, OTS stated that it would limit merger conversions to cases involving financially weak institutions. In addition, OTS indicated it would consider allowing merger conversions where a converting institution could demonstrate by clear and convincing evidence that a standard conversion would not be economically feasible, based on the ratio of expenses to gross proceeds, because of the asset size of the institution.[17]

In the last eight years OTS has approved only one merger conversion. That approval was based on the criteria articulated in the 1994 regulation. OTS reiterates the guidelines it established in the 1994 regulation and wishes to clarify that institutions proposing merger conversions should not propose plans where management of the disappearing institution would receive anything more than they could if they had undertaken a standard conversion. In addition, institutions contemplating a merger conversion must demonstrate a merger conversion is the only viable alternative, and document what other proposed solutions the company pursued, that the proposed distribution of assets is fair to all parties, and that the institution used independent counsel to represent the interests of the institution.

Q. Plain Language

The First Proposal converted OTS rules on mutual-to-stock conversions into a plain language format. All six commenters who addressed this change commented favorably. One commenter asked if OTS intended to make the same changes to the MHC regulations. OTS intends to make similar changes to the MHC regulations in a future project.

R. Miscellaneous Revisions

In addition to the revisions described above, the First Proposal proposed a number of miscellaneous revisions to filing and other requirements. OTS received no comments on these revisions and is re-proposing them as originally proposed. The miscellaneous changes will:

- Revise the definition section of the regulation to include only those definitions that are not defined elsewhere in OTS regulations, or to move specific definitions to the appropriate section of the regulation. *See* proposed § 563b.25.
- Reduce the number of copies of applications that a savings association must file with OTS from ten to seven. *See* proposed § 563b.155.
- Revise the filing requirements to coordinate the place of filing and number of copies filed, for the application for conversion and any amendments to the application for conversion. *See* proposed §§ 563b.115, 563b.155, 563b.180, and 563b.185.
- Codify the current informal standard requiring a legal opinion indicating that any marketing materials comply with all applicable securities laws. *See* proposed § 563b.150.
- Delete the requirement for a legal opinion regarding insured accounts. *See* proposed § 563b.100, Exhibit 3(d).

One commenter also asked for clarification on whether community offerings must occur in conversions. If all the stock is sold in the subscription phase of a conversion, a community offering is unnecessary. Another commenter asked if transfer restrictions applied in second step stock conversions. Transfer restrictions apply to newly purchased stock in second step stock conversions, but not to exchange shares presuming the appropriate transfer restriction time frames have already expired.

S. Forms

The First Proposal contained revisions to all of the forms currently in the conversion regulations, and drafted a new form that facilitates the conversion process (Form OF for the Order Form). In drafting these forms, OTS moved a number of requirements currently in the regulations to the related forms. OTS received one comment on the forms with some minor technical suggestions for revisions. OTS concurs with some of the technical revisions and has revised the forms accordingly. The forms will continue to be available through OTS Washington and Regional Offices and will be accessible on OTS's website.

V. Disposition of Existing Rules

[16] The MHC regulations provide that the procedural and substantive requirements of 12 CFR 563b.3 through 563b.8 apply to all MHC stock issuances under § 575.7 unless clearly inapplicable. In the past, OTS staff has informally advised certain acquirors that it has not considered § 563b.3(i)(3) to be clearly applicable in the MHC context.

[17] See 59 FR 61247, at 61255. OTS gave an example of institutions with assets of less than $25 million as more likely to be able to establish a justification for doing a merger conversion.

Original provision	Re-proposed provision	Comment
12 CFR 563b.1	12 CFR 563b.5	Nonsubstantive revision, moved.
12 CFR 563b.2(a)	12 CFR 563b.25	Substantive revisions, deletions, and moved.
12 CFR 563b.2(b)		Deleted.
12 CFR 563b.3(a)	12 CFR 563b.5(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(b)	12 CFR 563b.200(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(1)	12 CFR 563b.330(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(2)	12 CFR 563b.355(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(2)(i)–(ii)	12 CFR 563b.375(a), (d)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(3)	12 CFR 563b.360	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(4)	12 CFR 563b.335(b), (c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(4)(i)	12 CFR 563b.320(c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(4)(ii)	12 CFR 563b.375(c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(4)(iii)	12 CFR 563b.375(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(4)(iv)	12 CFR 563b.375(d)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(5)	12 CFR 563b.320(d), 365	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(6)	12 CFR 563b.320(e), 335(b), (d)	Nonsubstantive revision, deletions, and moved.
12 CFR 563b.3(c)(6)(i)	12 CFR 563b.385(a), (c), 380(a)	Substantive revision, deletions, and moved.
12 CFR 563b.3(c)(6)(ii)–(iii)	12 CFR 563b.395	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(6)(iv)	12 CFR 563b.390(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(7)	12 CFR 563b.385(a), (c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(8)	12 CFR 563b.370	Nonsubstantive revision, deletions, and moved.
12 CFR 563b.3(c)(9)	12 CFR 563b.505(d)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(10)	12 CFR 563b.330(a), 335(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(11)	12 CFR 563b.420(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(12)	12 CFR 563b.445(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(13)	12 CFR 563b.430(d), 445(b), 465, 485	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(14)	12 CFR 563b.25	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(15)	12 CFR 563b.440, 445(c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(16)	12 CFR 563b.140, 425	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(17)	12 CFR 563b.505(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(18)	12 CFR 563b.505(b)–(c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(19)	12 CFR 563b.530(a)–(c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(20)	12 CFR 563b.150(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(21)	12 CFR 563b.130	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(22)	12 CFR 563b.345(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(23)	12 CFR 563b.320(a)–(d), 380(a)–(c)	Nonsubstantive revision, moved.
12 CFR 563b.3(c)(24)	12 CFR 563b.520(a)–(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(d)(1)–(7)		Deleted.
12 CFR 563b.3(d)(8)	12 CFR 563b.385(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(d)(9)	12 CFR 563b.385(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(d)(10)–(11)		Deleted.
12 CFR 563b.3(d)(12)	12 CFR 563b.390(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(d)(13)		Deleted.
12 CFR 563b.3(e)(1)	12 CFR 563b.25	Nonsubstantive revision, moved.
12 CFR 563b.3(e)(2)		Deleted.
12 CFR 563b.3(f)(1)	12 CFR 563b.445(b), 450, 455, 480	Nonsubstantive revision, moved.
12 CFR 563b.3(f)(2)	12 CFR 563b.445(b), 450	Nonsubstantive revision, moved.
12 CFR 563b.3(f)(3)	12 CFR 563b.470(e), 475	Revision with partial deletion, moved.
12 CFR 563b.3(f)(4)	12 CFR 563b.460	Nonsubstantive revision, moved.
12 CFR 563b.3(f)(5)	12 CFR 563b.470(a)–(d)	Nonsubstantive revision, moved
12 CFR 563b.3(g)(1)	12 CFR 563b.510	Revision with deletion, moved.
12 CFR 563b.3(g)(2)	12 CFR 563b.510, 520(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(g)(3)	12 CFR 563b.510, 515	Substantive revision with deletion, moved.
12 CFR 563b.3(g)(4)	12 CFR 563b.500	Substantive revision, moved.
12 CFR 563b.3(h)	12 CFR 563b.340(a)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(1)–(2)	12 CFR 563b.340(b)(1)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(3)(i)	12 CFR 563b.525	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(3)(ii)	12 CFR 563b.420(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(3)(iii)	12 CFR 563b.525(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(4)(i)		Deleted.
12 CFR 563b.3(i)(4)(ii)–(iv)	12 CFR 563b.525(c)(1)–(3)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(4)(v)	12 CFR 563b.525(c)(4)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(4)(vi)–(5)	12 CFR 563b.525(d)(1)–(2)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(6)	12 CFR 563b.430(a), (b)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(7)(i)–(ii)	12 CFR 563b.25, 525(b)	Nonsubstantive revision, moved.
12 CFR 563b.3(i)(7)(iii)–(iv)		Deleted.
12 CFR 563b.3(j)	12 CFR 563b.5(a)	Nonsubstantive revision, moved.
12 CFR 563b.4(a)(1)	12 CFR 563b.120	Nonsubstantive revision, moved.
12 CFR 563b.4(a)(2)		Deleted.
12 CFR 563b.4(a)(3)	12 CFR 563b.125	Nonsubstantive revision, moved.
12 CFR 563b.4(a)(3)(i)–(ii), (4)(i)–(xviii)	12 CFR 563b.135(a), (b)	Nonsubstantive revision, moved.
12 CFR 563b.4(a)(4)(xix)		Deleted.

Original provision	Re-proposed provision	Comment
12 CFR 563b.4(a)(5)	12 CFR 563b.135(c)	Nonsubstantive revision, moved.
12 CFR 563b.4(b)(1)(i)	12 CFR 563b.180	Nonsubstantive revision, moved.
12 CFR 563b.4(b)(1)(ii)	12 CFR 563b.185	Nonsubstantive revision, moved.
12 CFR 563b.4(b)(2)		Deleted.
12 CFR 563b.4(b)(3)	12 CFR 563b.180(b)	Nonsubstantive revision, moved.
12 CFR 563b.4(c)	12 CFR 563b.160	Nonsubstantive revision, moved.
12 CFR 563b.5(a)	12 CFR 563b.250	Nonsubstantive revision, moved.
12 CFR 563b.5(b)–(c)	12 CFR 563b.270(b)	Nonsubstantive revision, moved.
12 CFR 563b.5(d)(1)	12 CFR 563b.255	Nonsubstantive revision, moved.
12 CFR 563b.5(d)(2)	12 CFR 563b.260, 265	Nonsubstantive revision, moved.
12 CFR 563b.5(d)(3)	12 CFR 563b.255(h)	Nonsubstantive revision, moved.
12 CFR 563b.5(d)(4)	12 CFR 563b.260	Nonsubstantive revision, moved.
12 CFR 563b.5(e)(1)–(2)	12 CFR 563b.150, 155	Nonsubstantive revision, deletions, and moved.
12 CFR 563b.5(e)(3)	12 CFR 563b.275(d)	Nonsubstantive revision, moved.
12 CFR 563b.5(e)(4)		Deleted.
12 CFR 563b.5(e)(5)	12 CFR 563b.150, 160(a)–(b)	Nonsubstantive revision, moved.
12 CFR 563b.5(e)(6)	12 CFR 563b.275(e)	Nonsubstantive revision, moved.
12 CFR 563b.5(e)(7)	12 CFR 563b.275(c)	Nonsubstantive revision, moved.
12 CFR 563b.5(f)	12 CFR 563b.280	Nonsubstantive revision, moved.
12 CFR 563b.5(g)(1)–(2)	12 CFR 563b.285(a)	Nonsubstantive revision, moved.
12 CFR 563b.5(g)(3)	12 CFR 563b.290	Substantive revision, moved.
12 CFR 563b.5(h)	12 CFR 563b.285(b)	Nonsubstantive revision, moved.
12 CFR 563b.6(a)	12 CFR 563b.225(a)	Nonsubstantive revision, moved.
12 CFR 563b.6(b)	12 CFR 563b.230	Nonsubstantive revision, moved.
12 CFR 563b.6(c)(1)	12 CFR 563b.235	Nonsubstantive revision, moved.
12 CFR 563b.6(c)(2)		Deleted.
12 CFR 563b.6(d)	12 CFR 563b.225(d)	Nonsubstantive revision, moved.
12 CFR 563b.6(e)	12 CFR 563b.225(b)–(c)	Nonsubstantive revision, moved.
12 CFR 563b.7(a)(1)	12 CFR 563b.325(a)	Nonsubstantive revision, moved.
12 CFR 563b.7(a)(2)	12 CFR 563b.300(a)	Nonsubstantive revision, moved.
12 CFR 563b.7(a)(3)	12 CFR 563b.325(a)	Nonsubstantive revision, moved.
12 CFR 563b.7(a)(4)		Deleted.
12 CFR 563b.7(b)	12 CFR 563b.300(e), 305	Nonsubstantive revision, moved.
12 CFR 563b.7(c)	12 CFR 563b.330	Nonsubstantive revision, moved.
12 CFR 563b.7(d)	12 CFR 563b.200(b)(8), 300(c)–(d), Form OC, Item 3.	Nonsubstantive revision, moved.
12 CFR 563b.7(e)	12 CFR 563b.335(c)	Nonsubstantive revision, moved.
12 CFR 563b.7(f)(1)–(2)	12 CFR 563b.200(b)	Nonsubstantive revision, deletion, and moved.
12 CFR 563b.7(f)(3)		Deleted.
12 CFR 563b.7(g)(1)–(2)	12 CFR 563b.335(a), Form OF, Items (1), (2)	Nonsubstantial revisions, deletions, and moved.
12 CFR 563b.7(g)(3),(4),(5)	Form OF, Items (3), (4), (5)	Nonsubstantive revision, moved.
12 CFR 563b.7(h)	12 CFR 563b.345(a), 350(c)	Nonsubstantive revision, moved.
12 CFR 563b.7(i)	12 CFR 563b.400	Nonsubstantive revision, moved.
12 CFR 563b.7(j)	12 CFR 563b.350(a)	Nonsubstantive revision, moved.
12 CFR 563b.7(k)(1)–(2)	12 CFR 563b.405	Nonsubstantive revision, moved.
12 CFR 563b.7(k)(2)(i)–(ii)	12 CFR 563b.310(d)	Nonsubstantive revision, moved.
12 CFR 563b.7(k)(3)		Deleted.
12 CFR 563b.7(k)(4)	12 CFR 563b.310(a)	Nonsubstantive revision, moved.
12 CFR 563b.7(k)(5)	12 CFR 563b.310(b)–(d)	Substantive revision, moved.
12 CFR 563b.8(a)	12 CFR 563b.155	Substantive revision, moved.
12 CFR 563b.8(b)(1)–(2)	12 CFR 563b.150	Nonsubstantive revision, moved.
12 CFR 563b.8(b)(3)		Deleted.
12 CFR 563b.8(c)(1)–(2)(i)–(ii)	12 CFR 563b.240	Nonsubstantive revision, moved.
12 CFR 563b.8(c)(2)(iii)	12 CFR 563b.260	Substantive revision, moved.
12 CFR 563b.8(c)(3)	12 CFR 563b.300(a), (c)	Substantial revisions, deletions, and moved.
12 CFR 563b.8(d)(1)–(2)	12 CFR 563b.430	Nonsubstantive revision, moved.
12 CFR 563b.8(d)(3)	12 CFR 563b.435	Nonsubstantive revision, moved.
12 CFR 563b.8(e)	12 CFR 563b.115(a), 155, 180(b), Form AC, General Instruction B.	Nonsubstantial revisions, deletions, and moved.
12 CFR 563b.8(f)		Deleted.
12 CFR 563b.8(g)	Form AC, General Instruction B	Nonsubstantive revision, moved.
12 CFR 563b.8(h)		Deleted.
12 CFR 563b.8(i)–(l)	Form AC, General Instruction B	Nonsubstantive revision, moved.
12 CFR 563b.8(m)		Deleted.
12 CFR 563b.8(n)	Form AC, General Instruction B	Nonsubstantive revision, moved.
12 CFR 563b.8(o)		Deleted.
12 CFR 563b.8(p)	12 CFR 563b.150(a)(6), Form AC, General Instruction B.	Nonsubstantive revision, moved.
12 CFR 563b.8(q)	Form AC, General Instruction B	Nonsubstantive revision, moved.
12 CFR 563b.8(r)	Form AC, General Instruction B	Substantive revision, moved.
12 CFR 563b.8(s)	Form AC, General Instruction B	Nonsubstantive revision, moved.
12 CFR 563b.8(t)(1)	12 CFR 563b.100	Nonsubstantive revision, moved.

Original provision	Re-proposed provision	Comment
12 CFR 563b.8(t)(2)		Deleted.
12 CFR 563b.8(u)	12 CFR 563b.205	Nonsubstantial revisions, deletions, and moved.
12 CFR 563b.8(v)	12 CFR 563b.530(d)	Nonsubstantive revision, moved.
12 CFR 563b.9	12 CFR 563b.10	Nonsubstantive revision, moved.
12 CFR 563b.10	12 CFR 563b.605(b)–(c)	Nonsubstantive revision, moved.
12 CFR 563b.11	12 CFR 563b.200(c)	Nonsubstantive revision, moved.
12 CFR 563b.20	12 CFR 563b.600	Nonsubstantive revision, moved.
12 CFR 563b.21(a)	12 CFR 563b.605	Nonsubstantive revision, moved.
12 CFR 563b.21(b)	12 CFR 563b.650, 610	Nonsubstantive revision, moved.
12 CFR 563b.22		Deleted.
12 CFR 563b.23(a)–(c)	12 CFR 563b.670, 675	Nonsubstantive revision, additions, and moved.
12 CFR 563b.23(d)	12 CFR 563b.690	Nonsubstantive revision, moved.
12 CFR 563b.24(a)–(b)(1), (3)	12 CFR 563b.625(a)(1)	Nonsubstantive revision, moved.
12 CFR 563b.24(b)(2)		Deleted.
12 CFR 563b.24(c)	12 CFR 563b.625(b)	Substantive addition, moved.
12 CFR 563b.25	12 CFR 563b.630	Nonsubstantive revision, moved.
12 CFR 563b.26	12 CFR 563b.625(a)(2)	Nonsubstantive revision, moved.
12 CFR 563b.27(a)	12 CFR 563b.650	Nonsubstantive revision, moved.
12 CFR 563b.27(b)	12 CFR 563b.660(f)(1)	Nonsubstantive revision, moved.
12 CFR 563b.27(c)	12 CFR 563b.660(a)(2)	Nonsubstantive revision, moved.
12 CFR 563b.27(d)	12 CFR 563b.660(c)	Nonsubstantive revision, moved.
12 CFR 563b.27(e)	12 CFR 563b.660(g)(2)	Nonsubstantive revision, moved.
12 CFR 563b.27(f)–(g)	12 CFR 563b.660(e)	Nonsubstantive revision, moved.
12 CFR 563b.27(h)	12 CFR 563b.660(f)(2)	Nonsubstantive revision, moved.
12 CFR 563b.27(i)	12 CFR 563b.660(g)(1)	Nonsubstantive revision, moved.
12 CFR 563b.27(j)	12 CFR 563b.660(g)(3)	Nonsubstantive revision, moved.
12 CFR 563b.27(k)	12 CFR 563b.660(g)(4)	Nonsubstantive revision, moved.
12 CFR 563b.27(l)	12 CFR 563b.660(d)(3)	Nonsubstantive revision, moved.
12 CFR 563b.27(m)	12 CFR 563b.660(d)(2)	Nonsubstantive revision, moved.
12 CFR 563b.27(n)	12 CFR 563b.660(d)(1)	Nonsubstantive revision, moved.
12 CFR 563b.27(o)	12 CFR 563b.660(d)(4)	Nonsubstantive revision, moved.
12 CFR 563b.27(p)	12 CFR 563b.660(a)(3)	Nonsubstantive revision, moved.
12 CFR 563b.27(q)–(r)	12 CFR 563b.660(h)	Nonsubstantive revision, moved.
12 CFR 563b.27(s)	12 CFR 563b.660(g)(5)	Nonsubstantive revision, moved.
12 CFR 563b.28	12 CFR 563b.610	Nonsubstantive revision, moved.
12 CFR 563b.29(a)	12 CFR 563b.660	Nonsubstantive revision, moved.
12 CFR 563b.29(b)		Deleted.
12 CFR 563b.29(d)(1)–(2)	12 CFR 563b.430	Nonsubstantive revision, moved.
12 CFR 563b.29(d)(3)	12 CFR 563b.435	Nonsubstantive revision, moved.
12 CFR 563b.30	12 CFR 563b.675	Nonsubstantive revision, moved.
12 CFR 563b.31	12 CFR 563b.680	Nonsubstantive revision, moved.
12 CFR 563b.32	12 CFR 563b.670(c)	Nonsubstantive revision, moved.
12 CFR 563b.33	12 CFR 563b.670(d)	Nonsubstantive revision, moved.
12 CFR 563b.100	Form AC—1680	Nonsubstantive revision, moved.
12 CFR 563b.101	Form PS—1681	Nonsubstantive revision, moved.
12 CFR 563b.102	Form OC—1682	Nonsubstantive revision, moved.
	12 CFR 563b.15, 20, 105, 110, 115, 165	New provisions.
	12 CFR 563b.295	New provision.
	12 CFR 563b.550–575	New provisions.
	Form OF—1683	New form.

VI. Request for Public Comment

OTS invites comment on all aspects of the Re-proposal. We encourage commenters to suggest modifications to approaches discussed above that could meet OTS's overall goal of improving the conversion process. Because this is a re-proposal, OTS believes the public comment period does not need to be as long as the First Proposal, therefore, OTS is publishing this Re-proposal with a 30-day comment period.

VII. Executive Order 12866

The Director of OTS determined that this Re-proposal does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

VIII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act of 1980 (RFA) requires federal agencies to either prepare an initial regulatory flexibility analysis (IRFA) with this Re-proposal or certify that the rule would not have a significant impact on a substantial number of small entities.[18] OTS cannot at this time determine whether the rule would have a significant impact on a substantial number of small entities. Therefore, OTS includes the following IRFA.[19]

A description of the reasons why OTS is taking this action, and a statement of the objectives of, and legal basis for, the Re-proposal are in the supplementary material above.

1. Small Entities to Which the Re-proposal Would Apply

The Re-proposal applies to mutual savings associations that propose to convert to the stock form of ownership. Under OTS jurisdiction, there are currently approximately 399 mutual

[18] 5 U.S.C. 605(b).

[19] 5 U.S.C. 603(a).

savings associations, 35 publicly traded MHCs, 2 non-publicly traded MHCs, and 27 MHCs with no stock issued. Of these institutions, approximately 239 have less than $100 million in assets. Small depository institutions are generally defined, for RFA purposes, as those with assets under $100 million.[20] In the past two years, OTS has processed 12 and 10 applications, respectively, to convert from mutual to stock or mutual holding company form. Based on this experience, OTS believes that the Re-proposal affects fewer than 15 savings associations annually.

2. Requirements of the Re-Proposal

The Re-proposal requires mutual savings associations wishing to convert to stock form to prepare a plan of conversion and other supporting forms and documents (such as a business plan and an independent appraisal) and submit the documents for OTS approval. The current mutual-to-stock conversion regulations require all of these documents or information.

The Re-proposal includes a new requirement that a savings association that intends to establish a charitable organization as part of its conversion must supply certain documents and information regarding the charitable organization. Under the current application processing policies, OTS often requires a savings association that intends to establish a charitable organization as part of its conversion to submit the same type of information that the Re-proposal would require. As a result, this new requirement should not have any additional impact on small savings associations.

The Re-proposal also adds demand account holders to the definition of savings account holders, allows accelerated vesting in management benefit plans for changes of control, and clarifies OTS policy regarding the amount of proceeds allowed at the holding company level. None of these provisions, however, should add to the reporting, recordkeeping, or compliance requirements for small entities.

Although it is not clear that the RFA requires a quantitative analysis of the impact of the re-proposed regulatory changes, OTS provides the following estimate. The Re-proposal's primary economic impact on small savings associations relates to the expense of preparing the application to convert. Savings associations wishing to convert must prepare the necessary documents and forms, including a plan of conversion, a business plan, and an appraisal. Preparation of these documents may require legal or professional help. OTS's experience in the conversion process indicates that savings associations generally hire legal counsel, accountants, marketing agents, and professional appraisers to assist in completion of the necessary documents and forms. Savings associations converting under the current regulations spend approximately $250,000 to one million dollars each to go through the process. We note that the new requirements will add only 10 hours of additional paperwork in preparation, and may save institutions that decide after preliminary business plan preparation and discussion not to convert significant time and expense. *See* discussion infra at Section IX. The new requirement for information supporting a proposed charitable contribution should not increase these costs appreciably.

3. Significant Alternatives

Section 603(c) of the RFA requires OTS to describe any significant alternatives to the Re-proposal that accomplish the stated objectives of the rule while minimizing any significant economic impact of the rule on small entities. Section 603(c) lists several examples of significant alternatives, including (1) establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarifying, consolidating, or simplifying compliance and reporting requirements for small entities; (3) using performance standards rather than design standards; and (4) exempting small entities from coverage of the rule or a part of the rule.

After consideration, OTS does not believe that any of these alternatives are feasible. As noted, more than half of the savings associations to which the Re-proposal could apply meet the RFA standard for ''small depository institutions.'' In fact, the conversion process is aimed largely at small institutions that want to raise capital in the open market by converting to the stock form of ownership. Given that the conversion process is designed with small institutions in mind, modifying the requirements for such small institutions is not necessary. Moreover, given that a conversion cannot be measured for performance until it takes place, the use of performance standards rather than design standards is impractical.

To reduce regulatory burden consistent with the goals of this regulation, the Re-proposal specifically permits OTS to waive any requirement under the part where the waiver is equitable and not detrimental to the savings association, the account holders, or the public interest. This process will provide substantial flexibility to OTS and the savings association to minimize any significant economic impact of a provision on a specific institution.

Nevertheless, OTS requests comments on the burdens associated with the Re-proposal that particularly affect small savings associations, and whether any modifications or exemptions from the rules for small savings associations would be appropriate.

IX. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, sec. 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS determined that the Re-proposal will not result in expenditures by state, local, or tribal governments or by the private sector of $100 million or more in any one year. Accordingly, this rulemaking is not subject to sec. 202 of the Unfunded Mandates Act.

X. Paperwork Reduction Act

The information collection requirements contained in the Re-proposal, 12 CFR part 563b, are virtually identical to those included in the July 2000 Proposed Rule on this subject. OTS has modified the forms in only minor ways, but the burden on respondents remains unchanged from those in the earlier rule, which the Office of Management and Budget (OMB) approved under control number 1550–0014. Respondents/recordkeepers are not required to respond to any collection of information unless it displays a currently valid OMB control number.

As part of its continuing effort to reduce paperwork and respondent burden, however, OTS invites the public to comment on the information collections contained in this rule, including the forms included in this publication as appendices.

OTS invites comment on all of the following issues:

- Whether the proposed information collection contained in this Re-proposal is necessary for the proper performance

[20] 13 CFR 121.201, Division H (1999).

of OTS's functions, including whether the information has practical utility.

• The accuracy of OTS's estimate of the burden of the proposed information collection.

• Ways to enhance the quality, utility, and clarity of the information to be collected.

• Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

• Estimates of capital and start-up costs of operation, maintenance, and purchases of services to provide information.

Send comments on these information collections to Information Collection Comments, Attention: 1550–0014, by e-mail to *infocollection.comments@ots.treas.gov*; by facsimile transmission to (202) 906–6518; or by mail to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552. OTS will post comments and the related index on the OTS Internet Site at *www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reference Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov*, or send a facsimile transmission to Public Information at (202) 906–7755.

List of Subjects

12 CFR Part 563b

Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 574

Administrative practice and procedure, Holding companies, Reporting and recordkeeping requirements, Savings associations, Securities.

12 CFR Part 575

Administrative practice and procedure, Capital, Holding companies, Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Office of Thrift Supervision proposes to amend 12 CFR chapter V, as set forth below:

1. Part 563b is revised to read as follows:

PART 563b—CONVERSIONS FROM MUTUAL TO STOCK FORM

Sec.

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Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 2901; 15 U.S.C. 78c, 78l, 78m,78n,78w.

563b.5 What does this part do?

(a) *General.* This part governs how a savings association (''you'') may convert from the mutual to the stock form of ownership. Subpart A of this part governs standard mutual-to-stock conversions. Subpart B of this part governs voluntary supervisory mutual-to-stock conversions. This part supersedes all inconsistent charter and bylaw provisions of federal savings associations converting to stock form.

(b) *Prescribed forms.* You must use the forms prescribed under this part and provide such information as OTS may require under the forms by regulation or otherwise. The forms required under this part include: Form AC (Application for Conversion); Form PS (Proxy Statement); Form OC (Offering Circular); and Form OF (Order Form).

(c) *Waivers.* OTS may waive any requirement of this part or a provision in any prescribed form. To obtain a waiver, you must file a written request with OTS that:

(1) Specifies the requirement(s) or provision(s) you want OTS to waive;

(2) Demonstrates that the waiver is equitable, is not detrimental to you, your account holders or other savings associations, and is not contrary to the public interest; and

(3) Includes an opinion of counsel demonstrating that applicable law does not conflict with the requirement or provision.

§ 563b.10 May I form a holding company as part of my conversion?

You may convert to the stock form of ownership as part of a transaction where you organize a holding company to acquire all of your shares upon their issuance. In such a transaction, your holding company will offer rights to purchase its shares instead of your shares. All of the requirements of subpart A generally apply to the holding company as they apply to the savings association. Section 574.6 of this chapter contains OTS's holding company application requirements.

§ 563b.15 May I form a charitable organization as part of my conversion?

When you convert to the stock form, you may form a charitable organization. Your contributions to the charitable organization are governed by the requirements of §§ 563b.550 through 563b.575.

§ 563b.20 May I acquire another insured stock depository institution as part of my conversion?

When you convert to stock form, you may acquire for cash or stock another insured depository institution that is already in the stock form of ownership.

§ 563b.25 What definitions apply to this part?

The following definitions apply to this part and the forms prescribed under this part:

Acting in concert has the same meaning as in § 574.2(c) of this chapter. The rebuttable presumptions of § 574.4(d) of this chapter, other than §§ 574.4(d)(1) and (d)(2) of this chapter, apply to the share purchase limitations at §§ 563b.355 through 563b.395.

Affiliate of, or a person *affiliated with*, a specified person, is a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the specified person.

Associate of a person is:

(1) A corporation or organization (other than you or your majority-owned subsidiaries), if the person is a senior officer or partner, or beneficially owns, directly or indirectly, 10 percent or more of any class of equity securities of the corporation or organization.

(2) A trust or other estate, if the person has a substantial beneficial interest in the trust or estate or is a trustee or fiduciary of the trust or estate. For purposes of §§ 563b.370, 563b.380, 563b.385, 563b.390, 563b.395 and 563b.505, a person who has a substantial beneficial interest in your tax-qualified or non-tax-qualified employee stock benefit plan, or who is a trustee or a fiduciary of the plan, is not an associate of the plan. For the purposes of § 563b.370, your tax-qualified employee stock benefit plan is not an associate of a person.

(3) Any person who is related by blood or marriage to such person and:

(i) Who lives in the same home as the person; or

(ii) Who is your director or senior officer, or a director or senior officer of your holding company or your subsidiary.

Association members or *members* are persons who, under applicable law, are eligible to vote at the meeting on conversion.

Control (including *controlling*, *controlled by*, and *under common control with*) means the direct or indirect power to direct or exercise a controlling influence over the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise as described at 12 CFR part 574.

Eligibility record date is the date for determining eligible account holders. The eligibility record date must be at least one year before the date your board of directors adopts the plan of conversion.

Eligible account holders are any persons holding qualifying deposits on the eligibility record date.

IRS is the Internal Revenue Service.

Local community includes:

(1) Every county, parish, or similar governmental subdivision in which you have a home or branch office;

(2) Each county's, parish's, or subdivision's metropolitan statistical area;

(3) All zip code areas in your Community Reinvestment Act assessment area; and

(4) Any other area or category you set out in your plan of conversion, as approved by OTS.

Offer, *offer to sell*, or *offer for sale* is an attempt or offer to dispose of, or a solicitation of an offer to buy, a security or interest in a security for value. Preliminary negotiations or agreements with an underwriter, or among underwriters who are or will be in privity of contract with you, are not offers, offers to sell, or offers for sale.

Person is an individual, a corporation, a partnership, an association, a joint-stock company, a limited liability company, a trust, an unincorporated organization, or a government or political subdivision of a government.

Proxy soliciting material includes a proxy statement, form of proxy, or other written or oral communication regarding the conversion.

Purchase or *buy* includes every contract to acquire a security or interest in a security for value.

Qualifying deposit is the total balance in an account holder's savings accounts at the close of business on the eligibility or supplemental eligibility record date. Your plan of conversion may provide that only savings accounts with total deposit balances of $50 or more will qualify.

Sale or *sell* includes every contract to dispose of a security or interest in a security for value. An exchange of securities in a merger or acquisition approved by OTS is not a sale.

Savings account is any withdrawable account as defined in § 561.42 of this chapter, including a demand account as defined in § 561.16 of this chapter.

Solicitation and *solicit* is a request for a proxy, whether or not accompanied by or included in a form of proxy; a request to execute, not execute, or revoke a proxy; or the furnishing of a form of proxy or other communication reasonably calculated to cause your members to procure, withhold, or revoke a proxy. Solicitation or solicit does not include providing a form of proxy at the unsolicited request of a member, the acts required to mail communications for members, or ministerial acts performed on behalf of a person soliciting a proxy.

Subscription offering is the offering of shares through nontransferable subscription rights to:

(1) Eligible account holders under § 563b.355;

(2) Tax-qualified employee stock ownership plans under § 563b.380;

(3) Supplemental eligible account holders under § 563b.355; and

(4) Other voting members under § 563b.365.

Supplemental eligibility record date is the date for determining supplemental eligible account holders. The supplemental eligibility record date is the last day of the calendar quarter before OTS approves your conversion and will only occur if OTS has not approved your conversion within 15 months after the eligibility record date.

Supplemental eligible account holders are any persons, except your officers, directors, and their associates, holding qualifying deposits on the supplemental eligibility record date.

Tax-qualified employee stock benefit plan is any defined benefit plan or defined contribution plan, such as an employee stock ownership plan, stock bonus plan, profit-sharing plan, or other plan, and a related trust, that is qualified under section 401 of the Internal Revenue Code (26 U.S.C. 401).

Underwriter is any person who purchases any securities from you with a view to distributing the securities, offers or sells securities for you in connection with the securities' distribution, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking. Underwriter does not include a person whose interest is limited to a usual and customary distributor's or seller's commission from an underwriter or dealer.

Subpart A—Standard Conversions

Prior to Conversion

§ 563b.100 What must I do before a conversion?

(a) You must meet with OTS at least ten days before you pass your plan of conversion. At that meeting you must provide OTS with a written strategic plan that outlines the objectives of the proposed conversion and the intended use of the conversion proceeds.

(b) You should also consult with OTS before you file your application for conversion. OTS will discuss the information that you must include in the application for conversion, general issues that you may confront in the conversion process, and any other pertinent issues.

§ 563b.105 What information must I include in my business plan?

(a) Prior to filing an application for conversion, you must adopt a business plan reflecting your intended plans for deployment of the proposed conversion proceeds. Your business plan is required, under § 563b.150, to be included in your conversion application. At a minimum, your business plan must address:

(1) Your projected operations and activities for three years following the conversion. You must describe how you will deploy the conversion proceeds at the converted savings association (and holding company, if applicable), and include three years of projected financial statements. The business plan must provide that the converted savings association must retain at least 50 percent of the net conversion proceeds. OTS may require that a larger percentage of proceeds remain in the institution.

(2) Your plan for deploying conversion proceeds to meet credit and lending needs in your proposed market areas. OTS strongly discourages business plans that provide for a substantial investment in mortgage securities or other securities, except as an interim measure to facilitate orderly, prudent deployment of proceeds during the three years following the conversion, or as part of a properly managed leverage strategy.

(3) How the new capital will support projected operations and activities, and what opportunities are available to reasonably achieve your planned deployment of conversion proceeds in your proposed market areas.

(4) The risks associated with your plan for deployment of conversion proceeds, and the effect of this plan on management resources, staffing, and facilities.

(5) The expertise of your management and board of directors, or that you have planned for adequate staffing and controls to prudently manage the growth, expansion, new investment, and other operations and activities proposed in your business plan.

(6) How you will achieve a reasonable return on equity, commensurate with investment risk, investor expectations, and industry norms, by the final year of the business plan.

(b) You may not project returns of capital or extraordinary dividends in any part of the business plan. A newly converted company should not plan on stock repurchases in the first year of the business plan, except in extraordinary circumstances.

§ 563b.110 Who must review my business plan?

(a) Your chief executive officer and members of the board of directors must review, and at least two-thirds of your board must approve, the business plan.

(b) Your chief executive officer and at least two-thirds of the board must certify that the business plan accurately reflects the intended plans for deployment of conversion proceeds, and that any new initiatives reflected in the business plan are reasonably achievable. You must submit these certifications with your business plan, as part of your conversion application under § 563b.150.

§ 563b.115 How will OTS view my business plan?

(a) OTS will review your business plan to determine that it demonstrates prudent deployment of conversion proceeds, as part of its review of your conversion application. In making its determination, OTS will consider how you have addressed the requirements of § 563b.105 in the aggregate, and not as individual criteria.

(b) You must file your business plan with the Regional Office. OTS may request additional information, if necessary, to support its determination under paragraph (a) of this section. You must also file your business plan as a confidential exhibit to the Form AC.

(c) If OTS approves your application for conversion and you complete your conversion, you must operate within the parameters of your business plan. You must obtain the prior written approval of the Regional Director for any material deviations from your business plan.

§ 563b.120 May I discuss my plans to convert with others?

(a) You may discuss information about your conversion with individuals that you authorize to prepare documents for your conversion.

(b) Except as permitted under paragraph (a) of this section, you must keep all information about your conversion confidential until your board of directors adopts your plan of conversion.

(c) If you violate this section, OTS may require you to take remedial action. For example, OTS may require you to take any or all of the following actions:

(1) Publicly announce that you are considering a conversion;

(2) Set an eligibility record date acceptable to OTS;

(3) Limit the subscription rights of any person who violates or aids a violation of this section; or

(4) Take any other action to assure that your conversion is fair and equitable.

Plan of Conversion

§ 563b.125 Must my board of directors adopt a plan of conversion?

Prior to filing an application for conversion, your board of directors must adopt a plan of conversion that conforms to §§ 563b.320 through 563b.395 (''Offers and Sales of Stock''). Your board of directors must adopt the plan by at least a two-thirds vote. Your plan of conversion is required, under § 563b.150, to be included in your conversion application.

§ 563b.130 What must I include in my plan of conversion?

You must include the information included in §§ 563b.320 through 563b.395 (''Offers and Sales of Stock'') in your plan of conversion. OTS may require you to delete or revise any provision in your plan of conversion if OTS determines the provision is inequitable; is detrimental to you, your account holders, or other savings associations; or is contrary to public interest.

§ 563b.135 How do I notify my members that my board of directors approved a plan of conversion?

(a) *Notice.* You must promptly notify your members that your board of directors adopted a plan of conversion and that a copy of the plan is available for the members' inspection in your home office and in your branch offices. You must mail a letter to each member or publish a notice in the local newspaper in every local community where you have an office. You may also issue a press release. OTS may require broader publication, if necessary, to ensure adequate notice to your members.

(b) *Contents of notice.* You may include any of the following statements and descriptions in your letter, notice, or press release.

(1) Your board of directors adopted a proposed plan to convert from a mutual to a stock savings institution.

(2) You will send your members a proxy statement with detailed information on the proposed conversion before you convene a members' meeting to vote on the conversion.

(3) Your members will have an opportunity to approve or disapprove the proposed conversion at a meeting. At least a majority of the eligible votes must approve the conversion.

(4) You will not vote existing proxies to approve or disapprove the conversion. You will solicit new proxies for voting on the proposed conversion.

(5) OTS, and in the case of a state-chartered savings association, the appropriate state regulator, must approve the conversion before the conversion will be effective. Your members will have an opportunity to file written comments, including objections and materials supporting the objections, with OTS.

(6) The IRS must issue a favorable tax ruling, or a tax expert must issue an appropriate tax opinion, on the tax consequences of your conversion before OTS will approve the conversion. The ruling or opinion must indicate the conversion will be a tax-free reorganization.

(7) OTS, and in the case of a state-chartered savings association, the appropriate state regulator, might not approve the conversion, and the IRS or a tax expert might not issue a favorable tax ruling or tax opinion.

(8) Savings account holders will continue to hold accounts in the converted savings association with the same dollar amounts, rates of return, and general terms as existing deposits. FDIC will continue to insure the accounts.

(9) Your conversion will not affect borrowers' loans, including the amount, rate, maturity, security, and other contractual terms.

(10) Your business of accepting deposits and making loans will continue without interruption.

(11) Your current management and staff will continue to conduct current services for depositors and borrowers under current policies and in existing offices.

(12) You may continue to be a member of the Federal Home Loan Bank System.

(13) You may substantively amend your proposed plan of conversion before the members' meeting.

(14) You may terminate the proposed conversion.

(15) After OTS, and in the case of a state-chartered savings association, the

appropriate state regulator, approves the proposed conversion, you will send proxy materials providing additional information. After you send proxy materials, members may telephone or write to you with additional questions.

(16) The proposed record date for determining the eligible account holders who are entitled to receive subscription rights to purchase your shares.

(17) A brief description of the circumstances under which supplemental eligible account holders will receive subscription rights to purchase your shares.

(18) A brief description of how voting members may participate in the conversion.

(19) A brief description of how directors, officers, and employees will participate in the conversion.

(20) A brief description of the proposed plan of conversion.

(21) The par value (if any) and approximate number of shares you will issue and sell in the conversion.

(c) *Other requirements.* (1) You may not solicit proxies, provide financial statements, describe the benefits of conversion, or estimate the value of your shares upon conversion in the letter, notice, or press release.

(2) If you respond to inquiries about the conversion, you may address only the matters listed in paragraph (b) of this section.

§ 563b.140 May I amend my plan of conversion?

You may amend your plan of conversion before you solicit proxies. After you solicit proxies, you may amend your plan of conversion only if OTS concurs.

Filing Requirements

§ 563b.150 What must I include in my application for conversion?

(a) Your application for conversion must include all of the following information.

(1) Your plan of conversion.

(2) Pricing materials meeting the requirements of § 563b.200(b).

(3) Proxy soliciting materials under § 563b.270, including:

(i) A preliminary proxy statement with signed financial statements;

(ii) A form of proxy meeting the requirements of § 563b.255; and

(iii) Any additional proxy soliciting materials, including press releases, personal solicitation instructions, radio or television scripts that you plan to use or furnish to your members, and a legal opinion indicating that any marketing materials comply with all applicable securities laws.

(4) An offering circular described in § 563b.300.

(5) The documents and information required by Form AC. You may obtain Form AC from OTS Washington and Regional Offices (see § 516.40 of this chapter) and OTS's website (*www.ots.treas.gov*).

(6) Where indicated, written consents, signed and dated, of any accountant, attorney, investment banker, appraiser, or other professional who prepared, reviewed, passed upon, or certified any statement, report, or valuation for use. *See* Form AC, instruction B(7).

(7) Your business plan, submitted as a separately bound, confidential exhibit. *See* § 563b.160.

(8) Any additional information OTS requests.

(b) OTS will not accept for filing, and will return, any application for conversion that is improperly executed, materially deficient, substantially incomplete, or that provides for unreasonable conversion expenses.

§ 563b.155 How do I file my application for conversion?

You must file seven copies of your application for conversion on Form AC. You must file the original and three conformed copies with the Applications Filing Room in Washington, and three conformed copies with the appropriate Regional Office at the addresses in § 516.40 of this chapter.

§ 563b.160 May I keep portions of my application for conversion confidential?

(a) OTS makes all filings under this part available to the public, but may keep portions of your application for conversion confidential under paragraph (b) of this section.

(b) You may request OTS to keep portions of your application confidential. To do so, you must separately bind and clearly designate as ''confidential'' any portion of your application for conversion that you deem confidential. You must provide a written statement specifying the grounds supporting your request for confidentiality. OTS will not treat as confidential the portion of your application describing how you plan to meet your Community Reinvestment Act (CRA) objectives. The CRA portion of your application may not incorporate by reference information contained in the confidential portion of your application.

(c) OTS will determine whether confidential information must be made available to the public under 5 U.S.C. 552 and part 505 of this chapter. OTS will advise you before it makes information you designated as ''confidential'' available to the public.

§ 563b.165 How do I amend my application for conversion?

To amend your application for conversion, you must:

(a) File an amendment with an appropriate facing sheet;

(b) Number each amendment consecutively;

(c) Respond to all issues raised by OTS; and

(d) Demonstrate that the amendment conforms to all applicable regulations.

Notice of Filing of Application and Comment Process

§ 563b.180 How do I notify the public that I filed an application for conversion?

(a) You must publish a public notice of the application under the procedures in § 516.55 of this chapter, except that you must publish your notice within three days before or after you file your application for conversion. You must simultaneously prominently post the notice in your home office and all branch offices. Your notice must include the following information:

(1) You filed an application for conversion with OTS;

(2) You delivered copies of the application to OTS and to the Regional Office, including the addresses of the applicable OTS offices; and

(3) A statement that anyone may file written comments, including objections to the plan of conversion and materials supporting the objections, within 20 days. You must include instructions regarding how a person may file a comment.

(b) Promptly after publication, you must file four copies of any public notice and an affidavit of publication from each publisher. You must file the original and one copy with the Applications Filing Room in Washington, and two copies with the appropriate Regional Office at the addresses in § 516.40 of this chapter.

(c) If OTS does not accept your application for conversion under § 563b.200 and requires you to file a new application, you must publish and post a new notice and allow an additional 20 days for comment.

§ 563b.185 How may a person comment on my application for conversion?

Anyone may submit a written comment supporting or opposing your application for conversion with OTS. To do so, commenters must file within 20 days after you notify the public under § 563b.180. A commenter must file the original and one copy of any comments with the Applications Filing Room in Washington, and two copies with the appropriate Regional Office at the addresses in § 516.40 of this chapter.

OTS Review of the Application for Conversion

§ 563b.200 What actions may OTS take on my application?

(a) OTS may approve your application for conversion only if:

(1) Your conversion complies with this part;

(2) You will meet your regulatory capital requirements under part 567 of this chapter after the conversion; and

(3) Your conversion will not result in a taxable reorganization under the Internal Revenue Code of 1986, as amended.

(b) OTS will review the appraisal required by § 563b.150(a)(2) in determining whether to approve your application. OTS will review the appraisal under the following requirements.

(1) Independent persons experienced and expert in corporate appraisal, and acceptable to OTS, must prepare the appraisal report.

(2) An affiliate of the appraiser may serve as an underwriter or selling agent, if you ensure that the appraiser is separate from the underwriter or selling agent affiliate and the underwriter or selling agent affiliate does not make recommendations or affect the appraisal.

(3) The appraiser may not receive any fee in connection with the conversion other than for appraisal services.

(4) The appraisal report must include a complete and detailed description of the elements of the appraisal, a justification for the appraisal methodology, and sufficient support for the conclusions.

(5) If the appraisal is based on a capitalization of your pro forma income, it must indicate the basis for determining the income to be derived from the sale of shares, and demonstrate that the earnings multiple used is appropriate, including future earnings growth assumptions.

(6) If the appraisal is based on a comparison of your shares with outstanding shares of existing stock associations, the existing stock associations must be reasonably comparable in size, market area, competitive conditions, risk profile, profit history, and expected future earnings.

(7) OTS may decline to process the application for conversion and deem it materially deficient or substantially incomplete if the initial appraisal report is materially deficient or substantially incomplete.

(8) You may not represent or imply that OTS approved the appraisal.

(c) OTS will review your compliance record under part 563e of this chapter and your business plan to determine how you will serve the convenience and needs of your communities after the conversion.

(1) Based on this review, OTS may approve your application, deny your application, or approve your application on the condition that you will improve your CRA performance or that you will address the particular credit or lending needs of the communities that you will serve.

(2) OTS may deny your application if your business plan does not demonstrate that your proposed use of conversion proceeds will help you to meet the credit and lending needs of the communities that you will serve.

(d) OTS may request that you amend your application if further explanation is necessary, material is missing, or material must be corrected.

(e) OTS will deny your application if the application does not meet the requirements of this subpart, unless OTS waives the requirement under § 563b.5(c).

§ 563b.205 May a court review OTS's final action on my conversion?

(a) Any person aggrieved by OTS's final action on your application for conversion may ask the court of appeals of the United States for the circuit in which the principal office or residence of such person is located, or the U.S. Court of Appeals for the District of Columbia Circuit, to review the action under 12 U.S.C. 1464(i)(2)(B).

(b) To obtain court review of the action, this statute requires the aggrieved person to file a written petition requesting that the court modify, terminate, or set aside the final OTS action. The aggrieved person must file the petition with the court within the later of 30 days after OTS publishes notice of OTS's final action in the **Federal Register** or 30 days after you mail the proxy statement to your members under § 563b.235.

Vote by Members

§ 563b.225 Must I submit the plan of conversion to my members for approval?

(a) After OTS approves your plan of conversion, you must submit your plan of conversion to your members for approval. You must obtain this approval at a special meeting, unless you are a state-chartered savings association and state law requires you to obtain approval at an annual meeting.

(b) Your members must approve your plan of conversion by a majority of the total outstanding votes, unless you are a state-chartered savings association and state law prescribes a higher percentage.

(c) Your members may vote in person or by proxy.

(d) You may notify eligible account holders or supplemental eligible account holders who are not voting members of your proposed conversion. You may include only the information in § 563b.135 in your notice.

§ 563b.230 Who is eligible to vote?

You determine members' eligibility to vote by setting a voting record date. You must set a voting record date that is not more than 60 days nor less than 20 days before your meeting, unless you are a state-chartered savings association and state law requires a different voting record date.

§ 563b.235 How must I notify my members of the meeting?

(a) You must notify your members of the meeting to consider your conversion by sending the members a proxy statement authorized by OTS.

(b) You must notify your members 20 to 45 days before your meeting, unless you are a state-chartered savings association and state law requires a different notice period.

(c) You must also notify each beneficial holder of an account held in a fiduciary capacity:

(1) If you are a federal association and the name of the beneficial holder is disclosed on your records; or

(2) If you are a state-chartered association and the beneficial holder possesses voting rights under state law.

§ 563b.240 What must I submit to OTS after the members' meeting?

Promptly after the members' meeting, you must file all of the following information with OTS:

(a) A certified copy of each adopted resolution on the conversion.

(b) The total votes eligible to be cast.

(c) The total votes represented in person or by proxy.

(d) The total votes cast in favor of and against each matter.

(e) The percentage of votes necessary to approve each matter.

(f) An opinion of counsel that you conducted the members' meeting in compliance with all applicable state or federal laws and regulations.

(g) Promptly after completion of the conversion, you must submit an opinion of counsel that you complied with all laws applicable to the conversion.

Proxy Solicitation

§ 563b.250 Who must comply with these proxy solicitation provisions?

(a) You must comply with these proxy solicitation provisions when you provide proxy solicitation material to

members for the meeting to vote on your plan of conversion.

(b) Your members must comply with these proxy solicitation provisions when they provide proxy solicitation materials to members for the meeting to vote on your conversion, except where:

(1) The member solicits 50 people or fewer and does not solicit proxies on your behalf; or

(2) The member solicits proxies through newspaper advertisements after your board adopts the plan of conversion. The newspaper advertisement may include only the following information:

(i) Your name;

(ii) The reason for the advertisement;

(iii) The proposal or proposals to be voted upon;

(iv) Where a member may obtain a copy of the proxy solicitation material; and

(v) A request for your members to vote at the meeting.

§ 563b.255 What must the form of proxy include?

The form of proxy must include all of the following:

(a) A statement in bold face type stating whether management is soliciting the proxy.

(b) Blank spaces where the member must date and sign the proxy.

(c) Clear and impartial identification of each matter or group of related matters that members will vote upon. You must include any proposed charitable contribution as an item to be voted on separately.

(d) The phrase ''Revocable Proxy'' in bold face type (at least 18 point).

(e) A description of any charter or state law requirement that restricts or conditions votes by proxy.

(f) An acknowledgment that the member received a proxy statement before he or she signed the form of proxy.

(g) The date, time, and the place of the meeting, when available.

(h) A way for the member to specify by ballot whether he or she approves or disapproves of each matter that members will vote upon.

(i) A statement that management will vote the proxy in accordance with the member's specifications.

(j) A statement in bold face type indicating how management will vote the proxy if the member does not specify a choice for a matter.

§ 563b.260 May I use previously executed proxies?

You may not use previously executed proxies for the plan of conversion vote. If members consider your plan of conversion at an annual meeting, you may vote proxies obtained through other proxy solicitations only on matters not related to your plan of conversion.

§ 563b.265 How may I use proxies executed under this part?

You may vote a proxy obtained under this part on matters that are incidental to the conduct of the meeting. You may not vote a proxy obtained under this subpart at any meeting other than the meeting (or any adjournment of the meeting) to vote on your plan of conversion.

§ 563b.270 What must I include in my proxy statement?

(a) *Content requirements.* You must prepare your proxy statement in compliance with this part and Form PS. You may obtain Form PS from OTS Washington and Regional Offices (see § 516.40 of this chapter) and OTS's website (*http://www.ots.treas.gov*).

(b) *Other requirements.* (1) OTS will review your proxy solicitation material when it reviews the application for conversion and will authorize the use of proxy solicitation material.

(2) You must provide an authorized written proxy statement to your members before or at the same time you provide any other soliciting material. You must mail authorized proxy solicitation material to your members within ten days after OTS authorizes the solicitation.

§ 563b.275 How do I file revised proxy materials?

(a) You must file revised proxy materials as an amendment to your application for conversion. *See* § 563b.155 for where to file.

(b) To revise your proxy solicitation materials, you must file:

(1) Seven copies of your revised proxy materials as required by Form PS;

(2) Seven copies of your revised form of proxy, if applicable; and

(3) Seven copies of any additional proxy solicitation material subject to § 563b.270.

(c) You must mark four of the seven required copies to clearly indicate changes from the prior filing.

(d) You must file seven definitive copies of all proxy solicitation material, in the form in which you furnish the material to your members. You must file no later than the date that you send or give the proxy solicitation material to your members. You must indicate the date that you will release the materials.

(e) Unless OTS requests you to do so, you do not have to file copies of replies to inquiries from your members or copies of communications that merely request members to sign and return proxy forms.

§ 563b.280 Must I mail a member's proxy solicitation material?

(a) You must mail the member's authorized proxy solicitation material if:

(1) Your board of directors adopted a plan of conversion;

(2) A member requests in writing that you mail proxy solicitation material;

(3) OTS has authorized the member's proxy solicitation; and

(4) The member agrees to defray your reasonable expenses.

(b) As soon as practicable after you receive a request under paragraph (a) of this section, you must mail or otherwise furnish the following information to the member:

(1) The approximate number of members that you solicited or will solicit, or the approximate number of members of any group of account holders that the member designates; and

(2) The estimated cost of mailing the proxy solicitation material for the member.

(c) You must mail authorized proxy solicitation material to the designated members promptly after the member furnishes the materials, envelopes (or other containers), and postage (or payment for postage) to you.

(d) You are not responsible for the content of a member's proxy solicitation material.

(e) A member may furnish other members its own proxy solicitation material, authorized by OTS, subject to the rules in this section.

§ 563b.285 What solicitations are prohibited?

(a) *False or misleading statements.* (1) No one may use proxy solicitation material for the members' meeting if the material contains any statement which, considering the time and the circumstances of the statement:

(i) Is false or misleading with respect to any material fact;

(ii) Omits any material fact that is necessary to make the statements not false or misleading; or

(iii) Omits any material fact that is necessary to correct a statement in an earlier communication that has become false or misleading.

(2) No one may represent or imply that OTS determined that the proxy solicitation material is accurate, complete, not false or not misleading, or passed upon the merits of or approved any proposal.

(b) *Other prohibited solicitations.* No person may solicit:

(1) An undated or post-dated proxy;

(2) A proxy that states it will be dated after the date it is signed by a member;

(3) A proxy that is not revocable at will by the member; or

(4) A proxy that is part of another document or instrument.

§ 563b.290 What will OTS do if a solicitation violates these prohibitions?

(a) If a solicitation violates § 563b.285, OTS may require remedial measures, including:

(1) Correction of the violation by a retraction and a new solicitation;

(2) Rescheduling the members' meeting; or

(3) Any other actions necessary to ensure a fair vote.

(b) OTS may also bring an enforcement action against the violator.

§ 563b.295 Will OTS require me to re-solicit proxies?

If you amend your application for conversion, OTS may require you to re-solicit proxies for your members' meeting as a condition of approval of the amendment.

Offering Circular

§ 563b.300 What must happen before OTS declares my offering circular effective?

(a) You must prepare and file your offering circular with OTS in compliance with this part and Form OC and, where applicable, part 563g of this chapter. Section 563b.155 governs where to file your offering circular. You may obtain Form OC from OTS Washington and Regional Offices (see § 516.40 of this chapter) and OTS's website (http://www.ots.treas.gov).

(b) You must condition your stock offering upon the members' approval of your plan of conversion.

(c) OTS will review the Form OC and may comment on the included disclosures and financial statements.

(d) You must file seven copies of each revised offering circular, final offering circular, and any post-effective amendment to the final offering circular.

(e) OTS will not approve the adequacy or accuracy of the offering circular or the disclosures.

(f) After you satisfactorily address OTS's concerns, you must request OTS to declare your Form OC effective for a time period. The time period may not exceed the maximum time period for the completion of the sale of all of your shares under § 563b.400.

§ 563b.305 When may I distribute the offering circular?

(a) You may distribute a preliminary offering circular at the same time as or after you mail the proxy statement to your members.

(b) You may not distribute an offering circular until OTS declares it effective. You must distribute the offering circular in accordance with this part.

(c) You must distribute your offering circular to persons listed in your plan of conversion within 10 days after OTS declares it effective.

§ 563b.310 When must I file a post-effective amendment to the offering circular?

(a) You must file a post-effective amendment to the offering circular with OTS when a material event or change of circumstance occurs.

(b) After OTS declares the post-effective amendment effective, you must immediately deliver the amendment to each person who subscribed for or ordered shares in the offering.

(c) Your post-effective amendment must indicate that each person may increase, decrease, or rescind their subscription or order.

(d) The post-effective offering period must remain open no less than 10 days nor more than 20 days, unless OTS approves a longer rescission period.

Offers and Sales of Stock

§ 563b.320 Who has priority to purchase my conversion shares?

You must offer to sell your shares in the following order:

(a) Eligible account holders.

(b) Tax-qualified employee stock ownership plans.

(c) Supplemental eligible account holders.

(d) Other voting members who have subscription rights.

(e) Your community, your community and the general public, or the general public.

§ 563b.325 When may I offer to sell my conversion shares?

(a) You may offer to sell your conversion shares after OTS approves your conversion, authorizes your proxy statement, and declares your offering circular effective.

(b) The offer may commence at the same time you start the proxy solicitation of your members.

§ 563b.330 How do I price my conversion shares?

(a) You must sell your conversion shares at a uniform price per share and at a total price that is equal to the estimated pro forma market value of your shares after you convert.

(b) The maximum price must be no more than 15 percent above the midpoint of the estimated price range in your offering circular.

(c) The minimum price must be no more than 15 percent below the midpoint of the estimated price range in your offering circular.

(d) If OTS permits, you may increase the maximum price of conversion shares sold. The maximum price, as adjusted, must be no more than 15 percent above the maximum price computed under paragraph (b) of this section.

(e) The maximum price must be between $5 and $50 per share.

(f) You must include the estimated price in any preliminary offering circular.

§ 563b.335 How do I sell my conversion shares?

(a) You must distribute order forms to all eligible account holders, supplemental eligible account holders, and other voting members to enable them to subscribe for the conversion shares they are permitted under the plan of conversion. You may either send the order forms with your offering circular or after you distribute your offering circular.

(b) You may sell your conversion shares in a community offering, a public offering, or both. You may begin the community offering, the public offering, or both at any time during the subscription offering or upon conclusion of the subscription offering.

(c) You may pay underwriting commissions (including underwriting discounts). OTS may object to the payment of unreasonable commissions. You may reimburse an underwriter for accountable expenses in a subscription offering if the public offering is limited. If no public offering occurs, you may pay an underwriter a consulting fee. OTS may object to the payment of unreasonable consulting fees.

(d) If you conduct the community offering, the public offering, or both at the same time as the subscription offering, you must fill all subscription orders first.

(e) You must prepare your order form in compliance with this part and Form OF. You may obtain Form OF from OTS Washington and Regional Offices (see § 516.40 of this chapter) and OTS's website (*http://www.ots.treas.gov*).

§ 563b.340 What sales practices are prohibited?

(a) In connection with offers, sales, or purchases of conversion shares under this part, you and your directors, officers, agents, or employees may not:

(1) Employ any device, scheme, or artifice to defraud;

(2) Obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary to make the statements, in light of the circumstances under which they were made, not misleading; or

(3) Engage in any act, transaction, practice, or course of business that operates or would operate as a fraud or deceit upon a purchaser or seller.

(b) During your conversion, no person may:

(1) Transfer, or enter into any agreement or understanding to transfer, the legal or beneficial ownership of subscription rights for your conversion shares or the underlying securities to the account of another;

(2) Make any offer, or any announcement of an offer, to purchase any of your conversion shares from anyone but you; or

(3) Knowingly acquire more than the maximum purchase limitations established in your plan of conversion.

(c) The restrictions in paragraphs (b)(1) and (b)(2) of this section do not apply to offers for more than 10 percent of any class of conversion shares by:

(1) An underwriter or a selling group, acting on your behalf, that makes the offer with a view toward public resale; or

(2) One or more of your tax-qualified employee stock ownership plans so long as the plan or plans do not beneficially own more than 25 percent of any class of your equity securities in the aggregate.

(d) If any person is found to have violated the restrictions in paragraphs (b)(1) and (b)(2) of this section, they may face prosecution or other legal action.

§ 563b.345 How may a subscriber pay for my conversion shares?

(a) A subscriber may purchase conversion shares with cash, by a withdrawal from a savings account, or a withdrawal from a certificate of deposit. If a subscriber purchases shares by a withdrawal from a certificate of deposit, you may not assess a penalty for the withdrawal.

(b) You may not extend credit to any person to purchase your conversion shares.

§ 563b.350 Must I pay interest on payments for conversion shares?

(a) You must pay interest from the date you receive a payment for conversion shares until the date you complete or terminate the conversion. You must pay interest at no less than your passbook rate for amounts paid in cash, check, or money order.

(b) If a subscriber withdraws money from a savings account to purchase conversion shares, you must pay interest on the payment until you complete or terminate the conversion as if the withdrawn amount remained in the account.

(c) If a depositor fails to maintain the applicable minimum balance requirement because he or she withdraws money from a certificate of deposit to purchase conversion shares, you may cancel the certificate and pay interest at no less than your passbook rate on any remaining balance.

§ 563b.355 What subscription rights must I give to each eligible account holder and each supplemental eligible account holder?

(a) You must give each eligible account holder subscription rights to purchase conversion shares in an amount equal to the greater of:

(1) The maximum purchase limitation established for the community offering or the public offering under § 563b.395;

(2) One-tenth of one percent of the total stock offering; or

(3) Fifteen times the following number: the total number of conversion shares that you will issue, multiplied by the following fraction. The numerator is the total qualifying deposit of the eligible account holder. The denominator is the total qualifying deposits of all eligible account holders. You must round down the product of this multiplied fraction to the next whole number.

(b) You must give subscription rights to purchase shares to each supplemental eligible account holder in the same amount as described in paragraph (a) of this section, except that you must compute the fraction described in paragraph (a)(3) of this section as follows: The numerator is the total qualifying deposit of the supplemental eligible account holder. The denominator is the total qualifying deposits of all supplemental eligible account holders.

§ 563b.360 Are my officers, directors, and their associates eligible account holders?

Your officers, directors, and their associates may be eligible account holders. However, if an officer, director, or his or her associate receives subscription rights based on increased deposits in the year before the eligibility record date, you must subordinate subscription rights for these deposits to subscription rights exercised by other eligible account holders.

§ 563b.365 May other voting members purchase conversion shares in the conversion?

(a) You must give rights to purchase your conversion shares in the conversion to voting members who are neither eligible account holders nor supplemental eligible account holders. You must allocate rights to each voting member that are equal to the greater of:

(1) The maximum purchase limitation established for the community offering and the public offering under § 563b.395; or

(2) One-tenth of one percent of the total stock offering.

(b) You must subordinate the voting members' rights to the rights of eligible account holders, tax-qualified employee stock ownership plans, and supplemental eligible account holders.

§ 563b.370 Does OTS limit the aggregate purchases by officers, directors, and their associates?

(a) When you convert, your officers, directors, and their associates may not purchase, in the aggregate, more than the following percentage of your total stock offering:

Institution size	Officer and director purchases (percent)
$50,000,000 or less	35
$50,000,001—100,000,000	34
$100,000,001—150,000,000	33
$150,000,001—200,000,000	32
$200,000,001—250,000,000	31
$250,000,001—300,000,000	30
$300,000,001—350,000,000	29
$350,000,001—400,000,000	28
$400,000,001 450,000,000	27
$450,000,001—500,000,000	26
Over $500,000,000	25

(b) The purchase limitations in this section do not apply to shares held in tax-qualified employee stock benefit plans that are attributable to your officers, directors, and their associates.

§ 563b.375 How do I allocate my conversion shares if my shares are oversubscribed?

(a) If your conversion shares are oversubscribed by your eligible account holders, you must allocate shares among the eligible account holders so that each, to the extent possible, may purchase 100 shares.

(b) If your conversion shares are oversubscribed by your supplemental eligible account holders, you must allocate shares among the supplemental eligible account holders so that each, to the extent possible, may purchase 100 shares.

(c) If a person is an eligible account holder and a supplemental eligible account holder, you must include the eligible account holder's allocation in determining the number of conversion shares that you may allocate to the person as a supplemental eligible account holder.

(d) For conversion shares that you do not allocate under paragraphs (a) and (b) of this section, you must allocate the shares among the eligible or supplemental eligible account holders

equitably, based on the amounts of qualifying deposits. You must describe this method of allocation in your plan of conversion.

(e) If shares remain after you have allocated shares as provided in paragraphs (a) and (b) of this section, and if your voting members oversubscribe, you must allocate your conversion shares among those members equitably. You must describe the method of allocation in your plan of conversion.

§ 563b.380 May my employee stock ownership plan purchase conversion shares?

(a) Your tax-qualified employee stock ownership plan may purchase up to 10 percent of the total offering of your conversion shares.

(b) If OTS approves a revised stock valuation range as described in § 563b.330(e), and the final conversion stock valuation range exceeds the former maximum stock offering range, you may allocate conversion shares to your tax-qualified employee stock ownership plan, up to the 10 percent limit in paragraph (a) of this section.

(c) If your tax-qualified employee stock ownership plan chooses not to purchase stock in the offering, it may, with prior OTS approval and appropriate disclosure in your offering circular, purchase stock in the open market, or purchase authorized but unissued conversion shares.

(d) You may include stock contributed to a charitable organization in the conversion in the calculation of the total offering of conversion shares under paragraphs (a) and (b) of this section, unless OTS objects on supervisory grounds.

§ 563b.385 May I impose any purchase limitations?

(a) You may limit the number of shares that any person, group of associated persons, or persons otherwise acting in concert, may subscribe to between one percent and five percent of the total stock sold.

(b) If you set a limit of five percent under paragraph (a) of this section, you may modify that limit with OTS approval to provide that any person, group of associated persons, or persons otherwise acting in concert subscribing for five percent, may purchase between five and ten percent as long as the aggregate amount that the subscribers purchase does not exceed 10 percent of the total stock offering.

(c) You may require persons exercising subscription rights to purchase a minimum number of conversion shares. The minimum number of shares must equal the lesser of the number of shares obtained by a $500 subscription or 25 shares.

(d) In setting purchase limitations under this section, you may not aggregate conversion shares attributed to a person in your tax-qualified employee stock ownership plan with shares purchased directly by, or otherwise attributable to, that person.

§ 563b.390 Must I provide a purchase preference to persons in my local community?

(a) In your subscription offering, you may give a purchase preference to eligible account holders, supplemental eligible account holders, and voting members residing in your local community.

(b) In your community offering, you must give a purchase preference to natural persons residing in your local community.

§ 563b.395 What other conditions apply when I offer conversion shares in a community offering, a public offering, or both?

(a) You must offer and sell your stock to achieve a widespread distribution of the stock.

(b) If you offer shares in a community offering, a public offering, or both, you must first fill orders for your stock up to a maximum of two percent of the conversion stock on a basis that will promote a widespread distribution of stock. You must allocate any remaining shares on an equal number of shares per order basis until you fill all orders.

Completion of the Offering

§ 563b.400 When must I complete the sale of my stock?

You must complete all sales of your stock within 45 calendar days after the last day of the subscription period, unless the offering is extended under § 563b.405.

§ 563b.405 How do I extend the offering period?

(a) You must request, in writing, an extension of any offering period.

(b) OTS may grant extensions of time to sell your shares. OTS will not grant any single extension of more than 90 days.

(c) If OTS grants your request for an extension of time, you must provide a post-effective amendment to the offering circular under § 563b.310 to each person who subscribed for or ordered stock. Your amendment must indicate that OTS extended the offering period and that each person who subscribed for or ordered stock may increase, decrease, or rescind their subscription or order within the time remaining in the extension period.

Completion of the Conversion

§ 563b.420 When must I complete my conversion?

(a) You must complete the conversion within 24 months of the date that your members approve the conversion. Once OTS approves the conversion, it will not permit extension of the completion date.

(b) Your conversion is complete on the date that you accept the offers for your stock.

§ 563b.425 Who may terminate the conversion?

(a) Your members may terminate the conversion by failing to approve the conversion at your members' meeting.

(b) You may terminate the conversion before your members' meeting.

(c) You may terminate the conversion after the members' meeting only if OTS concurs.

§ 563b.430 What happens to my old charter?

(a) If you are a federally chartered mutual savings association or savings bank, and you convert to a federally chartered stock savings association or savings bank, you must apply to OTS to amend your charter and bylaws consistent with part 552 of this chapter, as part of your application for conversion. You may only include OTS pre-approved anti-takeover provisions in your amended charter and bylaws. *See* 12 CFR 552.4(b)(8). OTS will state the effective date of your charter amendments in its approval of the conversion.

(b) If you are a federally chartered mutual savings association or savings bank and you convert to a state-chartered stock savings association under this part, you must surrender your federal charter to OTS for cancellation promptly after the state issues your charter. You must promptly file a copy of your new state stock charter with OTS.

(c) If you are a state-chartered mutual savings association or savings bank, and you convert to a federally chartered stock savings association or savings bank, you must apply to OTS for a new charter and bylaws consistent with part 552 of this chapter. You may only include OTS pre-approved anti-takeover provisions in your charter and bylaws. *See* 12 CFR 552.4(b)(8). OTS will state the effective date of your charter amendments with its approval of the conversion.

(d) Your new or amended charter must require you to establish and maintain a liquidation account for

eligible and supplemental eligible account holders under § 563b.450.

§ 563b.435 What happens to my corporate existence after conversion?

Your corporate existence will continue following your conversion, unless you convert to a state-chartered stock savings association and state law prescribes otherwise.

§ 563b.440 What voting rights must I provide to stockholders after the conversion?

You must provide your stockholders with exclusive voting rights, except as provided in § 563b.445(c).

§ 563b.445 What must I provide my savings account holders?

(a) You must provide each savings account holder, without payment, a withdrawable savings account or accounts in the same amount and under the same terms and conditions as their accounts before your conversion.

(b) You must provide a liquidation account for each eligible and supplemental eligible account holder under § 563b.450.

(c) If you are a state-chartered savings association and state law requires you to provide voting rights to savings account holders or borrowers, your charter must:

(1) Limit these voting rights to the minimum required by state law; and

(2) Require you to solicit proxies from the savings account holders and borrowers in the same manner that you solicit proxies from your stockholders.

Liquidation Account

§ 563b.450 What is a liquidation account?

(a) A liquidation account represents the potential interest of eligible account holders and supplemental eligible account holders in your net worth at the time of conversion. You must maintain a sub-account to reflect the interest of each account holder.

(b) Before you may provide a liquidation distribution to common stockholders, you must give a liquidation distribution to those eligible account holders and supplemental eligible account holders who hold savings accounts from the time of conversion until liquidation.

(c) You may not record the liquidation account in your financial statements. You must disclose the liquidation account in the footnotes to your financial statements.

§ 563b.455 What is the initial balance of the liquidation account?

The initial balance of the liquidation account is your net worth in the statement of financial condition included in the final offering circular.

§ 563b.460 How do I determine the initial balances of liquidation sub-accounts?

(a)(1) You determine the initial sub-account balance for a savings account held by an eligible account holder by multiplying the initial balance of the liquidation account by the following fraction: The numerator is the qualifying deposit in the savings account expressed in dollars on the eligibility record date. The denominator is total qualifying deposits of all eligible account holders on that date.

(2) You determine the initial sub-account balance for a savings account held by a supplemental eligible account holder by multiplying the initial balance of the liquidation account by the following fraction: The numerator is the qualifying deposit in the savings account expressed in dollars on the supplemental eligibility record date. The denominator is total qualifying deposits of all supplemental eligible account holders on that date.

(3) If an account holder holds a savings account on the eligibility record date and a separate savings account on the supplemental eligibility record date, you must compute separate sub-accounts for the qualifying deposits in the savings account on each record date.

(b) You may not increase the initial sub-account balances. You must decrease the initial balance under § 563b.470 as depositors reduce or close their accounts.

§ 563b.465 Do account holders retain any voting rights based on their liquidation sub-accounts?

Eligible account holders or supplemental eligible account holders do not retain any voting rights based on their liquidation sub-accounts.

§ 563b.470 Must I adjust liquidation sub-accounts?

(a)(1) You must reduce the balance of an eligible account holder's or supplemental eligible account holder's sub-account if the deposit balance in the account holder's savings account at the close of business on any annual closing date, which for purposes of this section is your fiscal year end, after the relevant eligibility record dates is less than:

(i) The deposit balance in the account holder's savings account at the close of business on any other annual closing date after the relevant eligibility record date; or

(ii) The qualifying deposits in the account holder's savings account on the relevant eligibility record date.

(2) The reduction must be proportionate to the reduction in the deposit balance.

(b) If you reduce the balance of a liquidation sub-account, you may not subsequently increase it if the deposit balance increases.

(c) You are not required to adjust the liquidation account and sub-account balances at each annual closing date if you maintain sufficient records to make the computations if a liquidation subsequently occurs.

(d) You must maintain the liquidation sub-account for each account holder as long as the account holder maintains an account with the same social security number.

(e) If there is a complete liquidation, you must provide each account holder with a liquidation distribution in the amount of the sub-account balance.

§ 563b.475 What is a liquidation?

(a) A liquidation is a sale of your assets and settlement of your liabilities with the intent to cease operations and close. Upon liquidation, you must return your charter to the governmental agency that issued it. The government agency must cancel your charter.

(b) A merger, consolidation, or similar combination or transaction with another depository institution, is not a liquidation. If you are involved in such a transaction, the surviving institution must assume the liquidation account.

§ 563b.480 Does the liquidation account affect my net worth?

The liquidation account does not affect your net worth.

§ 563b.485 What provision must I include in my new federal charter?

If you convert to federal stock form, you must include the following provision in your new charter: ''Liquidation Account. Under OTS regulations, the association must establish and maintain a liquidation account for the benefit of its savings account holders as of _____. If the association undergoes a complete liquidation, it must comply with OTS regulations with respect to the amount and priorities on liquidation of each of the savings account holder's interests in the liquidation account. A savings account holder's interest in the liquidation account does not entitle the savings account holder to any voting rights.''

Post-Conversion

§ 563b.500 May I implement a stock option plan or management or employee stock benefit plan?

(a) You may implement a stock option plan or management or employee stock benefit plan within 12 months after your conversion, if you meet all of the following requirements.

(1) You disclose the plans in your proxy statement and offering circular

and indicate in the offering circular that there will be a separate vote on the plans at least six months after the conversion.

(2) You do not grant stock options under your stock option plan in excess of 10 percent of shares that you issued in the conversion.

(3) You do not permit your management stock benefit plans, in the aggregate, to hold more than three percent of the shares that you issued in the conversion. However, if you have tangible capital of 10 percent or more following the conversion, OTS may permit you to establish a management stock benefit plan that holds up to four percent of the shares that you issued in the conversion.

(4) You do not permit your tax-qualified employee stock benefit plan(s) and your management stock benefit plans, in the aggregate, to hold more than 10 percent of the shares that you issued in the conversion. However, if you have tangible capital of 10 percent or more following the conversion, OTS may permit your tax-qualified employee stock benefit plan(s) and your management stock benefit plans, in the aggregate, to hold up to 12 percent of the shares that you issued in the conversion.

(5) No individual receives more than 25 percent of the shares under any plan.

(6) Your directors who are not your employees do not receive more than five percent of the shares of any plan individually, or 30 percent of the shares of any plan in the aggregate.

(7) Your shareholders approve each plan by a majority of the total votes eligible to be cast at a duly called meeting before you establish or implement the plan. You may not hold this meeting until six months after your conversion. If you are a subsidiary of a mutual holding company, a majority of the total votes eligible to be cast (other than your parent mutual holding company) must approve each plan before you may establish or implement the plan.

(8) When you distribute proxies or related material to shareholders in connection with the vote on a plan, you state that the plan complies with OTS regulations and that OTS does not endorse or approve the plan in any way. You may not make any written or oral representation to the contrary.

(9) You do not grant stock options at less than the market price at the time of grant.

(10) You do not use stock issued at the time of conversion to fund management or employee stock benefit plans.

(11) Your plan does not begin to vest earlier than one year after your shareholders approve the plan, and does not vest at a rate exceeding 20 percent a year.

(12) Your plan permits accelerated vesting only for disability or death, or if you undergo a change of control.

(13) Your plan provides that your executive officers or directors must exercise or forfeit their options in the event the institution becomes critically undercapitalized (as defined in § 565.4 of this chapter), is subject to OTS enforcement action, or receives a capital directive under § 565.7.

(14) You file a copy of the approved stock option plan or management or employee stock benefit plan with OTS and certify to OTS in writing that the plan approved by the shareholders is the same plan that you filed with, and disclosed in, the proxy materials distributed to shareholders in connection with the vote on the plan.

(15) You file the plan and the certification with OTS within five calendar days after your shareholders approve the plan.

(b) You may provide dividend equivalent rights or dividend adjustment rights to allow for stock splits or other adjustments to your stock in stock option plans or management or employee stock benefit plans under this section.

(c) If the plan is adopted more than one year following your conversion, any material deviations to the requirements in paragraph (a) of this section must be ratified by your shareholders.

§ 563b.505 May my directors, officers, and their associates freely trade shares?

(a) Directors and officers who purchase conversion shares may not sell the shares for one year after the date of purchase, except that in the event of the death of the officer or director, the successor in interest may sell the shares.

(b) You must include notice of the restriction described in paragraph (a) of this section on each certificate of stock that a director or officer purchases during the conversion or receives in connection with a stock dividend, stock split, or otherwise with respect to such restricted shares.

(c) You must instruct your stock transfer agent about the transfer restrictions in this section.

(d) For three years after you convert, your officers, directors, and their associates may purchase your stock only from a broker or dealer registered with the Securities and Exchange Commission. However, your officers, directors, and their associates may engage in a negotiated transaction involving more than one percent of your outstanding stock, and may purchase stock through any of your management or employee stock benefit plans.

§ 563b.510 May I repurchase shares after conversion?

(a) You may not repurchase your shares in the first year after the conversion except:

(1) In extraordinary circumstances, you may make open market repurchases of up to five percent of your outstanding stock in the first year after the conversion if you file a notice under § 563b.515(a) and OTS does not disapprove your repurchase. OTS will not approve such repurchases unless the repurchase meets the standards in § 563b.515(c), and the repurchase is consistent with paragraph (c) of this section.

(2) You may repurchase qualifying shares of a director or conduct an OTS approved repurchase pursuant to an offer made to all shareholders of your association.

(3) Repurchases to fund management recognition plans that have been ratified by shareholders do not count toward the repurchase limitations in this section. Repurchases in the first year to fund such plans require prior notification to OTS.

(4) Purchases to fund tax qualified employee stock benefit plans do not count toward the repurchase limitations in this section.

(b) After the first year, you may repurchase your shares, subject to all other applicable regulatory and supervisory restrictions and paragraph (c) of this section.

(c) All stock repurchases are subject to the following restrictions.

(1) You may not repurchase your shares if the repurchase will reduce your regulatory capital below the amount required for your liquidation account under § 563b.450. You must comply with the capital distribution requirements at part 563, subpart E of this chapter.

(2) The restrictions on share repurchases apply to a charitable organization under § 563b.550. You must aggregate purchases of shares by the charitable organization with your repurchases.

563b.515 What information must I provide to OTS before I repurchase my shares?

(a) To repurchase stock in the first year following conversion, other than repurchases under § 563b.510(a)(3) or (a)(4), you must file a written notice with the OTS. You must provide the following information:

(1) Your proposed repurchase program;

(2) The effect of the repurchases on your regulatory capital; and

(3) The purpose of the repurchases and, if applicable, an explanation of the extraordinary circumstances necessitating the repurchases.

(b) You must file your notice with your Regional Director, with a copy to the Applications Filing Room, at least ten days before you begin your repurchase program.

(c) You may not repurchase your shares if OTS objects to your repurchase program. OTS will not object to your repurchase program if:

(1) Your repurchase program will not adversely affect your financial condition;

(2) You submit sufficient information to evaluate your proposed repurchases;

(3) You demonstrate extraordinary circumstances and a compelling and valid business purpose for the share repurchases; and

(4) Your repurchase program would not be contrary to other applicable regulations.

§ 563b.520 May I declare or pay dividends after I convert?

You may declare or pay a dividend on your shares after you convert if:

(a) The dividend will not reduce your regulatory capital below the amount required for your liquidation account under § 563b.450;

(b) You comply with all capital requirements under part 567 of this chapter after you declare or pay dividends;

(c) You comply with the capital distribution requirements under part 563, subpart E of this chapter; and

(d) You do not return any capital to purchasers in the first year following conversion, and return capital to purchasers after the first year only if the return of capital is consistent with your business plan.

§ 563b.525 Who may acquire my shares after I convert?

(a) For three years after you convert, no person may, directly or indirectly, acquire or offer to acquire the beneficial ownership of more than ten percent of any class of your equity securities without OTS's prior written approval. If a person violates this prohibition, you may not permit the person to vote shares in excess of ten percent, and may not count the shares in excess of ten percent in any shareholder vote.

(b) A person acquires beneficial ownership of more than ten percent of a class of shares when he or she holds any combination of your stock or revocable or irrevocable proxies under circumstances that give rise to a conclusive control determination or rebuttable control determination under §§ 574.4(a) and (b) of this chapter. OTS will presume that a person has acquired shares if the acquiror entered into a binding written agreement for the transfer of shares. For purposes of this section, an offer is made when it is communicated. An offer does not include non-binding expressions of understanding or letters of intent regarding the terms of a potential acquisition.

(c) Notwithstanding the restrictions in this section:

(1) Paragraphs (a) and (b) of this section do not apply to any offer with a view toward public resale made exclusively to you, to the underwriters, or to a selling group acting on your behalf.

(2) Unless OTS objects in writing, any person may offer or announce an offer to acquire up to one percent of any class of shares. In computing the one percent limit, the person must include all of his or her acquisitions of the same class of shares during the prior 12 months.

(3) A corporation whose ownership is, or will be, substantially the same as your ownership may acquire or offer to acquire more than ten percent of your common stock, if it makes the offer or acquisition more than one year after you convert.

(4) One or more of your tax-qualified employee stock benefit plans may acquire your shares, if the plan or plans do not beneficially own more than 25 percent of any class of your shares in the aggregate.

(5) An acquiror does not have to file a separate application to obtain OTS approval under paragraph (a) of this section, if the acquiror files an application under part 574 of this chapter that specifically addresses the criteria listed under paragraph (d) of this section and you do not oppose the proposed acquisition.

(d) OTS may deny an application under paragraph (a) of this section if the proposed acquisition:

(1) Is contrary to the purposes of this part;

(2) Is manipulative or deceptive;

(3) Subverts the fairness of the conversion;

(4) Is likely to injure you;

(5) Is inconsistent with your plan to meet the credit and lending needs of your proposed market area;

(6) Otherwise violates laws or regulations; or

(7) Does not prudently deploy your conversion proceeds.

§ 563b.530 What other requirements apply after I convert?

After you convert, you must:

(a) Promptly register your shares under the Securities Exchange Act of 1934 (15 U.S.C. 78a–78jj, as amended). You may not deregister the shares for three years.

(b) Encourage and assist a market maker to establish and to maintain a market for your shares. A market maker for a security is a dealer who:

(1) Regularly publishes bona fide competitive bid and offer quotations for the security in a recognized inter-dealer quotation system;

(2) Furnishes bona fide competitive bid and offer quotations for the security on request; or

(3) May effect transactions for the security in reasonable quantities at quoted prices with other brokers or dealers.

(c) Use your best efforts to list your shares on a national or regional securities exchange or on the National Association of Securities Dealers Automated Quotation system.

(d) File all post-conversion reports that OTS requires.

Contributions to Charitable Organizations

§ 563b.550 May I donate conversion shares or conversion proceeds to a charitable organization?

You may contribute some of your conversion shares or proceeds to a charitable organization if:

(a) Your plan of conversion provides for the proposed contribution;

(b) Your members approve the proposed contribution; and

(c) The IRS either has approved, or approves within two years after formation, the charitable organization as a tax-exempt charitable organization under the Internal Revenue Code.

§ 563b.555 How do my members approve a charitable contribution?

At the meeting to consider your conversion, your members must separately approve by at least a majority of the total eligible votes, a contribution of conversion shares or proceeds. If you are in mutual holding company form and adding a charitable contribution as part of a second step stock conversion, you must also have a majority of your minority shareholders approve the charitable contribution.

§ 563b.560 How much may I contribute to a charitable organization?

You may contribute a reasonable amount of conversion shares or proceeds to a charitable organization if your contribution will not exceed limits for charitable deductions under the Internal Revenue Code, and OTS does not object on supervisory grounds. If

you are a well capitalized savings association, OTS generally will not object if you contribute an aggregate amount of eight percent or less of the conversion shares or proceeds.

§ 563b.565 What must the charitable organization include in its organizational documents?

The charitable organization's charter and bylaws (or trust agreement), gift instrument, and operating plan must provide that:

(a) The charitable organization's primary purpose is to serve and make grants in your local community;

(b) As long as the charitable organization controls shares, you must consider those shares as voted in the same ratio as all other shares voted on each proposal considered by your shareholders;

(c) For at least five years after its organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for an independent director (or trustee) from your local community. This director may not be your officer, director, or employee, or your affiliate's officer, director, or employee, and should have experience with local community charitable organizations and grant making; and

(d) For at least five years after its organization, one seat on the charitable organization's board of directors (or board of trustees) is reserved for a director from your board of directors or the board of directors of an acquiror or resulting institution in the event of a merger or acquisition of your organization.

§ 563b.570 How do I address conflicts of interest involving my directors?

(a) A person who is your director, officer, or employee, or a person who has the power to direct your management or policies, or otherwise owes a fiduciary duty to you (for example, holding company directors) and who will serve as an officer, director, or employee of the charitable organization, is subject to § 563.200 of this chapter. *See* Form AC (Exhibit 9) for further information on operating plans and conflict of interest plans.

(b) Before your board of directors may adopt a plan of conversion that includes a charitable organization, you must identify your directors that will serve on the charitable organization's board. These directors may not participate in your board's discussions concerning contributions to the charitable organization, and may not vote on the matter.

§ 563b.575 What other requirements apply to charitable organizations?

(a) The charitable organization's charter and bylaws (or trust agreement) and the gift instrument for the contribution must provide that:

(1) OTS may examine the charitable organization at the charitable organization's expense;

(2) The charitable organization must comply with all supervisory directives that OTS imposes;

(3) The charitable organization must annually provide OTS with a copy of the annual report that the charitable organization submitted to the IRS;

(4) The charitable organization must operate according to written policies adopted by its board of directors (or board of trustees), including a conflict of interest policy; and

(5) The charitable organization may not engage in self-dealing, and must comply with all laws necessary to maintain its tax-exempt status under the Internal Revenue Code.

(b) You must include the following legend in the stock certificates of shares that you contribute to the charitable organization or that the charitable organization otherwise acquires: ''The board of directors must consider the shares that this stock certificate represents as voted in the same ratio as all other shares voted on each proposal considered by the shareholders, as long as the shares are controlled by the charitable organization.''

(c) OTS may review the compensation paid to charitable organization directors (or trustees) who are not your directors, employees, or affiliates.

(d) After you complete your stock offering, you must submit four executed copies of the following documents to the OTS Applications Filing Room in Washington, and three executed copies to the OTS Regional Office: the charitable organization's charter and bylaws (or trust agreement), operating plan, conflict of interest policy, and the gift instrument for your contributions of either stock or cash to the charitable organization.

Subpart B—Voluntary Supervisory Conversions

§ 563b.600 What does this subpart do?

(a) You must comply with this subpart to engage in a voluntary supervisory conversion. This subpart applies to all voluntary supervisory conversions under sections 5(i)(1), (i)(2), and (p) of the Home Owners' Loan Act (HOLA), 12 U.S.C. 1464(i)(1), (i)(2), and (p).

(b) Subpart A of this part also applies to a voluntary supervisory conversion, unless a requirement is clearly inapplicable.

§ 563b.605 How may I conduct a voluntary supervisory conversion?

(a) You may sell your shares or the shares of a holding company to the public under the requirements of subpart A of this part.

(b) You may convert to stock form by merging into an interim federal- r state-chartered stock association.

(c) You may sell your shares directly to an acquiror, who may be a person, company, depository institution, or depository institution holding company.

(d) You may merge or consolidate with an existing or newly created depository institution. The merger or consolidation must be authorized by, and is subject to, other applicable laws and regulations.

§ 563b.610 Do my members have rights in a voluntary supervisory conversion?

Your members do not have the right to approve or participate in a voluntary supervisory conversion, and will not have any legal or beneficial ownership interests in the converted association, unless OTS provides otherwise. Your members may have interests in a liquidation account, if one is established.

Eligibility

§ 563b.625 When is a savings association eligible for a voluntary supervisory conversion?

(a) If you are an insured savings association, you may be eligible to convert under this subpart if:

(1)You are significantly undercapitalized (or you are undercapitalized and a standard conversion that would make you adequately capitalized is not feasible), and you will be a viable entity following the conversion;

(2) Severe financial conditions threaten your stability and a conversion is likely to improve your financial condition;

(3) FDIC will assist you under section 13 of the Federal Deposit Insurance Act, 12 U.S.C. 1823; or

(4) You are in receivership and a conversion will assist you.

(b) You will be a viable entity following the conversion if you satisfy all of the following:

(1) You will be adequately capitalized as a result of the conversion;

(2) You, your proposed conversion, and your acquiror(s) comply with applicable supervisory policies;

(3) The transaction is in your best interest, and the best interest of the federal deposit insurance funds and the public; and

(4) The transaction will not injure or be detrimental to you, the federal deposit insurance funds, or the public interest.

§ 563b.630 When is a BIF-insured state-chartered savings bank eligible for a voluntary supervisory conversion?

If you are a BIF-insured state-chartered savings bank you may be eligible to convert to a federal stock savings bank under this subpart if:

(a) FDIC certifies under section 5(o)(2)(C) of the HOLA that severe financial conditions threaten your stability and that the voluntary supervisory conversion is likely to improve your financial condition, and OTS concurs with this certification; or

(b) You meet the following conditions:

(1) Your liabilities exceed your assets, as calculated under generally accepted accounting principles, assuming you are a going concern; and

(2) You will issue a sufficient amount of permanent capital stock to meet your applicable FDIC capital requirement immediately upon completion of the conversion, or FDIC determines that you will achieve an acceptable capital level within an acceptable time period.

Plan of Supervisory Conversion

§ 563b.650 What must I include in my plan of voluntary supervisory conversion?

A majority of your board of directors must adopt a plan of voluntary supervisory conversion. You must include all of the following information in your plan of voluntary supervisory conversion.

(a) Your name and address.

(b) The name, address, date and place of birth, and social security number of each proposed purchaser of conversion shares and a description of that purchaser's relationship to you.

(c) The title, per-unit par value, number, and per-unit and aggregate offering price of shares that you will issue.

(d) The number and percentage of shares that each investor will purchase.

(e) The aggregate number and percentage of shares that each director, officer, and any affiliates or associates of the director or officer will purchase.

(f) A description of any liquidation account.

(g) Certified copies of all resolutions of your board of directors relating to the conversion.

Voluntary Supervisory Conversion Application

§ 563b.660 What must I include in my voluntary supervisory conversion application?

You must include all of the following information and documents in a voluntary supervisory conversion application to OTS under this subpart:

(a) *Eligibility.* (1) Evidence establishing that you meet the eligibility requirements under §§ 563b.625 or 563b.630.

(2) An opinion of qualified, independent counsel or an independent, certified public accountant regarding the tax consequences of the conversion, or an IRS ruling indicating that the transaction qualifies as a tax-free reorganization.

(3) An opinion of independent counsel indicating that applicable state law authorizes the voluntary supervisory conversion, if you are a state-chartered savings association converting to state stock form.

(b) *Plan of conversion.* A plan of voluntary supervisory conversion that complies with § 563b.650.

(c) *Business plan.* A business plan that complies with § 563b.105, where required by OTS.

(d) *Financial data.* (1) Your most recent audited financial statements and Thrift Financial Report. You must explain how your current capital levels make you eligible to engage in a voluntary supervisory conversion under §§ 563b.625 or 563b.630.

(2) A description of your estimated conversion expenses.

(3) Evidence supporting the value of any non-cash asset contributions. Appraisals must be acceptable to OTS and the non-cash asset must meet all other OTS policy guidelines. *See* Thrift Activities Handbook Section 110 for guidelines.

(4) Pro forma financial statements that reflect the effects of the transaction. You must identify your tangible, core, and risk-based capital levels and show the adjustments necessary to compute the capital levels. You must prepare your pro forma statements in conformance with OTS regulations and policy.

(e) *Proposed documents.* (1) Your proposed charter and bylaws.

(2) Your proposed stock certificate form.

(f) *Agreements.* (1) A copy of any agreements between you and proposed purchasers.

(2) A copy and description of all existing and proposed employment contracts. You must describe the term, salary, and severance provisions of the contract, the identity and background of the officer or employee to be employed, and the amount of any conversion shares to be purchased by the officer or employee or his or her affiliates or associates.

(g) *Related applications.* (1) All filings required under the securities offering rules of 12 CFR parts 563b and 563g.

(2) Any required Holding Company Act application, Control Act notice, or rebuttal submission under part 574 of this chapter, including prior-conduct certifications under Regulatory Bulletin 20.

(3) A subordinated debt application, if applicable.

(4) Applications for permission to organize a stock association and for approval of a merger, if applicable, and a copy of any application for Federal Home Loan Bank membership or FDIC insurance of accounts, if applicable.

(5) A statement describing any other applications required under federal or state banking laws for all transactions related to your conversion, copies of all dispositive documents issued by regulatory authorities relating to the applications, and, if requested by OTS, copies of the applications and related documents.

(h) *Waiver request.* A description of any of the features of your application that do not conform to the requirements of this subpart, including any request for waiver of these requirements.

OTS Review of the Voluntary Supervisory Conversion Application

§ 563b.670 Will OTS approve my voluntary supervisory conversion application?

OTS will generally approve your application to engage in a voluntary supervisory conversion unless it determines:

(a) You do not meet the eligibility requirements for a voluntary supervisory conversion under §§ 563b.625 or 563b.630 or because the proceeds from the sale of your conversion stock, less the expenses of the conversion, would be insufficient to satisfy any applicable viability requirement;

(b) The transaction is detrimental to or would cause potential injury to you or the federal deposit insurance funds or is contrary to the public interest;

(c) You or your acquiror, or the controlling parties or directors and officers of you or your acquiror, have engaged in unsafe or unsound practices in connection with the voluntary supervisory conversion; or

(d) You fail to justify an employment contract incidental to the conversion, or the employment contract will be an unsafe or unsound practice or represent

a sale of control. In a voluntary supervisory conversion, OTS generally will not approve employment contracts of more than one year for your existing management.

§ 563b.675 What conditions will OTS impose on an approval?

(a) OTS will condition approval of a voluntary supervisory conversion application on all of the following.

(1) You must complete the conversion stock sale within three months after OTS approves your application. OTS may grant an extension for good cause.

(2) You must comply with all filing requirements of parts 563b and 563g of this chapter.

(3) You must submit an opinion of independent legal counsel indicating that the sale of your shares complies with all applicable state securities law requirements.

(4) You must comply with all applicable laws, rules, and regulations.

(5) You must satisfy any other requirements or conditions OTS may impose.

(b) OTS may condition approval of a voluntary supervisory conversion application on either of the following:

(1) You must satisfy any conditions and restrictions OTS imposes to prevent unsafe or unsound practices, to protect the federal deposit insurance funds and the public interest, and to prevent potential injury or detriment to you before and after the conversion. OTS may impose these conditions and restrictions on you (before and after the conversion), your acquiror, controlling parties, directors and officers of you or your acquiror; or

(2) You must infuse a larger amount of capital, if necessary, for safety and soundness reasons.

Offers and Sales of Stock

§ 563b.680 How do I sell my shares?

If you convert under this subpart, you must offer and sell your shares under part 563g of this chapter.

Post-Conversion

§ 563b.690 Who may not acquire additional shares after the voluntary supervisory conversion?

For three years after the completion of a voluntary supervisory conversion, neither you nor any of your controlling shareholder(s) may acquire shares from minority shareholders without OTS's prior approval.

PART 574—ACQUISITION OF CONTROL OF SAVINGS ASSOCIATIONS

2. The authority citation for part 574 is revised to read as follows:

Authority: 12 U.S.C. 1467a, 1817, 1831i.

§ 574.3 [Amended]

3. Section 574.3(c)(1)(vii) is amended by removing the phrase ''563b.2(a)(39)'' and adding in lieu thereof the phrase ''563b.25''.

PART 575—MUTUAL HOLDING COMPANIES

4. The authority citation for part 575 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1828, 2901.

§ 575.2 [Amended]

5. Section 575.2(a) is amended by removing the phrase ''12 CFR 563b.2'', and by adding in lieu thereof the phrase ''563b.25 of this chapter''.

§ 575.4 [Amended]

6. Section 575.4(c)(2) is amended by removing the phrase ''economical home financing'', and by adding in lieu thereof the phrase ''the credit and lending needs of your proposed market area''.

7. Section 575.7 is amended by:

a. Revising the paragraph heading and adding a new first sentence to paragraph (a) introductory text;

b. Removing, in paragraph (a)(7), the phrase ''§ 563b.11 of this chapter'', and by adding in lieu thereof the phrase ''§ 563b.200(c) of this chapter'';

c. Removing, in paragraph (b)(1), the phrase ''§ 563b.7'' where it appears in the first and second sentences, and by adding in lieu of both phrases the phrase ''part 563b of this chapter'';

d. Removing, in paragraph (b)(2), the phrase ''§ 563b.7(c)'', and by adding in lieu thereof the phrase ''§ 563b.330''.

e. Removing, in paragraph (d)(6)(i), the phrase ''12 CFR 563b.102'', and by adding in lieu thereof the phrase ''Form OC'';

f. Adding new paragraphs (d)(7) and (d)(8);

g. Removing, in paragraph (e), the phrase ''§§ 563b.3 through 563b.8 of this chapter'', and adding in lieu thereof the phrase ''12 CFR part 563b''.

The additions read as follows:

§ 575.7 Issuances of stock by savings association subsidiaries of mutual holding companies.

(a) *Requirements.* Before any stock issuance, a savings association subsidiary of a mutual holding company must submit a business plan in accordance with the provisions of §§ 563b.105 through 563b.115 of this chapter.* * *

* * * * *

(d) * * *

(7) Notwithstanding the restrictions in paragraph (d)(6)(ii) of this section, a savings association subsidiary of a mutual holding company may issue stock as part of a stock benefit plan to any insider, associate of an insider, or tax qualified or non-tax qualified employee stock benefit plan of the mutual holding company or subsidiary of the mutual holding company without including the purchase priorities of 12 CFR part 563b.

(8) As part of a reorganization, a reasonable amount of shares or proceeds may be contributed to a charitable organization that complies with §§ 563b.550 to 563b.575 of this chapter, provided such contribution does not result in any taxes on excess business holdings under section 4943 of the Internal Revenue Code (26 U.S.C. 4943).

* * * * *

8. Section 575.8 is amended by:

a. Removing, in paragraph (a) introductory text, the phrase ''§ 563b.27(a)'', and by adding in lieu thereof the phrase ''§ 563b.650'';

b. Amending paragraphs (a)(3), (a)(4), (a)(5), and (a)(6) to remove the phrase ''ten'', and by adding in lieu thereof the phrase ''4.9'', and by removing the phrase ''held by persons other than the association's mutual holding company parent'';

c. Revising paragraph (a)(7);

d. Revising paragraph (a)(8);

e. Redesignating paragraphs (a)(9) through (a)(21) as paragraphs (a)(10) through (a)(22), respectively;

f. Adding a new paragraph (a)(9);

g. Amending newly designated paragraph (a)(10) by removing the phrase ''12 CFR 563b.102'', and by adding in lieu thereof the phrase ''Form OC''.

The additions and revisions read as follows:

§ 575.8 Contents of Stock Issuance Plans.

(a) * * *

(7)(i) Provide that the aggregate amount of common stock acquired in the proposed issuance, plus all prior issuances of the association, by all non-tax-qualified employee stock benefit plans of the association, insiders of the association, and associates of insiders of the association, exclusive of any stock acquired by such plans, insiders, and associates in the secondary market, shall not exceed the following percentages of the outstanding common stock of the association, held by persons other than the association's mutual holding company parent at the close of the proposed issuance:

Institution size	Officer and director purchases (percent)
$50,000,000 or less	35
$50,000,001–100,000,000	34
$100,000,001–150,000,000	33
$150,000,001–200,000,000	32
$200,000,001–250,000,000	31
$250,000,001–300,000,000	30
$300,000,001–350,000,000	29
$350,000,001–400,000,000	28
$400,000,001–450,000,000	27
$450,000,001–500,000,000	26
Over $500,000,000	25

(ii) In calculating the number of shares held by insiders and their associates under this provision or the provision in paragraph (a)(8) of this section, shares held by any tax-qualified or non-tax-qualified employee stock benefit plan of the association that are attributable to such persons shall not be counted.

(8) Provide that the aggregate amount of stock, whether common or preferred, acquired in the proposed issuance, plus all prior issuances of the association, by all non-tax-qualified employee stock benefit plans of the association, insiders of the association, and associates of insiders of the association, exclusive of any stock acquired by said plans, insiders, and associates in the secondary market, shall not exceed the following percentages of the stockholders' equity of the association, held by persons other than the association's mutual holding company parent at the close of the proposed issuance:

Institution size	Officer and director purchases (percent)
$50,000,000 or less	35
$50,000,001–100,000,000	34
$100,000,001–150,000,000	33
$150,000,001–200,000,000	32
$200,000,001–250,000,000	31
$250,000,001–300,000,000	30
$300,000,001–350,000,000	29
$350,000,001–400,000,000	28
$400,000,001–450,000,000	27
$450,000,001–500,000,000	26
Over $500,000,000	25

(9) Provide that the aggregate amount of common stock acquired in the proposed issuance, plus all prior issuances of the association, by all stock benefit plans, other than employee stock ownership plans, shall not exceed more than 25% of the outstanding common stock of the association held by persons other than the association's mutual holding company parent.

* * * * *

9. Section 575.11 is amended by:

a. Removing, in paragraphs (c)(1) and (c)(2) the phrases ''§ 563b.3(g)(1)'' or ''§ 563b.3(g)(3)'' wherever they appear, and by adding in lieu thereof the phrase ''§ 563b.510'';

b. Adding, in paragraph (e), after the phrase ''stock issuance'' the phrase '', and OTS does not object to the subsequent stock issuance''; and

c. Adding new paragraph (i).

The addition reads as follows:

§ 575.11 Operating restrictions.

* * * * *

(i) *Separate vote for charitable organization contribution.* In a mutual holding company stock issuance, a separate vote of a majority of the outstanding shares of common stock held by stockholders other than the mutual holding company or subsidiary holding company must approve any charitable organization contribution.

10. Section 575.12 is amended by adding new paragraph (a)(3) to read as follows:

§ 575.12 Conversion or liquidation of mutual holding companies.

(a)* * *

(3) If a subsidiary holding company or subsidiary savings association has issued shares to an entity other than the mutual holding company, the conversion of the mutual holding company to stock form may not be consummated unless a majority of the shares issued to entities other than the mutual holding company vote in favor of the conversion. This requirement applies in addition to any otherwise required account holder or shareholder votes.

* * * * *

11. Section 575.13 is amended by removing, in paragraph (c)(2), the phrase ''§ 563b.8 of this chapter'', and by adding in lieu thereof the phrase ''§ 563b.150 of this chapter'', and by revising paragraph (a)(1) to read as follows:

§ 575.13 Procedural requirements.

(a) *Proxies and proxy statements*—(1) *Solicitation of proxies.* The provisions of §§ 563b.225 to 563b.290 and 563b.25 to 563b.35 of this chapter shall apply to all solicitations of proxies by any person in connection with any membership vote required by this part. OTS must authorize all proxy materials used in connection with such solicitations. Proxy materials must be in the form and contain the information specified in §§ 563b.255 and 563b.270 of this chapter and Form PS, to the extent such information is relevant to the action that members are being asked to approve, with such additions, deletions, and other modifications as are necessary or appropriate under the disclosure standard set forth in § 563b.280 of this chapter. File proxies and proxy statements in accordance with § 563b.155 of this chapter and address them to the Business Transactions Division, Chief Counsel's Office, Office of Thrift Supervision, at the address set forth in § 516.40 of this chapter. For purposes of this paragraph (a)(1), the term *conversion,* as it appears in the provisions of part 563b of this chapter cited above in this paragraph (a)(1), refers to *the reorganization* or *the stock issuance,* as appropriate.

* * * * *

Dated: March 27, 2002.

By the Office of Thrift Supervision.

James E. Gilleran,

Director.

[FR Doc. 02–7979 Filed 4–8–02; 8:45 am]

BILLING CODE 6720–01–P

Federal Register

Tuesday,
April 9, 2002

Part IV

Office of Management and Budget

14 CFR Chapter VI and Part 1300
Air Transportation Safety and System Stabilization Act; Final Rules

OFFICE OF MANAGEMENT AND BUDGET

14 CFR Chapter VI and Part 1300

Air Transportation Safety and System Stabilization Act; Air Carrier Guarantee Loan Program

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Final rule; technical amendment.

SUMMARY: On October 12, 2001, the Office of Management and Budget (OMB) published a final rule establishing a new chapter in the Code of Federal Regulations for the Aviation Disaster Relief-Air Carrier Guarantee Loan Program. This technical amendment renames the chapter heading and establishes a new subchapter for the Office of Management and Budget rules to allow for the establishment of a subchapter for supplemental rules issued by the Air Transportation Stabilization Board (ATSB).

DATES: This technical amendment is effective April 9, 2002.

FOR FURTHER INFORMATION CONTACT: Clare Doherty, Office of Management and Budget, Washington, DC 20503. Telephone (202) 395–5704 (not a toll-free call).

SUPPLEMENTARY INFORMATION: On October 12, 2001, the OMB published a final rule (66 FR 52270) under Section 102(c)(2(B) of the Air Transportation Safety and System Stabilization Act (the Act). The section states that ''the Director of the Office of Management and Budget shall issue regulations setting forth procedures for application and minimum requirements * * * for the issuance of Federal credit instruments under Section 101(a)(1)'' of the Act. Section 101(a)(1) authorizes the ATSB, which is established by section 102(b)(1) of the Act, to issue Federal certain credit instruments to assist air carriers who suffered losses due to the terrorist attacks of September 11, 2001, and to whom credit is not otherwise reasonably available, in order to facilitate a safe, efficient, and viable commercial aviation system in the United States.

Section 102(c)(2)(B) of the Act authorizes the ATSB to supplement the regulations issued by OMB. This rule restructures chapter VI of 14 CFR to facilitate the incorporation of the ATSB's supplemental regulations, which are published elsewhere in this issue of the **Federal Register**. This rule also amends OMB's rules to include a technical reference to ATSB's rules.

Because this final rule is technical in nature, relates to public loan guarantees, and does not affect the substantive rights or obligations of any person, notice and public procedure are not required pursuant to 5 U.S.C. 553(a)(2) and (b)(B). For the same reasons, a delayed effective date is not required pursuant to 5 U.S.C. 553(a)(2) and (d)(3). This rule is not a ''significant regulatory action'' for purposes of Executive Order 12866, and is not a major rule under the Congressional Review Act, 5 U.S.C. 801 et seq.

List of Subjects in Part 1300

Air carriers, Disaster assistance, Loan programs—transportation, Reporting and recordkeeping requirements.

Dated: March 26, 2002.

Mitchell E. Daniels, Jr.,

Director, Office of Management and Budget.

For reasons set forth in the preamble and under the authority of 49 U.S.C. 40101 note, the Office of Management and Budget amends 14 CFR chapter VI as follows:

CHAPTER VI—AIR TRANSPORTATION SYSTEM STABILIZATION

1. The heading of chapter VI is revised to read as set forth above.

2. A new subchapter A, consisting of existing part 1300, is added to chapter VI to read as follows:

Subchapter A—Office of Management and Budget

PART 1300—AVIATION DISASTER RELIEF—AIR CARRIER GUARANTEE LOAN PROGRAM

3. The authority citation for part 1300 continues to read as follows:

Authority: Title I of Pub. L. 107–42, 115 Stat. 230 (49 U.S.C. 40101 note).

4. Add § 1300.3 to subpart A to read as follows:

§ 1300.3 Supplementary regulations of the Air Transportation Stabilization Board.

(a) The regulations in this part are supplemented by the regulations of the Air Transportation Stabilization Board in part 1310 of this chapter in accordance with section 102(c)(2)(B) of the Act.

(b) This part and part 1310 of this chapter jointly govern the application procedures and the requirements for issuance of Federal credit instruments under section 101(a)(1) of the Act.

[FR Doc. 02–8430 Filed 4–8–02; 8:45 am]

BILLING CODE 3110–01–P

AIR TRANSPORTATION STABILIZATION BOARD

14 CFR Part 1310

Administrative Regulations for Air Transportation Stabilization Board Under Section 101(a)(1) of the Air Transportation Safety and System Stabilization Act

AGENCY: Air Transportation Stabilization Board.

ACTION: Final rule.

SUMMARY: These regulations are issued by the Air Transportation Stabilization Board under section 102(c)(2)(B) of the Air Transportation Safety and System Stabilization Act, which authorizes the Air Transportation Stabilization Board to issue supplemental regulations for the issuance of federal credit instruments. The purpose of these regulations is to provide the Board with administrative rules and procedures necessary to conduct Board business related to administering the air carrier guarantee loan program. These regulations are effective upon publication.

EFFECTIVE DATE: April 9, 2002.

FOR FURTHER INFORMATION CONTACT: Joseph P. Adams, Jr., Executive Director, Air Transportation Stabilization Board, 1120 Vermont Avenue, NW., Suite 970, Washington, DC 20005, at (202) 775–8030 or by e-mail to *atsb@do.treas.gov.*

SUPPLEMENTARY INFORMATION: In response to terrorist attacks on September 11, 2001, the Federal Aviation Administration issued a Federal ground stop order that prohibited all flights to, from, and within the United States. Airports did not reopen until September 13 (except for Reagan National Airport, which partially reopened on October 4, 2001). At the same time, consumer demand for passenger air services declined significantly after the terrorist attacks. As a result, the U.S. commercial aviation industry suffered severe losses that have placed the financial survival of many air carriers at risk, in part because these carriers do not have adequate access to credit markets.

To address the viability of the U.S. commercial aviation system, Congress passed, and President Bush signed into law, the Air Transportation Safety and System Stabilization Act (Pub. L. 107–42) (the Act). In Section 102(b), the Act establishes the Air Transportation Stabilization Board (the ''Board'') to enter into agreements to issue loan guarantees and other Federal credit instruments as authorized. The Board is composed of the Chairman of the Board

of Governors of the Federal Reserve System or the designee of the Chairman (who is Chairman of the Board), the Secretary of Transportation or the designee of the Secretary, the Secretary of the Treasury or the designee of the Secretary, and the Comptroller General or the designee of the Comptroller General (who is a nonvoting member). The Board met on September 24, 2001 to discuss the administration of the loan guarantee program.

On October 12, 2001, the Office of Management and Budget (''OMB'') published regulations in the **Federal Register** (14 CFR Part 1300) regarding application procedures and minimum requirements (66 FR 52270). The Board has determined that it is appropriate to issue supplemental administrative rules and procedures to facilitate the conduct of Board business. These rules and procedures reflect the fact that the Department of the Treasury will provide extensive administrative services to the Board. The President, acting pursuant to the 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States (Pub. L. 107–38), transferred funds to the Departmental Offices, Department of the Treasury, so that the Departmental Offices is able to provide the necessary resources for staff, facilities, equipment, and other support for the Board to administer the guaranteed loan program for the airline industry. Accordingly, the Board has determined that the administrative operations of the Board will be conducted in accordance with the applicable administrative authorities of the Department of the Treasury; and that the relevant administrative regulations of the Department of the Treasury will be followed by, and applied by, the Board.

The Board concludes that it may publish these rules without first obtaining public comment and without a delayed effective date. Section 553(a) of the Administrative Procedure Act exempts from its rulemaking requirements those agency actions that concern ''loans, grants, benefits, or contracts.'' 5 U.S.C. 553(a). Since the Board's administrative rules and procedures concern the loan guarantee program, this issuance falls within this exception to the requirements otherwise imposed by section 553.

Moreover, to the extent that section 553's notice-and-comment requirements may apply to this action, we conclude that there is ''good cause'' under sections 553(b)(B) and 553(d) to issue the rule without prior public comment, effective immediately. These regulations respond to an emergency economic condition that makes compliance with prior notice requirements impracticable and contrary to the public interest. In requiring OMB to issue application regulations within 14 days of passage of the Act, Congress plainly intended to ensure that the loan guarantee program be implemented as swiftly as possible. Moreover, OMB's regulations permit the filing of an application immediately. The public interest is therefore served by having these regulations become effective upon publication, so that the Board can begin operations, and air carriers can submit applications to the Board at their earliest convenience.

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. It has also been determined that this rule is not a significant regulatory action for purposes of Executive Order 12866.

List of Subjects in Part 1310

Air carriers, Disaster assistance, Loan programs—transportation, Reporting and recordkeeping requirements.

Dated: April 1, 2002.

Joseph P. Adams, Jr.,

Executive Director, Air Transportation Stabilization Board.

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 40101 note, the Air Transportation Stabilization Board amends 14 CFR chapter VI as follows:

1. A new subchapter B, consisting of part 1310, is added to chapter VI to read as follows:

Subchapter B—Air Transportation Stabilization Board

PART 1310—AIR CARRIER GUARANTEE LOAN PROGRAM ADMINISTRATIVE REGULATIONS

Sec.

1310.1 Purpose and scope.
1310.2 Composition of the Board.
1310.3 Authority of the Board.
1310.4 Offices.
1310.5 Meetings and actions of the Board.
1310.6 Staff.
1310.7 Communications with the Board.
1310.8 Freedom of Information Act.
1310.9 Restrictions on lobbying.
1310.10 Government-wide debarment and suspension.
1310.11 Regulations of the Office of Management and Budget.
1310.20 Amendments.

Authority: Title I of Pub. L. 107–42, 115 Stat. 230 (49 U.S.C. 40101 note).

§ 1310.1 Purpose and scope.

This part is issued by the Air Transportation Stabilization Board pursuant to Section 102(c)(2)(B) of the Air Transportation Safety and System Stabilization Act, Public Law 107–42, 115 Stat. 230 (Act). This part describes the Board's authorities, organizational structure, the rules by which the Board takes actions, and procedures for public access to Board records.

§ 1310.2 Composition of the Board.

The Board consists of the Chairman of the Board of Governors of the Federal Reserve System or the designee of the Chairman, who acts as Chairman of the Board, the Secretary of the Treasury or the designee of the Secretary, the Secretary of Transportation or the designee of the Secretary, and the Comptroller General of the United States or the designee of the Comptroller General, who serves as a nonvoting member. The Comptroller General of the United States or the designee of the Comptroller General, who serves as a nonvoting member, shall not be involved in any of the Board's discussions or deliberations in connection with individual loan guarantee applications.

§ 1310.3 Authority of the Board.

Pursuant to the provisions of the Act, the Board is authorized to guarantee loans provided to airlines by eligible lenders in accordance with the procedures, rules, and regulations established by the Board, to make the determinations authorized by the Act, and to take such other actions as necessary to carry out its functions specified in the Act.

§ 1310.4 Offices.

The principal offices of the Board are at 1120 Vermont Avenue, N.W., Suite 970, Washington, D.C. 20005.

§ 1310.5 Meetings and actions of the Board.

(a) *Place and frequency.* The Board meets, on the call of the Chairman, in order to consider matters requiring action by the Board. The time and place for any such meeting shall be determined by the members of the Board.

(b) *Quorum and voting.* Two voting members of the Board constitute a quorum for the transaction of business. All decisions and determinations of the Board shall be made by a majority vote of the voting members. All votes on determinations of the Board required by the Act shall be recorded in the minutes. A Board member may request that any vote be recorded according to individual Board members.

(c) *Agenda of meetings.* As a general rule, an agenda for each meeting shall be distributed to members of the Board at least 48 hours in advance of the date

of the meeting, together with copies of materials relevant to the agenda items.

(d) *Minutes.* The Chief Administrative Officer shall keep minutes of each Board meeting and of action taken without a meeting, a draft of which is to be distributed to each member of the Board as soon as practicable after each meeting or action. To the extent practicable, the minutes of a Board meeting shall be corrected and approved at the next meeting of the Board.

(e) *Use of conference call communications equipment.* Any member may participate in a meeting of the Board through the use of conference call, telephone or similar communications equipment, by means of which all persons participating in the meeting can simultaneously speak to and hear each other. Any member so participating in a meeting shall be deemed present for all purposes, except that the Comptroller General of the United States or the designee of the Comptroller General, who serves as a nonvoting member, shall not participate in any of the Board's discussions or deliberations in connection with individual loan guarantee applications. Actions taken by the Board at meetings conducted through the use of such equipment, including the votes of each member, shall be recorded in the usual manner in the minutes of the meetings of the Board.

(f) *Actions between meetings.* When, in the judgment of the Chairman, it is desirable for the Board to consider action without holding a meeting, the relevant information and recommendations for action may be transmitted to the members by the Chief Administrative Officer and the voting members may communicate their votes to the Chairman in writing (including an action signed in counterpart by each Board member), electronically, or orally (including telephone communication). Any action taken under this paragraph has the same effect as an action taken at a meeting. Any such action shall be recorded in the minutes. If a voting member believes the matter should be considered at a meeting, the member may so notify the Chief Administrative Officer and the matter will be scheduled for consideration at a meeting.

(g) *Delegations of authority.* The Board may delegate authority, subject to such terms and conditions as the Board deems appropriate, to the Executive Director, the Legal Counsel, or the Chief Administrative Officer, to take certain actions not required by the Act to be taken by the Board. All delegations shall be made pursuant to resolutions of the Board and recorded in writing, whether in the minutes of a meeting or otherwise. Any action taken pursuant to delegated authority has the effect of an action taken by the Board.

§ 1310.6 Staff.

(a) *Executive Director.* The Executive Director advises and assists the Board in carrying out its responsibilities under the Act, provides general direction with respect to the administration of the Board's actions, directs the activities of the staff, and performs such other duties as the Board may require.

(b) *Legal Counsel.* The Legal Counsel provides legal advice relating to the responsibilities of the Board and performs such other duties as the Executive Director may require.

(c) *Chief Administrative Officer.* The Chief Administrative Officer sends notice of all meetings, prepares minutes of all meetings, maintains a complete record of all votes and actions taken by the Board, has custody of all records of the Board and performs such other duties as the Executive Director may require.

§ 1310.7 Communications with the Board.

Communications with the Board shall be conducted through the staff of the Board.

§ 1310.8 Freedom of Information Act.

While the Board is not part of the Department of the Treasury, the Board follows the regulations promulgated by the Department of the Treasury at subpart A (''Freedom of Information Act'') of part 1 (''Disclosure of Records'') of title 31 (''Money and Finance: Treasury'') of the Code of Federal Regulations (CFR). The procedures of 31 CFR 1.1 through 1.7 shall be followed for requesting access to records maintained by the Board, and processing such requests. Any reference in 31 CFR 1.1 through 1.7 to the ''Department of the Treasury,'' the ''Department'' or to a ''bureau,'' shall be construed to refer to the Board. In the event that the regulations at subpart A of part 1 of title 31 of the CFR subsequently are amended by the Department of the Treasury, the Board will follow those amended regulations. The following additional information is provided to implement 31 CFR 1.1 through 1.7 with respect to the Board.

(a) *Public reading room.* The public reading room for the Board is the Treasury Department Library. The Library is located in the Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. For building security purposes, visitors are required to make an appointment by calling 202–622–0990.

(b) *Requests for records.* Initial determinations under 31 CFR 1.5(h) as to whether to grant requests for records of the Board will be made by the Chief Administrative Officer or the designate of such official. Requests for records should be addressed to: Freedom of Information Request, Air Transportation Stabilization Board, Assistant Director, Disclosure Services, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

(c) *Administrative appeal of initial determination to deny records.* (1) Appellate determinations under 31 CFR 1.5(i) with respect to records of the Board will be made by the Executive Director, or the delegate of such official.

(2) Appellate determinations with respect to requests for expedited processing shall be made by the Executive Director or the delegate of such official.

(3) Appeals should be addressed to: Freedom of Information Appeal, Air Transportation Stabilization Board, Assistant Director, Disclosure Services, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

(d) *Delivery of process.* Service of process will be received by the Legal Counsel of the Board or the delegate of such official and shall be delivered to the following location: Legal Counsel, Air Transportation Stabilization Board, 1120 Vermont Avenue, NW., Suite 970, Washington, DC 20005.

§ 1310.9 Restrictions on lobbying.

(a) While the Board is not part of the Department of the Treasury, the regulations promulgated by the Department of the Treasury at part 21 (''New Restrictions on Lobbying'') of title 31 (''Money and Finance: Treasury'') of the Code of Federal Regulations (CFR), including the appendices thereto, are applicable in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement. The regulations promulgated by the Department of the Treasury at 31 CFR part 21 also are applicable to a request for, or receipt of, any Federal contract, grant, loan or cooperative agreement; and to a request for, or receipt of, a commitment providing for the United States to insure or guarantee a loan. These terms are defined in 31 CFR 21.105.

(b) In the event that the regulations at part 21 of title 31 of the CFR subsequently are amended by the Department of the Treasury, the Board will follow those amended regulations.

§ 1310.10 Governmentwide debarment and suspension.

While the Board is not part of the Department of the Treasury, the regulations promulgated by the Department of the Treasury at subpart A (''General''), subpart B (''Effect of Action''), subpart C (''Debarment''), subpart D (''Suspension''), and subpart E (''Responsibilities of GSA, Agency and Participants'') of part 19 (''Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements For Drug-Free Workplace (Grants)'') of title 31 (''Money and Finance: Treasury'') of the Code of Federal Regulations (CFR) are applicable to the Board. Any reference in 31 CFR part 19 to the ''Department of the Treasury'' or the ''Department'' shall be construed to refer to the Board. In the event that the regulations at subpart A, B, C, D or E of part 19 of title 31 of the CFR subsequently are amended by the Department of the Treasury, the Board will follow those amended regulations.

§ 1310.11 Regulations of the Office of Management and Budget.

(a) The regulations in this part supplement the regulations of the Office of Management and Budget in part 1300 of this chapter in accordance with section 102(c)(2)(B) of the Act.

(b) This part and part 1300 of this chapter jointly govern the application procedures and the requirements for issuance of Federal credit instruments under section 101(a)(1) of the Act.

§ 1310.20 Amendments.

The procedures in this part may be adopted or amended, or new procedures may be adopted, only by majority vote of the Board. Authority to adopt or amend these procedures may not be delegated.

[FR Doc. 02–8431 Filed 4–8–02; 8:45 am]

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Federal Register

Tuesday,
April 9, 2002

Part V

Department of Labor

Pension and Welfare Benefits Administration

29 CFR Part 2520

Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans; Final Rule

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2520

RIN 1210–AA71

Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of final rulemaking.

SUMMARY: This document contains final rules under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), concerning the disclosure of certain employee benefit plan information through electronic media, and the maintenance and retention of employee benefit plan records in electronic form. The rules establish a safe harbor pursuant to which all pension and welfare benefit plans covered by Title I of ERISA may use electronic media to satisfy disclosure obligations under Title I of ERISA. The rules also provide standards concerning the use of electronic media in the maintenance and retention of records required by sections 107 and 209 of ERISA. The rules affect employee pension and welfare benefit plans, including group health plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

DATES: *Effective Date:* These regulations are effective October 9, 2002.

Applicability Date: The requirements of § 2520.107–1 apply as of the first day of the first plan year beginning on or after October 9, 2002.

FOR FURTHER INFORMATION CONTACT: Katherine D. Lewis, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC, 20210, (202) 693–8523 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

Pursuant to section 1510(a) of the Taxpayer Relief Act of 1997 (TRA '97) [1] and in recognition of a need generally to update the rules governing the distribution of disclosure materials by employee benefit plans under the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), the Department of Labor, on January 28, 1999, published a notice of proposed rulemaking and a request for public comments on electronic disclosure and recordkeeping issues (64 FR 4506). In general, that notice contained a proposal to expand the electronic disclosure safe harbor applicable to group health plans, at § 2520.104b–1(c), to all pension and welfare benefit plans covered by Title I of ERISA.[2] The proposal also would expand the disclosure documents covered by the safe harbor to include, in addition to summary plan descriptions (SPDs) and related disclosures, the distribution of summary annual reports (SARs). In addition, the notice contained proposed standards applicable to the use of electronic media, including electronic storage and automated data processing systems, for the maintenance and retention of records required by sections 107 and 209 of ERISA. As with the interim rule for group health plans, the Department indicated in the preamble to the proposal that the safe harbor was not intended to represent the exclusive means by which the requirements of § 2520.104b–1 may be satisfied using electronic media. Rather, electronic disclosures meeting the conditions of the safe harbor would be deemed to satisfy the disclosure requirements under § 2520.104b–1.

The following is an overview of the public comments received on the proposed and interim rules and the changes in the final regulations made in response to the comments.

B. Disclosure Through Electronic Media—29 CFR 2520.104b–1(c)

As proposed, the availability of the safe harbor was limited to participants who have effective access to electronically furnished documents at their work place. Most of the commenters supported broadening the scope of the safe harbor to encompass disclosures to individuals (i.e., both participants and beneficiaries) beyond worksite locations and expanding the covered disclosures to include all documents required to be disclosed under Title I of ERISA, rather than just SPDs and related documents and SARs.

Expand Safe Harbor To Include Distributions to Participants and Beneficiaries Outside the Workplace

Most of the commenters supported expanding the safe harbor to permit the electronic delivery of documents to places other than worksite locations when a participant or beneficiary voluntarily elects to have documents furnished by such means. A number of these commenters suggested that any such electronic notice should include a reminder to participants and beneficiaries of the need to apprise the plan administrator of any changes that may affect the receipt of the disclosures (e.g., a change in e-mail address). One commenter indicated that, if electronic distributions beyond the worksite are permitted at the election of participants and beneficiaries, participants and beneficiaries should be afforded the opportunity to change their election at any time. Another commenter argued that electronic distributions beyond worksite locations should not be included in the safe harbor because plan sponsors have no means of determining whether participants and beneficiaries have the electronic technology necessary for receiving such information.

The Department is persuaded that where participants and beneficiaries have access to electronic information systems beyond the workplace (e.g., Internet-based systems) that will, as determined by the participant or beneficiary, provide an acceptable means by which to access plan information, neither plans nor participants and beneficiaries should be discouraged from utilizing such systems for plan-related communications. Accordingly, the Department has modified and expanded the safe harbor to encompass electronic delivery of plan information beyond the workplace to participants, beneficiaries and other persons entitled to disclosures under Title I of ERISA where, as discussed below, certain conditions designed to protect participants, beneficiaries and such other persons are satisfied. Because the proposal was limited to the furnishing of information electronically to individuals at worksite locations, the proposed safe harbor necessarily applied only to disclosures furnished to participants. With the expansion of the safe harbor to include the electronic distribution of documents beyond worksite locations, the Department sees

[1] Section 1510(a) of the TRA '97 directs the Secretary of Labor and the Secretary of the Treasury to issue guidance designed to interpret the notice, election, consent, disclosure, time requirements, and related recordkeeping requirements of ERISA and the Internal Revenue Code, respectively, as applied to the use of new technologies by sponsors and administrators of retirement plans. Pub. L. 105–34, enacted August 5, 1997.

[2] The safe harbor was established in an interim rule for group health plans published in the **Federal Register** on April 8, 1997 (62 FR 16979). The Department received five comments on the interim rule that addressed electronic disclosure issues. The proposed and interim rules are being finalized concurrently in this document to facilitate consideration of the full range of issues raised by public comments.

no basis for continuing to limit the safe harbor to participants.

As revised, the safe harbor applies to communications through electronic media with two categories of individuals (described in paragraph (c)(2) of § 2520.104b–1). The first category of individuals is participants who, similar to the proposed safe harbor, have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties. See § 2520.104b–1(c)(2)(i). The second category of individuals is participants, beneficiaries and other persons entitled to plan disclosures under Title I of ERISA who consent to receiving documents electronically. A discussion of comments received and the application of the regulation to each of these categories follows.

The provisions governing the first category of individuals have been modified from the proposal in two respects. As indicated by the foregoing description, the Department has eliminated use of the term ''worksite,'' but has retained the general concept. In this regard, the revised language—''any location where a participant is reasonably expected to perform his or her duties as an employee''—is intended to make clear that the safe harbor extends to employees who work at home or who may be on travel, provided that they have ready access to the employer's information system.

Some commenters recommended eliminating the requirement that access to the employer's or plan sponsor's information system be an integral part of the participant's duties. The commenters argued that the availability of a computer kiosk in a common area at a participant's workplace should be sufficient to satisfy the access requirement. The Department disagrees. As stated in the proposal, the Department believes that the actual location of an employee's work is less important than the employee being expected to regularly access the employer's electronic information system and, therefore, more likely to receive timely communication of plan information. The Department has long held the view that, where documents are required to be furnished to participants, it is not acceptable merely to make the documents available in a location frequented by participants. See § 2520.104b–1(b). The Department believes that, even where a participant is otherwise provided notice of the availability of a document, requiring participants to physically seek out the documents in common areas of the workplace will be a disincentive for participants to obtain and review important information affecting their rights, benefits, and obligations under their plan. Accordingly, while the use of electronic information systems in common areas of the workplace may be an appropriate means by which to make plan information available for inspection, as a supplemental method of disclosure, or as a way to access additional non-mandated materials, it is not an appropriate means by which to deliver documents required to be furnished to participants.

Second, the Department has eliminated the requirement that participants have the opportunity to readily convert furnished documents from electronic form to paper form free of charge. A number of commenters questioned the need for this requirement if participants have the ability to obtain paper versions of electronically furnished documents. Commenters also raised questions as to the application of this requirement when employees are on travel or worksite locations where printers are not readily available. The Department is persuaded that this requirement is not necessary where participants have the right to request and obtain paper versions of the electronically furnished documents.[3]

The second category of individuals to whom documents may be furnished electronically under the expanded safe harbor is participants, beneficiaries and other persons entitled to disclosure documents under Title I who consent to receive such documents electronically. See § 2520.104b–1(c)(2)(ii). The furnishing of documents to this category of individuals assumes the furnishing of documents electronically beyond the workplace and, therefore, the utilization of electronic information systems beyond the control of the plan or plan sponsor. For this reason, the safe harbor establishes conditions that are intended to ensure the adequacy of the information system for the individuals to whom disclosures will be made electronically. The established conditions take into account both suggestions of the commenters and provisions of the Electronic Signatures in Global and National Commerce Act (the E–SIGN Act) relating to consumer disclosure and consent with regard to electronic communications.[4]

As expanded, the safe harbor conditions electronic communications beyond the workplace on the individual to whom disclosure is being made affirmatively consenting to receive documents electronically. In the case of documents to be furnished through the Internet or other electronic communication network, the individual must, in addition to providing an address for the receipt of documents electronically, consent or confirm consent electronically in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used. Such confirmation will not only ensure the compatibility of the hardware and software of the individual and the plan, but will also serve to evidence that the administrator has taken appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt, as required by paragraph (c)(1)(i)(A). See § 2520.104b–1(c)(2)(ii)(B). The requirement for an e-mail address and electronic confirmation would not apply where the means of electronic communication is via CD, DVD or similar media not dependent on electronic transmission of the documents to the participant or beneficiary. See § 2520.104b–1(c)(2)(ii)(A)

As noted earlier, making electronic information systems available in common areas of the workplace (e.g., computer kiosks) is not, in the Department's view, a permissible means by which to deliver documents required to be furnished to participants.

In an effort to ensure that all parties understand the nature of, and requirements for, such communications, reliance on the safe harbor also is conditioned on the individual being provided, prior to his or her consent, a clear and conspicuous statement containing certain specified information. The statement must identify the documents or categories of documents to which the consent would apply; explain that consent may be withdrawn at any time without charge; describe procedures for withdrawing

[3] If a document is required by the Act, or regulations issued thereunder, to be furnished without charge to participants and beneficiaries, plan administrators availing themselves of the safe harbor must furnish to participants and beneficiaries without charge a paper version of any such document transmitted electronically. On the other hand, if an administrator is permitted to impose a reasonable charge for a document, the administrator may impose a reasonable charge for furnishing a paper version of the document under this safe harbor (§ 252.104b–1(c)). Also see: 29 CFR 2520.104b–30.

[4] Pub. L. 106–229, 114 Stat. 464 (2000) (codified at 15 U.S.C. 7001 et seq.)

consent or updating address or other information; explain the right of the individual to request and obtain a paper version of the electronically furnished document(s), including whether the paper version will be provided free of charge; and identify any software and hardware requirements to access and retain the identified documents to be provided electronically. The Department believes that the foregoing will provide participants and beneficiaries with the basic information necessary to make an informed decision about receiving documents electronically.

The Department recognizes that there may be additional information that administrators believe should or must be communicated in conjunction with this disclosure, including, as suggested by commenters, an explanation of the importance of keeping the plan or plan sponsor apprised of changes that may affect the communication of plan information. The requirements for a clear and conspicuous statement are not intended to limit the ability of plan administrators to include information, in addition to that required, they believe is important to participants and beneficiaries, but rather to ensure that the communicated information is both brought to the attention of the electing individual and set forth in a reasonably understandable manner.

Recognizing that there may be system or other changes that may affect the electronic furnishing of documents, the safe harbor requires that where there are changes in hardware or software that may create a material risk that an individual will not be able to access documents electronically, the individual must be provided a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents, as well as the right to withdraw consent without charge. Following notice of the hardware or software changes and the right to withdraw consent, the individual must again affirmatively consent to receive documents electronically. This condition is intended to afford participants and beneficiaries the opportunity to fully assess and reconfirm the compatibility of the system changes with their ability to access and retain documents.

Expand Scope of Safe Harbor To Cover Other Disclosures

As proposed, the safe harbor covered the distribution of SPDs, summaries of changes to the SPD and summary annual reports. Many commenters requested that the scope of the safe harbor for electronic disclosures be expanded in the final regulation to include additional disclosures required under Title I of ERISA. The commenters specifically identified: individual benefit statements under section 105(c) of ERISA; investment-related information required to be provided to participants and beneficiaries in the case of plan fiduciaries seeking to be covered by section 404(c) of ERISA; COBRA notifications under sections 606 of ERISA; qualified domestic relations order (QDRO) notifications under section 206(d)(3) of ERISA; qualified medical child support order (QMCSO) notifications under section 609 of ERISA; information concerning participant loans under section 408(b)(1) of ERISA; and information required to be furnished or made available for inspection under sections 104(b)(2) and 104(b)(4) of ERISA in response to a request from a participant or beneficiary.

The Department is persuaded that, with safeguards to protect the confidentiality of personal information, the safe harbor should be expanded to include the transmittal of all documents required to be furnished or made available under Title I of ERISA and the regulations issued thereunder that are within the jurisdiction of the Department of Labor.[5] In this regard, the Department believes that the general standard applicable to the distribution of documents under § 2520.104b–1(b)—requiring plan administrators to use measures reasonably calculated to ensure actual receipt—would appear generally applicable to documents required to be distributed under Title I. The Department notes that when § 2520.104b–1 was originally adopted in 1977, the primary disclosure documents under Title I were set forth in Part 1 of Title I. Since that time, the statute has been amended to incorporate disclosure and notice requirements relating to qualified domestic relations orders under Part 2, qualified medical child support orders under Part 6, continuation coverage rights under Part 6, and creditable coverage and related disclosures under Part 7 of Title I, and the Department has adopted regulations under section 404(c), among others. The general application of the standards under § 2520.104b–1 was most recently recognized by the Department in the revised claims procedure regulations adopted on November 21, 2000. In those regulations, the Department specifically referenced the applicability of the electronic distribution safe harbor standards set forth in paragraph (c) of § 2520.104b–1 to benefit determinations.[6] For these reasons, the Department believes it is appropriate to amend § 2520.104b–1 to apply to disclosures under Title I generally, rather than limiting its application to disclosures of SPDs and related disclosures and SARs. In this regard, the Department is making conforming amendments to paragraphs (a) and (b) of § 2520.104b–1 to accommodate the extension of the safe harbor to Title I disclosures generally, as well as clarify that the provisions of the regulation, including the safe harbor, do not extend to disclosures within the jurisdiction of the Department of the Treasury.

The Department wishes to note that, while the scope of § 2520.104b–1 is being expanded to encompass the distribution of plan disclosures to participants, beneficiaries, and certain other individuals under Title I, the distribution standards of revised § 2520.104b–1 do not alter any requirements otherwise applicable to specific disclosures, such as the party to whom the disclosure must be made, the content of the disclosure, or the timing of the disclosure. The Department also notes that the standards of revised § 2520.104b–1 are limited to plan disclosures under Title I of ERISA and do not govern other communications under Title I, for example, communications from participants or beneficiaries (such as spousal consents), or between plan administrators and employers or other plan sponsors.

Currently, the manner in which applicants may notify interested persons of the pendency of a proposed exemption from ERISA's prohibited transaction provisions, including the use of electronic media, is determined on a case-by-case basis under 29 CFR 2570.43. The Department is considering the applicability of the safe harbor provided by this rule to that notice requirement. In this regard, the Department invites interested parties to submit comments and views concerning the application of the safe harbor to such notifications. Comments should be addressed to the Office of Exemption

[5] The Department notes that § 2510.104b–1, including the provisions of the safe harbor, do not extend to certain disclosures required under provisions of Part 2 or Part 3 of the Act over which the Department of the Treasury has regulatory and interpretative authority pursuant to Reorganization Plan No. 4 of 1978. A new paragraph (e) has been added to the final regulation to note this limitation. Plan administrators and others should refer to regulations and guidance issued by the Department of the Treasury for information on the use of electronic communication technologies to satisfy disclosure obligations within its jurisdiction.

[6] *See* 29 CFR 2560.503–1(g)(1), providing that electronic notifications of benefit determinations must comply with the requirements of § 2520.104b–1(c)(1).

Determinations, Room N–5649, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210; Attention: ''Electronic Notice to Interested Persons.'' Comments should be submitted by June 30, 2002. The Department expects to complete its consideration of this issue no later than December 31, 2002.

Recognizing that certain information required to be disclosed under Title I, such as individual benefit and claims information, may be confidential in nature, the Department is amending the general standards of the safe harbor, at paragraph (c)(1)(i), to require that, with respect to disclosures that relate to individuals and their accounts and benefits, the administrator must take appropriate and necessary measures to ensure that the system for furnishing such information protects the confidentiality of the information, such as by incorporating into the system measures designed to preclude unauthorized receipt of, or access to, the information by individuals other than the individual for whom the information is intended. The Department is not prepared at this time, however, to express any view as to the adequacy of any particular method designed to protect confidentiality, such as the use of PINs or passwords.

General Obligations of Administrator

The general obligations of a plan administrator with respect to the distribution of documents electronically under the safe harbor are set forth in paragraph (c)(1) of § 2520.104b–1. As proposed, the administrator is required to take appropriate and necessary measures to ensure that the system for furnishing documents results in actual receipt of transmitted information and documents. The proposal included the following examples of such measures: using return-receipt electronic mail features; or conducting periodic reviews or surveys to confirm receipt of transmitted information. See § 2520.104b–1(c)(1)(i). Some commenters asked whether this requirement was intended to impose a standard for ensuring electronic disclosures are received that is stricter than the standard that applies to other methods of delivery. Another commenter asked the Department to add electronic systems that notify the sender of ''undelivered'' e-mails as an example in the regulation. Other commenters requested that the safe harbor be limited to electronic communications that the plan administrator could prove were actually received by the participant.

It is the Department's view that the standard for furnishing materials under § 2520.104b–1 should not be stricter for electronic disclosures than for other methods of delivery. Rather, the safe harbor criteria are intended to extend the application of the general standards of § 2520.104b–1(b) to electronically distributed documents. For example, utilization of mail delivery, whether first, second or third class, for distribution of documents anticipates the sender (i.e., the plan administrator) being apprised of address changes or non-delivery of the mailed documents. This condition is being adopted essentially as proposed, except that, as discussed above, the paragraph has been amended to require protection of personal information and, as suggested by one commenter, an example of ''notice of undelivered electronic mail'' has been added to paragraph (c)(1)(i) of § 2520.104b–1.

Another general condition for reliance on the safe harbor is that electronically delivered documents are prepared and furnished in a manner consistent with the applicable style, format, and content requirements. See § 2520.104b–1(c)(1)(ii). A few commenters asked that the Department clarify whether differences in format between a paper version and an electronic version of SPDs are permitted so long as the content, form, style and other requirements applicable to SPDs are satisfied. Another commenter noted that the proposal indicated that participants and beneficiaries had a right to request paper ''copies'' of electronic disclosures, and expressed concern that the use of interactive technologies, multimedia presentations and hyperlinks in electronic disclosures would be severely limited if the safe harbor required paper and electronic documents to be identical. Neither the safe harbor nor the content, style and format requirements applicable to disclosures under the Act preclude the use of interactive technologies, multimedia components or hyperlinks to related materials in electronic disclosures. Moreover, the Department recognizes that electronic disclosures and paper versions of the required disclosure documents may differ. In the Department's view, the requirements of the safe harbor will be satisfied where the electronic and paper versions of a disclosure document, albeit different, each satisfy the style, format and content requirements applicable to the specific document when viewed independently. Paragraph (c)(1)(ii) has been only slightly modified to take into account that § 2520.104b–1 is being expanded to encompass disclosures under Title I generally.

Paragraph (c)(1)(iii) of the proposal further conditions reliance on the safe harbor on each participant being provided notice of the documents being furnished electronically, the significance of the documents and the participant's right to request and receive a paper version free-of-charge. Paragraph (c)(1)(iii) served to require that, upon request, individuals are furnished paper versions of the electronically furnished documents. While a number of commenters supported the ''notice of furnished documents'' condition, one commenter suggested that the Department permit such notices to be included as part of regular mailings or e-mails (e.g., with account statements) annually. The required notice is intended to bring to the attention of participants and beneficiaries at the time of the electronic disclosure that they have been furnished important plan information. The Department believes that merely furnishing a general notice on a periodic basis would not accomplish this goal. For purposes of the safe harbor, therefore, the Department believes that the timing of the notice must be governed by the time frame applicable to the required disclosure, and paragraph (c)(1)(iii) has been modified to make this clear. Nothing in the safe harbor, however, is intended to preclude the furnishing of the required notice with other information relating to the plan or plan sponsor. In such cases, however, care should be taken to ensure that the required notifications are sufficiently conspicuous to alert participants and beneficiaries to electronically furnished documents. The Department has also clarified that the requirement that the notice apprise each participant and beneficiary of the significance of the document being provided electronically applies only where the significance of the document may not be reasonably evident from the transmittal, such as where it is an attachment to an e-mail.

The Department received several comments suggesting that there is unneeded redundancy in the requirement that participants have the ability at the workplace to readily convert furnished documents from electronic form to paper form free of charge, when they must also be advised of and afforded the opportunity to obtain paper versions of the furnished documents from the plan administrator free of charge. As discussed earlier, that requirement has been eliminated from the safe harbor. For a variety of reasons (e.g., malfunctioning hardware or

software, readability, portability), however, documents furnished in electronic form may not accommodate the needs of every participant or beneficiary on every occasion. Accordingly, the Department continues to believe that the ability of participants and beneficiaries to receive paper versions of electronically furnished documents is important to ensuring adequate disclosure to participants and beneficiaries. The Department, therefore, has retained the requirement to make paper versions of electronically furnished documents available to participants and beneficiaries.[7]

Because the scope of the safe harbor, and § 2520.104b–1, have been expanded to encompass all Title I disclosures generally, the safe harbor has been modified to eliminate the requirement that paper versions of documents always be furnished free-of-charge. As noted above, however, if a document is required by the Act, or regulations issued thereunder, to be furnished without charge to participants and beneficiaries, plan administrators availing themselves of the safe harbor must furnish to participants and beneficiaries without charge a paper version of any such document transmitted electronically. On the other hand, if an administrator is permitted to impose a reasonable charge for a document, the administrator may impose a reasonable charge for furnishing a paper version of the document under the safe harbor.

Miscellaneous Issues Involving the Use of Electronic Media

Two commenters asked the Department to clarify whether the safe harbor would apply to disclosures of plan information maintained in a separate section of a company's website that is easily accessible from its home page with access generally restricted to employees and others by password and PIN requirements. The Department believes that using a company's website as a method of providing information is similar to using an insert to a company publication, which is cited in the general standard in 29 CFR 2520.104b–1(b) as an acceptable method of ''furnishing'' disclosures within the meaning of the regulation provided the distribution list for the periodical is comprehensive and up-to-date and a prominent notice appears on the front page of the publication advising readers that the publication contains important information about rights under the plan. A plan administrator relying on such website disclosure must still satisfy all the conditions of the safe harbor. For example, participants and beneficiaries would have to be notified of the availability of the particular disclosure document and its significance by sending written or electronic notice, as described in § 2520.104b–1(c)(1)(iii), directing them to the document on the website, and the administrator would still be required to take appropriate and necessary measures to ensure the website system for furnishing documents results in actual receipt, e.g., the website homepage should contain a prominent link to the website sections that contain information about the plan, the website should include directions on how to obtain a replacement for a lost or forgotten password to the extent one is needed, and disclosure documents should remain on the website for a reasonable period of time after participants and beneficiaries are notified of their availability.

Another commenter asked whether documents could be furnished on a magnetic disk or CD–ROM. The regulation does not categorize particular electronic media as either permissible or impermissible methods through which required disclosures may be provided as long as the conditions of the safe harbor are met. For example, as noted above, under the safe harbor, participants and beneficiaries must be provided with a notice in accordance with § 2520.104b–1(c)(1)(iii) apprising them of the document(s) to be furnished electronically, the significance of the document (e.g., the document describes changes in the benefits provided by your plan) and the participant's or beneficiary's right to request and receive a paper version of each such document. The purpose of the notice requirement is to ensure that participants and beneficiaries who receive an electronic disclosure will be put on notice that the communication contains important information relating to their plan or to their rights and obligations under the plan. Thus, a plan administrator could provide a participant with a CD–ROM containing the plan's SPD, for example, so long as the CD–ROM was accompanied by a paper notice or was clearly labeled to provide the notification required by § 2520.104b–1(c)(1)(iii) and the other conditions in the safe harbor were satisfied.

C. Electronic Recordkeeping—29 CFR 2520.107–1

Proposed regulation 29 CFR 2520.107–1 provided standards concerning the use of electronic media, including electronic storage and ADP systems, for the maintenance and retention of records required by sections 107 and 209 of ERISA. Only a few comments were submitted regarding the recordkeeping provisions in proposal, and, in general, they asked for relatively minor clarifications of certain provisions in the proposal. Accordingly, the final rule being adopted herein is essentially unchanged from the proposal.

In General

The final rule provides that electronic media may be used for purposes of complying with the records maintenance and/or retention requirements of sections 107 and 209, provided: (1) The recordkeeping system has reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form; (2) the electronic records are maintained in reasonable order, in a safe and accessible place, and in such manner as they may be readily inspected or examined (for example, the recordkeeping system should be capable of indexing, retaining, preserving, retrieving and reproducing the electronic records); (3) the electronic records can be readily converted into legible and readable paper copy as may be needed to satisfy reporting and disclosure requirements or any other obligation under Title I of ERISA; and (4) adequate records management practices are established and implemented (for example, following procedures for labeling of electronically maintained or retained records, providing a secure storage environment, creating back-up electronic copies and selecting an off-site storage location, observing a quality assurance program evidenced by regular evaluations of the electronic recordkeeping system including periodic checks of electronically maintained or retained records, and retaining paper copies of records that cannot be clearly, accurately or completely transferred to an electronic recordkeeping system).[8]

[7] As discussed earlier with regard to the application of style, format and content requirements, paper documents are not required to be duplicates of the electronically furnished document. In an effort to further clarify this point, the term ''paper version'' has been substituted for ''paper copy'' in § 2520.104b–1(c)(1)(iii).

[8] The proposed standards are not inconsistent with guidance issued by the Internal Revenue Service under section 6001 of the Internal Revenue Code of 1986 regarding the maintenance of books and records on an electronic storage system or within an ADP system. *See* Rev. Proc. 97–22, 1997–13 I.R.B. 9, and Rev. Proc. 98–25, 1998–11 I.R.B. 7. The Department also notes that the regulation does not specifically address the use of microfilm and microfiche for storing employee benefit plan

The final rule also provides that the electronic recordkeeping system may not be subject to any agreement or restriction that would, directly or indirectly, compromise a person's ability to comply with any reporting and disclosure requirement or any or other obligation under Title I of ERISA. In addition, the final rule provides guidance on when original paper records may be discarded after they have been transferred to electronic media.

The Department again emphasizes what it stated in the preamble to the notice of proposed rulemaking that the duty to maintain records in accordance with Title I of ERISA cannot be avoided by contract, delegation or otherwise. Use of a third party to provide an electronic recordkeeping system does not relieve the person responsible for the maintenance and retention of records required under Title I of ERISA of the responsibilities described therein. For example, if the administrator of a plan arranges with a service provider to perform functions with respect to the plan and, pursuant to the arrangement, the service provider creates, maintains, retains or prepares the plan's records, or keeps physical custody of those records, the statutory requirements relating to such records remain with the administrator, and the administrator must make such agreements and arrangements with the service provider as are necessary to ensure that the records are properly maintained and retained.[9]

Furthermore, it is the Department's view that persons subject to recordkeeping obligations under section 107 and section 209 of ERISA would, pursuant to the Department's investigative authority under section 504 of ERISA, be required to provide the Department, upon request, with the necessary equipment and resources (including software, hardware and personnel) as would be needed for inspection, examination and conversion of electronic records into legible and readable paper copy or other usable form acceptable to the Department. Similarly, such persons would be required to have the capability of converting electronic records into usable form, including, at a minimum, paper copy, as may be necessary to satisfy reporting, disclosure and other obligations under Title I of ERISA.

This final rule is consistent with the goals of the E-SIGN Act and is designed to facilitate voluntary use of electronic records while ensuring continued accuracy, integrity and accessibility of employee benefit plan information and records required to be kept by law. The requirements of the final rule are justified by the importance of the employee benefit plan records involved, are substantially equivalent to the requirements imposed on records that are not electronic records, will not impose unreasonable costs on the acceptance and use of electronic records, and do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records.

Destruction of Paper Records After Converting to Electronic Form

One commenter asked the Department to clarify the proposal regarding destruction of originals. The proposal provided that original records generally may be discarded once such records are transferred to an electronic recordkeeping system that complies with the above described electronic media and record maintenance requirements, but included an exception under which original records may not be discarded if they have legal significance as original records such that an electronic record would not constitute a duplicate record. The commenter urged that the term ''legal significance'' be dropped because it could be interpreted as applying to many documents and records. The commenter also suggested that the examples in the proposal (notarized documents, insurance contracts, stock certificates, and documents executed under seal) would require plans to keep paper copies where electronic reproductions were sufficient.

On review, the Department has determined that the ''legal significance as an original'' component in the proposal may have been confusing because it was essentially redundant to the condition that the electronic record be usable as a duplicate original. Accordingly, the ''legal significance'' component has been eliminated and the exception has been clarified to provide that original paper records may be disposed of any time after they are transferred to an electronic recordkeeping system that complies with the requirements of § 2520.107–1, unless the resulting electronic record would not constitute a duplicate or substitute record under the terms of the plan and applicable federal or state law.

Miscellaneous Comments Regarding Matters Outside the Scope of This Rulemaking

One commenter asked the Department to provide guidance on the types of records that must be retained for purposes of sections 107 and 209. As the Department explained in the preamble to the proposed regulation, the purpose of this rulemaking is not to define or address the types of records required to be maintained under sections 107 and 209, nor the period of time for which records must be retained under those sections of the Act. Accordingly, the Department is not making any changes in the proposal in response to that comment because that issue is outside the scope of this rulemaking.

Another commenter asked the Department to explain whether the standards in the safe harbor regarding ''back-up'' electronic records and off-site storage apply when records are maintained in paper form. It is the view of the Department that, regardless of whether records are held in paper or electronic form, the appropriate plan fiduciary or fiduciaries should establish and implement adequate records management practices. What is ''adequate'' may vary depending on the recordkeeping system involved and the different risks of loss or destruction to which the records or recordkeeping medium may be exposed. Nonetheless, regardless of the medium used to keep records, the loss or destruction of records required to be retained by sections 107 and 209 does not discharge the persons required to retain such records from their statutory duties under sections 107 and 209 with regard to the purposes for which such records are required to be retained under those sections. Whether lost or destroyed records can, or should be, reconstructed and whether the persons responsible for the retention of records are, or should be, personally liable for the cost incurred in connection with the reconstruction of records is necessarily dependent on the facts and circumstances of each case.

D. Effective Date and Applicability Dates

The effective date of these regulations is October 9, 2002. There is no special applicability date for the amendments of § 2520.104b–1, and, accordingly, those amendments apply as of the effective date stated above. The requirements of

records. The Department previously addressed this issue in an information letter to Gregg M. Goodman from Robert J. Doyle (August 23, 1983). The letter stated that, in the absence of regulations providing otherwise, the retention of microfilm, microfiche or similar reproduction of records, in lieu of original records, would not violate the provisions of section 107 or 209 provided certain conditions were met.

[9] See Advisory Opinion 84–19A (April 26, 1984).

§ 2520.107–1, concerning maintenance and retention of employee benefit plan records in electronic form, are applicable as of the first day of the first plan year beginning on or after October 9, 2002. The preamble accompanying the Proposed Rules set forth the Department's view that, in the absence of final regulations or other guidance on using electronic media for purposes of complying with ERISA's Title I disclosure and recordkeeping requirements, good faith compliance with the standards set forth in the Proposed Rules would, with respect to the disclosure and recordkeeping requirements specifically addressed therein, constitute compliance with a reasonable interpretation of 29 CFR 2520.104b–1 and ERISA sections 107 and 209. The preamble also made clear that the interim rule pertaining to electronic disclosures continued to be in effect for group health plans during the pendency of the proposal. The final regulations being promulgated in this rulemaking will, upon becoming applicable, supersede and replace the interim rule for group health plans and the good faith compliance provision in the proposal.

E. Economic Impact of Electronic Technologies Regulation

Summary

These final rules expand the safe harbor for electronic provision of ERISA disclosure documents to include both more documents and more delivery locations. As a result of these final rules, plans will be in a position to make greater use of electronic technologies when providing required disclosures to participants and beneficiaries. Wider use of such technologies will produce two distinct economic benefits. One benefit will be financial savings arising from the elimination of materials, printing, and mailing costs associated with provision of printed disclosures. The other will be improved timeliness, quality and accessibility of information that will flow from instant, on-line availability and information access tools such as hot-links and search queries.

The net savings produced by moving from printed to electronic disclosures under this regulation will be approximately $66 million in the first year, the Department estimates. This net figure includes a total of $74 million in annually recurring gross savings from the elimination of materials, printing, and mailing costs. This gross savings is partly offset in the first year by an $8 million cost incurred to obtain affected participants' consent to accept electronic delivery of disclosures outside the workplace. No other new costs were attributed to the adoption of new technologies, reflecting the Department's expectations that (1) master copies of printed versions of disclosures typically are maintained in electronic form or can be easily converted to such form, (2) that plan sponsors will provide disclosures via electronic media and infrastructure that already exist for purposes other than the provision of ERISA disclosures, and (3) that the cost to transmit disclosures electronically is negligible.

Most of the $74 million in gross savings is attributable to expected electronic provision of SPDs and SMMs, and SARs to participants outside the workplace. These applications of new technologies are expected to save $34 million and $32 million, respectively. SPDs/SMMs can be large documents, so electronic provision can eliminate substantial printing, materials, and mailing costs. SPDs/SMMs and SARs are also some of the most widely distributed ERISA disclosure documents, thus offering significant potential for the reduction of distribution costs.

Not included in the $74 million gross savings estimate is an additional $65 million in savings from the electronic provision of SPDs/SMMs and SARs to participants at the workplace that were authorized by the safe harbor provision of the proposed regulation.[10] Savings arising from them are not being attributed to this final regulation. Also not included is any savings from the adoption of electronic recordkeeping. The Department believes that the final regulation's standards for electronic recordkeeping are consistent with reasonable and prudent business practices that are already widely followed, and therefore are unlikely to substantially change recordkeeping costs.

The Department's estimates reflect its expectations about the degree to which disclosures will be provided electronically under the final regulation. Approximately 21 percent of participants currently have appropriate access to electronic media at their work places, and another 38 percent have such access at home, the Department estimates. For purposes of these estimates, the Department assumed that a large majority of plans will adopt new technologies, and approximately three-fourths of participants with access to electronic media only at home will consent to receive electronic disclosures. The Department included in its savings estimates only disclosures that are directed at participants and include no information specific to individuals, reasoning that such disclosures might be the first to which new technologies are applied. In combination, these assumptions suggest that the printing, materials and mailing costs associated with relevant ERISA disclosures will be reduced by approximately 14 percent in the first year in connection with this final regulation (or 27 percent in connection with the proposed and final regulations together). The electronic provision of ERISA disclosures and the corresponding amount of savings is likely to grow in the future, as participants' access to, and comfort with, electronic media both at work and at home increases, as plans' use of such media expands, and as some sponsors apply new technologies more broadly to disclosures to beneficiaries or former participants or to disclosures that include information specific to individuals.

The final regulation is also expected to improve the timeliness, quality and accessibility of information for participants and beneficiaries. Timeliness will improve as delays attributable to printing and mailing are eliminated. In addition, the frequency with which SPDs are updated to reflect changes may increase as the cost to provide updated copies falls. The quality and accessibility of information may improve along many dimensions. Information access tools such as hot-links and search queries may help participants retrieve desired information from SPDs and other documents. Multi-media enhancements may present information in ways some participants find more accessible, comprehensible or appealing. The value of these benefits cannot be specifically quantified.

Basis for Savings Estimates

As a result of this final regulation, plans will be in a position to make greater use of electronic technologies when providing required disclosures to participants and beneficiaries. Wider use of such technologies will produce financial savings by eliminating some of the materials, printing, and mailing costs normally associated with provision of printed disclosures. As noted above, the Department estimates that net savings produced by moving from printed to electronic disclosures under this regulation will be approximately $66 million in the first year.

[10] See footnote 13 and accompanying text, infra, for a discussion of the difference between this $65 million estimate and the estimated saavings in the preamble to the proposal.

The Department's estimates of financial savings from the final regulation are grounded in its separate estimates of the cost to provide relevant ERISA disclosures in printed form. For purposes of compliance with the Paperwork Reduction Act, the Department maintains estimates of the cost to prepare and distribute such disclosures. Preparation costs generally include the cost to develop the content and format of the disclosure, while distribution costs generally include the materials, printing and mailing cost incurred to provide the disclosures to participants and beneficiaries as required.

The Department's estimates assume that preparation costs will be unchanged by the final regulation. This assumption reflects the Department's belief that master copies of printed versions of disclosures typically are maintained in electronic form or can be easily converted to such form. Some plan sponsors may elect to develop new formats and content for electronic disclosures. New formats and content might include interactive interfaces that involve hot-links, text search capabilities, and/or multimedia presentations, all of which might improve the timeliness, quality and accessibility of information for participants. However, the final regulation does not require the development of formats or content beyond that which satisfies disclosure requirements in printed form.

The Department's estimates assume that electronic provision of disclosures eliminates the distribution cost otherwise associated with the provision of printed disclosures. This assumption reflects the Department's expectation that (1) plan sponsors will provide disclosures via electronic media and infrastructure that exist for purposes other than the provision of ERISA disclosures and (2) that the cost to electronically transmit disclosures is therefore negligible.

Having adopted these assumptions, the Department estimated the amount of gross savings as a function of the degree to which disclosures will be provided electronically under the final regulation. This in turn is a function of participant access to electronic media, plan sponsor adoption of new technologies, the application of those technologies to particular disclosures, and the degree to which participants and beneficiaries will consent to receive disclosures electronically at home. The Department considered each of these in turn.

Based on a Census Bureau household survey published in 2001[11] on computer use and a separate 1999 Census Bureau household survey on pension and health benefit plan participation,[12] the Department estimates that approximately 21 percent of participants have appropriate access to electronic media at their work places, and another 38 percent have such access at home. The pension and health coverage rates from the 1999 survey were applied to the computer use rates industry-by-industry to account for the likelihood that computer use is higher among plan participants and especially among large plan participants, because such participants are concentrated in certain industries.

The Department assumed that a large majority of plans with participants who have access to electronic media (or their service providers) will adopt new technologies as a means to provide at least some relevant ERISA disclosures. This may be especially true of large plans, which account for the lion's share of participants. Pension plans with 1,000 or more participants included nearly three-fourth of all participants in 1997. Similar data are not available for welfare plans. The Department also assumed that plan sponsors (or their service providers) would be more inclined to provide disclosures electronically at work than outside the workplace, because communication at the workplace might be viewed as more reliable and the final regulation requires no consent from participants before implementation of such disclosures. Specifically, the Department assumed that plans covering 90 percent of participants with access to electronic media at work would distribute disclosures electronically at work, and that plans covering two-thirds of participants with access only at home would offer the opportunity for receiving disclosures electronically outside the work place, and so seek consent.

The Department assumed that plans would distribute electronically only those disclosures that are directed at participants, and not those directed at beneficiaries or former participants or beneficiaries. It seems likely that plans might view their electronic links to participants and active employees as more reliable than those to beneficiaries or former participants or beneficiaries and, because beneficiaries and former participants and beneficiaries are not active employees, they will not have access to electronic media at the workplace. Therefore, for example, the Department assumed that sponsors who adopt new technologies will electronically distribute SPDs/SMMs, SARs, ERISA Section 404(c)-related disclosures, and ERISA Section 701-related notices of special enrollment rights and preexisting condition exclusions, but not ERISA Section 701-related certificates of prior coverage or Section 606-related notices of COBRA continuation rights.

Moreover, the Department conservatively assumed that plans would distribute electronically only disclosures that contain no potentially sensitive information specific to individuals, which might raise privacy concerns. For example, the Department did not assume that plans would electronically distribute notices and disclosures pertaining to individual claims for benefits or qualified domestic relations orders.

These assumptions are intended to address what the Department estimates as the likely impact of the final rules based on existing practices in the current environment. Such assumptions should not be interpreted as bearing on actions specifically permitted under the final rules. To the extent that plans do provide electronic disclosures to former participants or beneficiaries or do electronically distribute disclosures containing sensitive, individual-specific information as permitted by the final rules, then the overall incidence of electronic distribution and the corresponding savings will be larger than the Department estimates.

The Department assumed that three-fourths of participants with access to electronic media only at home, and who are offered the opportunity to consent to receive disclosures outside the workplace, would actually consent. It seems reasonable to assume that a substantial majority would so consent, given the Department's forgoing assumption that only disclosures that do not contain sensitive, individual-specific information would be distributed electronically.

Finally, the Department assumed that the marginal cost of distributing a disclosure to an individual is equal to the average cost of distributing it to all relevant individuals. This assumption seems reasonable given that the large plan sponsors and service providers who provide most disclosures provide very large numbers of them. The assumption implies that the cost of distributing a particular disclosure is a linear function of the number of

[11] "Home Computers and Internet Use in the United States: August 2000," U.S. Census Bureau Current Population Reports (September, 2001).

[12] Contingent Work Supplement to the February, 1999 Current Populations Survey, U.S. Census Bureau.

individuals receiving it, so the cost of distributing a disclosure will decrease proportionately with the share of individuals to whom it is distributed electronically rather than in printed form.

In combination, these assumptions suggest that the printing, materials and mailing costs associated with relevant ERISA disclosures will be reduced by approximately 14 percent in the first year in connection with this final regulation (or 27 percent in connection with the proposed and final regulations together). This amounts to $66 million in net savings from the final regulation (or $131 million from the proposed and final regulations together).

As noted above, the Department's estimate of $66 million in savings in the first year is a net figure. It includes a total of $74 million in gross annual savings from the elimination of materials, printing, and mailing costs. This gross saving is partly offset in the first year by an $8 million cost incurred to develop appropriate consent materials and procedures and obtain affected participants' consent to accept electronic delivery of disclosures outside the workplace. The final regulation's safe harbor requires plans that wish to distribute disclosures electronically outside the work place to obtain affirmative consent from the affected participants and beneficiaries. To accomplish this, plans or their service providers generally must develop a process for requesting and recording such consent, and then implement the process and thereby obtain or fail to obtain consent from affected participants and beneficiaries.

The Department estimates the cost to develop and implement consent processes at $8 million. The cost to develop the processes and most of the cost to implement them are one-time costs incurred in the first year. Ongoing costs in later years include only the cost of obtaining consent from new or prospective participants and beneficiaries and the cost of maintaining consent records and processing any changes in consent elections. These ongoing tasks are likely to be integrated into the larger process of hiring and enrolling individuals in benefit plans and will add little cost at the margin. Ongoing savings are expected to amount to at least $74 million per year, increasing in the future with increased utilization of electronic disclosure methods.

The electronic provision of ERISA disclosures and the corresponding amount of savings is likely to grow in the future, as participants' access to and comfort with electronic media both at work and at home increases, as plans' use of such media expands, and as some sponsors apply new technologies more broadly to disclosures to beneficiaries or former participants or to disclosures that include information specific to individuals.

The Department's estimates of the savings from the final and proposed regulations are summarized below.

ESTIMATED FINANCIAL SAVINGS ATTRIBUTABLE TO THE FINAL REGULATIONS

[$Millions in First Year]

Selected disclosures	At work	Other location	Total
SPD/SMM	[13] 33.5	34.2	67.7
SAR	[13] 31.7	32.4	64.1
404 (c) Disclosure	3.2	3.1	6.3
Notice of Pre-Existing Condition Exclusions	0.2	0.2	0.5
Special Enrollment	0.2	0.2	0.4
Total Gross Savings	68.8	70.2	139.0
Less SPD/SMM and SAR Savings Attributable to the Proposed Regulation [13]	−65.2		
Consent Cost	.....	−7.7	−7.7
Total Net Savings	3.6	62.5	66.0

[13] These savings are attributable to the proposed regulation and therefore are not included in total savings from the final regulation. The $33.5 million and $31.7 million estimated SPD/SMM and SAR savings differ from those presented in the preamble to the proposed regulation (64 FR 4511). The Department grounded its current estimates in data from recent Census Bureau survey of computer use. These data were not available when the Department published the proposed regulation.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that these rules are significant within the meaning of section 3(f)(4) of the Executive Order, and are thus subject to OMB review. Discussion of the costs and benefits of this final rule appear above in the summary of the Economic Impact of Electronic Technologies Regulation.

Paperwork Reduction Act

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the information collection request (ICR) incorporated in the final rules relating to use of electronic communication and recordkeeping technologies by employee benefit plans.

Desired Focus of Comments: The Department of Labor has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) of PRA 95 for review of its information collection. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

PRA Addresses: A copy of the ICR with applicable supporting statement may be obtained by calling the Department of Labor, Ms. Marlene Howze, at (202) 693–4158, or by email to *Howze-Marlene@dol.gov.* Comments and questions about the ICR should be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, ATTN: Desk Officer for the Pension and Welfare Benefits Administration, Room 10235, 725 17th Street, NW, Washington, DC, 20503 ((202) 395–7316).

Dates: The Department has requested that OMB approve or disapprove the collection of information by June 10, 2002. Comments should be submitted to OMB by May 9, 2002 to ensure their consideration.

The ICR provisions are included at § 2520.104b–1(c). Employee benefit plan administrators will be deemed to satisfy their disclosure obligations when furnishing documents electronically only if a participant who does not have access to the employer's electronic information system in the normal course of his duties, or a beneficiary or other person entitled to documents, has affirmatively consented to receive disclosure documents. Prior to consenting, the participant or beneficiary must also be provided with a clear and conspicuous statement indicating the types of documents to which the consent would apply, that consent may be withdrawn at any time, procedures for withdrawing consent and updating necessary information, the right to obtain a paper copy, and any hardware and software requirements. In the event of a hardware or software change that creates a material risk that the individual will be unable to access or retain documents that were the subject of the initial consent, the individual must be provided with information concerning the revised hardware or software, and an opportunity to withdraw a prior consent.

The Department is unaware of any data source that would directly identify the number of plans that will decide to transmit disclosure documents electronically to a non-work location, and thus be subject to the affirmative consent requirement. The Department has instead made certain assumptions pertaining to the cost to prepare and distribute consent for all employee benefit plans. Plans are expected to incur what is primarily a one-time start-up cost in the development and preparation of materials used to seek and verify consent from participants and beneficiaries.

Our estimates are based on the conservative assumption that most plans will wish to avail themselves of the opportunity to reduce distribution costs if possible, such that most plan sponsors will incur the cost to develop a consent procedure and documentation on behalf of the plan, regardless of the magnitude of savings that can be accomplished in satisfying disclosure obligations through electronic means. The number of separate consent forms designed is then reduced based on other factors considered relevant. Specifically, the total number of plans is reduced to take account of the fact that a sponsor is likely to use either the same or nearly the same form for each plan they sponsor (for example, only one consent form and procedure is assumed to be designed for use by a sponsor's health and pension plan or plans).

It is also assumed that the very large number of small health plans will either not communicate electronically and require consent, or will rely on the relatively small number of group insurance issuers they utilize to design consent forms and procedures. Finally, with the exception of large, self-administered plans, the number of plans is spread over an estimate of the number of third parties that are expected to assist plan sponsors with developing consent materials that conform to the terms of the regulation, in recognition of the economies of scale that can be achieved through the purchase of administrative services. The number of large, self-administered plans is added to arrive at an estimate of about 50,000 separate entities that will develop consent materials.

About 95% are expected to use service providers, resulting in cost burden, while about 5% are expected to develop consent materials using in-house staff. Resulting hour and cost burden estimates, based on 2 hours at an hourly rate of $72,[14] are shown below. Total costs include minor additions for paper and copying costs.

Type of Review: New.

Agency: Department of Labor, Pension and Welfare Benefits Administration.

Title: Consent to receive employee benefit plan disclosures electronically.

OMB Number: 1210–NEW.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Respondents: 50,000.

Frequency of Response: One-time.

Responses: 50,000.

Estimated Total Burden Hours: 5,042.

Total Capital/Start-up Cost: $7,340,000.

Total Annualized Capital/Start-up Cost: $2,447,000.

The Department has not accounted separately for the ongoing cost of maintaining consent materials and providing them to new employees. The ongoing cost associated with maintenance is considered to be minimal for any sponsor once the initial investment in materials and procedures is defrayed. Plan sponsors and administrators who make use of electronic means of disclosure are expected to distribute consent forms in the least costly way available, such as including a photocopy in new employee information packages or along with various other employment forms, resulting in additional burden that is so small as to be considered negligible.

Although the discussion presented here pertains to the consent requirement in the final rule, it should also be noted that the amendment to § 2520.104b–1 and the methodology used to estimate the impact of the amendments offer a basis for adjustments to the burden estimates of a number of other disclosures under Title I of ERISA. In

[14] Based on the Bureau's of Labor Statistics Occupational Employment Survey and Employment Cost Index.

general, § 2520.104b–1 provides implementing guidance on the manner in which the substantive disclosure requirements of Title I of ERISA will be deemed to have been met. These final amendments address the circumstances under which electronic disclosure methods will be deemed to have met substantive disclosure obligations, but they do not alter the substantive disclosure requirements of Title I.

As a result of using electronic disclosure methods, and of meeting the conditions of this ICR involving appropriate consent, the burden of other information collections may be reduced. Information supporting the Department's estimates of those potential burden reductions for disclosures such as information required to be provided under ERISA section 404(c), or Notices of Preexisting Condition Exclusions under Part 7 will be submitted to OMB. Because the underlying terms of those information collections, which are incorporated in existing statutory provisions and regulatory guidance, are unchanged, however, it is the view of the Department that the terms of these information collections have not been modified.

Comments submitted in response to this notice will be considered by OMB in its consideration of the request for approval of the ICR; they will also become a matter of public record.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

At the time of publication of the notice of proposed rulemaking, the Pension and Welfare Benefits Administration (PWBA) certified that the proposed rule, if promulgated in final form without material change, would not have a significant impact on a substantial number of small entities regardless of whether that determination was based on the definition of a small entity found in regulations issued by the Small Business Administration (13 CFR 121.201) or on the definition considered appropriate by PWBA as based on section 104(a)(2) of ERISA, as an employee benefit plan with fewer than 100 participants. The Department requested comments on its definition and certification, and received none. It is the Department's view that the final rule, including the modifications from the proposal, will not significantly impact entities in any size category. The final rule does not require any plan or other entity to make use of electronic media for either disclosure or recordkeeping purposes. As such, entities may avoid both any marginal cost and any beneficial impacts by simply retaining their existing paper-based methods of compliance with disclosure requirements. Therefore, the undersigned certifies that this final rule will not have a significant impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

The rules being issued here are subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The rule is not a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding $100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this final rule do not alter the fundamental reporting and disclosure requirements provisions of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

Statutory Authority

This regulation is issued pursuant to the authority in sections 104(b), 107, 209, and 505 of ERISA (Pub. L. 93–406, 88 Stat. 894, 29 U.S.C. 1027, 1059, 1134, 1135) and under Secretary of Labor's Order No. 1–87, 52 FR 13139, April 21, 1987.

List of Subjects in 29 CFR Part 2520

Employee benefit plans, Employee Retirement Income Security Act, Pension plans, Recordkeeping, Welfare plans.

For the reasons set forth above, Part 2520 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2520—[AMENDED]

1. The authority for Part 2520 is revised to read as follows:

Authority: Secs. 101, 102, 103, 104, 105, 107, 109, 110, 111(b)(2), 111(c), 209, and 505, Pub. L. 93–406, 88 Stat. 840–52, 865, 893 and 894 (29 U.S.C. 1021–1025, 1027, 1029–31, 1059, 1134 and 1135); Secretary of Labor's Order No. 27–74, 13–76, 1–87, and Labor Management Services Administration Order 2–6. Sections 2520.102–3, 2520.104b–1 and 2520.104b–3 also are issued under sec. 101(a), (c) and (g)(4) of Pub. L. 104–191, 110 Stat. 1936, 1939, 1951 and 1955 and, sec. 603 of Pub. L. 104–204, 110 Stat. 2935 (29 U.S.C. 1185 and 1191c). Sections 2520.104b–1 and 2520.107 are also issued under the authority of sec. 1510 of Pub. L. 105–37, 111 Stat. 1114.

2. Amend section 2520.104b–1 to revise the first sentence of paragraph (a), the first sentence of paragraph (b)(1),

and paragraph (c), and to add a new paragraph (e) to read as follows:

§ 2520.104b–1 Disclosure.

(a) *General disclosure requirements.* The administrator of an employee benefit plan covered by Title I of the Act must disclose certain material, including reports, statements, notices, and other documents, to participants, beneficiaries and other specified individuals. Disclosure under Title I of the Act generally takes three forms. * * *

(b) *Fulfilling the disclosure obligation.* (1) Except as provided in paragraph (e) of this section, where certain material, including reports, statements, notices and other documents, is required under Title I of the Act, or regulations issued thereunder, to be furnished either by direct operation of law or on individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals. * * *

* * * * *

(c) *Disclosure through electronic media.* (1) Except as otherwise provided by applicable law, rule or regulation, the administrator of an employee benefit plan furnishing documents through electronic media is deemed to satisfy the requirements of paragraph (b)(1) of this section with respect to an individual described in paragraph (c)(2) if:

(i) The administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents—

(A) Results in actual receipt of transmitted information (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information); and

(B) Protects the confidentiality of personal information relating to the individual's accounts and benefits (e.g., incorporating into the system measures designed to preclude unauthorized receipt of or access to such information by individuals other than the individual for whom the information is intended);

(ii) The electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the particular document;

(iii) Notice is provided to each participant, beneficiary or other individual, in electronic or non-electronic form, at the time a document is furnished electronically, that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted (e.g., the attached document describes changes in the benefits provided by your plan) and of the right to request and obtain a paper version of such document; and

(iv) Upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents.

(2) Paragraph (c)(1) shall only apply with respect to the following individuals:

(i) A participant who—

(A) Has the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee; and

(B) With respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties; or

(ii) A participant, beneficiary or any other person entitled to documents under Title I of the Act or regulations issued thereunder (including, but not limited to, an ''alternate payee'' within the meaning of section 206(d)(3) of the Act and a ''qualified beneficiary'' within the meaning of section 607(3) of the Act) who—

(A) Except as provided in paragraph (c)(2)(ii) (B) of this section, has affirmatively consented, in electronic or non-electronic form, to receiving documents through electronic media and has not withdrawn such consent;

(B) In the case of documents to be furnished through the Internet or other electronic communication network, has affirmatively consented or confirmed consent electronically, in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used to provide the information that is the subject of the consent, and has provided an address for the receipt of electronically furnished documents;

(C) Prior to consenting, is provided, in electronic or non-electronic form, a clear and conspicuous statement indicating:

(1) The types of documents to which the consent would apply;

(2) That consent can be withdrawn at any time without charge;

(3) The procedures for withdrawing consent and for updating the participant's, beneficiary's or other individual's address for receipt of electronically furnished documents or other information;

(4) The right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and

(5) Any hardware and software requirements for accessing and retaining the documents; and

(D) Following consent, if a change in hardware or software requirements needed to access or retain electronic documents creates a material risk that the individual will be unable to access or retain electronically furnished documents:

(1) Is provided with a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents;

(2) Is given the right to withdraw consent without charge and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and

(3) Again consents, in accordance with the requirements of paragraph (c)(2)(ii)(A) or paragraph (c)(2)(ii)(B) of this section, as applicable, to the receipt of documents through electronic media.

* * * * *

(e) *Limitations.* This section does not apply to disclosures required under provisions of part 2 and part 3 of the Act over which the Secretary of the Treasury has interpretative and regulatory authority pursuant to Reorganization Plan No. 4 of 1978.

3. Add subpart G to part 2520 to read as follows:

Subpart G—Recordkeeping Requirements

Sec.
2520.107–1 Use of electronic media for maintenance and retention of records.

§ 2520.107–1 Use of electronic media for maintenance and retention of records.

(a) *Scope and purpose.* Sections 107 and 209 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), contain certain requirements relating to the maintenance of records for reporting and disclosure purposes and for determining the pension benefits to which participants and beneficiaries are or may become entitled. This section provides standards applicable to both pension and welfare plans concerning the use of electronic media for the maintenance and retention of records required to be kept under sections 107 and 209 of ERISA.

(b) *General requirements.* The record maintenance and retention requirements of sections 107 and 209 of ERISA are satisfied when using electronic media if:

(1) The electronic recordkeeping system has reasonable controls to ensure the integrity, accuracy, authenticity and

reliability of the records kept in electronic form;

(2) The electronic records are maintained in reasonable order and in a safe and accessible place, and in such manner as they may be readily inspected or examined (for example, the recordkeeping system should be capable of indexing, retaining, preserving, retrieving and reproducing the electronic records);

(3) The electronic records are readily convertible into legible and readable paper copy as may be needed to satisfy reporting and disclosure requirements or any other obligation under Title I of ERISA;

(4) The electronic recordkeeping system is not subject, in whole or in part, to any agreement or restriction that would, directly or indirectly, compromise or limit a person's ability to comply with any reporting and disclosure requirement or any other obligation under Title I of ERISA; and

(5) Adequate records management practices are established and implemented (for example, following procedures for labeling of electronically maintained or retained records, providing a secure storage environment, creating back-up electronic copies and selecting an off-site storage location, observing a quality assurance program evidenced by regular evaluations of the electronic recordkeeping system including periodic checks of electronically maintained or retained records, and retaining paper copies of records that cannot be clearly, accurately or completely transferred to an electronic recordkeeping system).

(c) *Legibility and readability.* All electronic records must exhibit a high degree of legibility and readability when displayed on a video display terminal or other method of electronic transmission and when reproduced in paper form. The term ''legibility'' means the observer must be able to identify all letters and numerals positively and quickly to the exclusion of all other letters or numerals. The term ''readability'' means that the observer must be able to recognize a group of letters or numerals as words or complete numbers.

(d) *Disposal of original paper records.* Original paper records may be disposed of any time after they are transferred to an electronic recordkeeping system that complies with the requirements of this section, except such original records may not be discarded if the electronic record would not constitute a duplicate or substitute record under the terms of the plan and applicable federal or state law.

Signed at Washington, D.C., this 3rd day of April, 2002.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits, Administration, Department of Labor.

[FR Doc. 02–8499 Filed 4–8–02; 8:45 am]

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Federal Register

Tuesday,
April 9, 2002

Part VI

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 27 and 52

Federal Acquisition Regulation; Trademarks for Government Products; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 27 and 52

[FAR Case 1998–018 (Public Meeting)]

Federal Acquisition Regulation; Trademarks for Government Products

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of public meeting.

SUMMARY: The Director of Defense Procurement and the General Services Administration Deputy Associate Administrator for Acquisition Policy are cosponsoring a public meeting to discuss the proposed Federal Acquisition Regulation (FAR) rule 1998–018, Trademarks for Government Products, that was published in the **Federal Register** at 66 FR 42101 on August 9, 2001. Five written comments were submitted in response to the **Federal Register** notice; in addition, articles have been published discussing the proposed rule. After reviewing the public comments, the cosponsors would like to explore further the views of interested parties regarding the key issues raised in the proposed rule. Copies of the five written comments, and a list of possible issues for discussion at the public meeting, are available on the Defense Procurement internet home page at *http://www.acq.osd.mil/dp/.*

If necessary to ensure that all of the views of the interested parties have been heard, subsequent public meetings may be held concerning issues raised by the proposed rule. The dates and times of any subsequent meetings will be published after the initial meeting on the Defense Procurement internet home page at *http://www.acq.osd.mil/dp/.*

DATES: The first meeting will be held on May 9, 2002, from 8 a.m. to 5 p.m. with an hour break for lunch at 12 p.m.

ADDRESSES: The public meeting will be held in room C–43, Crystal Mall Building 4, 1941 Jefferson Davis Highway, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: William H. Anderson, Chair, Defense Acquisition Regulations Council Committee on Patents, Data, and Copyrights, by telephone at (703) 588–5090, by fax at (703) 588–8037, or by e-mail at *William.Anderson@pentagon.af.mil.*

Dated: April 3, 2002.

Jeremy Olson,

Acting Deputy Director, Acquisition Policy Division.

[FR Doc. 02–8452 Filed 4–8–02; 8:45 am]

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District of Columbia College Access Improvement Act of 2002 (Apr. 4, 2002; 116 Stat. 118)

H.R. 2739/P.L. 107–158

To amend Public Law 107-10 to authorize a United States plan to endorse and obtain observer status for Taiwan at the annual summit of the World Health Assembly in May 2002 in Geneva, Switzerland, and for other purposes. (Apr. 4, 2002; 116 Stat. 121)

H.R. 3985/P.L. 107–159

To amend the Act entitled ''An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases'', approved August 9, 1955, to provide for binding arbitration clauses in leases and contracts related to reservation lands of the Gila River Indian Community. (Apr. 4, 2002; 116 Stat. 122)

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