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Contents

Federal Register

Vol. 68, No. 227

Tuesday, November 25, 2003

Agricultural Marketing Service
RULES
Oranges and grapefruit grown in—
Texas, 66001–66003

Agriculture Department
See Agricultural Marketing Service
See Foreign Agricultural Service
See Forest Service

Army Department
See Engineers Corps

Civil Rights Commission
NOTICES
Meetings; State advisory committees:
New Jersey, 66073

Coast Guard
RULES
Drawbridge operations:
New Jersey, 66014–66015
PROPOSED RULES
Drawbridge operations:
California, 66059–66062
New Jersey, 66062–66064
Ports and waterways safety:
San Francisco Bay, CA; security zones, 66064–66067

Commerce Department
See Foreign-Trade Zones Board
See International Trade Administration
See National Institute of Standards and Technology
See National Oceanic and Atmospheric Administration

Committee for the Implementation of Textile Agreements
NOTICES
Cotton, wool, and man-made textiles:
Bangladesh, 66079–66080
Jamaica, 66080–66081
Kuwait, 66081
Laos, 66081–66082

Commodity Futures Trading Commission
PROPOSED RULES
Commodity Exchange Act:
Exempt commercial markets, 66032–66040
NOTICES
Meetings; Sunshine Act, 66082

Defense Department
See Engineers Corps

Drug Enforcement Administration
PROPOSED RULES
Controlled substances; manufacturers, distributors, and dispensers; registration:
Chemical registration waivers; fee exemption, 66052–66059
Records, reports, and exports of listed chemicals:
Drug products containing gamma-hydroxybutyric acid, 66048–66052

Education Department
NOTICES
Meetings:
National Assessment Governing Board, 66083–66084

Employment and Training Administration
NOTICES
Adjustment assistance:
Andrew Corp., 66126
Belden Wire & Cable, 66126
Buffalo China, 66126
Delphi Automotive Systems, 66126
Duluth, Missabe, and Iron Range Railway Co., 66126
Fairchild Semiconductor, 66126
Fishing Vessels—
CORDOVA, 66126–66127
SEA COMBER, 66127
General Mills, Inc., 66127
Halliburton Energy Services, 66127
Honeywell Industry Solutions, 66127
Interceptor, 66127
Ranco North America, 66127–66128
Rubicon, 66128
State of Alaska Commercial Fisheries, 66128
Wellington Synthetic Fibers, 66128
West Point Fisheries, 66128
Zinisar Corp., 66128–66129
Zytec America, Inc., 66129

Employment Standards Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals [**Editorial Note:** This document, published at 68 FR 65960 in the **Federal Register** of Monday, November 24, 2003, was erroneously listed under **Employment and Training Administration** in that issue's Table of Contents.]

Energy Department
See Energy Efficiency and Renewable Energy Office
See Federal Energy Regulatory Commission
NOTICES
Grants and cooperative agreements; availability, etc.:
Nuclear Power 2010 Program; new nuclear power plant licensing demonstration projects, 66084
Meetings:
Environmental Management Site-Specific Advisory Board—
Oak Ridge Reservation, TN, 66084–66085
Secretary of Energy Advisory Board, 66085

Energy Efficiency and Renewable Energy Office
NOTICES
Meetings:
Federal Energy Management Advisory Committee, 66085

Engineers Corps
NOTICES
Environmental statements; notice of intent:
Mill Creek Watershed Plan, TN, 66082–66083

Environmental Protection Agency
PROPOSED RULES
Hazardous waste:
Nonwastewaters from production of dyes, pigments, and food, drug, and cosmetic colorants; mass loadings-based listing, 66163–66230
NOTICES
Meetings:
Acute Exposure Guideline Levels for Hazardous Substances National Advisory Committee, 66093–66094
Market enhancement opportunities for water-efficient products; public meeting, 66094
Science Advisory Board, 66094–66096

Executive Office of the President
See Presidential Documents

Federal Aviation Administration
RULES
Airworthiness directives:
MD Helicopters, Inc., 66004–66006
PROPOSED RULES
Airworthiness directives:
Boeing, 66026–66032

Federal Bureau of Investigation
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66124

Federal Communications Commission
RULES
Radio spectrum, efficient use promotion; secondary markets development; regulatory barriers elimination, 66251–66286
PROPOSED RULES
Radio spectrum, efficient use promotion; secondary markets development; regulatory barriers elimination, 66231–66251
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66097–66100
Common carrier services:
Wireless telecommunications services—
900 MHz bands; specialized mobile radio service; licenses auction, 66100–66112

Federal Emergency Management Agency
RULES
Flood elevation determinations:
California and Hawaii, 66024–66025
Massachusetts and Ohio, 66023–66024
Various States, 66020–66023
PROPOSED RULES
Flood elevation determinations:
Washington, 66067–66069
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66117–66118

Federal Energy Regulatory Commission
NOTICES
Electric rate and corporate regulation filings:
ESI Energy, LLC, et al., 66088–66091
Electric utilities (Federal Power Act):
Hydroelectric licensing regulations
Correction
Hydroelectric applications, 66091
Meetings:
Electric reliability oganization certification and electric reliability standards establishment and enforcement, 66093
Lake Charles Express LLC; site visit, 66091–66092
Applications, hearings, determinations, etc.:
El Paso Natural Gas Co., 66086, 66092–66093
Great Lakes Gas Transmission L.P., 66086
OkTex Pipeline Co. et al., 66092
Questar Pipeline Co., 66086–66087
Tennessee Gas Pipeline Co., 66087
Transcontinental Gas Pipe Line Corp., 66087
Williston Basin Interstate Pipeline Co., 66092
Young Gas Storage Co., Ltd., 66087–66088

Federal Highway Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66152–66153

Federal Maritime Commission
NOTICES
Ocean transportation intermediary licenses:
Distribution Support Systems, Inc., et al., 66112

Food and Drug Administration
PROPOSED RULES
Food for human consumption:
Food labeling—
Dietary guidance, 66040–66048
NOTICES
Human drugs:
Patent extension; regulatory review period determinations—
XIGRIS, 66112–66113
Meetings:
Nonprescription Drugs Advisory Committee and Reproductive Health Drugs Advisory Committee, 66113–66114

Foreign Agricultural Service
NOTICES
Farmers; trade adjustment assistance:
Catfish Farmers of America, et al., 66072

Foreign-Trade Zones Board
NOTICES
Applications, hearings, determinations, etc.:
Ohio, 66073

Forest Service
NOTICES
Environmental statements; availability, etc.:
Northwest Forest Plan, CA, OR, and WA; northern spotted owl, 66072
Meetings:
Resource Advisory Committees—
Madera County, 66072–66073

General Services Administration
NOTICES
Acquisition regulations:
Treasury Department; ACH Vendor/Miscellaneous Payment Enrollment (SF 3881); form revision, 66112

Health and Human Services Department
See Food and Drug Administration

See National Institutes of Health
NOTICES
Scientific misconduct findings; administrative actions:
Gelband, Craig H.; correction, 66112

Homeland Security Department
See Coast Guard
See Federal Emergency Management Agency

Housing and Urban Development Department
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66118
America's Affordable Communities Initiative:
Funding allocations; removal of regulatory barriers; incentive criteria proposals, 66287–66295
Grant and cooperative agreement awards:
Healthy Homes Grant Program, 66118–66119
Lead-Based Paint Hazard Control Grant Program, 66119–66120
Lead Hazard Reduction Demonstration Grant Program, 66120–66121
Operation Lead Elimination Action Program, 66121
Grants and cooperative agreement awards:
Lead Outreach Grant Program, 66121–66122

Interior Department
See Land Management Bureau
See Reclamation Bureau

Internal Revenue Service
PROPOSED RULES
Incomes taxes:
Modified accelerated cost recovery system property; changes in use; depreciation; hearing cancellation, 66059
NOTICES
Income taxes, etc.:
Tier 2 Tax Rates Publication, 66161
Meetings:
Taxpayer Advocacy Panels, 66161

International Trade Administration
NOTICES
Countervailing duties:
Stainless steel wire rod from—
Italy, 66073
Export trade certificates of review, 66074

Justice Department
See Drug Enforcement Administration
See Federal Bureau of Investigation

Labor Department
See Employment and Training Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66124–66125
North American Agreement on Labor Cooperation:
Operation and effectiveness from 1999 to present; review; comment request, 66125

Land Management Bureau
NOTICES
Environmental statements; availability, etc.:
Northwest Forest Plan, CA, OR, and WA; northern spotted owl, 66072
Meetings:
Resource Advisory Councils—
Southwest Colorado, 66122
Public land orders:
Colorado, 66122–66123

National Archives and Records Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66129
Meetings:
Records of Congress Advisory Committee, 66129

National Highway Traffic Safety Administration
NOTICES
Reports and guidance documents; availability, etc.:
Vehicle Weight, Fatality Risk and Crash Compatibility of Model Year 1991-1999 Passenger Cars and Light Trucks; technical report, 66153–66155

National Institute of Standards and Technology
NOTICES
Meetings:
Advanced Technology Program Advisory Committee, 66074–66075
Malcolm Baldridge National Quality Award Board of Overseers, 66075
Spam technology; public workshop, 66075–66076

National Institutes of Health
NOTICES
Grants and cooperative agreements; availability, etc.:
Research projects listing, 66114–66117

National Oceanic and Atmospheric Administration
PROPOSED RULES
Fishery conservation and management:
Caribbean, Gulf, and South Atlantic fisheries—
Snapper-grouper, 66069–66071
NOTICES
Marine mammals:
Incidental taking; authorization letters, etc.—
San Francisco Bay, CA; seismic retrofit construction of Richmond-San Rafael Bridge; Pacific harbor seals and California sea lions, 66076–66079

Nuclear Regulatory Commission
NOTICES
Operating licenses, amendments; no significant hazards considerations; biweekly notices, 66131–66144
Applications, hearings, determinations, etc.:
Exelon Generation Co., LLC, 66130–66131

Peace Corps
RULES
Freedom of Information Act; implementation, 66006–66014
Standards of conduct, 66014

Personnel Management Office
NOTICES
Federal Employees' Group Life Insurance Program:
New Option B premiums, 66144

Postal Service
RULES
Domestic Mail Manual:
Miscellaneous amendments, 66015–66020

Presidential Documents
PROCLAMATIONS
Special observances:
Thanksgiving Day (Proc. 7738), 66313–66316
EXECUTIVE ORDERS
Government agencies and employees:
Presidential Management Fellows Program; establishment (EO 13318), 66317–66318

Reclamation Bureau
NOTICES
Environmental statements; notice of intent:
Sanpete County, UT; Narrows Dam construction, 66123–66124

Research and Special Programs Administration
NOTICES
Pipeline safety:
Advisory bulletins—
Pipeline operator public education programs self-assessment, 66155–66156
Waiver petitions—
PNGTS Operating Co., LLC, 66156–66158

Securities and Exchange Commission
NOTICES
Self-regulatory organizations; proposed rule changes:
American Stock Exchange LLC, 66144–66147
National Association of Securities Dealers, Inc., 66147–66152

State Department
NOTICES
Presidential permit:
Laredo, TX; construction of new international border crossing, 66152

Textile Agreements Implementation Committee
See Committee for the Implementation of Textile Agreements

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See National Highway Traffic Safety Administration
See Research and Special Programs Administration

Treasury Department
See Internal Revenue Service
PROPOSED RULES
Currency and foreign transactions; financial reporting and recordkeeping requirements:
USA PATRIOT Act; implementation—
Burma; special measures imposition due to designation as primary money laundering concern, 66298–66305
Myanar Mayflower Bank and Asia Wealth Bank; special measures imposition due to designation as institutions of primary money laundering concern, 66304–66311
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 66158–66159
Primary money laundering concerns:
Designation of countries—
Burma, et al., 66297–66298
Privacy Act:
Systems of records, 66159–66161

Separate Parts In This Issue

Part II
Environmental Protection Agency, 66163–66230

Part III
Federal Communications Commission, 66231–66286

Part IV
Housing and Urban Development Department, 66287–66292

Part V
Housing and Urban Development Department, 66293–66295

Part VI
Treasury Department, 66297–66311

Part VII
Executive Office of the President, Presidential Documents, 66313–66318

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR

Proclamations:

7738 66315

Executive Orders:

12364 (Superseded by EO 13318) 66317

13318 66317

7 CFR

906 66001

14 CFR

39 66004

Proposed Rules:

39 (3 documents) 66026, 66028, 66030

17 CFR

Proposed Rules:

36 66032

21 CFR

Proposed Rules:

101 66040

1304 66048

1306 66048

1309 (2 documents) 66048, 66052

1310 66052

22 CFR

303 66006

307 66014

26 CFR

Proposed Rules:

1 66059

31 CFR

Proposed Rules:

103 (2 documents) 66299, 66305

33 CFR

117 66014

Proposed Rules:

117 (2 documents) 66059, 66062

165 66064

39 CFR

111 66015

40 CFR

Proposed Rules:

148 66164

261 66164

268 66164

271 66164

302 66164

44 CFR

65 66020

67 (2 documents) 66023, 66024

Proposed Rules:

67 66067

47 CFR

1 66252

27 66252

Proposed Rules:

1 66232

2 66232

20 66232

21 66232

22 66232

24 66232

25 66232

27 66232

74 66232

78 66232

80 66232

87 66232

90 66232

95 66232

97 66232

101 66232

50 CFR

Proposed Rules:

622 66069

Rules and Regulations

Federal Register
Vol. 68, No. 227
Tuesday, November 25, 2003

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 906

[Docket No. FV04–906–1 IFR]

Oranges and Grapefruit Grown in Lower Rio Grande Valley in Texas; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule increases the assessment rate established for the Texas Valley Citrus Committee (Committee) for the 2003–04 and subsequent fiscal periods from $0.11 to $0.14 per 7/10-bushel carton or equivalent of oranges and grapefruit handled. The Committee locally administers the marketing order which regulates the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas. Authorization to assess orange and grapefruit handlers enables the Committee to incur expenses that are reasonable and necessary to administer the program. The fiscal period began August 1 and ends July 31. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective November 26, 2003. Comments received by January 26, 2004, will be considered prior to issuance of a final rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938, or E-mail: *moab.docketclerk@usda.gov*. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Belinda G. Garza, Regional Manager, McAllen Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1313 E. Hackberry, McAllen, TX 78501; telephone: (956) 682–2833, Fax: (956) 682–5942; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 906, as amended (7 CFR part 906), regulating the handling of oranges and grapefruit grown in the Lower Rio Grande Valley in Texas, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, orange and grapefruit handlers in the Lower Rio Grande Valley in Texas are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable oranges and grapefruit beginning on August 1, 2003, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Committee for the 2003–04 and subsequent fiscal periods from $0.11 to $0.14 per 7/10-bushel carton or equivalent of oranges and grapefruit.

The Texas orange and grapefruit marketing order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are producers and handlers of Texas oranges and grapefruit. They are familiar with the Committee's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2002–03 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

The Committee met on May 29, 2003, and unanimously recommended 2003–04 expenses of $1,222,506 for

management, administrative, compliance, a Mexican Fruit Fly program, and advertising and promotion. The Committee recommended that the current assessment rate of $0.11 per 7/10-bushel carton continue for the 2003–04 fiscal period. The quantity of assessable citrus was estimated at 10 million 7/10-bushel cartons or equivalents.

The Committee met again on October 8, 2003, and unanimously recommended revised 2003–04 expenditures of $1,322,506 and an assessment rate of $0.14 per 7/10-bushel carton or equivalent of oranges and grapefruit. In comparison, last year's budgeted expenditures were $1,226,022. The assessment rate of $0.14 is $0.03 higher than the rate currently in effect. The Committee recommended the $0.14 assessment rate to cover the increased costs associated with implementing a more comprehensive Mexican Fruit Fly program, and a significant decrease in the assessable production estimate for the 2003–04 marketing season. At this meeting, the estimate of assessable citrus was reduced to 9 million 7/10-bushel cartons or equivalents.

The major expenditures recommended by the Committee for the 2003–04 fiscal period include $800,000 for advertising, $279,000 for the Mexican Fruit Fly program, $119,929 for management and administration of the program, and $72,777 for compliance. Budgeted expenses for these items in 2002–03 were $810,500, $179,000, $107,845, and $74,777, respectively.

As mentioned earlier, the Committee's fiscal period begins August 1. There are no citrus shipments out of the production area during the months of August, September, and part of October. Some shippers begin shipping during the latter part of October, but shipments are light until late November when heavier shipments begin. On October 31, 2003, the Committee's reserve totaled $16,230. The Committee will need to make significant advertising and promotion expenditures (about $60,000) during November.

The Committee believes that assessment billings at the lower $0.11 per 7/10-bushel carton rate may not be sufficient to cover all of its expenses. Assessing at the higher $0.14 rate sooner would enable the Committee to maintain its reserves at a satisfactory level and ensure that all of its obligations are met.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Texas oranges and grapefruit. Texas orange and grapefruit shipments for the fiscal period are estimated at 9 million 7/10-bushel cartons or equivalents, which should provide $1,260,000 in assessment income. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, will be adequate to cover budgeted expenses. Funds in the reserve ($16,230 on October 31) will be kept within the maximum of one fiscal period's expenses permitted by the order (§ 906.35).

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate is effective for an indefinite period, the Committee will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Committee's 2003–04 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 214 producers of oranges and grapefruit in the production area and approximately 16 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

An updated Texas citrus industry profile shows that 6 of the 16 handlers (38 percent) shipped over 588,235 7/10-bushel carton equivalents of oranges and grapefruit. Using an average f.o.b. price of $8.50 per 7/10-bushel carton, these handlers could be considered large businesses under SBA's definition, and the remaining 10 handlers (62 percent) could be considered small businesses. Of the approximately 214 producers within the production area, few have sufficient acreage to generate sales in excess of $750,000. Thus, the majority of handlers and producers of Texas oranges and grapefruit may be classified as small entities.

This rule increases the assessment rate established for the Committee and collected from handlers for the 2003–04 and subsequent fiscal periods from $0.11 to $0.14 per 7/10-bushel carton equivalent of oranges and grapefruit.

The Committee met on May 29, 2003, and unanimously recommended 2003–04 expenses of $1,222,506 for management, administrative, compliance, a Mexican Fruit Fly program, and advertising and promotion. The Committee recommended that the current assessment rate of $0.11 per 7/10-bushel carton continue for the 2003–04 fiscal period. The quantity of assessable citrus was estimated at 10 million 7/10-bushel cartons or equivalents.

The Committee met again on October 8, 2003, and unanimously recommended revised 2003–04 expenditures of $1,322,506 and an assessment rate of $0.14 per 7/10-bushel carton or equivalent of oranges and grapefruit. In comparison, last year's budgeted expenditures were $1,226,022. The assessment rate of $0.14 is $0.03 higher than the current rate. The Committee recommended the $0.14 assessment rate to cover the increased costs associated with the Committee's desire to implement a more comprehensive Mexican Fruit Fly program, and a significant decrease in the assessable production estimate for the 2003–04 marketing season. At this meeting, the estimate of assessable citrus was reduced to 9 million 7/10-bushel cartons or equivalents.

The major expenditures recommended by the Committee for the 2003–04 fiscal period include $800,000 for advertising, $279,000 for the Mexican Fruit Fly program, $119,929 for management and administration of the program, and $72,777 for compliance.

Budgeted expenses for these items in 2002–03 were $810,500, $179,000, $107,845, and $74,777, respectively.

The Committee's fiscal period begins August 1. There are no citrus shipments out of the production area during the months of August, September, and part of October. Some shippers begin shipping during the latter part of October, but shipments are light until late November when heavier shipments begin. On October 31, 2003, the Committee's reserve totaled $16,230. The Committee will need to make significant advertising and promotion expenditures (about $60,000) during November.

The Committee believes that assessment billings at the lower $0.11 per 7/10-bushel carton rate may not be sufficient to cover all of its expenses. Assessing at the higher $0.14 rate sooner would enable the Committee to maintain its reserves at a satisfactory level and ensure that all of its obligations are met.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of Texas oranges and grapefruit. Texas orange and grapefruit shipments for the fiscal period are estimated at 9 million 7/10-bushel cartons or equivalents, which should provide $1,260,000 in assessment income. Income derived from handler assessments, along with interest income and funds from the Committee's authorized reserve, will be adequate to cover budgeted expenses.

In arriving at this budget, the Committee considered information from various sources, including the Committee's Executive Committee. Alternative expenditure levels were discussed based upon the relative need of the Mexican Fruit Fly program to the Texas citrus industry.

The proposed assessment rate of $0.14 per 7/10-bushel carton of assessable orange and grapefruit was then determined by dividing the total recommended budget by the 9 million 7/10-bushel cartons of oranges and grapefruit estimated for the 2003–04 fiscal period. The $0.14 rate will provide $1,260,000 in assessment income. The additional $62,506 to fund the Committee's estimated expenses will come from the Committee's reserve and interest income.

A review of historical information (October 1999 through May 2003) and preliminary information pertaining to the upcoming fiscal period indicates that the packinghouse door price for the 2003–04 fiscal period could range, monthly, from $0.26 to $6.41 per 7/10-bushel carton of Texas oranges and from $1.30 to $7.30 for Texas grapefruit, depending upon the fruit variety, size, and quality. Therefore, the estimated assessment revenue for the 2003–04 fiscal period as a percentage of total grower (packinghouse door) revenue could range between 2.2 and 53.8 percent for oranges and 1.9 to 10.8 percent for grapefruit.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived by the operation of the marketing order. In addition, the Committee's meetings were widely publicized throughout the Texas orange and grapefruit industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the May 29 and October 8, 2003, meetings were public meetings and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

This action imposes no additional reporting or recordkeeping requirements on either small or large Texas orange and grapefruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2003–04 fiscal period began on August 1, 2003, and the marketing order requires that the rate of assessment for each fiscal period apply to all assessable oranges and grapefruit handled during such fiscal period; (2) the Texas citrus industry must have funding available to implement, as necessary, a more comprehensive Mexican Fruit Fly program; (3) the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (4) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting and is similar to other assessment rate actions issued in past years; and (5) this interim final rule provides a 60-day comment period, and all comments timely received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 906

Grapefruit, Marketing agreements, Oranges, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 906 is amended as follows:

PART 906—ORANGES AND GRAPEFRUIT GROWN IN LOWER RIO GRANDE VALLEY IN TEXAS

■ 1. The authority citation for 7 CFR part 906 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 906.235 is revised to read as follows:

§ 906.235 Assessment rate.

On and after August 1, 2003, an assessment rate of $0.14 per 7/10-bushel carton or equivalent is established for oranges and grapefruit grown in the Lower Rio Grande Valley in Texas.

Dated: November 19, 2003.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 03–29513 Filed 11–21–03; 10:05 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–SW–16–AD; Amendment 39–13370; AD 2003–24–01]

RIN 2120–AA64

Airworthiness Directives; MD Helicopters, Inc. Model 369A, H, HE, HM, HS, D, and E Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified model helicopters modified with a Helicopter Technology Company, LLC, Supplemental Type Certificate (STC) No. SR09172RC, SR09074RC, or SR09184RC. This action requires recording on the component history card or equivalent record the number of torque events (TEs) on each main rotor blade (blade). When a blade accumulates 13,720 TEs and 750 hours time-in-service (TIS), the AD requires inspecting both surfaces of the blade for a crack at specified intervals. If a crack is found, the AD also requires replacing the blade with an airworthy blade. Also, the AD establishes life limits for certain part-numbered blades. This proposal is prompted by several reports, including a recent report dated July 24, 2003, of blade cracks due to a high number of TEs per hour. The actions specified in this AD are intended to prevent fatigue cracking of the blade, blade failure, and subsequent loss of control of the helicopter.

DATES: Effective December 10, 2003.

Comments for inclusion in the Rules Docket must be received on or before January 26, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2003–SW–16–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Marc Belhumeur, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Rotorcraft Certification Office, Fort Worth, Texas 76193–0170, telephone (817) 222–5177, fax (817) 222–5783.

SUPPLEMENTARY INFORMATION: This amendment adopts a new AD for MD Helicopters, Inc. Model 369A, H, HE, HM, HS, D, and E helicopters, modified with a Helicopter Technology Company, LLC, STC No. SR09172RC, SR09074RC, or SR09184RC. The AD requires determining and recording on the component history card or equivalent record the total number of TEs accumulated on each blade to date and thereafter, recording the total number of TEs accumulated after each day's operation, or every 100 external lift operations, whichever occurs first. A torque event (TE) is the transition to a hover or landing from forward flight with an airspeed of 30 or more knots or any external lift operation. An external lift operation is defined as pickup and drop-off of an external load. After drop-off of an external load, if the airspeed reaches 30 or more knots during the flight back to the pickup point, a second TE must be recorded.

For a blade with 13,720 TEs and 750 hours TIS, the AD requires certain inspections of the blade for a crack at specified intervals. If a crack is found, the AD also requires, before further flight, replacing the blade with an airworthy blade. Also, the AD revises the Limitations and Conditions of Helicopter Technology Company, LLC, STC Nos. SR09172RC, SR09074RC, and SR09184RC by establishing life limits for certain part-numbered blades. This AD is prompted by reports, including a recent report dated July 24, 2003, of blades cracking due to a higher number of TEs per hour than was originally calculated. These blades, as well as similar MD Helicopter, Inc. blades, have had cracks that have propagated through most of the trailing edge skin and channel sub-structure. This condition, if not corrected, could result in fatigue cracking of the blade, blade failure, and subsequent loss of control of the helicopter.

The FAA has reviewed Helicopter Technology Company, LLC, Mandatory Service Bulletin, Notice No. 2100–3R2, dated December 20, 2002. This service bulletin describes procedures for performing the blade TE inspection and determining an inspection interval.

This unsafe condition is likely to exist or develop on other helicopters of the same type designs modified with a Helicopter Technology Company, LLC, STC No. SR09172RC, SR09074RC, or SR09184RC. Therefore, this AD is being issued to prevent fatigue cracking of the blade, blade failure, and subsequent loss of control of the helicopter. This AD requires:

- On or before 12 hours TIS or 30 days, whichever occurs first, determining and recording on the component history card or equivalent record the total number of TEs on each blade. If you cannot determine the actual number of TEs for a blade, assume and record 13,720 TEs as the accumulated total number of TEs on that blade to date.
- Thereafter, after each day's operation or after 100 external lift operations, whichever occurs first, record on the component history card or equivalent record the number of TEs that occurred during that period for each blade.
- After a blade accumulates 13,720 TE and 750 hours TIS, conduct certain inspections for a crack in the blade. Thereafter, inspect the blade at specified intervals.
- Before further flight, replace the blade with an airworthy blade if a crack is found.
- On or before 3,530 hours TIS, replace each blade, part number (P/N) 500P2100–BSC or 500P2100–101, and on or before 2,440 hours TIS, replace each blade, P/N 500P2100–301, with an airworthy blade.

This AD establishes a life limit of 3,530 hours TIS for blade, P/N 500P2100–BSC and 500P2100–101, and a life limit of 2,440 hours TIS for blade, P/N 500P2100–301. The life limits were inadvertently omitted from the Limitations and Conditions of the Helicopter Technology Company, LLC, STCs. The STC Nos. SR09172RC, SR09074RC, and SR09184RC, Limitations and Conditions, have already been amended and revised to include the mandated inspection and life limits. The number of TEs accumulated on the blades does not change the life limits of the blades but are only used for inspection determinations. The life limits of the blades are not changed because we believe the TE inspections are an adequate means for detecting cracks in the blades and preventing blade failure during high TE occurrences.

The short compliance times involved are required because the previously described critical unsafe condition can adversely affect the controllability and structural integrity of the helicopter. Therefore, the inspections based on TE and hours TIS are required within a very short time span, and this AD must be issued immediately.

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.

The FAA estimates that this AD will:

- Affect 800 helicopters of U.S. registry.

• Take approximately 1 work hour per helicopter to determine and record the initial number of TEs; 1 work hour to record the number of TEs after each day's operation or 100 external lift operations, whichever occurs first; 1 work hour to inspect a set of blades for a crack; and 8 work hours to replace a set of blades at an average labor rate of $65 per work hour.

• Cost approximately $9,500 per blade.

Based on these amounts, the estimated cost impact of the AD on U.S. operators will be $16,655,600 for the labor for the additional record keeping and inspections over the life of one set of blades, assuming there are 284 additional inspections and the TEs must be recorded 353 times, and an additional $38,416,000 in parts and labor, assuming one set of blades (5 blades) are replaced on each aircraft in the entire fleet. The total estimated cost impact of the AD on U.S. operators is $55,071,600.

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 should identify the Rules Docket number and be submitted in triplicate to the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. 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.

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 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 No. 2003–SW–16–AD.'' The postcard will be date stamped and returned to the commenter.

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, 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:

2003–24–01 MD Helicopters, Inc.: Amendment 39–13370. Docket No. 2003–SW–16–AD.

Applicability: Models 369A, H, HE, HM, HS, D, or E, with a main rotor blade (blade), part number (P/N) 500P2100–BSC, 500P2100–101, or 500P2100–301, and modified with Helicopter Technology Company, LLC, Supplemental Type Certificate (STC) No. SR09172RC, SR09074RC, or SR09184RC, installed, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking of the blade, blade failure, and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 12 hours time-in-service (TIS) or 30 days, whichever occurs first, determine and record on the component history card or equivalent record the number of torque events (TEs) accumulated on each blade. Record a torque event (TE) for each transition to a hover or landing from forward flight with an airspeed of 30 or more knots or any external lift operation. An external lift operation is defined as the pickup and drop-off of an external load. (An external lift operation with a return flight at an airspeed of 30 or more knots back to the pick-up location would be recorded as two TEs).

(1) If you cannot determine the actual number of TEs for a blade, assume and record 13,720 TEs as the accumulated total number of TEs on that blade.

(2) Thereafter, after each day's operation or after 100 external lift operations, whichever occurs first, record on the component history card or equivalent record the number of TEs that occurred during that period for each blade.

Note 1: Helicopter Technology Company, LLC, Mandatory Service Bulletin Notice No. 2100–3R2, dated December 30, 2002, pertains to the subject of this AD.

(b) For each blade with 750 or more hours TIS and 13,720 or more TEs, before further flight and thereafter at intervals not to exceed 35 hours TIS or 200 TEs, whichever occurs first:

(1) Lift the outboard end of the blade until the blade is off the droop stop.

(2) Using a bright light and a 10× or higher magnifying glass, inspect for a crack on the first 24-inch inboard area of the bottom side of the blade. Pay particular attention to the area around the root fitting, its adjacent doubler and skin, and in line with the root fitting attach bolts. Also, pay particular attention at blade stations: 22.6, 24.1, 25.1, 25.3, 27.9, and 36.4 (these blade stations are located 4.9, 6.4, 7.4, 7.6, 10.2, and 18.7 inches outboard (parallel to the blade) from the center of the root fitting and lead lag attach bolt holes closest to the trailing edge).

(3) Using a bright light, inspect for a crack on the remaining length of the bottom side of the blade.

(4) Lower the blade back onto the droop stop.

(5) Using a bright light and a 10× or higher magnifying glass, inspect for a crack on the first 24-inch inboard area of topside of the blade. Pay particular attention to the area around the root fitting, its adjacent doubler and skin, and in line with root fitting attach bolts. Also pay particular attention at blade stations: 22.6, 24.1, 25.1, 25.3, 27.9, and 36.4 (these blade stations are located 4.9, 6.4, 7.4, 7.6, 10.2, and 18.7 inches outboard (parallel to the blade) from the center of the root fitting bushing and lead lag attach bolt hole closest to the trailing edge).

(6) Using a bright light, inspect for a crack on the remaining length of the topside of each blade.

(c) If a crack is found, replace the blade with an airworthy blade before further flight.

(d) On or before 3,530 hours TIS, replace each blade, P/N 500P2100–BSC or P/N 500P2100–101, with an airworthy blade.

(e) On or before 2,440 hours TIS, replace each blade, P/N 500P2100–301, with an airworthy blade.

(f) This AD revises the Limitations and Conditions of Helicopter Technology Company, LLC, STC Nos. SR09172RC, SR09074RC, or SR09184RC by establishing a life limit of 3,530 hours TIS for blade, P/N 500P2100–BSC and P/N 500P2100–101, and 2,440 hours TIS for blade P/N 500P2100–301.

Note 2: TEs are used only to establish an additional inspection interval and not to establish an alternative retirement life.

(g) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Rotorcraft Certification Office, Rotorcraft Directorate, FAA, for information about previously approved alternative methods of compliance.

(h) This amendment becomes effective on December 10, 2003.

Issued in Fort Worth, Texas, on November 17, 2003.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 03–29222 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–13–P

PEACE CORPS

22 CFR Part 303

Procedures for Disclosure of Information Under the Freedom of Information Act

AGENCY: Peace Corps.

ACTION: Final rule.

SUMMARY: The Peace Corps is revising its regulations on the Freedom of Information Act (FOIA) to implement the 1996 amendments to the FOIA regarding electronic records, time limits, and standards for processing requests for records. In addition, the revisions incorporate procedures for Office of Inspector General (OIG) records. Provisions are also added describing the availability of Peace Corps records in the **Federal Register** and the agency's electronic reading room. Finally, provisions are added that set out procedures for responding to a subpoena.

DATES: This rule will be effective December 26, 2003.

FOR FURTHER INFORMATION CONTACT: Suzanne B. Glasow, Associate General Counsel, 202–692–2150.

SUPPLEMENTARY INFORMATION: *Background.* On July 2, 2003, the Peace Corps published a proposed FOIA rule for public comment. *See* 68 FR 39490 (July 2, 2003). The Agency received no comments. The Peace Corps now publishes the rule as final. This rule substantially revises the Peace Corps' FOIA regulation to implement the 1996 amendments to the FOIA regarding electronic records, time limits, and standards for processing requests for records. *See* ''Electronic Freedom of Information Act Amendments of 1996.'' Pub. L. 104–231. It also adds procedures for OIG records and describes the availability of Peace Corps records in the **Federal Register** and the agency's public reading room. Finally, provisions are added that set out procedures for responding to a subpoena. This rule is based on guidances issued by the Department of Justice's (DOJ) Office of Information and Privacy and DOJ's FOIA rule. A section-by-section analysis follows.

Section-by-Section Analysis

Section 303.1 Purpose

The purpose of this part is to provide rules and procedures for making Peace Corps records, including electronic records, available to the public under the Freedom of Information Act, 5 U.S.C. 552. The language of this section is revised to reflect the broader scope of the rule, which now includes provisions on electronic records and the availability of Peace Corps records in the **Federal Register** and the agency's electronic reading room.

Section 303.2 Definitions

This section is revised by deleting outdated definitions and by including definitions located elsewhere in the current rule. The definitions of the terms related to the charging of fees are based, as required under the FOIA, on an Office of Management and Budget (OMB) guidance. *See* 52 FR 10012 (March 27, 1987) and 53 FR 6151–6154 (March 1, 1988).

Section 303.3 Policy

This new section sets out the policy of the Peace Corps regarding its compliance with the FOIA.

Section 303.4 Records Published in the Federal Register

This new section describes the Peace Corps' process for complying with Sec. 552(a)(1) of FOIA, which requires each agency to currently publish in the **Federal Register** for the guidance of the public a range of basic information regarding its structure and operations, including information on the agency's organization, function, procedural and substantive rules, and general statements of policy. The Peace Corps complies with this requirement by annually publishing such information in the United States Government Manual, a special publication of the **Federal Register**.

Section 303.5 Public Reading Room

This is a new section which sets out the process by which the Peace Corps implements section 552(a)(2) of the FOIA which requires agencies to maintain a public reading room where certain Peace Corps records must be made available to the public for inspection and copying. Reading room records generally include final opinions and orders, statements of policy and interpretations adopted by the Peace Corps that are not published in the **Federal Register** and administrative staff manuals and instructions that affect the public. A new category of reading room records includes any record provided pursuant to a public request for records that is determined by the Peace Corps to be subject to multiple subsequent requests (''subsequent request record''). For example, the Federal Bureau of Investigation has identified its records on Elvis Presley, Marilyn Monroe, Elliot Ness, Jackie Robinson and Will Rodgers as subsequent request records.

The use of the term ''will be made available'' in paragraph (b) is intended to clarify that certain public reading room records will normally be maintained in the public reading room, while others will normally be kept in close proximity elsewhere in Peace Corps headquarters. In response to a request, any records kept in close proximity will be made available for inspection and copying in the public reading room.

Paragraph (c) describes the protections from public disclosure that may apply to certain reading room records and the process the Peace Corps will use to edit or delete protected information.

Paragraph (d) provides that reading room records created by the Peace Corps after November 1, 1996, and an index of such records, will be made available electronically. The Peace Corps is in the process of identifying such records and coverting them to electronic form. As they are so identified and converted, they will be made available electronically in the public reading room.

Paragraph (e) provides that the Peace Corps will make most of its electronic public reading room records available on its public Web site.

Section 303.6 Procedures for Use of Public Reading Room

This section describes the process by which a member of the public may inspect and copy public reading room records. Persons interested in using the public reading room shall make arrangements with the FOIA Office ahead of time to facilitate their access to the requested information.

Section 303.7 Index of Records

The FOIA requires the Peace Corps to maintain and make available an index of reading room records. This section clarifies that the index the Peace Corps maintains will be made available in the public reading room and on Peace Corps's Web site.

Section 303.8 Requests for Records

The category of FOIA records that is most familiar to the public are records required to be made available by the Peace Corps upon request by a person, unless they are exempt from mandatory disclosure under any of the FOIA exemptions. Such records generally include information created, obtained and/or used by the Peace Corps in the performance of its statutory mission. This category of records does not include public reading room records or records published in the **Federal Register**.

This section sets out the process by which the Peace Corps makes such records available. For example, it sets out the time limits imposed by the FOIA, establishes standards and a process for providing expedited treatment for requests and includes provisions on OIG records, in recognition of the establishment of an OIG at the Peace Corps. It also clarifies that the Peace Corps is not required to create a document or perform research to satisfy a request.

Section 303.9 Exemptions for Withholding Records

This section delineates in paragraph (a) the exemptions that protect certain records from mandatory disclosure. All of the exemptions in this section are based on the FOIA, although not all FOIA exemptions are included in this rule, because certain exemptions are not currently and are unlikely to be applicable to the Peace Corps. Paragraph (b) explains the process by which the Peace Corps will redact protected information from information that must be made available to the requester. Under the 1996 amendments to the FOIA, the Peace Corps must indicate the amount and location of redacted material, if technically feasible, unless such action would harm the interest protected by the applicable exemption.

This section also includes provisions that implement Executive Order 12600, which requires each agency to notify a person who has submitted records containing confidential business information to the Peace Corps when the agency receives a request for such records, and to provide the submitter an opportunity to object to disclosure.

Section 303.10 Responsibilities and Authorities

This section identifies the officials within the Peace Corps authorized to grant or deny requests for records and to decide appeals. It also establishes a process for dealing with law enforcement and classified information and records received by the Peace Corps from other agencies.

Section 303.11 Denials

This section describes what constitutes a denial of records and the process for denying a request for records.

Section 303.12 Appeals

This section describes that process by which a person may appeal a denial. Appeals of denials made by the OIG are forwarded by the FOIA Officer to the OIG for processing.

Section 303.13 Fees

This section describes the authority of the Peace Corps to charge or waive fees for its costs in responding to FOIA requests. It includes the standards established under FOIA for determining whether a requester qualifies for a fee-waiver and sets out a schedule of fees applicable to the various types of requesters. It also provides the Peace Corps with discretion to charge interest to requesters who fail to pay their fees and to aggregate requests when the Peace Corps reasonably believes a requestor or group of requesters is attempting to break a request into a series of requests for the purpose of evading the assessment of fees.

Section 303.14 Procedures for Responding to a Subpoena

This section sets forth the procedures to be followed when a subpoena, order or other demand is issued in a proceeding in which the Peace Corps is not a party. Paragraph (a) of this section details the types of demands subject to these procedures. Paragraph (b) of this section explains that employees are not to disclose information without approval of the Office of the General Counsel, and it is the General Counsel or designee, together with consultation from other Agency officials, including the Agency's FOIA Officer, who makes all determinations with respect to demands discussed herein. Paragraph (c)(1) identifies generally two of the factors that should be considered in deciding whether to make disclosures. These are, however, only a couple of the considerations, as the factors relevant to a particular demand may vary widely with the nature of the demand. Paragraph (c)(2) specifically identifies certain circumstances in which disclosure will not be made by the Peace Corps. These standards, in essence, identify several widely acknowledged areas of privilege that are most relevant to Peace Corps. They are intended to be compatible with the exemptions from mandatory disclosure provided by the Freedom of Information Act, the Privacy Act, and other relevant guidelines.

The OIG has independent subpoena authority under the IG Act of 1978, as amended. The OIG will follow these procedures and they will be implemented by appropriate OIG staff.

Executive Order 12866

This regulation has been determined to be non-significant within the meaning of Executive Order 12866.

Regulatory Flexibility Act

The Peace Corps Director, in accordance with the Regulatory Flexibility Act, (5 U.S.C. 605), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Under the Freedom of Information Act, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by the Peace Corps are nominal. Further, the ''small entities'' that make FOIA requests, as compared with individual requesters and other requesters, are relatively few in number.

Unfunded Mandates Reform Act of 1995

This 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 were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

List of Subjects in 22 CFR Part 303

Freedom of Information.

■ For reasons set out in the preamble, the Peace Corps is revising part 303 as follows:

PART 303—PROCEDURES FOR DISCLOSURE OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

Sec.
303.1 Purpose.
303.2 Definitions.
303.3 Policy.
303.4 Records published in the **Federal Register**.
303.5 Public reading room.
303.6 Procedures for use of public reading room.
303.7 Index of records.
303.8 Requests for records.
303.9 Exemptions for withholding records.
303.10 Responsibilities and authorities.
303.11 Denials.
303.12 Appeals.
303.13 Fees.
303.14 Procedures for responding to a subpoena.

Authority: 5 U.S.C. 552; 22 U.S.C. 2501, et. seq.; E.O. 12137, 44 FR 29023, 3 CFR, 1979 Comp., p. 389; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

§ 303.1 Purpose.

This part sets out the rules and procedures the Peace Corps follows in making records available to the public under the Freedom of Information Act (FOIA).

§ 303.2 Definitions.

As used in this part—

(a) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester has made a commercial use request, the Peace Corps will look to the use to which a requester will put the documents requested. When the Peace Corps has reasonable cause to doubt the requester's stated use of the records sought, or where the use is not clear from the request itself, it will seek additional clarification before assigning the request to a category.

(b) *Duplication* means the process of making a copy of a record requested pursuant to this part. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable electronic documents, among others.

(c) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, or an institution of professional or vocational education which operates a program or programs of scholarly research.

(d) *Non-commercial scientific institution* means an institution that is not operated on a ''commercial'' basis and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(e) *OIG records* means those records as defined generally in this section which originated with or are in the possession and control of the Office of Inspector General (OIG) of the Peace Corps which have been compiled for law enforcement, audit, and investigative functions and/or any other purpose authorized under the IG Act of 1978, as amended.

(f) *Records* means books, papers, maps, photographs, or other documentary materials, regardless of whether the format is physical or electronic, made or received by the Peace Corps in connection with the transaction of Peace Corps' business and preserved by the Peace Corps as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Peace Corps, or because of the informational value of data in them. The term does not include, *inter alia,* books, magazines, or other materials acquired solely for library purpose, or that are otherwise publicly available.

(g) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (*e.g.,* electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of ''freelance'' journalists, they will be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

(h) *Review* means the process of examining a document located in response to a request to determine whether any portion of such document is exempt from disclosure. It also includes processing any such document for disclosure. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(i) *Search* means the process of looking for and retrieving records that are responsive to a request for records. It includes page-by-page or line-by-line identification of material within documents and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Searches may be conducted manually or by automated means and will be conducted in the most efficient and least expensive manner. If the Agency cannot identify the requested records after a 2 hour search, it can determine that the records were not adequately described and ask the requester to provide a more specific request.

§ 303.3 Policy.

The Peace Corps will make its records concerning its operations, activities, and business available to the public consistent with the requirements of the FOIA. Records exempt from disclosure under the FOIA may be made available at the discretion of the Peace Corps.

§ 303.4 Records published in the Federal Register.

The Peace Corps publishes its notices and substantive regulations in the **Federal Register**. It also publishes information on its basic structure and operations necessary to inform the public how to deal effectively with the Peace Corps in the *United States Government Manual,* a special publication of the **Federal Register**. The Peace Corps will make reasonable efforts to currently update such information, which includes information on Peace Corps' location and functions, and how the public may obtain information or forms, or make submittals or requests. The Peace Corps' published regulations are at 22 CFR Chapter III.

§ 303.5 Public reading room.

(a) The Peace Corps will maintain a public reading room at its headquarters at 1111 20th Street, NW., Washington, DC 20526. This room will be supervised and will be open to the public during Peace Corps' regular business hours for inspecting and copying records described in paragraph (b) of this section.

(b) Subject to the limitation stated in paragraph (c) of this section, the

following records will be made available in the public reading room:

(1) All final public opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases that involve the Peace Corps;

(2) Statements of policy and interpretations adopted by the Peace Corps that are not published in the **Federal Register**;

(3) Administrative staff manuals and instructions to the staff that affect the public;

(4) Copies of records, regardless of form or format, released to any person in response to a public request for records which the Peace Corps determines are likely to become subject to subsequent requests for substantially the same records, and a general index of such records;

(5) The index required by § 303.7; and

(6) Other records the Peace Corps has determined are of general interest to members of the public in understanding activities of the Peace Corps or in dealing with the Peace Corps in connection with those activities.

(c) Certain records otherwise required by FOIA to be available in the public reading room may be exempt from mandatory disclosure pursuant to § 552(b) of the FOIA. Such record will not be made available in the public reading room. Other records maintained in the public reading room may be edited by the deletion of identifying details concerning individuals to prevent a clearly unwarranted invasion of personal privacy. In such cases, the record shall have attached to it an explanation of the deletion. The extent of the deletion shall be indicated, unless doing so would harm an interest protected by the exemption under which the deletion is made. It technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.

(d) *Electronic reading room.* Records required by the FOIA to be maintain and made available in the public reading room created by the Peace Corps on or after November 1, 1996, shall be made available electronically.

(e) Most electronic public reading room records will also be made available to the public on the Peace Corps Web site at *http://www.peacecorps.gov.*

§ 303.6 Procedures for use of public reading room.

Any member of the public may inspect or copy records described in § 303.5(b) in the public reading room during regular business hours. Because it will sometimes be impossible to produce records or copies of records on short notice, a person who wishes to inspect or copy records shall arrange a time in advance, by telephone or letter request made to the Peace Corps FOIA Officer. Persons submitting request by telephone will be notified whether a written request would be advisable to aid in the identification and expeditious processing or the records sought. Written request should identify the records sought in the manner described in § 303.8(b) and should request a specific date for inspecting the records. The requester will be advised as promptly as possible if, for any reason, it may not be possible to make the records sought available on the date requested.

§ 303.7 Index of records.

The Peace Corps will maintain a current index identifying any matter within the scope of § 303.4 or § 303.5(b)(1) through (5). The index will be maintained and made available for public inspection and copying at the Peace Corps' headquarters in Washington, DC. The cost of a copy of the index will not exceed the standard charge for duplication set out in § 303.13(e). The Peace Corps will also make the index available on its public Web site.

§ 303.8 Requests for records.

(a) Except for records required by the FOIA to be published in the **Federal Register** or to be made available in the public reading room, Peace Corps records will be made promptly available, upon request, to any person in accordance with this section, unless it is determined that such records should be withheld and are exempt form mandatory disclosure under the FOIA.

(b) *Requests.* Requests for records under this section shall be made in writing, shall include the signature of the requester, and the envelope and the letter shall be clearly marked ''Freedom of Information Request.'' No e-mail requests will be accepted. All such requested shall be addressed to the FOIA Officer. Requests by letter shall use the address given in § 303.5(a). Any request not marked and addressed as specified in this paragraph will be so marked by Peace Corps personnel as soon as it is properly identified, and will be forwarded immediately to the FOIA Officer. A request improperly addressed will not be deemed to have been received for purposes of the time period set out in paragraph (h) of this section until it has been received by the FOIA Officer. Upon receipt of an improperly addressed request, the FOIA Officer shall notify the requester of the date on which the time period began. The request shall be stamped ''received'' on the date it is received by the FOIA Office.

(c) A request must reasonably describe the records requested so that employees of the Peace Corps who are familiar with the subject area of the request are able, with a reasonable amount of effort, to determine which particular records are within the scope of the request. If it is determined that a request does not reasonably describe the records sought, the requester shall be so informed and provided an opportunity to confer with Peace Corps personnel in order to attempt to reformulate the request in a manner that will meet the needs of the requester and the requirements of this paragraph. If the Agency cannot identify the requested records after a 2 hour search, it can determine that the records were not adequately described and ask the requester to provide a more specific request.

(d) To facilitate the location of records by the Peace Corps, a requester should try to provide the following kinds of information, if known;

(1) The specific event or action to which the record refers;

(2) The unit or program of the Peace Corps which may be responsible for or may have produced the record;

(3) The date of the record or the date or period to which it refers or relates;

(4) The type of record, such as an application, a particular form, a contract, or a report;

(5) Personnel of the Peace Corps who may have prepared or have knowledge of the record; or

(6) Citations to newspapers or publications which have referred to the record.

(e) The Peace Corps is not required to create a record or to perform research to satisfy a request.

(f) Any request for a waiver or reduction of fees should be included in the FOIA request, and any such request should indicate the grounds for a waiver or reduction of fees, as set out in § 303.13(f). The Peace Corps shall respond to such request as promptly as possible.

(g) *Format.* The Peace Corps will provide records in the form or format indicated by the requester to the extent such records are readily reproducible in the requested form or format.

(h) *Initial response/delays.* (1) The FOIA Officer, upon request for any records made in accordance with this section, except in the case of a request for OIG records, shall make an initial determination of whether to comply

with or deny such request and dispatch such determination to the requester within 20 business days after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 business days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(2) If the FOIA Officer determines that a request or portion thereof is for OIG records, the FOIA Officer shall promptly refer the request or portion thereof to the OIG and send notice of such referral to the requester. In such case, the OIG FOIA Officer shall make an initial determination of whether to comply with or deny such request and dispatch such determination to the requester within 20 business days after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 business days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. If for any reason, a request for Agency information goes directly to the OIG rather than through the FOIA Officer, the OIG shall provide notice to the FOIA Officer of its receipt of the request. The FOIA Office and the OIG should normally consult with each other whenever they receive requests for the same or similar records.

(3) *Unusual circumstances.* As used in this part, ''unusual circumstances'' are limited to the following, but only to the extent reasonably necessary for the proper processing of the particular request:

(i) The need to search for and collect the requested records from components or locations that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency or organization having a substantial interest in the determination of the request or among two or more components of the Peace Corps having a substantial subject matter interest therin.

(i) If a request is particularly broad or complex so that it cannot be completed within the time periods stated in paragraph (h) of this section, the Peace Corps may ask the requester to narrow the request or agree to an additional delay.

(j) When no determination can be dispatched within the applicable time limit, the FOIA Officer or the OIG FOIA Officer shall inform the requester of the reason for the delay, the date on which a determination may be expected to be dispatched, and the requester's right to treat the delay as a denial and to appeal to the Associate Director for the Office of Management or the Inspector General, in accordance with § 303.12. If no determination has been dispatched by the end of the 20-day period, or the last extension thereof, the requester may deem the request denied, and exercise a right of appeal in accordance with § 303.12. The FOIA Officer or the OIG FOIA Officer may ask the requester to forego an appeal until a determination is made.

(k) After it has been determined that a request will be granted, the responsible official will act with due diligence in providing a prompt response.

(l) *Expedited treatment.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever the requester demonstrates a compelling need. A compelling need means:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Peace Corps or Federal government activity and the request is made by a person primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) a matter of widespread and exceptional media interest in which there exist possible questions about the Peace Corps' or the Federal government's integrity which affect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time. For a prompt determination, a request for expedited processing must be properly addressed and marked and received by the Peace Corps pursuant to paragraph (b) of this section.

(3) A requester who seeks expedited processing must submit a statement demonstrating a compelling need that is certified by the requester to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing.

(4) Within ten business days of its receipt of a request for expedited processing, the FOIA Officer or the OIG FOIA Officer shall decide whether to grant the request and shall notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously by the Peace Corps.

(5) Appeals shall be made to the Associate Director for the Office of Management, who shall respond within 10 business days of receipt of the appeal.

§ 303.9 Exemptions for withholding records.

(a) The Peace Corps may withhold a requested record from public disclosure only if the record fits within one or more of the following FOIA exemptions:

(1) Matter specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and is in fact properly classified pursuant to such Executive Order;

(2) Matter which is related solely to the internal personnel rules and practices of the Peace Corps;

(3) Matter which is specifically exempted from disclosure by statute (other than exemptions under FOIA at 5 U.S.C. 552(b)), provided that such statute requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding, or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Peace Corps;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes including enforcing the Peace Corps Act or any other law, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person or a recipient of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or

foreign agency or authority or any private institution which furnished information on a confidential basis; and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(b) In the event that one or more of the above exemptions in paragraph (a) of this section apply, any reasonably segregable portion of a record shall be provided to the requester after deletion of the portions that are exempt. The amount of information deleted shall be indicated on the released portion of the record, unless doing so would harm the interest protected by the exemption under which the deletion is made. If technically feasible, the amount of information deleted shall be indicated at the place in the record where the deletion is made. At the discretion of the Peace Corps officials authorized to grant or deny a request for records, it may be possible to provide a requester with:

(1) A summary of information in the exempt portion of a record; or

(2) An oral description of the exempt portion of a record.

(c) No requester shall have a right to insist that any or all of the techniques in paragraph (b) of this section should be employed in order to satisfy a request.

(d) Records that may be exempt from disclosure pursuant to paragraph (a) of this section may be made available at the discretion of the Peace Corps.

(e) Proprietary information. (1) It is the policy of the Peace Corps to withhold proprietary information that falls within the protection of paragraph (a)(4) of this section. Proprietary information includes trade secrets, or commercial or financial information obtained from a person, the disclosure of which could reasonably be expected to cause substantial competitive harm.

(2) It is also the policy of the Peace Corps to give submitters of arguably proprietary information an adequate opportunity to provide information to the Peace Corps to establish that the information constitutes protected proprietary information.

(3) A person submitting arguably proprietary information to the Peace Corps will be notified in writing by the Peace Corps if there is a FOIA request for the information, unless:

(i) The Peace Corps has already decided that the information should be withheld;

(ii) The information has been lawfully published or has been officially made available to the public; or

(iii) Disclosure of the information is required by law.

(4) The notice shall afford the submitter at least ten business days in which to object to the disclosure of any requested information. Whenever the Peace Corps provides such notice to the submitter, it shall also notify the requester that notice and an opportunity to comment are being provided to the submitter.

(5) A submitter's request for protection for information under paragraph (a)(4) of this section shall:

(i) Specifically identify the exact material claimed to be confidential proprietary information;

(ii) State whether the information identified has ever been released to a person who is not in a confidential relationship with the submitter;

(iii) State the basis for the submitter's belief that the information is not commonly known or readily ascertainable by outside persons; and

(vi) State how release of the information would cause harm to the submitter's competitive position.

(6) The Peace Corps shall consider the submitter's objections and specific grounds for non-disclosure when deciding whether to disclose the information. If the Peace Corps decides to disclose the information, it shall, to the extent permitted by law, provide the submitter at least ten business days notice of its decision before the information is disclosed and a statement of its reasons for not sustaining the objection to disclosure. Whenever the Peace Corps notifies the submitter of its final decision, it shall also notify the requester.

(7) Whenever a FOIA requester brings suit seeking to compel disclosure of proprietary information, the Peace Corps shall promptly notify the submitter.

§ 303.10 Responsibilities and authorities.

(a) *Legal counsel.* The General Counsel shall furnish legal advice to Peace Corps officials and staff as to their obligations under this part and shall take such other actions as may be necessary or appropriate to assure a consistent and equitable application of the provisions of this part by and within the Peace Corps.

(b) *Authority to grant or deny requests.* The FOIA Officer is authorized to grant or deny requests for records, except for OIG records, under this part. The OIG FOIA Officer is authorized to grant or deny requests for OIG records under this part. The FOIA Officer and the OIG FOIA Officer shall consult with each other when a request includes both Peace Corps and OIG records in order to ensure consistency and lack of duplication in processing the request.

(c)(1) *Records received from other agencies.* When the Peace Corps receives a request for a record in its possession that it has received from another agency, it shall determine whether the other agency is better qualified to decide whether the record is exempt from disclosure and, if so, whether it should be disclosed as a matter of discretion. If the Peace Corps determines it is better qualified to process the record in response to the request, then it shall do so. If the Peace Corps determines it is not better qualified to process the request, it shall either:

(i) Consult with the other agency before responding to the request; or

(ii) Refer the responsibility for responding to the request for the record to the other agency (but only if the agency is subject to FOIA). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it.

(2) *Law enforcement and classified information.* Notwithstanding paragraph (c)(1) of this section:

(i) Whenever the Peace Corps receives a request for a record containing information that relates to an investigation of a possible violation of law that was originated by another agency, the Peace Corps will either consult with the other agency before responding or refer the responsibility for responding to the request to the other agency; and

(ii) Whenever a request is made for a record containing information that has been classified by another agency or may be appropriate for classification under Executive Order 12958 or any other executive order concerning the classification of records, the Peace Corps shall refer the responsibility for responding to the request regarding that information to the agency that classified the information, should consider the information for classification, or has the primary interest in the information, as appropriate.

(3) *Notice of referral.* Whenever the Peace Corps refers all or any part of the responsibility for responding to a request to another agency, it ordinarily shall notify the requester of the referral and inform the requester of the name of the agency to which the request has

been referred and the part of the request that has been referred.

(4) *Effect of consultations and referrals on timing of response.* All consultations and referrals will be handled according to the date the FOIA request was initially received by the Peace Corps.

(5) *Agreements with other agencies.* The Peace Corps may make agreements with other agencies to eliminate the need for consultations or referrals for particular types of records.

§ 303.11 Denials.

(a) A denial of a written request for a record that complies with the requirements of § 303.8 shall be in writing and shall include, as applicable:

(1) A reference to the applicable exemption or exemptions in § 303.9(a) upon which the denial is based;

(2) An explanation of how the exemption applies to the requested records;

(3) A statement explaining why it is deemed unreasonable to provide segregable portions of the record after deleting the exempt portions;

(4) An estimate of the volume of requested matter denied unless providing such estimate would harm the interest protected by the exemption under which the denial is made, if other than the FOIA Officer;

(5) The name and title of the person or persons responsible for denying the request, if other than the FOIA Officer; and

(6) An explanation of the right to appeal the denial and the procedures for submitting an appeal, including the address of the official to whom appeals should be submitted.

(b) A partial deletion of a record made available to a requester shall be deemed a denial of a record for purposes of paragraph (a) of this section. All denials shall be treated as final opinions under § 303.5(b).

§ 303.12 Appeals.

(a) Any person whose written request has been denied is entitled to appeal the denial within 20 business days by writing to the Associate Director of the Office of Management or, in the case of a denial of a request for OIG Records, the Inspector General, at the address given in § 303.5(a). The envelope and letter should be clearly marked ''Freedom of Information Act Appeal.'' An appeal need not be in any particular form, but should adequately identify the denial, if possible, by describing the requested record, identifying the official who issued the denial, and providing the date on which the denial was issued.

(b) The decision of the Associate Director for the Office of Management or the Inspector General on an appeal shall be in writing and, in the event the denial is in whole or in part upheld, shall contain an explanation responsive to the arguments advanced by the requester, the matters described in § 303.11(a)(1) through (4), and the provisions for judicial review of such decision under section 552(a)(4) of the FOIA. The decision shall be dispatched to the requester within 20 business days after receipt of the appeal, unless an additional period is justified pursuant to § 303.8(i) and such period taken together with any earlier extension does not exceed 10 business days. The decision by the Associate Director for the Office of Management or the Inspector General shall constitute the final action of the Peace Corps. All such decisions shall be treated as final opinions under § 303.5(b).

§ 303.13 Fees.

(a) For information routinely provided by the Peace Corps to the public in the normal course of doing business, such as informational or recruiting brochures, no fees will be charged.

(b) For each a commercial use request, fees will be limited to reasonable standard charges for document search, review, and duplication.

(c) For each request for records sought by a representative of the news media or by an educational or non-commercial scientific institution, fees shall be limited to reasonable standard charges for document duplication after the first 100 pages.

(d) For all other requests, fees shall be limited to reasonable standard charges for search time after the first 2 hours and duplication after the first 100 pages.

(e) The schedule of reasonable standard charges for services regarding the production or disclosure of the Peace Corps records is as follows:

(1) Manual search and review of records: Salary rate of employee[s] performing the search and review plus 16%. Charges for search and review time less than a full hour will be billed by quarter-hour segments;

(2) Computer time: Actual costs as incurred;

(3) Duplication by paper copy: 10 cents per page;

(4) Duplication by other methods: Actual costs as incurred;

(5) Certification of true copies: $1.00 each;

(6) Packing and mailing records: Actual costs as incurred; and

(7) Special delivery or express mail: Actual charges as incurred.

(f) *Fee waivers:* Fees will be waived or reduced below the fees established under paragraph (e) of this section if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Peace Corps or Federal government and is not primarily in the commercial interest of the requester.

(1) In order to determine whether the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal government, the Peace Corps shall consider the following four criteria:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the Peace Corps or Federal government;

(ii) The informative value of the information to be disclosed: Whether the disclosure is ''likely to contribute'' to an understanding of Peace Corps or Federal government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to ''public understanding;'' and

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute ''significantly'' to public understanding of Peace Corps or Federal government operations or activities.

(2) In order to determine whether disclosure of the information is not primarily in the commercial interest of the requester, the Peace Corps shall consider the following two factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so,

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ''primarily in the commercial interest of the requester.''

(3) These fee waiver/reduction provisions will be subject to appeal in the same manner as appeals from denial under § 303.12.

(g) No fee will be charged under this section unless the cost of routine collection and processing of the fee payment is likely to exceed the average cost of processing a payment.

(h) Requesters must agree to pay all fees charged for services associated with their requests. The Peace Corps will assume that requesters agree to pay all charges for services associated with

their requests up to $25 unless otherwise indicated by the requester.

(i) No requester will be required to make an advance payment of any fee unless:

(1) The requester has previously failed to pay a required fee to another federal agency or to Peace Corps within 30 days of the date of billing, in which case an advance deposit of the full amount of the anticipated fee together with the fee then due plus interest accrued may be required. (The request will not be deemed to have been received by the Peace Corps until such payment is made.); or

(2) The Peace Corps determines that an estimated fee will exceed $250, in which case the requester shall be notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. Such notification shall be transmitted as soon as possible, but in any event within 5 business days of receipt of the request by the Peace Corps. The notification shall offer the requester the opportunity to confer with appropriate representatives of the Peace Corps for the purpose of reformulating the request so as to meet the needs of the requester at a reduced cost. The request will not be deemed to have been received by the Peace Corps for purposes of the initial 20-day response period until the requester makes a deposit on the fee in an amount determined by the Peace Corps.

(j) Interest may be charged to those requesters who fail to pay the fees charged. Interest will be assessed on the amount billed, starting on the 31st day following the day on which the billing was sent. The rate charged will be as prescribed in 31 U.S.C. 3717.

(k) The Agency is not required to process a request for a requester who has not paid FOIA fees owed to another Federal agency.

(l) If the Peace Corps reasonably believes that a requester or group of requesters is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, the Peace Corps shall aggregate such requests and charge accordingly. Likewise, the Peace Corps will aggregate multiple requests for documents received from the same requester within 45 business days.

(m) The Peace Corps reserves the right to limit the number of copies of any document that will be provided to any one requester or to require that special arrangements for duplication be made in the case of bound volumes or other records representing unusual problems of handling or reproduction.

§ 303.14 Procedures for responding to a subpoena.

(a) *Purpose and scope.* (1) This part sets forth the procedures to be followed in proceedings in which the Peace Corps is not a party, whenever a subpoena, order or other demand (collectively referred to as a ''demand'') of a court or other authority is issued for:

(i) The production or disclosure of any material contained in the files of the Agency;

(ii) The production or disclosure of any information relating to material contained in the files of the Agency;

(iii) The production or disclosure of any information or material acquired by any person while such person was an employee of the Agency as a part of the performance of his official duties or because of his official status, or

(iv) The production of an employee of the Agency for the deposition or an appearance as a witness in a legal action or proceeding.

(2) For purposes of this part, the term ''employee of the Agency'' includes all officers and employees of the Agency appointed by, or subject to the supervision, jurisdiction or control of, the director of the Agency, including personal services contractors. Also for purposes of this part, records of the Agency do not include records of the Office of Inspector General.

(3) This part is intended to provide instructions regarding the internal operations of the Agency, and is not intended, and does not and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by a party against the Agency.

(4) This part applies to:

(i) State and local court, administrative and legislative proceedings; and

(ii) Federal court and administrative proceedings.

(5) This part does not apply to:

(i) Congressional requests or subpoenas for testimony or documents:

(ii) Employees or former employees making appearances solely in their private capacity in legal or administrative proceedings that do not relate to the Agency (such as cases arising out of traffic accidents or domestic relations); Any questions whether the appearance relates solely to the employee's or former employee's private capacity should be referred to the Office of the General Counsel.

(6) Nothing in this part otherwise permits disclosure of information by the Agency except as is provided by statute or other applicable law.

(b) *Procedure in the event of a demand for production or disclosure.* (1) No employee or former employee of the Agency shall, in response to a demand of a court or other authority set forth in § 303.14(a) produce any material, disclose any information or appear in any proceeding, described in § 303.14(a) without the approval of the General Counsel or designee.

(2) Whenever an employee or former employee of the Peace Corps receives a demand for the production of material or the disclosure of information described in § 303.14(a) he shall immediately notify and provide a copy of the demand to the General Counsel or designee. The General Counsel, or designee, shall be furnished by the party causing the demand to be issued or served a written summary of the information sought, its relevance to the proceeding in connection with which it was served and why the information sought is unavailable by any other means or from any other sources.

(3) The General Counsel, or designee, in consultation with appropriate Agency officials, including the Agency's FOIA Officer, or designee, and in light of the considerations listed in § 303.14(d), will determine whether the person on whom the demand was served should respond to the demand.

(4) To the extent he deems it necessary or appropriate, the General Counsel or designee, may also require from the party causing such demand to be issued or served a plan of all reasonably foreseeable demands, including but not limited to names of all employees and former employees from whom discovery will be sought, areas of inquiry, length of time of proceedings requiring oral testimony and identification of documents to be used or whose production is sought.

(c) *Considerations in determining whether production or disclosure should be made pursuant to a demand.* (1) In deciding whether to make disclosures pursuant to a demand, the General Counsel or designee, may consider, among things:

(i) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose; and

(ii) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(2) Among the demands in response to which disclosure will not be made are those demands with respect to which any of the following factors exist:

(i) Disclosure would violate a statute or a rule of procedure;

(ii) Disclosure would violate the privacy rights of an individual;

(iii) Disclosure would violate a specific regulation;

(iv) Disclosure would reveal classified information, unless appropriately declassified by the originating agency;

(v) Disclosure would reveal trade secrets or proprietary information without the owner's consent;

(vi) Disclosure would otherwise adversely affect the interests of the United States or the Peace Corps; or

(vii) Disclosure would impair an ongoing Inspector General or Department of Justice investigation.

Dated: November 19, 2003.

Tyler S. Posey,

General Counsel.

[FR Doc. 03–29409 Filed 11–24–03; 8:45 am]

BILLING CODE 6015–01–M

PEACE CORPS

22 CFR Part 307

Peace Corps Standards of Conduct

AGENCY: Peace Corps.

ACTION: Final rule.

SUMMARY: The Peace Corps is removing outdated regulations that set out the ethical conduct and other responsibilities applicable to Peace Corps employees. These regulations have been superseded, in significant part, by government-wide regulations.

EFFECTIVE DATE: This rule will be effective on November 25, 2003.

FOR FURTHER INFORMATION CONTACT: Carl R. Sosebee, Designated Agency Ethics Official, (202) 692–2150.

SUPPLEMENTARY INFORMATION:

I. Background

Part 307, which sets out Peace Corps' regulations regarding the ethical conduct and other responsibilities of Peace Corps employees was last revised in 1987, *see* 52 FR 30151, Aug. 13, 1987; 22 CFR part 307. The conduct and responsibilities covered in this part have been superseded by the Office of Government Ethics' (OGE) executive branch ethical standards and requirements codified at 5 CFR parts 2634, 2635, 2636, 2637, 2638 and 2640. Further, rules governing partisan political activity by executive branch employees and rules governing gambling, betting and lotteries on government owned or leased property or while on duty are set forth at 5 CFR parts 734 and 735. Government-wide rules on procurement integrity are set forth in the Procurement Integrity Act, 41 U.S.C. 423, and the Federal Acquisition Regulations, 48 CFR 3.104. Because Peace Corps employees are already subject to these various rules, the Peace Corps is removing Part 307 from the Code of Federal Regulations. Remaining portions of the Peace Corps' existing standards pertaining to prior review of publications of official concern set forth in Section 307.735–306(a)3; and portions pertaining to economic and financial activities of employees abroad, set forth in Section 307.735–308 have been retained as Agency internal regulations pursuant to the authority of the Director in 22 U.S.C. 2503. To the extent part 307 covers organizational conflicts of interest in procurement and procurement-related matters, the Peace Corps is considering whether to incorporate them into the Peace Corps' internal rules.

Peace Corps published a proposed rule in the **Federal Register** on February 5, 2003 (68 FR 5857). Public comments were due on March 7, 2003. The Agency received no comments and has not made any changes to the rule.

II. Matters of Regulatory Procedure

Executive Order 12866. The Peace Corps has determined that this proposed rule does not constitute a ''significant regulatory action'' for the purposes of Executive Order 12866.

Regulatory Flexibility Act. Pursuant to section 605(b) of the Regulatory Flexibility Act, the Peace Corps certifies 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.*). Accordingly, no regulatory flexibility analysis is required.

Unfunded Mandates Reform Act of 1995. Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) (2 U.S.C. Chs. 17A and 25) 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, agencies must also identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The Peace Corps has determined that this rule will not result in expenditures by State, local, or tribal governments or by the private sector of $100 million or more. Accordingly, the Peace Corps has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 22 CFR Part 307

Political activities; Government employees; Ethical conduct; Financial disclosure, Conflicts of interest.

■ For the reasons set forth in the preamble, the Peace Corps amends title 22 of the CFR by removing part 307.

Dated: November 19, 2003.

Tyler S. Posey,

General Counsel.

[FR Doc. 03–29408 Filed 11–24–03; 8:45 am]

BILLING CODE 6015–01–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD05–03–180]

RIN 1625–AA09

Drawbridge Operation Regulations; Mullica River, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has approved a temporary deviation from the regulations governing the operation of the Green Bank Road Bridge across Mullica River, mile 18.0, at Green Bank, New Jersey. From 7 a.m. on November 3, 2003, through 11 p.m. on December 1, 2003, this deviation allows the bridge to remain closed to navigation. This closure is necessary to facilitate emergency mechanical and structural repairs.

DATES: This deviation is effective from 7 a.m. on November 3, 2003, through 11 p.m. on December 1, 2003.

FOR FURTHER INFORMATION CONTACT: Terrance Knowles, Environmental Protection Specialist, Fifth Coast Guard District, Bridge Section at (757) 398–6587.

SUPPLEMENTARY INFORMATION: The Green Bank Road Bridge is co-owned and operated by the Atlantic and Burlington Counties. However, the New Jersey Department of Transportation, as lead agency for the rehabilitation project, has requested a temporary deviation from the operating regulation set out in 33 CFR 117.735a. Currently, the draw of the Green Bank bridge shall open on signal unless at least four hours notice is given from April 1 through November 30, from 11 p.m. and 7 a.m.; and from December 1 through March 31, at all times.

The work involves the replacement of counterweight and main trunnion sections of the moveable span of the bridge. To facilitate the replacement, the work requires completely immobilizing the operation of the bascule span in the closed position to vessels from 7 a.m. on November 3, 2003, through 11 p.m. on December 1, 2003. The Coast Guard has informed the known users of the waterway of the closure period for the bridge caused by the temporary deviation.

The District Commander has granted temporary deviation from the operating requirements listed in 33 CFR 117.35 for the purpose of repair completion of the drawbridge. The temporary deviation allows the Green Bank Road Bridge across the Mullica River, mile 18.0, to remain closed to navigation from 7 a.m. on November 3, 2003, through 11 p.m. on December 1, 2003.

Dated: November 12, 2003.

Waverly W. Gregory,

Chief, Bridge Administration Section, Fifth Coast Guard District.

[FR Doc. 03–29390 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–15–P

POSTAL SERVICE

39 CFR Part 111

Domestic Mail Manual (DMM) Issue 58: Miscellaneous Amendments

AGENCY: Postal Service

ACTION: Final rule.

SUMMARY: This document describes the numerous amendments consolidated in the Transmittal Letter for Issue 58 of the *Domestic Mail Manual* (DMM), which is incorporated by reference in Title 39 *Code of Federal Regulations,* part 111.1 (39 CFR 111.1). These amendments reflect changes in mail preparation requirements and other mailing rules and regulations.

EFFECTIVE DATE: August 10, 2003.

FOR FURTHER INFORMATION CONTACT: Jane Stefaniak, United States Postal Service, Mailing Standards, (703) 292–3548.

SUPPLEMENTARY INFORMATION: The *Domestic Mail Manual* (DMM), incorporated by reference in Title 39 *Code of Federal Regulations,* part 111, contains the basic standards of the U.S. Postal Service® (Postal Service) governing its domestic mail services, descriptions of the mail classes and special services and the conditions governing their use, and the standards for rate eligibility and mail preparation. The document is amended and republished periodically, with each issue sequentially numbered. DMM Issue 58, the current printed edition, is dated August 10, 2003. Issue 58 contains all changes published prior to that date. Announcements of the changes appearing in DMM Issue 58 were first published in the **Federal Register** and/or various issues of the *Postal Bulletin,* an official biweekly document published by the Postal Service. Interim updates to the DMM are posted monthly on the Postal Service Postal Explorer Web site (*http://pe.usps.gov*).

In addition, the revised table of contents for DMM Issue 58 is provided.

Domestic Mail Manual (DMM) Issue 58

Summary of Changes by DMM Module

A Addressing

A010.6.1 and 6.3 are revised to update the addressing requirements for overseas military mail. These revisions remove the requirement that mail sent to APO/FPO addresses include a military person's grade, rank, or rating in the address line. Effective 4–17–03.

A030 is added; A040 is redesignated as A020; A800.3.0 is deleted; and additional portions of Module A are revised to consolidate many of the critical addressing requirements for Presorted and automation rate mail and to update information for several Address Information System (AIS) products. Effective 6–12–03.

A030.1.4, A910.6.1, and A950.1.3 are revised to add National Change of Address Linkage System Product or NCOA^{Link} as an additional method for preparing Presorted and automation rate First-Class Mail® pieces to meet the Move Update standard. Effective 6–26–03.

A030.1.4 is revised to clarify that all ancillary service endorsements, except ''Forwarding Service Requested,'' meet the Move Update standard for Presorted and automation rate First-Class Mail. Effective 6–26–03.

A040.1.0 (renumbered A020.1.0) and A040.4.3 (renumbered E050.2.3) are revised to clarify the preparation requirements for letters and flats that use the simplified address format. Additionally, all congressional mailings using the simplified address format will use Tag 11 on all containers to ensure appropriate handling through downstream Postal Service processes. Effective 11–14–02.

C Characteristics and Content

Portions of Module C are revised to consolidate many of the critical addressing requirements for Presorted and automation rate mail and to update information for several AIS products. Effective 6–12–03.

C010.1.0 and C600 are revised to add Customized MarketMail (CMM), a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

C021, C023, C024.18.0, C050.2.2 are revised to align the Postal Service mailing standards for Division 6.2 infectious substances with the regulations adopted by the U.S. Department of Transportation and to incorporate other minor changes and clarifications related to hazardous materials mailing standards. Effective 6–12–03.

C050.2.2 and C100.2.7c are revised to correct and clarify the text. Effective 4–3–03.

C100 is revised to clarify and expand the standards that apply to First-Class Mail card rates. Effective 10–3–02.

C100 and C700.1.0 are revised to clarify that, for First-Class Mail or Package Services, Delivery Confirmation™ or Signature Confirmation™ may be used only for parcels and not for letter-size or flat-size mail. Effective 7–10–03.

C100.2.6 is revised to further clarify the format standards for displaying a message area on the address side of a First-Class Mail card rate mailpiece that is divided horizontally. Effective 4–3–03.

C200.3.0 and C820.7.0 are revised to reorganize and clarify the existing standards that apply to the uniformity of automation flats. Effective 11–14–02.

C600.4.0 is revised to clarify that Customized MarketMail (CMM) pieces, whether letter-size or flat-size, are not subject to the Standard Mail nonmachinable surcharge in E620. Effective 8–10–03.

C810.7.0 is added to allow repositionable notes to be applied to First-Class Mail and Standard Mail letter-size pieces that otherwise qualify for automation letter rates, if certain standards are met. A repositionable note is a 3 inch by 3 inch paper attached to a letter-size mailpiece with an adhesive strip. The note is designed to be removed by the recipient and ''repositioned'' for future reference or use (*e.g.*, on a telephone, refrigerator, or computer). Effective 4–3–03.

C820 Exhibit 4.1b (renumbered C820.4.2 and C820.4.3) is revised to clarify the wrapping instructions for the automated flat sorting machine (AFSM) 100 polywrapped automation flats. Effective 9–5–02.

C820.1.0 and C820.4.0 are revised to clarify standards for the use of polywrap for flat-size mailpieces claimed at

automation rates and the certification program for polywrap. Effective 7–10–03.

C850.1.4 is revised to amend the barcode requirements for Delivery Confirmation and Signature Confirmation labels. Effective 6–27–02.

C850.3.1 is revised to allow the placement of the postal routing barcode in locations other than adjacent to the address. Effective 8–7–03.

D Deposit, Collection, and Delivery

D042.7.0 is revised to add CMM, a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

D072 is revised to clarify the application process for drop shipment authorization of presorted metered mail and to specify that mailers must pay the applicable mailing fees and meet all other conditions for presenting mail for verification and acceptance at the office(s) of entry. Effective 6–12–03.

E Eligibility

Portions of Module E are revised to consolidate many of the critical addressing requirements for Presorted and automation rate mail and to update information for several AIS products. Effective 6–12–03.

Module E is revised to change mail preparation standards for AFSM 100-compatible flat-size mail for Periodicals, Standard Mail, and Bound Printed Matter (BPM) mailings. In addition, there are changes to Periodicals flat-size and irregular parcel mailings, Standard Mail flat-size mailings, and BPM flat-size and irregular parcel mailings that are placed in certain 3-digit sacks, on 5-digit scheme pallets, and on optional 3-digit pallets. Effective 1–9–03.

E010.2.3 is revised to correct and clarify the text. Effective 4–3–03.

E040 is revised to clarify and simplify the eligibility standards for free matter for the blind and other physically handicapped persons. Effective 8–8–02.

E110 is revised to clarify and expand the standards that apply to First-Class Mail card rates. Effective 10–3–02.

E230.3.3 is revised to clarify the preparation requirements for letters and flats that use the simplified address format. Additionally, all congressional mailings using the simplified address format will use Tag 11 on all containers to ensure appropriate handling through downstream Postal Service processes. Effective 11–14–02.

E230.4.0 is deleted since the text on Periodicals publications prepared in combined or copalletized mailings is clarified and expanded in M230. Effective 3–6–03.

E610.2.3 is revised to clarify the eligibility standards for computer-prepared material mailed at Standard Mail rates. Effective 6–12–03.

E610.9.0 is revised to allow mailers to use the ''Change Service Requested'' endorsement with Delivery Confirmation and Signature Confirmation. Effective 10–3–02.

E620.4.0 and E660.2.0 are revised to clarify that CMM pieces, whether letter-size or flat-size, are not subject to the Standard Mail nonmachinable surcharge in E620. Effective 8–10–03.

E650, E751, and E752.2.0 are revised to include changes to the standards governing the deposit of destination bulk mail center (DBMC) rate Standard Mail and Package Services machinable parcels at the Buffalo auxiliary service facility (ASF) and the Pittsburgh bulk mail center (BMC). Effective 11–14–02.

E650.1.3 and E752.1.2 are revised to clarify the application of the minimum volume requirement for Standard Mail and BPM prepared using plant-verified drop shipment (PVDS) procedures. Effective 7–10–03.

E650.5.4 is revised to allow mailers the option of placing onto BMC and ASF pallets specially sorted packages, sacks, and trays of mixed area distribution center (ADC) Standard Mail. Effective 10–3–02.

E660 is added and E110.1.1, E610, E620.3.0, E630.5.0, E650.1.1, and E710.1.1 are revised to add CMM, a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

E670.5.11 is revised to update the maximum value of low-cost items mailable at the Nonprofit Standard Mail rates. Effective 2–6–03.

E670.11.4 is revised to provide that an organization's primary authorization to mail at Nonprofit Standard Mail rates will not be revoked for nonuse if the organization has mailed at the nonprofit rates at any additional mailing office based upon that primary authorization. Effective 5–1–03.

E751 Exhibit 6.0 is revised to add a ZIP Code for Parcel Select® mail entered at a BMC. Effective 6–27–02.

E751 Exhibit 8.0 is corrected to delete five ZIP Codes and add one ZIP Code. Effective 10–3–02.

E751 Exhibit 8.0 is amended to add ZIP Codes. Effective 12–12–02.

E751 Exhibit 8.0 is amended to delete ZIP Codes. Effective 5–1–03.

E751 Exhibit 8.0 is amended to delete two ZIP Codes. Effective 8–7–03.

F Forwarding and Related Services

Portions of Module F are revised to consolidate many of the critical addressing requirements for Presorted and automation rate mail and to update information for several AIS products. Effective 6–12–03.

F010 and F030 are revised to expand and clarify the standards related to Address Change Service (ACS). Effective 1–23–03.

F010.5.0 is revised to allow mailers to use the ''Change Service Requested'' endorsement with Delivery Confirmation and Signature Confirmation. Effective 10–3–02.

F010.5.0 is revised to incorporate changes and clarifications related to hazardous materials mailing standards. Effective 6–12–03.

F010.5.3 is revised to add CMM, a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

G General Information

G091, G092, and G095 are redesignated as G991, G992, and G995, respectively; G900 is redesignated as G090; and G910 is added to provide requirements for negotiated service agreements (NSAs) that would be treated as comparable to those which form the basis for experimental mail classifications established in accordance with Chapter 36 of Title 39 of the United States Code. Published in PB 22104 (6–12–03).

G092 (renumbered G992) is added to implement a new experiment testing whether additional rate incentives will encourage the copalletization and drop shipment of individual Periodicals publications. The experiment includes two per piece discounts for copalletization of Periodicals publications that otherwise would have been prepared in sacks. Effective 4–20–03.

G092 (renumbered G992) is revised to specify that certain co-palletization data must be reported on a monthly basis under 3.0 and is not required at the time of mailing. Effective 4–20–03.

G995 is deleted to reflect the expiration of the experimental classification for Presorted Priority Mail. Effective 7–15–03.

L Labeling Lists

Labeling lists are periodically updated to reflect changes in mail processing operations. Please see individual lists.

Module L is revised to change mail preparation standards for AFSM 100-compatible flat-size mail for Periodicals, Standard Mail, and BPM mailings. In addition, there are changes to Periodicals flat-size and irregular parcel mailings, Standard Mail flat-size mailings, and BPM flat-size and

irregular parcel mailings that are placed in certain 3-digit sacks, on 5-digit scheme pallets, and on optional 3-digit pallets. Effective 1–9–03.

L601 and L602 are revised to include changes to the standards governing the deposit of DBMC rate Standard Mail and Package Services machinable parcels at the Buffalo ASF and the Pittsburgh BMC. Effective 11–14–02.

M Mail Preparation and Sortation

Portions of Module M are revised to consolidate many of the critical addressing requirements for Presorted and automation rate mail and to update information for several AIS products. Effective 6–12–03.

Module M is revised to change mail preparation standards for AFSM 100-compatible flat-size mail for Periodicals, Standard Mail, and BPM mailings. In addition, there are changes to Periodicals flat-size and irregular parcel mailings, Standard Mail flat-size mailings, and BPM flat-size and irregular parcel mailings that are placed in certain 3-digit sacks, on 5-digit scheme pallets, and on optional 3-digit pallets. Effective 1–9–03.

M013 is revised to expand and clarify the standards related to ACS. Effective 1–23–03.

M013.2.0 is revised and M013.3.0 is added to allow placement of an ACS participant code in a new optional location. Effective 10–3–02.

M013.2.5, M045.3.2, M610, M810.2.2, and M820.5.3 are revised to allow mailers the option of placing onto BMC and ASF pallets specially sorted packages, sacks, and trays of mixed ADC Standard Mail. Effective 10–3–02.

Exhibit M013.2.5, M610.2.2, M810.2.2, and M820.5.3 are revised to correct the DMM standards that allow mailers preparing mail on pallets under the option in M045.3.2 to use L802 to label packages, sacks, and trays of mixed ADC mail and mixed AADC mail placed onto BMC and ASF pallets. Effective 5–1–03.

M013.3.2 is revised to allow placement of an ACS participant code on flat-size mailpieces. Effective 1–9–03.

M031.1.7, M031.4.11, M032.1.3, M045.8.2, and M230 are revised to clarify when it is permissible to use the designation ''NEWS'' rather than the designation ''PER'' on Line 2 (the content line) of labels that identify sacks, trays, and pallets containing copies of Periodicals publications prepared in combined mailings or in copalletized mailings. Effective 3–6–03.

M032, M033.2.2, and M910.3.0 are revised to clarify the use of letter trays rather than sacks when preparing and palletizing certain sizes of Standard Mail flat-size pieces and to add co-traying as an option. Effective 7–10–03.

M032, M033.1.2, M033.2.0, M610.1.1, M610.4.5, M620.1.1, and M820.5.2 are revised to allow mailers to use letter trays rather than sacks when preparing and palletizing certain sizes of Standard Mail flat-size pieces. This option applies to Standard Mail flat-size pieces claimed at automation rates, as well as flat-size pieces claimed at Enhanced Carrier Route rates. Effective 11–14–02.

M033.2.2c is revised to allow the placement of smaller size pieces in two rows in a single tray, provided that the two rows run parallel to each other, with the address side of the pieces all faced toward the end (short dimension) of the tray and perpendicular to the entire length (long dimension) of the tray. Effective 2–6–03.

M041 is revised by excluding the use of metal strapping or metal banding material for securing pallets of mail, whether an individual pallet of mail, a pallet composed of several individual pallets stacked to form a single unit, or a pallet with a pallet box containing mail. Effective 5–30–03.

M050.2.0 is deleted to support new procedures for calculating revenue deficiencies for sequenced mail. Effective 11–14–02.

M110.1.0 is revised to correct and clarify the text. Effective 4–3–03.

M110.1.0c is corrected to state that all permit imprint mail must be faced and packaged. Effective 4–17–03.

M220.1.1 and M220.3.0 are revised to clarify the preparation requirements for letters and flats that use the simplified address format. Additionally, all congressional mailings using the simplified address format will use Tag 11 on all containers to ensure appropriate handling through downstream Postal Service processes. Effective 11–14–02.

M610.1.4 and M620.1.3 are deleted and M820.1.8 and M820.1.10 are revised to eliminate the letter-size preparation requirements for nonautomation Standard Mail pieces combined in a mailing with palletized automation flats. Effective 8–8–02.

M610.2.1 is revised to correct an error in the packaging standards for Standard Mail machinable letter-size pieces. Effective 3–6–03.

M610.4.3, M820.5.1, and M950.3.2 are revised to change the minimum number of pieces required for 5-digit packages of automation and Presorted rate Standard Mail flats. Effective 9–5–02.

M660 is added and M011.1.4, M012.2.1, M032 Exhibit 1.3, and M072.1.0 are revised to add CMM, a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

M820.5.1 is revised to clarify the packaging standards for automation rate Standard Mail flat-size pieces sorted using the 5-digit scheme under L007. Effective 3–6–03.

M910 and M950 are revised to provide new mail preparation standards for the co-packaging and co-sacking of flat-size BPM mailpieces. Related revisions are made to M011, M032, M722, and M820 to support the new co-packaging and co-sacking standards. Effective 4–3–03.

M910.1.1h, M910.2.1g, M910.3.1h, M920.2.1m, and M940.2.1l are corrected to remove the references to Manifest Analysis and Certification (MAC) software. Effective 2–6–03.

M920.1.5f, M920.2.5e, M930.1.5f, M930.2.4e, M940.1.5f, and M940.2.4e are corrected to remove the references to 5-digit scheme (L001) pallets. Effective 2–6–03.

M920.2.5, M930.2.4, and M940.2.4 are revised to allow mailers using the advanced preparation options for flat-size mail to place certain mixed ADC packages on ASF or BMC pallets. Effective 2–6–03.

P Postage and Payment Methods

P014 is revised to update the administrative charges for processing refunds for unused meter stamps and business reply mail pieces returned with postage affixed. Effective 1–1–03.

P014 is revised to clarify the refund policy for unused postage evidencing system indicia on mailpieces or labels. Effective 7–11–02.

P014.4.1, P014.4.12, P014.4.13, and P040.1.1 are revised to correct and clarify the text. Effective 4–3–03.

P023.3.1 and P023.3.2 are revised to clarify the approval process for mailer authorizations to preprint rate markings on precanceled stamps or to use a precancel postmark on adhesive stamps, stamped cards, and stamped envelopes. Effective 3–6–03.

P030 is revised to clarify the required contents and format of meter indicia printed by meters and other postage evidencing systems in Postal Service facilities. Effective 1–9–03.

P030 is revised to clarify the required contents and format of meter indicia. Effective 10–3–02.

Exhibit P040.4.1b is revised to add CMM, a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

R Rates and Fees

R600 is revised to add CMM, a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

R900.4.0 is revised to change all instances of ''per piece charges'' to ''per piece fees.'' This change aligns the text in the DMM with the terminology used in the Domestic Mail Classification Schedule (DMCS), which is part of Title 39 *Code of Federal Regulations* (39 CFR). Effective 7–10–03.

R900.9.0 is revised to reflect the implementation of Confirm service. Effective 9–22–02.

S Special Services

S070.1.1 and S500.2.0 are revised to add CMM, a new option for mailing nonrectangular and irregular-shaped Regular Standard Mail and Nonprofit Standard Mail pieces. Effective 8–10–03.

S500.1.2 and S919.1.5 are revised to add new options for obtaining proof of delivery information for Express Mail and Signature Confirmation. Effective 7–10–03.

S911 and S912 are revised to include the toll-free number and clarify the options for retrieving the delivery status of Registered Mail and Certified Mail. Effective 5–20–03.

S918 and S919 are revised to add new language for the preparation and submission of PS Form 3152. Effective 7–11–02.

S918.1.0 and S919.1.0 are revised to clarify that, for First-Class Mail or Package Services, Delivery Confirmation or Signature Confirmation may be used only for parcels and not for letter-size or flat-size mail. Effective 7–10–03.

S922, S923, and S924 are revised to change all instances of ''per piece charges'' to ''per piece fees.'' This change aligns the text in the DMM with the terminology used in the Domestic Mail Classification Schedule (DMCS), which is part of Title 39 *Code of Federal Regulations* (39 CFR). Effective 7–10–03.

S922.4.0 is amended to allow the ''No Postage Necessary'' imprint, the business reply legend, and the horizontal bars required on business reply mail to be printed on an insert appearing through an address window. Effective 11–28–02.

S941 is added to reflect the implementation of Confirm'' service. Effective 9–22–02.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

■ In consideration of the foregoing, 39 CFR part 111 is amended as set forth below:

PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

■ 2. The table at the end of Section 111.3(f) is amended by correcting the entry for Transmittal letter issue 56 and adding a new entry for Transmittal letter issue 58 to read as follows:

§ 111.3 Amendments to the Domestic Mail Manual.

* * * * *

(f) * * *

Transmittal letter for issue	Dated	Federal Register publication
* *	* *	*
56	January 7, 2001.	66 FR 8370.
* *	* *	*
58	August 10, 2003.	[INSERT FR CITATION FOR THIS FINAL RULE].

3. Section 111.5 is revised to read as follows:

§ 111.5 Contents of the Domestic Mail Manual.

A ADDRESSING

A000 Basic Addressing
A010 General Addressing Standards
A020 Alternative Addressing Standards
A030 Address Quality
A060 Detached Address Labels (DALs)
A800 Addressing for Barcoding
A900 Customer Support
A910 Mailing List Services
A920 Address Sequencing Services
A930 Other Services
A950 Coding Accuracy Support System (CASS)

C CHARACTERISTICS AND CONTENT

C000 General Information
C010 General Mailability Standards
C020 Restricted or Nonmailable Articles and Substances
C021 Articles and Substances Generally
C022 Perishables
C023 Hazardous Materials
C024 Other Restricted or Nonmailable Matter
C030 Nonmailable Written, Printed, and Graphic Matter
C031 Written, Printed, and Graphic Matter Generally
C032 Sexually Oriented Advertisements
C033 Pandering Advertisements
C050 Mail Processing Categories
C100 First-Class Mail
C200 Periodicals
C500 Express Mail
C600 Standard Mail
C700 Package Services
C800 Automation-Compatible Mail
C810 Letters and Cards
C820 Flats
C840 Barcoding Standards for Letters and Flats
C850 Barcoding Standards for Parcels

D DEPOSIT, COLLECTION, AND DELIVERY

D000 Basic Information
D010 Pickup Service
D020 Plant Load
D030 Recall of Mail
D040 Delivery of Mail
D041 Customer Mail Receptacles
D042 Conditions of Delivery
D070 Drop Shipment
D071 Express Mail and Priority Mail
D072 Metered Mail
D100 First-Class Mail
D200 Periodicals
D210 Basic Information
D230 Additional Entry
D500 Express Mail
D600 Standard Mail
D700 Package Services
D900 Other Delivery Services
D910 Post Office Box Service
D920 Caller Service
D930 General Delivery and Firm Holdout

E ELIGIBILITY

E000 Special Eligibility Standards
E010 Overseas Military Mail
E020 Department of State Mail
E030 Mail Sent by U.S. Armed Forces
E040 Free Matter for the Blind and Other Physically Handicapped Persons
E050 Official Mail (Franked)
E060 Official Mail (Penalty)
E070 Mixed Classes
E080 Absentee Balloting Materials
E100 First-Class Mail
E110 Basic Standards
E120 Priority Mail
E130 Nonautomation Rates
E140 Automation Rates
E150 Qualified Business Reply Mail (QBRM)
E200 Periodicals
E210 Basic Standards
E211 All Periodicals
E212 Qualification Categories
E213 Periodicals Mailing Privileges

E214 Reentry
E215 Copies Not Paid or Requested by Addressee
E216 Publisher Records
E217 Basic Rate Eligibility
E220 Presorted Rates
E230 Carrier Route Rates
E240 Automation Rates
E250 Destination Entry
E260 Ride Along
E270 Preferred Periodicals
E500 Express Mail
E600 Standard Mail
E610 Basic Standards
E620 Presorted Rates
E630 Enhanced Carrier Route Rates
E640 Automation Rates
E650 Destination Entry
E660 Customized MarketMail
E670 Nonprofit Standard Mail
E700 Package Services
E710 Basic Standards
E711 Parcel Post
E712 Bound Printed Matter
E713 Media Mail
E714 Library Mail
E750 Destination Entry
E751 Parcel Select
E752 Bound Printed Matter
E753 Combining Package Services Parcels

F FORWARDING AND RELATED SERVICES

F000 Basic Services
F010 Basic Information
F020 Forwarding
F030 Address Correction, Address Change, FASTforward, and Return Services

G GENERAL INFORMATION

G000 The USPS and Mailing Standards
G010 Basic Business Information
G011 Post Offices and Postal Services
G013 Trademarks and Copyrights
G020 Mailing Standards
G030 Postal Zones
G040 Information Resources
G042 Rates and Classification Service Centers
G043 Address List for Correspondence
G090 Philatelic Services
G900 Experimental Classification and Rate Filings
G910 Negotiated Service Agreements
G911 Capital One Services, Inc. NSA
G990 Experimental Classifications and Rates
G991 NetPost Mailing Online
G992 Outside-County Periodicals Copalletization Drop-Ship Classification

L LABELING LISTS

L000 General Use
L001 5–Digit Scheme—Periodicals Flats and Irregular Parcels, Standard Mail Flats, and BPM Flats
L002 3–Digit ZIP Code Prefix Matrix
L003 3–Digit ZIP Code Prefix Groups—3–Digit Scheme Sortation
L004 3–Digit ZIP Code Prefix Groups—ADC Sortation
L005 3–Digit ZIP Code Prefix Groups—SCF Sortation
L006 5–Digit Metro Scheme
L007 5–Digit Scheme—Periodicals, Standard Mail, and BPM Flats in Packages
L600 Standard Mail and Package Services
L601 BMCs
L602 ASFs
L603 ADCs—Irregular Standard Mail Parcels
L604 Originating ADCs—Standard Mail Irregular Parcels
L605 BMCs/ASFs—Nonmachinable Parcel Post BMC Presort and OBMC Presort
L606 5–Digit Scheme—Standard Mail and Package Services Parcels
L800 Automation Rate Mailings
L801 AADCs—Letter-Size Mailings
L802 BMC/ASF Entry—Periodicals, Standard Mail, and Bound Printed Matter
L803 Non-BMC/ASF Entry—Periodicals, Standard Mail, and Bound Printed Matter

M MAIL PREPARATION AND SORTATION

M000 General Preparation Standards
M010 Mailpieces
M011 Basic Standards
M012 Markings and Endorsements
M013 Optional Endorsement Lines
M014 Carrier Route Information Lines
M020 Packages
M030 Containers
M031 Labels
M032 Barcoded Labels
M033 Sacks and Trays
M040 Pallets
M041 General Standards
M045 Palletized Mailings
M050 Delivery Sequence
M070 Mixed Classes
M071 Basic Information
M072 Express Mail and Priority Mail Drop Shipment
M073 Combined Mailings of Standard Mail and Package Services Parcels
M074 Plant Load Mailings
M100 First-Class Mail (Nonautomation)
M110 Single-Piece First-Class Mail
M120 Priority Mail
M130 Presorted First-Class Mail
M200 Periodicals (Nonautomation)
M210 Presorted Periodicals
M220 Carrier Route Periodicals
M230 Combining Multiple Editions or Publications
M500 Express Mail
M600 Standard Mail (Nonautomation)
M610 Presorted Standard Mail
M620 Enhanced Carrier Route Standard Mail
M660 Customized Marketmail
M700 Package Services
M710 Parcel Post
M720 Bound Printed Matter
M721 Single-Piece Bound Printed Matter
M722 Presorted Bound Printed Matter
M723 Carrier Route Bound Printed Matter
M730 Media Mail
M740 Library Mail
M800 All Automation Mail
M810 Letter-Size Mail
M820 Flat-Size Mail
M900 Advanced Preparation Options for Flats
M910 Co-Traying and Co-Sacking Package of Automation and Presorted Mailings
M920 Merged Containerization of Packages Using the City State Product
M930 Merged Palletization of Packages Using a 5% Threshold
M940 Merged Palletization of Packages Using the City State Product and a 5% Threshold
M950 Co-Packaging Automation Rate and Presorted Rate Pieces

P POSTAGE AND PAYMENT METHODS

P000 Basic Information
P010 General Standards
P011 Payment
P012 Documentation
P013 Rate Application and Computation
P014 Refunds and Exchanges
P020 Postage Stamps and Stationery
P021 Stamped Stationery
P022 Postage Stamps
P023 Precanceled Stamps
P030 Postage Meters (Postage Evidencing Systems)
P040 Permit Imprints
P070 Mixed Classes
P100 First-Class Mail
P200 Periodicals
P500 Express Mail
P600 Standard Mail
P700 Package Services
P900 Special Postage Payment Systems
P910 Manifest Mailing System (MMS)
P920 Optional Procedure (OP) Mailing System
P930 Alternate Mailing Systems (AMS)
P950 Plant-Verified Drop Shipment (PVDS)
P960 First-Class or Standard Mail Mailings With Different Payment Methods

R RATES AND FEES

R000 Stamps and Stationery

R100 First-Class Mail
R200 Periodicals
R500 Express Mail
R600 Standard Mail
R700 Package Services
R900 Services

S SPECIAL SERVICES

S000 Miscellaneous Services
S010 Indemnity Claims
S020 Money Orders and Other Services
S070 Mixed Classes
S500 Special Services for Express Mail
S900 Special Postal Services
S910 Security and Accountability
S911 Registered Mail
S912 Certified Mail
S913 Insured Mail
S914 Certificate of Mailing
S915 Return Receipt
S916 Restricted Delivery
S917 Return Receipt for Merchandise
S918 Delivery Confirmation
S919 Signature Confirmation
S920 Convenience
S921 Collect on Delivery (COD) Mail
S922 Business Reply Mail (BRM)
S923 Merchandise Return Service
S924 Bulk Parcel Return Service
S930 Handling
S940 Mailpiece Information
S941 Confirm Service

I INDEX INFORMATION

I000 Information
I010 Summary of Changes
I020 References
I021 Forms Glossary
I022 Subject Index

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 03–29337 Filed 11–24–03; 8:45 am]

BILLING CODE 7710–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket No. FEMA–B–7440]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Interim rule.

SUMMARY: This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified Base Flood Elevations for new buildings and their contents.

DATES: These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Maps in effect prior to this determination for each listed community.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Division Director for the Emergency Preparedness and Response Directorate reconsider the changes. The modified elevations may be changed during the 90-day period.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E. Hazard Identification Section, Mitigation Division, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection is provided.

Any request for reconsideration must be based on knowledge of changed conditions or new scientific or technical data.

The modifications are made pursuant to Section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required to either adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by the other Federal, State, or regional entities.

The changes in are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director for the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because modified base flood elevations are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are required to maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This interim rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case no.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modificaiton	Community number
Arizona:					
Maricopa	Town of Gila Bend, (02–09–807P), (02–09–857P).	August 7, 2003, August 14, 2003, *Arizona Business Gazette*.	The Honorable Chuck Turner, Mayor, Town of Gila Bend, P.O. Box A, Gila Bend, Arizona 85337.	Nov. 13, 2003	040043
Maricopa	City of Phoenix, (03–09–0522P).	August 7, 2003, August 14, 2003, *Arizona Business Gazette*.	The Honorable Skip Rimsza, Mayor, City of Phoenix, 200 West Washington Street, 11th Floor, Phoenix, Arizona 85003.	Nov. 13, 2003	040051
Maricopa	City of Scottsdale, (03–09–0482P).	July 24, 2003, July 31, 2003, *Arizona Business Gazette*.	The Honorable Mary Manross, Mayor, City of Scottsdale, 3939 North Drinkwater Boulevard, Scottsdale, Arizona 85251.	Oct. 23, 2003	045012
Maricopa	Unincorporated Areas, (02–09–807P), (02–09–857P).	August 7, 2003, August 14, 2003, *Arizona Business Gazette*.	The Honorable R. Fulton Brock, Chairman, Maricopa County, Board of Supervisors, 301 West Jefferson, 10th Floor, Phoenix, Arizona 85003.	Nov. 13, 2003	040037
Maricopa	Unincorporated Areas, (02–09–1240P).	August 7, 2003, August 14, 2003, *Arizona Republic*.	The Honorable R. Fulton Brock, Chairman, Maricopa County, Board of Supervisors, 301 West Jefferson, 10th Floor, Phoenix, Arizona 85003.	Nov. 13, 2003	040037
Pima	Unincorporated Areas, (01–09–407P).	July 24, 2003, July 31, 2003, *Tucson Citizen*.	The Honorable Sharon Bronson, Chair, Pima County Board of Supervisors, 130 West Congress, 11th Floor, Tucson, Arizona 85701.	June 30, 2003	040073
Yavapai	Town of Prescott Valley, (03–09–0757P).	July 31, 2003, August 7, 2003, *Prescott Daily Courier*.	The Honorable Richard Killingsworth, Mayor, Town of Prescott Valley, Civic Center, 7501 East Civic Circle, Prescott Valley, Arizona 86314.	Nov. 6, 2003	040121
California:					
Contra Costa	City of Concord, (03–09–0859P).	September 4, 2003, September 11, 2003, *Contra Costa Times*.	The Honorable Mark Peterson, Mayor, City of Concord, Concord City Hall, 1950 Parkside Drive, Concord, California 94519.	Aug. 11, 2003	065022
Contra Costa	City of Richmond, (03–09–1116P).	September 18, 2003, September 25, 2003, *Contra Costa Times*.	The Honorable Irma Anderson, Mayor, City of Richmond, 2600 Barrett Avenue, Third Floor, Richmond, California 94804.	Aug. 27, 2003	060035
Mendocino	City of Ukiah, (03–09–0317P).	October 2, 2003, October 9, 2003, *Ukiah Daily Journal*.	The Honorable Eric Larson, Mayor, City of Ukiah, 300 Seminary Avenue, Ukiah, California 95482.	Sept. 11, 2003	060186
Mendocino	Unincorporated Areas, (03–09–0317P).	October 2, 2003, October 9, 2003, *Ukiah Daily Journal*.	The Honorable Richard Shoemaker, Chairman, Mendocino County, Board of Supervisors, 501 Low Gap Road, Room 1090, Ukiah, California 95482.	Sept. 11, 2003	060183
Riverside	City of Temecula, (02–09–1356P).	July 31, 2003, August 7, 2003, *Press Enterprise*.	The Honorable Jeff Stone, Mayor, City of Temecula, P.O. Box 9033, Temecula, California 92589–9033.	Nov. 6, 2003	060742
Sacramento ...	Unincorporated Areas, (03–09–0432P).	August 7, 2003, August 14, 2003, *Daily Recorder*.	The Honorable Illa Collin, Chair, Sacramento County, Board of Supervisors, 700 H Street, Room 2450, Sacramento, California 95814.	July 21, 2003	060262
San Bernardino.	City of Yucaipa, (03–09–0821P).	September 18, 2003, September 25, 2003, *San Bernardino County Sun*.	The Honorable Dick Riddell, Mayor, City of Yucaipa, 34272 Yucaipa Boulevard, Yucaipa, California 92399.	Sept. 2, 2003	060739
San Diego	City of San Diego, (03–09–1057P).	August 14, 2003, August 21, 2003, *San Diego Daily Transcript*.	The Honorable Richard M. Murphy, Mayor, City of San Diego, 202 C Street, 11th Floor, San Diego, California 92101.	Nov. 20, 2003	060295
San Diego	City of San Diego, (03–09–0450P).	September 18, 2003, September 25, 2003, *San Diego Union-Tribune*.	The Honorable Richard M. Murphy, Mayor, City of San Diego, 202 C Street, 11th Floor, San Diego, California 92101.	Aug. 21, 2003	060295
Santa Barbara	City of Santa Barbara, (01–09–220P).	October 9, 2003, October 16, 2003, *Santa Barbara News Press*.	The Honorable Marty Blum, Mayor, City of Santa Barbara, P.O. Box 1990, Santa Barbara, California 93102–1990.	Jan. 15, 2004	060335

State and county	Location and case no.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modificaiton	Community number
Ventura	City of Fillmore, (02–09–927P).	July 31, 2003, August 7, 2003, *Fillmore Gazette*.	The Honorable Evaristo Barajas, Mayor, City of Fillmore, City Hall, Central Park Plaza, 250 Central Avenue, Fillmore, California 93015–1907.	Nov. 7, 2003	060415
Ventura	Unincorporated Areas, (02–09–927P).	July 31, 2003, August 7, 2003, *Fillmore Gazette*.	The Honorable Judy Mikels, Chair, Ventura County, Board of Supervisors, 800 South Victoria Avenue, Ventura, California 93009.	Nov. 7, 2003	060413
Colorado:					
Arapahoe	Unincorporated Areas, (03–08–0362P).	August 14, 2003, August 21, 2003, *Denver Post*.	The Honorable Marie Mackenzie, Chair, Arapahoe County, Board of Commissioners, 5334 South Prince Street, Littleton, Colorado 80166–0060.	July 24, 2003	08001
Denver	City and County of Denver, (03–08–0362P).	August 14, 2003, August 21, 2003, *Denver Post*.	The Honorable John W. Hickenlooper, Mayor, City and County of Denver, 1437 Bannock Street, Suite 350, Denver, Colorado 80202.	July 24, 2003	080046
El Paso	City of Colorado Spriongs, (03–08–0212P).	August 14, 2003, August 21, 2003, *The Gazette*.	The Honorable Lionel Rivera, Mayor, City of Colorado Springs, P.O. Box 1575, Colorado Springs, Colorado 80901–1575.	Oct. 9, 2003	080060
El Paso	City of Colorado Springs, (01–08–177P).	October 9, 2003, October 16, 2003, *The Gazette*.	The Honorable Lionel Rivera, Mayor, City of Colorado Springs, P.O. Box 1575, Colorado Springs, Colorado 80901–1575.	Jan. 15, 2004	080060
El Paso	Unincorporated Areas, (03–08–0385P).	August 20, 2003, August 27, 2003, *El Paso County News*.	The Honorable Chuck Brown, Chairman, El Paso County, Board of Commissioners, 27 East Vermijo Avenue, Colorado Springs, Colorado 80903–2208.	Nov. 26, 2004	080059
El Paso	Unincorporated Areas, (01–08–177P).	October 9, 2003, October 16, 2003, *The Gazette*.	The Honorable Chuck Brown, Chairman, El Paso County, Board of Commissioners, 27 East Vermijo Avenue, Colorado Springs, Colorado 80903–2208.	Jan. 15, 2004	080059
Jefferson	City of Lakewood, (03–08–0167P).	June 19, 2003, August 7, 2003, *Lakewood Sentinel*.	The Honorable Steve Burkholder, Mayor, City of Lakewood, 480 South Allison Parkway, Lakewood, Colorado 80226–3127.	Sept. 25, 2003	085075
Hawaii: Hawaii	Hawaii County, (03–09–0853P).	August 7, 2003, August 14, 2003, *Hawaii Tribune Herald*.	The Honorable Harry Kim, Mayor, Hawaii County, 25 Aupuni Street, Hilo, Hawaii 96720.	July 15, 2003	155166
Idaho: Gem	Unincorporated Areas, (03–10–0299P).	August 31, 2003, September 7, 2003, *Idaho Press Tribune*.	The Honorable Ed Mansfield, Chairman, Gem County, Board of Commissioners, 415 East Main Street, Emmett, Idaho 83617.	Dec. 4, 2003	160127
Nevada: Clark	Unincorporated Areas, (03–09–1569P).	October 2, 2003, October 9, 2003, *Las Vegas Review-Journal*.	The Honorable Mary Kincaid-Chauncey, Chair, Clark County, Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, Nevada 89155.	Sept. 11, 2003	320003
Texas: Collin	City of Frisco, (01–06–1415P).	August 8, 2003, August 15, 2003, *Frisco Enterprise*.	The Honorable Mike Simpson, Mayor, City of Frisco, 6891 Main Street, Frisco, Texas 75034.	Nov. 14, 2003	480134
Washington:					
Thurston	City of Olympia, (03–10–0337P).	September 18, 2003, September 25, 2003, *The Olympian*.	The Honorable Stan Biles, Mayor, City of Olympia, P.O. Box 1967, Olympia, Washington 98507–1967.	Dec. 26, 2003	530191
Thurston	City of Tumwater, (03–10–0337P).	September 18, 2003, September 25, 2003, *The Olympian*.	The Honorable Ralph C. Osgood, Mayor, City of Tumwater, 555 Israel Road Southwest, Tumwater, Washington 98501.	Dec. 26, 2003	530192
Thurston	Unincorporated Areas, (03–10–0337P).	September 18, 2003, September 25, 2003, *The Olympian*.	The Honorable Cathy Wolfe, Chair, Thurston County, Board of Commissioners, Building 1, Room 269, 2000 Lakeridge Drive Southwest, Olympia, Washington 98502–6045.	Dec. 26, 2003	530188

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance'')

Dated: November 18, 2003.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 03–29354 Filed 11–24–03; 8:45 am]

BILLING CODE 9110–13–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: Base (1% annual chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The base flood elevations and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated on the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, FEMA, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA makes the final determinations listed below for the modified BFEs for each community listed. These modified elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Mitigation Division Director of the Emergency Preparedness and Response Directorate, has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

The Agency has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)
MASSACHUSETTS	
Chelmsford (Town), Middlesex County (FEMA Docket No. D–7548)	
River Meadow Brook:	
Downstream corporate limit ..	*105
Approximately 20 feet upstream of Mill Road	*117
Putnam Brook:	
At confluence with River Meadow Brook	*112
Approximately 560 feet above confluence with River Meadow Brook	*112
Maps available for inspection at the Chelmsford Town Office, 50 Billerica Road, Chelmsford, Massachusetts.	
OHIO	
Bloomingburg (Village), Fayette County (FEMA Docket No. D–7580)	
East Fork Paint Creek:	
Upstream side of Midland Avenue (State Route 38) ..	•973
Approximately 0.5 mile upstream of State Route 38	•974
Maps available for inspection at the Bloomingburg Village Hall, 62 Main Street, Bloomingburg, Ohio.	
Fayette County (Unincorporated Areas) (FEMA Docket No. D–7528)	
East Fork Paint Creek:	
Approximately 300 feet upstream of confluence with Paint Creek	•954
Approximately 0.90 mile upstream of Greene Road	•1,026
Rattlesnake Creek:	
At Milledgeville-Octa Road ...	•1,038
Approximately 130 feet upstream of State Route 734	•1,058
Sugar Creek:	
Approximately 150 feet downstream of Parrott Station Road	•1,026

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)
Approximately 1,500 feet upstream of Main Street	•1,047
Maps available for inspection at the Fayette County Building Department, 121 E. East Street, Washington Court House, Ohio.	
Octa (Village), Fayette County (FEMA Docket No. D–7528)	
Rattlesnake Creek:	
At the downstream side of Allen Road	•1,041
Approximately 175 feet upstream of Allen Road	•1,041
Maps available for inspection at the Village of Octa Council House, Allen Street, Milledgeville, Ohio.	
Washington Court House (City), Fayette County (FEMA Docket No. D–7528)	
East Fork Paint Creek:	
Approximately 1,375 feet downstream of Washington Avenue	•954
Approximately 1.2 miles upstream of Washington Avenue	•959
Maps available for inspection at the Washington Court House City Hall, 105 North Main Street, Washington Court House, Ohio.	

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance'')

Dated: November 18, 2003.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 03–29356 Filed 11–24–03; 8:45 am]

BILLING CODE 9110–13–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATE: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the FIRM is available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E. Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA makes the final determinations listed below of BFEs and modified BFEs for each community listed. The proposed BFEs and proposed modified BFEs were published in newspapers of local circulation and an opportunity for the community or individuals to appeal the proposed determinations to or through the community was provided for a period of ninety (90) days. The proposed BFEs and proposed modified BFEs were also published in the **Federal Register**.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67.

FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community.

The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act

This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act

The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this rule is exempt from the requirements of the Regulatory Flexibility Act because final or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform

This proposed rule meets the applicable standards of section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

■ Accordingly, 44 CFR Part 67 is amended to read as follows:

PART 67—[AMENDED]

■ 1. The authority citation for Part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD)
CALIFORNIA	
San Pablo (City), Contra Costa County, (FEMA Docket No. B–7408)	
Wildcat Creek:	
Approximately 700 feet downstream of Rumrill Boulevard	*30
Just downstream of Creek Vale Road	*81
San Pablo Creek:	
Approximately 50 feet downstream of Giant Road	*24
Approximately 100 feet upstream of Church Lane	*57
Maps are available for inspection at One Alvarado Square, San Pablo, California.	

Source of flooding and location	#Depth in feet above ground. *Elevation in feet (NGVD)
HAWAII	
Hawaii County, (FEMA Docket No. B–7437)	
Kaluiiki Branch:	
At confluence of Waipahoehoe Stream and Alenaio Stream	*754
Approximately 200 feet upstream of Akala Road	*811
Waipahoehoe Stream:	
At confluence with Kaluiiki Branch and Alenaio Stream	*754
Approximately 100 feet upstream of Akala Road	*811
Alenaio Stream:	
Just upstream of Kaumana Drive	*708
At confluence of Kaluiiki Branch and Waipahoehoe Stream	*754
Maps are available for inspection at the Hawaii County Department of Public Works, Engineering Division, 25 Aupuni Street, Hilo, Hawaii.	

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance'')

Dated: November 18, 2003.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 03–29357 Filed 11–24–03; 8:45 am]

BILLING CODE 9110–13–P

Proposed Rules

Federal Register

Vol. 68, No. 227

Tuesday, November 25, 2003

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–237–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767–200 and –300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 767–200 and –300 series airplanes. This proposal would require replacement of certain door-mounted escape slides and slide-raft assemblies with new slide-raft assemblies; replacement of certain escape system latches with new latches; and modification or replacement of certain counterbalance assemblies with new counterbalance assemblies; as applicable. This action is necessary to prevent the escape slides and slide-rafts of the forward and mid-cabin entry and service doors from being too short to reach the ground in the event that the airplane rotates onto the aft fuselage, resulting in an extreme tip-back position, which could result in injury to passengers and crewmembers during an emergency evacuation. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 9, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–237–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2001–NM–237–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from 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.

FOR FURTHER INFORMATION CONTACT: Susan Rosanske, Aerospace Engineer, Airframe Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6448; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2001–NM–237–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–237–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports indicating that the original analysis of the highest sill heights for the forward and mid-cabin entry and service doors is no longer valid on certain Boeing Model 767–200 and –300 series airplanes. The original analysis showed that, in the event of a main landing gear (MLG) failure, the engine nacelle strut would shear off due to the weight of the airplane; however, the results of further testing revealed that the engine nacelle strut has a higher strength than originally calculated. This higher strength could result in higher-than-expected sill height values ocurring at the forward and mid-cabin doors with the airplane resting on one MLG and the opposite engine. In this instance, the airplane could rotate onto the aft fuselage (*i.e.*, an extreme tip-back position). We have received two reported incidents of a single MLG collapsing, which resulted in a partial tip-back position due to the degree of rotation of the airplane. No injury resulted to passengers using the evacuation slides during the emergency.

This condition, if not corrected, could cause the escape slides and slide-rafts of the forward and mid-cabin entry and service doors to be too short to reach the ground in the event that the airplane rotates onto the aft fuselage, resulting in an extreme tip-back position. This tip-back position could result in injury to passengers and crewmembers during an emergency evacuation.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletin 767–25–0266, dated September 14, 2000, which describes procedures for replacing certain door-mounted escape slides and slide-raft assemblies with new slide-raft assemblies; replacing certain door latches with new latches; and modifying or replacing certain counterbalance assemblies with new counterbalance assemblies; as applicable. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

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

Differences Between Proposed Rule and Service Bulletin

Operators should note that, although Boeing Service Bulletin 767–25–0266 recommends that the affected parts be replaced at the end of the ''useful service life'' (approximately 15 years) of the slides and slide-rafts, the FAA has determined that the ''useful service life'' interval would not address the unsafe condition in a timely manner. Therefore, this proposal would require that the affected parts be replaced within five years from the effective date of this AD. In developing an appropriate compliance time for this AD, the FAA considered not only the manufacturer's recommendation, but also 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 replacement. In light of all of these factors, the FAA finds a five-year compliance time for completing the required actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Cost Impact

There are approximately 745 airplanes of the affected design in the worldwide fleet. The FAA estimates that 261 airplanes of U.S. registry would be affected by this proposed AD. The work hours and required parts per airplane vary according to the configuration group to which the affected airplane belongs.

The following table shows the estimated cost impact for airplanes of U.S. registry affected by this proposed AD:

COST IMPACT

Airplane configuration group	Number on U.S. register	Work hours per airplane	Parts cost per airplane	Cost per airplane	Total cost for U.S.-registered airplanes
1	208	6	$1,236	$1,626	$338,208
2	12	12	2,472	3,252	39,024
3	41	11	98,858	99,573	4,082,493
4 (none on U.S. register)	0	11	50,400	51,115	0
5 (none on U.S. register)	0	17	51,636	52,741	0

Based on the figures in the above table, the cost impact of the proposed AD on U.S. operators is estimated to be $4,459,725.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket 2001–NM–237–AD.

Applicability: Model 767–200 and –300 series airplanes, line numbers 1 through 793 inclusive, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the escape slides and slide-rafts of the forward and mid-cabin entry and service doors from being too short to reach the ground in the event that the airplane rotates onto the aft fuselage, resulting in an extreme tip-back position, which could result in injury to passengers and crewmembers during an emergency evacuation, accomplish the following:

Replacement

(a) Within five years from the effective date of this AD, perform the actions specified in Table 1 of this AD for the applicable airplane configuration group, on the applicable doors, per the Accomplishment Instructions in Boeing Service Bulletin 767–25–0266, dated September 14, 2000.

TABLE 1.—REPLACEMENT REQUIREMENTS

For airplanes identified in the service bulletin as group—	Perform the following action—	At these affected doors—
1	Replace the escape slides or slide-raft assemblies with new escape slide-raft assemblies, and replace the escape system latches with new latches.	Forward entry and service doors.
2	Replace the escape slides or slide-raft assemblies with new escape slide-raft assemblies, and replace the escape system latches with new latches.	Forward and mid-cabin entry and service doors.
3	Replace the escape slides or slide-raft assemblies with new escape slide-raft assemblies; replace the escape system latches with new latches; and replace the counterbalance assemblies with new counterbalance assemblies.	Forward entry and service doors.
4	Replace the escape slides or slide-raft assemblies with new escape slide-raft assemblies; replace the escape system latches with new latches; and modify or replace the counterbalance assemblies with new counterbalance assemblies.	Forward entry and service doors.
5	Replace the escape slides or slide-raft assemblies with new escape slide-raft assemblies; replace the escape system latches with new latches.	Forward and mid-cabin entry and service doors.
5	Modify or replace the counterbalance assemblies with new counterbalance assemblies.	Forward entry and service doors.

Replacements Accomplished Previously per the Service Bulletin

(b) Replacements accomplished before the effective date of this AD per Boeing Service Bulletin 767–25–0266, dated September 14, 2000, are considered acceptable for compliance with the corresponding actions specified in this AD.

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, Seattle Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Issued in Renton, Washington, on November 17, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29340 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–334–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 707 and 720 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all Boeing Model 707 and 720 series airplanes. This proposed AD would require inspection of the bolt forward of the wing front spar upper chord on the overwing support fittings of the inboard and outboard nacelle struts to verify that BACB30US type bolts are installed. If any other type of bolt is found, this proposed AD would require replacement with a new BACB30US type bolt. This action is necessary to prevent separation of the engine from the airplane due to stress corrosion cracking and consequent fracturing of the bolts. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 9, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–334–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2002–NM–334–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from 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.

FOR FURTHER INFORMATION CONTACT: Candice Gerretsen, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6428; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments,

in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NM–334–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–334–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports indicating that several fractured H–11 steel bolts have been found on the underwing strut attachment fitting on Boeing Model 767 series airplanes. The cause of the H–11 steel bolt fracture was due to stress corrosion. This condition, if not corrected, could result in separation of the engine from the airplane due to stress corrosion cracking and consequent fracturing of the bolts.

The H–11 steel bolts forward of the wing front spar upper chord on the overwing support fittings of the inboard and outboard nacelle struts on certain Boeing Model 707 and 720 series airplanes are identical to those on the affected Boeing Model 767 series airplanes. Therefore, all these airplanes may be subject to the same unsafe condition.

Other Relevant Rulemaking

The FAA has previously issued AD 2000–10–51, amendment 39–11770 (65 FR 37011, June 13, 2000), applicable to certain Boeing Model 767 series airplanes. That AD requires an inspection of the 767 underwing strut attachment fitting to determine whether H–11 steel tension bolts are installed in the side load underwing fittings on both struts. This proposed AD would not affect the current requirements of that AD.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing 707/720 Service Bulletin A3502, dated February 21, 2002, which describes procedures for performing a general visual inspection of the bolt forward of the wing front spar upper chord on the overwing support fittings of the inboard and outboard nacelle struts to verify that BACB30US type bolts are installed, and performing corrective actions if any other type bolt is found. The corrective actions consist of performing a high frequency eddy current inspection of the hole bore for corrosion and cracks; measuring the hole to verify the diameter is within the specified dimensions; contacting the manufacturer for corrective action if any crack or corrosion is found or if hole diameter is not within the specified dimensions; and replacing non-BACB30US type bolts with new BACB30US type bolts. The new BACB30US bolts are made from nickel alloy 718 material and are not subject to stress corrosion. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

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

Differences Between Proposed Rule and Service Bulletin

Operators should note that, although the service bulletin specifies that reviewing records is another way to verify if a BACB30US type bolt is installed, this proposed AD would require performing a general visual inspection as the only way to verify if a BACB30US type bolt is installed. The FAA has determined that even if a BACB30US type bolt had been installed as shown on the records, the BACB30US type bolt could have been replaced at a later time with a bolt other than a BACB30US type bolt. Therefore, a general visual inspection is the only way to verify if a BACB30US type bolt is installed.

Operators should note that, although the service bulletin specifies that the manufacturer may be contacted for disposition of certain repair conditions, this proposed AD would require the repair of those conditions 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 FAA to make such findings.

Cost Impact

There are approximately 230 airplanes of the affected design in the worldwide fleet. The FAA estimates that 42 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed inspection and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $2,730, or $65 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation

Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket 2002–NM–334–AD.

Applicability: All Model 707 and 720 series airplanes, as listed in Boeing 707/720 Service Bulletin A3502, dated February 21, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent separation of the engine from the airplane due to stress corrosion cracking and consequent fracturing of the bolts, accomplish the following:

Service Bulletin References

(a) The term ''service bulletin,'' as used in this AD, means the Accomplishment Instructions of Boeing 707/720 Service Bulletin A3502, dated February 21, 2002.

Inspection and Corrective Action

(b) Except as provided by paragraph (c) of this AD, within 12 months from the effective date of this AD, perform a general visual inspection of the bolts forward of the wing front spar upper chord on the overwing support fittings of the inboard and outboard nacelle struts to verify that BACB30US type bolts are installed, per Figure 1 of the service bulletin.

Note 1: For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(c) The service bulletin specifies that reviewing records is another way to verify if a BACB30US type bolt is installed. However, this AD does not allow that alternative. The general visual inspection required by paragraph (b) of this AD must be accomplished to verify if BACB30US type bolts are installed.

(d) If any bolt other than the BACB30US type bolts specified in Figure 1 of the service bulletin is found during the inspection required by paragraph (b) of this AD or if any bolt cannot be identified: Prior to further flight, do the actions specified in paragraphs (d)(1) and (d)(2) of this AD, per Figure 2 of the service bulletin.

(1) Perform a high frequency eddy current (HFEC) inspection of the hole bore for cracks and corrosion and measure the hole to verify the diameter is within the specified dimensions. If any corrosion or cracking is found or if the measured hole diameter is not within the specified dimensions, and the service bulletin specifies to contact Boeing for appropriate action: Prior to further flight, 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 who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved, the approval must specifically reference this AD.

(2) Replace the bolt with a new BACB30US type bolt per Figure 2 of the service bulletin.

Parts Installation

(e) As of the effective date of this AD, no person shall install any bolt other than a BACB30US type bolt in the locations specified in this AD, on any airplane.

Alternative Methods of Compliance

(f) In accordance with 14 CFR 39.19, the Manager, Seattle Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Issued in Renton, Washington, on November 17, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29341 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–50–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777–200 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 777–200 series airplanes. This proposal would require a one-time general visual inspection of wire bundles routed aft of electrical disconnect panel AC2162 to determine their installation and separation, and corrective actions, if necessary. This action is necessary to prevent damage to the stabilizer cutout circuit wires in the bundles due to contact between the bundles and the adjacent galley water drain tube and hydraulic tubes, which if followed by active fault in stabilizer command circuit, could result in undesired stabilizer motion that cannot be stopped, and could lead to loss of pitch control and loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 9, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–50–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2003–NM–50–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from 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.

FOR FURTHER INFORMATION CONTACT: Binh Tran, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6485; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to

change the compliance time and a request to change the service bulletin reference as two separate issues.

- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.,* reasons or data) for each request.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2003–NM–50–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–50–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received a report of a chronic occurrence of the stabilizer rate valve failure maintenance message on a Model 777 airplane. The cause of the occurrence was due to wire bundles lying on top of the galley water drain tube. The wire bundles had an intermittent conductor-to-shield short because of contact with the tube and vibration. It is likely the wire bundles were in contact with the tube because, during production, the wire bundles were not installed properly with adequate separation. This condition, if not corrected, and if followed by active fault in stabilizer command circuit, could result in undesired stabilizer motion that cannot be stopped. Stabilizer motion that cannot be stopped could lead to loss of pitch control and loss of control of the airplane.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletin 777–27–0057, dated August 22, 2002, which describes procedures for performing a one-time general visual inspection of the wire bundles that route aft of electrical disconnect panel AC2162 to determine their installation and separation, and corrective actions, if necessary. The corrective actions include performing a detailed inspection of the wire bundles for damage, repair of the wire bundles if necessary, and securing the wire bundles as necessary. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

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

Differences Between Proposed Rule and Service Bulletin

Operators should note that, although the service bulletin recommends accomplishing the inspection at the first convenient maintenance opportunity, the FAA has determined that such an imprecise compliance time would not address the identified unsafe condition in a timely manner. 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 inspection (one hour). In light of all of these factors, the FAA finds a compliance time of within 18 months from the effective date of the AD for completing the required actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Cost Impact

There are approximately 64 airplanes of the affected design in the worldwide fleet. The FAA estimates that 17 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed general visual inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $1,105, or $65 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed 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. Manufacturer warranty remedies may be available for labor costs associated with this proposed AD. As a result, the costs attributable to the proposed AD may be less than stated above.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket 2003–NM–50–AD.

Applicability: Model 777–200 series airplanes, as listed in Boeing Service Bulletin 777–27–0057, dated August 22, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent damage to the stabilizer cutout circuit wires in the bundles due to contact between the bundles and the adjacent galley water drain tube and hydraulic tubes, which if followed by active fault in stabilizer command circuit, could result in undesired stabilizer motion that cannot be stopped, and could lead to loss of pitch control and loss of control of the airplane, accomplish the following:

Service Bulletin References

(a) The term ''service bulletin,'' as used in this AD, means the Accomplishment Instructions of Boeing Service Bulletin 777–27–0057, dated August 22, 2002.

Inspection

(b) Within 18 months of the effective date of this AD, perform a one-time general visual inspection of the wire bundles that route aft of electrical disconnect panel AC2162 to determine their installation and separation, in accordance with the service bulletin.

Note 1: For the purposes of this AD, a general visual inspection is defined as: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(c) If wire bundles are installed in accordance with the service bulletin, no further action is required by this AD.

Corrective Action

(d) If any wire bundle is not installed in accordance with the service bulletin: Before further flight, perform the actions specified in paragraphs (d)(1) and (d)(2) of this AD.

(1) Perform a detailed inspection of the wire bundle for damage, and repair all damage, in accordance with the service bulletin.

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

(2) Add clamps or tie strips to secure the wire bundles in accordance with the service bulletin.

Alternative Methods of Compliance

(e) In accordance with 14 CFR 39.19, the Manager, Seattle Aircraft Certification Office, FAA, is authorized to approve alternative methods of compliance for this AD.

Issued in Renton, Washington, on November 17, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29342 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 36

Exempt Commercial Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is proposing two actions relating to electronic trading facilities that operate in reliance on the exemption in section 2(h)(3) of the Commodity Exchange Act (''the Act''). First, the Commission is proposing to amend Rule 36.3(b), which governs Commission access to information regarding transactions on such trading facilities, to provide for access to more relevant and useful information from all such markets. Second, the Commission is proposing rules that would require those electronic trading facilities that operate in reliance on the exemption in section 2(h)(3) and that perform a significant price discovery function for transactions in the underlying cash market to publicly disseminate certain specified trading data. These price discovery rules are being proposed pursuant to section 2(h)(4) of the Act, which authorizes the Commission to prescribe rules and regulations to ensure timely dissemination by such trading facilities of price, trading volume, and other trading data to the extent appropriate.

DATES: Comments must be received by January 26, 2004.

ADDRESSES: Comments should be sent to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, attention: Office of the Secretariat. Comments may be sent by facsimile transmission to 202–418–5521 or, by e-mail to *secretary@cftc.gov.* Reference should be made to ''Proposed Rules for Exempt Commercial Markets.''

FOR FURTHER INFORMATION CONTACT: Nancy E. Yanofsky, Chief Counsel (telephone 202–418–5292, e-mail *nyanofsky@cftc.gov*), or Don Heitman, Senior Special Counsel (telephone 202–418–5041, e-mail *dheitman@cftc.gov*), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

The Commodity Futures Modernization Act of 2000 (''CFMA''), Pub. L. 106–554, created an exemption from the Commission's jurisdiction for transactions conducted on certain electronic commercial markets (''exempt commercial markets,'' ''ECMs'' or ''§ 2(h)(3) markets''). Specifically, § 2(h)(3) of the Act provides that, except to the extent provided in § 2(h)(4), nothing in the Act shall apply to a transaction in an exempt commodity [1] that is: (a) Entered into on a principal-to-principal basis solely between persons that are eligible commercial entities at the time the persons enter into the agreement, contract, or transaction; and (b) executed or traded on an electronic trading facility. Section 2(h)(4) provides that a transaction described in § 2(h)(3) shall be subject to certain specified provisions of the Act, such as the Act's antimanipulation and antifraud provisions, and furthermore, that such transactions shall be subject to price dissemination rules if the electronic trading facility serves a significant price discovery function for the underlying cash market. Section 2(h)(5) requires an electronic trading facility relying on the exemption in § 2(h)(3) to provide the Commission with certain information and to comply with information access provisions set out in § 2(h)(5)(B)(i).

II. Information Access Provisions

Section 2(h)(5)(B)(i) of the Act requires an electronic trading facility relying on the exemption provided in § 2(h)(3) to provide the Commission with information regarding trading activity on the facility. The statute establishes two alternatives for providing that information:

(I) provide the Commission with access to the facility's trading protocols and electronic access to the facility with respect to transactions conducted in reliance on the exemption set forth in paragraph (3); or

(II) provide such reports to the Commission regarding transactions executed on the facility in reliance on the exemption set forth

[1] Under the Act, exempt commodities generally are tangible, non-agricultural commodities and include energy and metals products. *See* § 1a(14) of the Act, 7 U.S.C. 1a(14).

in paragraph (3) as the Commission may from time to time request to enable the Commission to satisfy its obligations under this Act.

These two statutory alternatives are referred to hereafter as, respectively, the ''electronic access option'' and the ''reporting option.''

Regulation 36.3(b)(1), published on August 10, 2001, was intended to implement the foregoing statutory provisions. It provides as follows:

(b) *Required information.* (1) A facility operating in reliance on the exemption in section 2(h)(3) of the Act, initially and on an ongoing basis, must:

(i) Provide the Commission with access to the facility's trading protocols and electronic access to transactions conducted on the facility in reliance on such exemption; or

(ii) Attach its initial trading protocols and any amendments thereto in hard copy form to the notification required in paragraph (a) of this section and provide in a form and manner acceptable to the Commission, as determined by the Commission in response to a petition by the exempt market relying on the exemption in section 2(h)(3) of the Act, information regarding transactions by large traders on the facility.

To date, those trading facilities that have sought to comply with this regulation have generally chosen the former, the electronic access option. In applying the electronic access option, the Commission has generally accepted from ECMs electronic access to their trading protocols (*i.e.*, the trading agreements and/or other terms and conditions applicable to trades on the facility, generally available on their Web sites) in addition to view-only electronic access to the data stream of trades taking place on the system. The Commission suggested, when it adopted Part 36, that such electronic access would provide information similar to that provided by large trader reports filed with the Commission with respect to trading on designated contract markets:

The [electronic] access requirement provides the Commission with information on a routine, ongoing basis, thereby serving many of the functions that large trader reports serve on the regulated markets. Using this access, the Commission is able to surveil transactions on the market in order to enforce its anti-manipulation authority.[2]

In practice, however, the Commission's Division of Market Oversight (''Division'') has found that the view-only information provided under the electronic access option, by those trading facilities that have filed notifications under section 2(h)(3) over the last 24 months, is neither as relevant,[3] nor as useful,[4] as anticipated.

Therefore, the Commission is proposing to amend its regulations to focus Rule 36.3(b)(1) more precisely so as to provide the Commission with access to more relevant and useful information regarding trading activity on exempt commercial markets. Under the amended rules, an electronic trading facility filing a notification with the Commission under Rule 36.3 would be required, initially and on an ongoing basis, to: (1) Provide the Commission with access to the facility's trading protocols, either electronically or in hard copy form; (2) identify those transactions conducted on the facility with respect to which it intends to rely on the exemption in section 2(h)(3); and (3) inform the Commission whether it intends to satisfy the information access requirement of section 2(h)(5)(B)(i) of the Act with respect to such transactions through the electronic access option provided in paragraph 36.3(b)(1)(ii)(B), or the reporting option provided in paragraph 36.3(b)(1)(ii)(A), as described below.

The trading facility would not be required to include among the agreements, contracts or transactions for which it is seeking an exemption those agreements, contracts or transactions that are not contracts for future delivery of a commodity, or options, and are, therefore, not subject to the Commission's exclusive jurisdiction. Thus, for example, the trading facility would not be required to identify, or provide information with respect to, agreements, contracts or transactions involving ''any sale of any cash commodity for deferred shipment or delivery.'' Such transactions are excluded from the Commission's exclusive jurisdiction under section 1a(19) of the Act (commonly referred to as ''the forward contract exclusion''). Neither would a trading facility be required to identify, or provide information with respect to, agreements, contracts or transactions that constitute cash or spot transactions, which are contracts for present, rather than future, delivery and likewise are not subject to the Commission's exclusive jurisdiction.

In complying with amended Rule 36.3, trading facilities shall make their best effort to identify to the Commission only those agreements, contracts or transactions that are subject to the Commission's exclusive jurisdiction and with respect to which they intend to rely on the exemption provided in section 2(h)(3). Should a new agreement, contract or transaction be added, or an existing one amended, that would be traded in reliance on the exemption, the trading facility should amend its notice accordingly.

A trading facility that does not offer trading in any futures or option contracts subject to the Commission's exclusive jurisdiction—for example, a facility where only cash or forward contracts are traded—is not required to file a notification under Rule 36.3. Such a facility is not subject to the Commodity Exchange Act.

Consistent with section 2(i) of the Act,[5] the mere fact that it was identified as being traded in reliance on the section 2(h)(3) exemption would not be construed as creating a presumption that any agreement, contract or transaction is or otherwise would be subject to the Act. Thus, for example, in any enforcement action involving any such agreement, contract or transaction, the Commission would be required to prove its jurisdiction independently of an ECM's identification of that agreement, contract or transaction for purposes of information access under Rule 36.3. Also, should a trading facility seeking in good faith to comply with Rule 36.3 fail to identify for information access purposes a particular agreement, contract or transaction, which is later determined to be a futures or option contract subject to the Commission's exclusive jurisdiction, such failure would not be construed by the Commission as a violation of section

[2] 66 FR 42264, Aug. 10, 2001.

[3] The electronic access option, as currently applied, gives the Commission information regarding all contracts traded on an ECM's trading facility. This may include a large amount of irrelevant, extraneous data regarding contracts that are not contracts for future delivery of a commodity, or options, and are, therefore, not within the Commission's exclusive jurisdiction.

[4] The Division's surveillance staff have determined that the information available through the current view-only electronic access to ECM trading facilities is not, in fact, equivalent to the large trader information received with respect to designated contract markets.

[5] Section 2(i) of the Commodity Exchange Act provides that:

(1) No provision of this Act shall be viewed as implying or creating any presumption that —

(A) any agreement, contract or transaction that is excluded from this Act under section 2(c), 2(d), 2(e), 2(f), or 2(g) of this Act or Title IV of the Commodity Futures Modernization Act of 2000, or exempted under section 2(h) or 4(c) of this Act; or

(B) any agreement, contract or transaction, not otherwise subject to this Act, that is not so excluded or exempted is or would otherwise be subject to this Act.

(2) No provision of, or amendment made by, the Commodity Futures Modernization Act of 2000 shall be construed as conferring jurisdiction on the Commission with respect to any such agreement, contract or transaction, except as expressly provided in section 5a of this Act (to the extent provided in section 5a(g) of this Act), 5b of this Act, or 5d of this Act.

4(a) of the Act.[6] However, such transaction would still remain subject to the Commission's antifraud and antimanipulation authority.

Trading facilities electing to provide information under the reporting option would be required to file weekly reports containing information that could be useful to the Commission in enforcing its antifraud and antimanipulation authority with respect to those trading facilities. Such reports would include, in a form and manner approved by the Commission, a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3) the following information: the commodity, the location,[7] the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument, the type of option (call or put) and the strike price. Each such report would be required to be electronically transmitted weekly, within such time period as is acceptable to the Commission following the end of the week to which the data applies.

Those trading facilities wishing to provide information pursuant to the electronic access option (Rule 36.3(b)(1)(ii)(B)) would be required, initially and on an ongoing basis, to provide the Commission with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3). Such access must be structured so as to permit the Commission to capture in permanent form a continuing record of trades on the facility such that the Commission would be able to reconstruct and compile the same information regarding transactions on the trading facility that would otherwise be provided by the trading facility under the reporting option (Rule 36.3(b)(1)(ii)(A)) described above.

The Commission expects that the information that will be provided by ECMs in reports required under Rule 36.3(b)(1)(ii)(A), or compiled by the Commission through electronic access provided under Rule 36.3(b)(1)(ii)(B), will be useful in identifying aberrant price behavior, including intraday price spikes. Such price anomalies may serve as indicators of the need for further Commission investigation. In such instances, the Commission may, among other things, use the special call authority provided by section 2(h)(5)(B)(iii) to determine whether a manipulation may have occurred warranting appropriate enforcement action.

This reactive oversight differs from that applicable to Designated Contract Markets (''DCMs'') and registered Derivatives Transaction Execution Facilities (''DTFs''). Those markets are subject to a greater degree of regulatory oversight than ECMs and, accordingly, are required to provide more frequent and detailed transaction data, which enables the Commission not only to investigate and punish manipulation after-the-fact, but to detect and prevent it as well.

Proposed Rule 36.3(b)(1)(iii) would require a trading facility to maintain a record of allegations or complaints concerning instances of suspected fraud or manipulation. The record would be required to include the name of the complainant, if provided, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint. The intent of this provision is to make clear that the language of section 2(h)(5)(B)(ii) of the Act, which requires a trading facility to maintain ''records of activities related to its business as an electronic trading facility exempt under paragraph (3),'' extends to maintaining records relating to allegations or complaints of fraud or manipulation in trading activity on the facility.

Proposed Rule 36.3(b)(1)(iv) would require a trading facility to provide to the Commission a copy of the record of each substantive complaint no later than three days after the complaint is received. The basis for this requirement is the language appearing at the end of section 2(h)(5)(B)(i)(II) (the reporting option), which states that reports regarding transactions executed on the facility are provided ''to enable the Commission to satisfy its obligations under this Act.'' The purpose expressed in this language seems to apply not only to the reporting subparagraph in which it appears, but also to the electronic access subparagraph that precedes it. Clearly, the two subparagraphs are intended to provide alternative methods of reaching the same objective, which is to impart information to the Commission that will enable it to perform its duties under the Act.

Given the Commission's duty to enforce the antifraud and antimanipulation provisions of the Act with respect to transactions conducted in reliance on the section 2(h)(3) exemption, the Commission believes it is crucial that ECMs report complaints of such activities. Reports to the Commission are consistent with an ECM's ongoing obligations under section 2(h)(5)(D) both to comply with paragraph 2(h)(5) itself and to require participants trading on the facility in reliance on the section 2(h)(3) exemption to ''agree to comply with all applicable law.'' Such reports are especially important given the after-the-fact nature of the Commission's oversight of such trading activity. It is also significant that the ECMs receiving these complaints (unlike more highly-regulated DCMs or DTFs) have no self-regulatory responsibility or authority, and thus no ability to respond to such complaints themselves beyond denying the violator future access to the trading facility. This creates an even greater need for the Commission to receive information that will enable it to take action in response to such suspected manipulation or fraud.

It should be noted that the reporting requirement is limited to ''substantive'' claims of manipulation or fraud. The Commission's intent in including this limitation is to allow an ECM to exercise its judgment to weed out clearly frivolous claims.[8]

III. Price Discovery Provisions

With respect to price dissemination rules, section 2(h)(4)(D) specifically provides that a transaction described in section 2(h)(3) shall be subject to:

> such rules and regulations as the Commission may prescribe if necessary to ensure timely dissemination by the electronic trading facility of price, trading volume, and other trading data to the extent appropriate, if the Commission determines that the electronic trading facility performs a significant price discovery function for transactions in the cash market for the commodity underlying any agreement, contract, or transaction executed or traded on the electronic trading facility.

On August 10, 2001, the Commission published Rule 36.3, which implements the notification, information and other provisions of the CFMA related to section 2(h)(3) exempt commercial markets. *See* 66 FR 42255. Subsection (c)(2) of Rule 36.3 provides that the Commission may make a determination that such a trading facility performs a significant price discovery function under section 2(h)(4)(D) by order, and that such finding shall be made after notice and an opportunity for a hearing

[6] Section 4(a) of the Act makes it unlawful to trade a contract for future delivery of a commodity in the U.S. unless on a contract market designated by, or a derivatives transaction execution facility registered with, the Commission.

[7] In this context, ''location'' means the delivery or the price-basing location specified in the agreement, contract or transaction.

[8] An ECM could, as an alternative to exercising such judgment, choose to forward all complaints to the Commission.

through submission of written data, views and arguments.

To date, ten electronic commercial markets have notified the Commission of their intent to operate as ECMs in reliance on the section 2(h)(3) exemption. The Commission has issued acknowledgment letters to seven ECMs, and is considering the issuance of acknowledgment letters to the other three markets. In view of the Commission's receipt of these section 2(h)(3) notifications, the Commission now is proposing to add specificity to its price discovery rules in several ways. First, the Commission is proposing to adopt two criteria that the Commission will use to determine whether a section 2(h)(3) market performs a significant price discovery function for the underlying cash market. Second, the Commission is proposing to specify the information that must be disseminated by section 2(h)(3) markets that serve such a significant price discovery function. Third, the Commission is proposing certain amendments to its procedures for making a price discovery determination.[9]

A. The Elements of Price Discovery

Price discovery commonly is defined as the process of determining prices through the interaction of buyers and sellers. Prices may be discovered by a single buyer and seller in a privately negotiated bilateral cash market transaction, or through the simultaneous interaction of multiple buyers and sellers in organized markets.

Organized markets, which include futures markets and certain cash markets where trading takes place in accordance with established rules, often perform an important role in facilitating price discovery in the broader cash markets. In particular, these markets facilitate price discovery in cash markets by efficiently incorporating supply and demand information for the underlying commodity into the transaction prices or bids and offers through the operation of a centralized market for the commodity. Thus, the price discovery process on organized markets may significantly enhance the efficiency of the overall cash market.

The extent to which price information is used in establishing prices for cash market transactions that occur outside of the organized markets provides a relevant factor for determining the contribution of that market to price discovery and for determining whether there is a federal interest in the dissemination of such price information.[10] Such price information may be used in varying degrees to facilitate the establishment of prices and may also serve as one of a number of sources of price information that are consulted by cash market participants in developing bids, offers, or transaction prices. In certain circumstances, such price information may be sufficiently well regarded by the industry that it serves as an important benchmark for cash market participants to consider in setting bids or offers or in negotiating cash market transaction prices.[11] In other circumstances, prices discovered on a market may be such an integral and indispensable part of the price determination process in the underlying cash market that bids, offers or cash market transaction prices have a relatively high correlation to the prices discovered on the market. This latter practice is known as price basing.

Price basing is a frequently observed practice in many futures markets and some cash markets. As indicated above, under price basing, commercial entities establish transaction prices for the underlying commodity, or a related commodity, based directly on the prices discovered on an organized market. These entities may or may not trade in the organized market. The cash market transaction prices established through price basing may be either spot or forward prices.

Prices discovered on futures or organized cash markets vary widely with regard to their influence on transaction prices established in broader cash markets. For instance, many long-established organized markets for agricultural, metal, and energy commodities appear to perform a crucial price discovery role for the broader cash markets, as reflected by the widespread practice of price basing in many of these markets. For example, for certain dairy products, the price discovery function of established organized cash markets is so significant that prices established on such markets are extensively used for price basing even though the organized market's prices may be based on a relatively small number of transactions. Similarly, prices established on actively traded futures markets for commodities like grains, oilseeds, natural gas and petroleum products are extensively used for price basing. In contrast, newly established organized markets may be less likely to perform a significant price discovery function for their associated cash markets in their early stages of development.

As indicated above, the relative significance of prices discovered on an organized market for its underlying cash market is directly related to the extent to which such prices are used in the establishment of transaction prices between commercial entities. As a result of this relationship, the use of a market's prices for price basing, either directly or indirectly, provides observable indicia that the market performs a significant price discovery function that would serve as a basis for such a determination under section 2(h)(4).

B. Proposed Criteria for Making Price Discovery Determination

While the Act authorizes the Commission to make a determination that a section 2(h)(3) market performs a significant price discovery function, it does not define that term or contain criteria to guide that determination. Accordingly, the Commission is proposing to establish the following two alternative criteria for determining that a section 2(h)(3) market performs a significant price discovery function:

(a) Cash market bids, offers or transactions are directly based on or quoted at a differential to the prices generated on the market on a more than occasional basis; or

(b) The market's prices are routinely disseminated in a widely distributed industry publication and are consulted by the industry on a more than occasional basis for pricing cash market transactions.

Under the proposed criteria, a section 2(h)(3) market would be deemed to be performing a significant price discovery function under section 2(h)(4)(D) when a market's prices are used for price basing on a more than occasional basis or are published in a widely distributed industry publication and consulted by the industry on a more than occasional basis for pricing purposes.[12] As

[9] The types of instruments traded on exempt commercial markets vary widely. Some of these instruments, but not all of them, are subject to the Commission's exclusive jurisdiction. The Commission's proposed rules are directed only to those instruments that are traded in reliance on the section 2(h)(3) exemption and are otherwise subject to the Commission's exclusive jurisdiction.

[10] It is this effect that section 2(h)(4) addresses when it provides that information shall be disseminated by an exempt commerciald market when ''the electronic trading facility performs a significant price discovery function for transactions in the cash market for the commodity underlying any agreement, contract or transaction executed.''

[11] If the price information discovered on a market is widely respected in an industry, such recognition by the industry in question may lead to the publication of such information in established industry publications.

[12] The Commission is aware of econometric techniques used by academics to measure the relative contribution to the price discovery process by various financial markets trading similar assets (See, *e.g.*, Hasbrouck, J., *One Security, Many Markets: Determining the Contribution to Price Discovery*, Journal of Finance, 50 P 1175–1199, 1995.). However, the Commission understands that these techniques would require price data for both the exempt commercial market and for the

Continued

discussed above, price basing as described under criterion (a) directly confirms that the prices being generated on the market have significant utility with regard to discovering prices in connection with cash market transactions. Furthermore, publication of a section 2(h)(3) market's prices in a widely distributed industry publication, and industry consulting those prices on a more than occasional basis, confirms that the prices are thought to be sufficiently reliable and acceptable to be considered to be a significant source of price discovery.

In evaluating a section 2(h)(3) market's price discovery role, assessments under criterion (a) would include an analysis of whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set, either explicitly or implicitly, at a differential to prices established on a section 2(h)(3) market. Cash market prices are set *explicitly* at a differential to the section 2(h)(3) market when, for instance, they are quoted in dollars and cents above or below the reference market's prices. Cash prices are set *implicitly* at a differential to a section 2(h)(3) market's prices when, for instance, they are arrived at after adding to, or subtracting from, the section 2(h)(3) market's price, but then quoted or reported as a flat price.[13] The Commission will also consider whether cash market entities are quoting cash prices based on a section 2(h)(3) market's prices on a more than occasional basis. [14]

With regard to criterion (b), consideration would be given to whether prices established on a section 2(h)(3) market are reported in a widely distributed industry publication, such as Platts Oil Gram, Inside FERC or the Lundberg Survey. In making this determination, the Commission would consider the reputation of the publication within the industry, how frequently it is published and whether the information contained in the publication is consulted by industry participants for pricing cash market transactions on a more than occasional basis.

Under the proposal, an exempt commercial market would be required to notify the Commission when it has reason to believe that one or more of the markets that it is operating in reliance on section 2(h)(3) meet either of the specified criteria.[15] The Commission specifically asks commenters to discuss potential financial costs and legal risks created by the proposed notification requirement. Do the aforementioned factors, specifically, that prices be used on ''more than an occasional basis,'' and that they be ''widely distributed,'' provide enough specificity to enable trading facilities to make a determination regarding notification obligations. If not, what further guidance could be provided that would enable a determination?

Upon receipt of such a filing, the Commission's staff would conduct an assessment of the facility's markets operated in reliance on section 2(h)(3) to identify those markets that perform a significant price discovery function for the associated cash market. The scope of the inquiry conducted by the Commission would vary. In the course of its assessment, Commission staff might contact cash market participants to verify the extent to which they refer to the market for price basing. The assessment might also examine whether the section 2(h)(3) market, although occasionally performing a price discovery function, failed to do so on a more than occasional basis and thus does not perform a significant price discovery function.

If the available information indicates that a market is serving a significant price discovery function for the underlying cash market, the Commission would notify the section 2(h)(3) market that it appears to be performing a significant price discovery function and provide the market with an opportunity for a hearing through the submission of written data, views and arguments. The Commission, after consideration of all relevant information, would issue an order determining whether or not the section 2(h)(3) market serves a significant price discovery function.[16]

C. Information To Be Disseminated by a Price Discovery Market

The Commission has not previously addressed the nature and scope of the information that should be disclosed by a price discovery market subject to section 2(h)(4)(D), other than by incorporating in its rules the Act's requirement that the exempt commercial market disseminate publicly ''price, trading volume and other trading data to the extent appropriate with respect to transactions executed in reliance on the exemption as specified in the order.'' *See* Commission Rule 36.3(c)(2). In determining the nature and scope of the information that should be disclosed under the proposed rules, the Commission has looked to other provisions of the Act that impose public dissemination requirements on other categories of regulated and unregulated markets.

With respect to other markets, sections 5(d)(7) and (8) of the Act require designated contract markets to make available to the public: (i) Information concerning the terms and conditions of the contracts and the mechanisms for executing transactions; and (ii) daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts. Sections 5a(d)(4) and (5) require registered derivatives transaction execution facilities to disclose publicly: (i) Information concerning contract terms and conditions, trading conventions, mechanisms and practices, financial integrity protections, and other information relevant to participation in trading on the facility; and (ii) if the Commission determines that the

individual transactions in the associated cash market. These transaction prices may not be published or otherwise available (indeed, cash market transaction prices may be proprietary), which would preclude application of these statistical techniques. Moreover, these techniques likely would not be familiar to industry participants and may be costly to perform. For these reasons, the Commission is not proposing to base its criteria on the econometric techniques used in the academic literature.

[13] For example, if crude oil prices were generated on a section 2(h)(3) market, price basing practices that would satisfy criterion (a) would include cases where cash market bids or offers would be explicitly quoted at a differential to the prices generated on that market (*e.g.*, ten cents per barrel above the exempt market's price for crude oil delivered in July). In addition, criterion (a) would encompass cases where cash market bids, offers or transaction prices are quoted as a whole price (*e.g.*, $30/barrel) and such price is calculated implicitly by adding to, or subtracting from, the section 2(h)(3) market's prices a specified price differential (*e.g.*, a $30/barrel quoted price is derived as the sum of a ten-cent per barrel differential plus the exempt market's price of $29.90/barrel).

[14] As in cash markets underlying many established futures markets, the differential for a particular cash market bid, offer or transaction may vary from time to time in response to changes in various factors that affect the relationship between cash market prices and prices discovered on a section 2(h)(3) market.

[15] In addition, the Commission may, at any time, *sua sponte*, conduct an assessment as to whether an exempt market is serving a significant price discovery function for the associated cash market. In this regard, the Commission would consider a number of factors in deciding whether to initiate a review of a market's price discovery function, including whether the market holds itself out as performing a price discovery function for the underlying cash market. To facilitate its review of a market's price discovery function in such cases, the Commission is proposing to require that an electronic trading facility operating in reliance on section 2(h)(3) notify the Commission when the facility commences holding its markets out as serving a price discovery function.

[16] The proposed rules would also provide the market with an opportunity to request at any time that the Commission review the continuing appropriateness of its determination in light of changed facts or circumstances.

contracts perform a significant price discovery function for transactions in the cash market for the commodity underlying the contracts, daily information on settlement prices, volume, open interest, and opening and closing price ranges for contracts traded on the facility. Section 5d(d) requires exempt boards of trade (''EBOTs'') to disseminate publicly on a daily basis information on trading volume, opening and closing ranges, open interest, and other trading data appropriate to the market if the Commission determines that the EBOT is a significant source of price discovery for transactions in the cash market for the commodity underlying the contracts.

As noted, the Act only stipulates that an ECM should make available ''price, trading volume and other trading data to the extent appropriate.'' However, as also noted above, this requirement is unclear as to what precisely is intended to be made available to the public by ECMs, especially with regard to the term ''price.'' Based on the information that is required to be made available by a comparably regulated market, the EBOT, the Commission requests comment on the reasonableness of requiring similar information, including trading activity measures, price information, and certain contextual information. The Commission also requests comment on what contextual information should be made available in order to assure that the public can accurately interpret the meaning of the trading activity and price information.

Specifically, the Commission is requesting comment on a requirement that the ECMs serving a price discovery function publicly disseminate the following information on a daily basis:

Contextual information:

- Contract terms and conditions or product descriptions; and
- Trading conventions, mechanisms, and practices.

Trading activity information:

- Trading volume; and
- Open interest, if available.

Price information:

- Opening and closing prices or price ranges;
- High and low prices;
- A volume-weighted average price; or
- Any other price information approved by the Commission.[17]

The types of contextual, trading activity and price information that the Commission proposes to require to be published potentially would be useful to the price basing process; *i.e.,* this information potentially would be useful for commercial entities that do not participate directly in a market, but use the market's prices as a basis for setting prices for cash market transactions. The reasoning regarding the individual elements of the proposed market information reporting requirements is discussed below.

Contextual information: Information regarding the terms and conditions of the contracts traded on a § 2(h)(3) market and the market's trading rules is necessary to facilitate the public's accurate interpretation of the meaning of data on prices and trading activity reported by markets. This information collectively defines the items being traded on a market as well as a contract's pricing basis and therefore is critical to those who would gather information for purposes of risk management, price basing, or speculation in the market. Ill-defined products and trading conventions will not result in prices with sufficient specificity to be useful for such purposes.

Trading activity: It appears appropriate to require that exempt commercial markets that serve a significant price discovery function disseminate information related to activity in the market, such as daily trading volume data and open interest (if such information is available). In this regard, in futures and option markets, trading activity most often is measured by volume of trading or open interest. Volume of trading, which is required by statute to be provided by exempt commercial markets, is the number of contracts transacted in a commodity in a market over a specified period of time, generally defined as a day. Daily trading volume data provide an indication of the level of past interest in trading in a particular market. Markets with consistently high trading volumes are generally considered to be more liquid[18] than those with lower levels of volume. Thus, the availability of such information, which can serve as a measure of the liquidity of the market on which prices are determined, is important for the interpretation of the reliability of the prices on the market and the general availability of this market statistic is important for an exempt commercial market's continued functioning as a price discovery mechanism.

Open interest is defined as the number of open contracts observed at the close of trading each day. Like trading volume, open interest also is often regarded as an indicator of market liquidity, as higher levels of open interest indicate, in part, traders' confidence that their positions can be readily liquidated without materially affecting the price they receive for such a transaction. Moreover, as noted, imposing a requirement that exempt commercial markets publish open interest data if available,[19] as well as data on trading volume, is consistent with the Act's requirements for EBOTs that are determined by the Commission to be serving a significant price discovery function.

Price information: With regard to price information, both the Act and the logic of price basing require access to price data. Reliable price information is also critical for speculative trading. In considering price-reporting requirements, the Commission has focused on the reporting of delayed price information, rather than real-time price data. In this regard, the Commission notes that the Act does not appear to require publication of real-time price data. The Commission also notes that many exchanges charge fees for real-time market data (usually bids, offers and transaction prices), and that such fees can be an important source of exchange revenues. The exchanges also make certain market summary data freely available to the public on a delayed basis (where the delay can be as little as 10 minutes). This delayed market information generally includes opening and closing prices or price ranges, daily high and low prices, settlement prices, daily trading volume

[17] The section 2(h)(3) market may satisfy the dissemination requirements by placing the information on its website, providing the information to a financial information service, or using a combination of these media. Furthermore, the section 2(h)(3) market may disseminate such additional information as it believes is appropriate for price discovery purposes. A section 2(h)(3) market may also publish all of the information specified in proposed rule 36.3(c)(2)(iv) whether or not the Commission has made a price discovery determination applicable to that market under rule 36.3(c)(2)(iii). Such voluntary dissemination by a section 2(h)(3) market may, in appropriate circumstances, obviate the need for the market to notify the Commission and for the Commission to make a price discovery determination.

[18] Liquidity is a measure of a market's ability to absorb large orders within a short period of time without requiring a substantial change in price. Liquid markets are often described as ''broad'' and/or ''deep,'' whereas illiquid markets re often described as ''thin.'' The liquidity of a market is an indication of the quality or the reliability of the prices determined thereon.

[19] Open interest data generally would be available for markets such as Designated Contract Markets (''DCMs''), which provide an exclusive forum for offset of positions thereon. However, the Commission understands that, unlike positions on a DCM—where contracts entered into on the exchange can only be offset on that exchange—positions established on an ECM can be offset away from the ECM, without the ECM's knowledge. Therefore, it might be impossible for an ECM to maintain accurate open interest data.

and open interest. The Commission interprets the Act as allowing exempt commercial markets to reap gains from the sale of real-time market data, but also to require these markets to publish the required market summary information noted above without charge to the marketplace on a delayed basis.

In view of the different types of exempt markets, the Commission proposes to provide flexibility in regard to the specific price information to be published by section 2(h)(3) markets. Specifically, the Commission proposes to require that markets publish opening and closing prices or price ranges, daily high and low prices, or volume weighted average prices over a period of time that is representative of trading on the market. In addition, on a case-by-case basis, the Commission proposes to permit markets to publish other price information, in lieu of the price measures enumerated above, subject to the Commission's approval.

As noted above, the Act requires that opening and closing price ranges be provided by the Act's other category of exempt market—EBOTs. However, because not all exempt markets will have such information available, as a consequence of the way trading is conducted, the Commission recommends that two alternative price measures, the day's high and low, or the day's volume weighted average price, be provided. Established exchanges commonly publish high and low prices for each trading session. In addition, high and low prices provide useful information regarding the range of daily trading activity. Volume weighted average prices provide a good estimate of the price applicable to most transactions executed on a market during daily trading sessions and, accordingly, may provide a better indication of the representative prices observed in a market on a given day than the other measures noted above. Finally, as noted, the Commission is proposing to give markets the flexibility of publishing alternative price measures, subject to Commission approval, if such measures would provide the public with an adequate indication of the market's daily price levels.

IV. Cost Benefit Analysis

Section 15 of the Act, as amended by section 119 of the CFMA, requires the Commission to consider the costs and benefits of its action before issuing a new regulation or order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Rather, section 15(a) simply requires the Commission to ''consider the costs and benefits'' of the subject rule or order.

Section 15(a) further specifies that the costs and benefits of the proposed rule or order shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The proposed price dissemination rules are intended to facilitate the continued performance of an exempt market's price discovery function. As discussed above, this function involves social benefits that extend beyond the market and its users. Moreover, the information that the proposed rules require exempt markets to disseminate is virtually certain to either exist already or be a byproduct of the operation of the market, especially one performing a significant price discovery function. Finally, the Commission is proposing to accept website posting of the required information in satisfaction of the rule, as it currently does for designated contract markets and registered derivatives transaction execution facilities. Because the exempt markets subject to the proposed rule are by definition electronic markets, all of which maintain internet websites, dissemination costs should not be significant.

In formulating the proposed price dissemination rules, the Commission also has taken into consideration that organized markets must produce prices before they can disseminate them. The Commission acknowledges that price discovery, *i.e.*, the production of prices, is a costly activity requiring considerable investment by an organized market. Restrictions on the dissemination of prices discovered on an organized exchange can be viewed as a legitimate means of protecting the exchange's investment in the production of accurate prices. The Commission acknowledges the concerns raised in certain academic studies showing that some forms of mandated price dissemination rules can produce unintended consequences such as: (1) Less accurate prices; (2) higher trading costs; (3) wealth transfers from those who produce prices to those who consume the information contained in prices discovered elsewhere; and (4) wealth transfers from some classes of market participants to others.[20] These studies apply to rules concerning the dissemination of highly valuable real-time prices. Since the proposed rule applies only to the dissemination of less valuable delayed prices, the possibilities of this rule producing significant unintended consequences appear to be low.

The Commission also has considered the costs and benefits of the proposed amendments to regulation 36.3(b)(1), regarding information access, in light of the above-noted specific areas of concern identified in section 15. The Commission intends that the amended rules would impose the minimum requirements necessary to enable it to perform its oversight functions and to carry out its mandate to protect the public interest in markets that are free of fraud, abuse and manipulation.

After considering these factors, the Commission has determined to propose the rules and rule amendments set forth below.

The Commission specifically invites public comment on its application of the criteria contained in the Act for consideration. Commenters are also invited to submit any quantifiable data that they may have concerning the costs and benefits of the proposed rules with their comment letter.

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The rules proposed herein would affect exempt commercial markets. The Commission has previously determined that exempt commercial markets are not small entities for purposes of the RFA.[21] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a

[20] *See* J. Harold Mulherin, Jeffry Netter, and James A. Overdahl, *Prices are Property: the Organization of Financial Exchanges from a Transaction Cost Perspective*, Journal of Law and Economics 34 (October 1991) 591–644; and J. Harold Mulherin, *Market Transparency: Pros. Cons. and Property Rights*, Journal of Applied Corporate Finance Volume 5 Number 4 (Winter 1993) 94–97.

[21] 66 FR 42256, 42268 (Aug. 10, 2001).

significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), which imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA, does not apply to this rule. The proposed rules do not appear to contain information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 17 CFR Part 36

Commodity futures, Commodity Futures Trading Commission.

In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act and, in particular, sections 2(h)(3)–(5) of the Act, the Commission hereby proposes to amend Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 36—EXEMPT MARKETS

1. The authority citation for part 36 continues to read as follows:

Authority: 7 U.S.C. 2, 6, 6c, and 8a.

2. Section 36.3 is proposed to be amended by revising paragraphs (b)(1)(i) and (ii), by adding new paragraphs (b)(1)(iii) and (iv), by redesignating paragraphs (b)(2) and (b)(3) as paragraphs (b)(3) and (b)(4), by adding a new paragraph (b)(2), by adding a heading to paragraph (c)(1), by revising paragraph (c)(2), and by adding a heading to paragraph (c)(3) to read as follows:

§ 36.3 Exempt commercial markets.

* * * * *

(b) * * *

(1) * * *

(i) Provide the Commission with access to the facility's trading protocols, either electronically or in hard copy form;

(ii) Identify to the Commission those transactions conducted on the facility with respect to which it intends to rely on the exemption in section 2(h)(3) of the Act and, with respect to such transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3) of the Act the following information: The commodity, the location, the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument the type of option (call or put) and the strike price. Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies; or

(B) Provide the Commission, in a form and manner acceptable to the Commission, with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3) of the Act, which access would allow the Commission to compile the information described in paragraph (b)(1)(ii)(A) of this section and create a permanent record thereof;

(iii) Maintain a record of allegations or complaints received by the trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in section 2(h)(3) of the Act. The record shall contain the name of the complainant, if provided, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint; and

(iv) Provide to the Commission, either electronically or in hard copy form, a copy of the record of each substantive complaint received pursuant to paragraph (b)(1)(iii) of this section no later than three business days after the complaint is received.

(2) The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting reports, the time within which such reports shall be filed, and the form and manner of providing electronic access, under paragraph (b)(1) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

* * * * *

(c) * * *

(1) *Prohibited representation.* * * *

(2) *Market data dissemination.* (i) *Criteria for price discovery determination.* An electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract, or transaction executed or traded on the electronic trading facility when:

(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis; or

(B) The market's prices are routinely disseminated in a widely distributed industry publication and are consulted by the industry on a more than occasional basis for pricing cash market transactions.

(ii) *Notification.* An electronic trading facility operating in reliance on section 2(h)(3) of the Act shall notify the Commission when it has reason to believe that:

(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis;

(B) The market's prices are routinely disseminated in a widely distributed industry publication; or

(C) The market holds itself out to the public as performing a price discovery function for the cash market for the commodity.

(iii) *Price discovery determination.* Following receipt of a notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an electronic trading facility operating in reliance on section 2(h)(3) of the Act that the trading facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the electronic trading facility with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the electronic trading facility performs a significant price discovery function under the criteria of paragraph (c)(2)(i)(A) or (B) of this section.

(iv) *Price dissemination.* An electronic trading facility that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this paragraph shall disseminate publicly and on a daily basis all of the following

information with respect to transactions executed in reliance on the exemption:

(A) Contract terms and conditions, or a product description, and trading conventions, mechanisms and practices;

(B) Trading volume by commodity and, if available, open interest; and

(C) The opening and closing prices or price ranges, the daily high and low prices, a volume-weighted average price that is representative of trading on the market, or such other daily price information as proposed by the facility and approved by the Commission.

(v) *Modification of price discovery determination.* A trading facility that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section may petition the Commission at any time to modify or vacate that determination. The petition shall contain an appropriate justification for the request. The Commission, after notice and opportunity for a hearing through the submission of written data, views and arguments, shall grant, grant subject to conditions, or deny such request.

(3) *Required representation.* * * *

Issued in Washington, DC, on November 20, 2003, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 03–29437 Filed 11–24–03; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 2003N–0496]

RIN 0910–AF09

Food Labeling: Health Claims; Dietary Guidance

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is issuing this advance notice of proposed rulemaking (ANPRM) to request comments on alternatives for regulating qualified health claims in the labeling of conventional human foods and dietary supplements. FDA also is soliciting comments on various other issues related to health claims and on the appropriateness and nature of dietary guidance statements on conventional food and dietary supplement labels. Comments on the regulatory alternatives and the additional topics will inform FDA's rulemaking to establish regulations for qualified health claims, as well as any policy initiative(s) that FDA may undertake to provide information to consumers to help them make wise food choices.

DATES: Submit written or electronic comments by January 26, 2004.

ADDRESSES: Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*.

FOR FURTHER INFORMATION CONTACT: Paulette Gaynor, Office of Nutritional Products, Labeling and Dietary Supplements (HFS–800), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1450.

SUPPLEMENTARY INFORMATION:

I. Background

The Nutrition Labeling and Education Act of 1990 (NLEA) (Public Law 101–535)[1] directed FDA to issue regulations authorizing health claims (i.e., labeling claims that characterize the relationship of a substance to a disease or health-related condition) only if the agency determines, based upon the totality of publicly available scientific evidence (including evidence from well designed studies conducted in a manner which is consistent with generally recognized scientific procedures and principles), that there is significant scientific agreement (SSA), among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence (21 U.S.C. 343(r)(3)(B)(i)). Congress delegated to FDA the authority to establish the procedure and standard for health claims for dietary supplements (21 U.S.C. 343(r)(5)(D)). In accordance with the NLEA, FDA issued regulations establishing general requirements for health claims in labeling for conventional foods (58 FR 2478, January 6, 1993). By regulation (59 FR 395, January 4, 1994), and under Congressional authority[2], FDA adopted the same general requirements, including the procedure and standard, for health claims in dietary supplement labeling that Congress had prescribed in the NLEA for health claims in the labeling of conventional foods. (See 21 U.S.C. 343(r)(3) and (r)(4).)

The procedure requires the evidence supporting a health claim to be presented to FDA for review before the claim may appear in labeling (§ 101.14(d) and (e) and 101.70) (21 CFR 101.14(d) and (e), 101.70)). The standard requires a finding of ''significant scientific agreement'' (SSA) before FDA may authorize a health claim by regulation (§ 101.14(c)). FDA's current regulations, which mirror the statutory language in 21 U.S.C. 343(r)(3)(B)(i), provide that this standard is met only if FDA determines that there is SSA, among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by the totality of publicly available scientific evidence, including evidence from well-designed studies conducted in a manner that is consistent with generally recognized scientific procedures and principles (§§ 101.14(c) and 101.70(f)).

Among its provisions regulating claims, the NLEA required FDA to determine whether claims respecting 10 specific substance/disease relationships met the requirements for a health claim (NLEA section 3(b)(1)(A)(vi) and (x), Pub. L. 101–535). FDA conducted these statutorily required analyses. Not all relationships that Congress required the agency to consider were found to meet the standard of SSA, and, so, not all were authorized by FDA. Some of the substance/disease relationships that were found to lack SSA became the subject of a lawsuit, *Pearson* v. *Shalala* (*Pearson*), brought by dietary supplement marketers and health advocacy organizations.

In *Pearson*, the plaintiffs challenged FDA's general health claims regulations for dietary supplements and FDA's decision not to authorize health claims for four specific substance/disease relationships. Although the U.S. District Court for the District of Columbia initially ruled in favor of FDA (14 F. Supp. 2d 10 (D.D.C. 1998)), the U.S. Court of Appeals for the D.C. Circuit reversed the lower court's decision (*Pearson* v. *Shalala*, 164 F.3d 650 (D.C. Cir. 1999)).[3] The appeals court held

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[1] The NLEA authorized health claims in food labeling by amending the Federal Food, Drug, and Cosmetic Act (the act) to add section 403(r) to the act (21 U.S.C. 343(r)). This section specifies, in part, that a food is misbranded if it bears a claim that expressly or by implication characterizes the relationship of a nutrient to a disease or health-related condition unless the claim is made in accordance with section 403(r)(3) (for conventional foods) or 403(r)(5)(D) (for dietary supplements).

[2] FDA issued regulations establishing general requirements for health claims in dietary supplement labeling (59 FR 395) under the NLEA and the Dietary Supplement Act of 1992 (Public Law 102–571).

[3] The appellate court decided the case on January 15, 1999. On March 1, 1999, the Government filed a petition for rehearing en banc. The U.S. Court of Appeals for the D.C. Circuit denied the petition for

that, on the administrative record compiled in the challenged rulemakings, the first amendment does not permit FDA to reject health claims that the agency determines to be potentially misleading unless the agency also reasonably concludes that a disclaimer would not eliminate the potential deception.

The Appeals Court further stated that it did not ''rule out the possibility that where evidence in support of a claim is outweighed by evidence against the claim, the FDA could deem it incurable by a disclaimer and ban it outright.'' (164 F. 3d at 659.) Also, the court saw ''no problem with the FDA imposing an outright ban on a claim where evidence in support of the claim is qualitatively weaker than the evidence against the claim.'' Id. at 659 n.10. This language was the genesis of the ''weight of the evidence'' criterion discussed in this ANPRM.

In the **Federal Register** of October 6, 2000 (65 FR 59855), following the Appeals Court ruling in *Pearson*, FDA published a notice announcing its intention to exercise its enforcement discretion with regard to certain categories of dietary supplement health claims that may not meet the SSA standard currently endorsed in § 101.14(c).[4] The October 6, 2000, notice identified circumstances in which the agency intended to consider exercising enforcement discretion for a qualified health claim in dietary supplement labeling. Included in the agency's consideration was whether the scientific evidence in support of a given health claim outweighed the scientific evidence against it. In the **Federal Register** of December 20, 2002 (67 FR 78002), FDA published a notice of availability announcing that the agency was identifying qualified health claim enforcement discretion factors in the form of guidance and expanding its consideration of enforcement discretion to include health claims in the labeling of conventional foods as well as dietary supplements.[5]

Six days after publication of the December 20, 2002, notice and the guidance, the U.S. District Court for the District of Columbia issued its decision in *Whitaker* v. *Thompson*, 248 F. Supp. 2d 1 (D.D.C. 2002) (*Whitaker*). In *Whitaker*, the district court, interpreting *Pearson*, found that ''credible evidence,'' rather than ''weight of the evidence,'' is the appropriate standard for FDA to apply in evaluating qualified health claims. *Whitaker*, 248 F.Supp. 2d at 10. In light of *Whitaker*, FDA believes that the weight of the evidence standard in the October 6, 2000, **Federal Register** notice and the December 20, 2002, guidance must be tempered by the test of credible evidence (68 FR 41387 at 41388–41389).

Also in December 2002, FDA announced a major new initiative, the Consumer Health Information for Better Nutrition Initiative, to make available more and better information about conventional foods and dietary supplements to help consumers improve their health and decrease the risk of contracting diseases by making sound dietary decisions. Under this initiative, the agency established the Task Force on Consumer Health Information for Better Nutrition (the Task Force). The Task Force was charged with, among other things, reporting on how the agency can improve consumer understanding of the health consequences of dietary choices and increase competition by product developers in support of healthier diets. This charge includes how the agency should evaluate scientific evidence for qualified health claims, as well as developing a framework for regulations that will give these principles the force and effect of law.

FDA announced the availability of the Task Force report (Ref. 1), in a notice published in the **Federal Register** of July 11, 2003 (68 FR 41387). The notice also announced the availability of two guidances entitled ''Guidance for Industry and FDA: Interim Evidence-Based Ranking System for Scientific Data'' (Ref. 2) and ''Guidance for Industry and FDA: Interim Procedures for Qualified Health Claims in the Labeling of Conventional Human Food and Human Dietary Supplements'' (Ref. 3) that further updated the agency's approach on how it intends to implement the *Pearson* decision. Further, the notice stated that FDA intended to publish an ANPRM to solicit comments on the regulatory approaches and topics addressed in the Task Force report. This ANPRM is that document.

As of September 1, 2003, the agency has implemented the evidence-based ranking system and the procedures for qualified health claims[6] on an interim basis. However, FDA recognizes the need for transparent, long-term procedures that have the force and effect of law.[7] Such procedures would benefit both the industry and the consumer, provided they result in well-reasoned, science-based decisions that facilitate the communication of truthful and non-misleading information to the consumer. To this end, the agency is issuing this ANPRM to solicit comment on various approaches the agency might adopt to regulate qualified health claims in the labeling of conventional foods and dietary supplements.[8]

Although the Task Force focused primarily on the issue of qualified health claims, its discussions were enriched by considerations related to promoting partnerships with sister public health agencies and others, with the goal of increasing the quantity and improving the impact of health messages[9] on conventional human foods

rehearing on April 2, 1999 (172 F.3d 72 (D.C. Cir. 1999)).

[4] In the **Federal Register** of December 1, 1999 (64 FR 67289), FDA published a notice to inform the public of the steps FDA planned to follow to carry out the *Pearson* decision. In the **Federal Register** of December 22, 1999 (64 FR 71794), FDA published a notice of availability of guidance clarifying the SSA standard in light of *Pearson*. The October 2000 notice announced FDA's revisions to the 1999 implementation strategy.

[5] FDA decided to apply the enforcement discretion factors to conventional foods to promote consistency in health messages, to enable consumers to learn about important health information even if it may not necessarily meet the current SSA standard, and to avoid further litigation over the constitutionality of the health claims provisions of the NLEA applicable to conventional food labeling to the extent that these provisions do not permit qualified claims (68 FR 41387 at 41389).

[6] FDA is using the term ''qualified health claim'' to refer to health claims that do not meet the current SSA standard. This is in contrast to FDA's use of the term ''unqualified health claim'' to refer to health claims that meet the current SSA standard and are or could be authorized under the NLEA and regulations issued under the act, including 21 CFR 101.70.

[7] Since the October 2000 **Federal Register** notice and under the December 2002 guidance, when FDA decides to exercise its enforcement discretion with respect to a qualified health claim, it so notifies the petitioner by letter. This process was developed as a short-term response to the court decisions described above and does not provide for public participation.

[8] In accordance with the recommendation of the Task Force, FDA is also conducting consumer research to determine whether potentially misleading health claims can be cured by disclaimers in at least some cases. The agency does not have such data for conventional foods or dietary supplements. Within the next year, the agency will be completing research in this area. FDA's rulemaking will be informed by the results of this research, as well as the agency's evaluation and consideration of the regulatory alternatives and public comment.

[9] In the **Federal Register** of November 27, 1991 (56 FR 60537 at 60538), FDA stated that for consistency with the NLEA, the agency was using the term ''health claim'' in place of ''health message,'' which was used in pre-NLEA **Federal Register** documents (i.e., proposed rule of August 4, 1987 (52 FR 28843); ANPRM of August 8, 1989 (54 FR 32610); and re-proposed rule of February 13, 1990 (55 FR 5176)) that discussed disease-related information on food labeling. Thus, the use of the term ''health message'' in those previous documents was roughly equivalent to the use of the term ''health claim'' in post-NLEA **Federal Register** documents. In recent documents (e.g., the December 2002 guidance, the Task Force report), including this ANPRM, however, FDA is using the term ''health message''in a broader context than solely to

Continued

and human dietary supplements.[10] In light of the need for improved health messages and science-based competition among food (including dietary supplement) producers to promote better health, and given the broader goals of the Consumer Health Information for Better Nutrition Initiative, FDA believes that it would be prudent to expand the scope of this ANPRM to request comments on the appropriateness and nature of dietary guidance statements on food labels.

II. Health Claims

A. Regulatory Alternatives for Qualified Health Claims

FDA is considering three alternatives (i.e., options) identified in the Task Force report (Ref. 4) for regulating health claims that do not meet the SSA standard of evidence (i.e., qualified health claims) required in 21 U.S.C. 343(r)(3)(B)(i) and § 101.14(c) to evaluate the scientific validity of health claims. The options identified by the Task Force are: Option 1—incorporate the interim procedures and evidence-based ranking system into a regulation under notice-and-comment rulemaking; option 2—reinterpret the SSA standard to apply to the accuracy of the characterization of the evidence supporting the claim, instead of the underlying substance-disease relationship, and subject qualified health claims to notice-and-comment rulemaking; and option 3—treat qualified health claims as wholly outside the NLEA and regulate them solely on a postmarket basis, if they are false or misleading. FDA is seeking comment on each of the options described, including comments about the strengths and weaknesses of each option from the perspective of public health, policy, law, and practicality; and which is the best option and why. The agency also is requesting comments that suggest additional options for regulating qualified health claims, together with an analysis of the strengths and weaknesses of each suggested alternative from the perspective of public health, policy, law, and practicality.

1. Option 1

The first option would be to codify the current interim procedures and evidence-based ranking system into a regulation, or codify a variation of these. This approach addresses both procedural and substantive concerns about qualified health claims, and also allows such claims to be made in labeling in a more timely manner than under option 2. With respect to the procedural issues, this approach is consistent with the spirit of the NLEA because it maintains the premarket clearance system that provides for FDA review of qualified health claims and the supporting data, and an opportunity for public participation. This option is similar in approach to the suggestions made in comments on the December 20, 2002, guidance on qualified health claims. Even though the process would not include notice-and-comment rulemaking for the agency's decision on a qualified health claim, the petition with the requested qualified health claim and the supporting data would be made available to the public for comment.

Second, this approach responds to the first amendment concerns identified in *Pearson* by providing for the use of disclaimers to communicate to consumers the level of scientific evidence in support of health claims and to cure potentially misleading health claims. The addition of a clarifying disclaimer to a potentially misleading claim would provide consumers with truthful and nonmisleading information. (See *Pearson*, 164 F.3d at 658–59.)

Finally, this approach allows for faster review and, if necessary, revision of qualified health claims. Under this option, the agency's review of a petition for a qualified health claim would usually be completed within 270 days after receipt of the petition. In addition, the agency's decision on a qualified health claim would remain in the form of an enforcement discretion letter and not, as some comments to the December 20, 2002, guidance requested, in the form of a regulation. Thus, FDA could more readily revise its decision about a qualified health claim if subsequent data were to indicate the need to do so. The data underlying qualified health claims are, by definition, preliminary and subject to change as more studies are conducted. If the qualified health claim were established in a regulation, FDA could amend it only through notice-and-comment rulemaking. Thus, a claim that becomes inaccurate or misleading because of new scientific developments would remain in labeling until the regulation was revised.

2. Option 2

The second option would be to require each qualified health claim to undergo notice-and-comment rulemaking, which is the statutorily prescribed process for health claims for conventional foods. Requiring rulemaking before a qualified health claim is allowed on food labels is consistent with suggestions made in a comment on the December 20, 2002, guidance.

This approach would require FDA to reinterpret the SSA standard to apply to the claim (including the disclaimer, if any) instead of the underlying substance-disease relationship. Thus, the agency's focus would be on whether the words of the claim accurately reflect the data supporting it (e.g., ''limited and preliminary scientific research suggests * * *.''), rather than whether there is SSA supporting the substance-disease relationship.

Because the SSA requirement in FDA's health claim regulations (§ 101.14(c)) tracks the language of the statute (21 U.S.C. 343(r)(3)(B)(i)), and both require FDA to evaluate whether there is SSA that the claim is supported by the totality of publicly available scientific evidence, it would not be necessary to amend § 101.14(c) to implement this option. However, FDA would have to revoke its contrary interpretation of the statute and § 101.14(c) in the preambles to the general health claim regulations. In those preambles, FDA stated that SSA was about the substance-disease relationship instead of the words of the claim.

Mandatory rulemaking for each qualified health claim may not provide sufficient flexibility to implement changes in the claims necessitated by rapid developments in science. Moreover, this process could be quite burdensome without any apparent corresponding public health benefit if the claim is based on weak scientific evidence. In addition, the reinterpretation of the SSA standard to apply to the claim rather than the underlying substance-disease relationship could eliminate the value of the standard because claims about

refer to health claims. That is, FDA considers that the term ''health message'' includes the various forms of dietary statements (e.g., a health claim, a dietary guidance statement).

[10] Health messages on product labels can be divided into several categories, including health claims, dietary guidance statements, and ''structure/function'' claims. A structure/function claim describes the effect of a substance or product on the structure or function of the human body (see 21 U.S.C. 321(g)(1)(C) and 343(r)6)). An example of a structure/function claim is: Calcium helps build strong bones. Structure/function claims do not refer to a disease, and in this way often resemble one type of dietary guidance statement as described in section III.A of this document. Structure/function claims may appear on conventional foods as well as dietary supplements. Such claims are not pre-reviewed by FDA, but must be truthful and not misleading as required under sections 201(n) and 403(a)(1) of the act (21 U.S.C. 321(n), and 343(a)(1)). Additional requirements apply when a structure/function claim is used in the labeling of a dietary supplement. For example, firms must notify FDA of a structure/function claim within 30 days after first marketing the product with the statement, and a disclaimer must accompany the statement (see 21 U.S.C. 343(r)(6) and 21 CFR 101.93).

any substance-disease relationship, no matter how weak or preliminary the evidence, would meet SSA as long as the claim accurately described the level of the evidence.

This approach may be vulnerable to a first amendment challenge because it applies the statutorily prescribed process for reviewing unqualified health claims to qualified health claims. The statutory process requires notice-and-comment rulemaking and permits FDA up to 540 days to complete its review of a health claim petition (see 21 U.S.C. 343(r)(4)(A)(i)). Although the United States Court of Appeals for the Second Circuit has held that a period of 540 days is not an unconstitutional prior restraint for unqualified health claims (see *Nutritional Health Alliance* v. *Shalala*, 144 F.3d 220 (1998), cert. denied, 525 U.S. 1040 (1998)), it is unclear whether it is too long to restrain qualified health claims in which the SSA standard is applied to the claim itself rather than the substance/disease relationship. FDA is concerned that this approach may be found to be unconstitutional because the value of commercial speech often depends upon its timeliness.

3. Option 3

A third option would be to treat qualified health claims as wholly outside the NLEA and regulate them on a postmarket basis under section 403(a)(1) of the act, which provides that food is misbranded if its labeling is false or misleading. Consistent with FDA's past practice, ''false or misleading'' would be defined to include lacking substantiation.

Under this approach, FDA could only evaluate and, where necessary, prohibit a claim after it appears on a product label (or in other product labeling). This is similar to the Federal Trade Commission's (FTC) approach, but with one significant difference: FTC has administrative subpoena power, allowing FTC to obtain a company's substantiating data, evaluate the data, and, where appropriate, take enforcement action with relative speed. In contrast, while FDA holds administrative subpoena power in some circumstances, the agency is not vested with such power for the investigation and enforcement of health claims in the labeling of conventional foods and dietary supplements.

As a result, the agency would have to build enforcement cases by first searching the literature and consulting with experts. Depending on the nature of the matter, FDA might also have to test how consumers would interpret the claim (where, for example, there was a serious question about the existence of an implied claim). There is also a concern that this option would not afford FDA any role in reviewing or clearing claims before they appeared in labeling and would not provide any opportunity for public participation. Finally, this option could be inefficient and too resource intensive for FDA to be able to protect consumers from misleading claims that would already be in the labeling of products in the marketplace.

B. Issues Raised in the Task Force Report

In its report, the Task Force recommended that FDA seek comment on several additional topics: (1) Data and research on a substance/disease relationship, including incentives for SSA; (2) revised claim language for unqualified health claims; (3) interim final rules for unqualified health claims; (4) use of phrases such as ''FDA authorized'' in qualified and unqualified health claims; (5) consumer education; (6) evaluations of outside groups; and (7) competent and reliable evidence.

1. Data and Research on a Substance/Disease Relationship, Including Incentives for SSA

Although FDA intends to provide for the use of qualified health claims, the agency remains interested in authorizing unqualified health claims by regulation under the SSA standard. Based on the July 2003 interim evidence-based ranking guidance (Ref. 2), the level of scientific evidence to support the substance/disease relationship for an unqualified health claim would continue to be based on relevant, high quality studies, such as randomized, controlled intervention trials and prospective observational cohort studies, which minimize bias. FDA is requesting comments on how to provide incentives for manufacturers to develop the data needed to obtain SSA for an unqualified health claim. In addition, FDA is requesting comments on how to more effectively develop public-sponsored research on substance/disease relationships.

2. Revised Claim Language for Unqualified Health Claims

The health claim regulations require unqualified health claims to state that the substance ''may'' reduce the risk of the specified disease (e.g., ''calcium may reduce the risk of osteoporosis'') (§ 101.14(d)(2)(ii)). In the final rule on general requirements for health claims for conventional foods (58 FR 2478 at 2505), FDA explained that the agency's use of the term ''may'' relates to the potential to reduce the risk of disease. The agency intended the use of the word ''may'' to convey to consumers that there is no guarantee that any one dietary practice will, in fact, reduce an individual's risk of a disease. FDA noted that absolute claims about diseases affected by diet generally are not possible because such diseases are almost always multifactorial, and that diet is only one factor that influences whether a person will get such a disease (58 FR 2478 at 2505). For example, in the case of calcium and osteoporosis, genetic predisposition (e.g., where there is a family history of fragile bones with aging) can play a major role in whether an individual will develop the disease. Id. Because of factors other than diet, some individuals may develop the disease regardless of how they change their dietary patterns to avoid the disease. Id. Thus, FDA intended the word ''may'' to alert consumers that there is no certainty that risk of disease will be reduced for each individual. However, it seems to the agency that in common practice the word ''may'' could be, and perhaps often is, interpreted as a reflection of the science supporting the claim rather than the certainty about the ability of a dietary practice to affect any one consumer. Thus, the word ''may'' leads to uncertainty about the science behind the claim, which was not FDA's intention.

The Task Force suggested that FDA consider removing the requirement for the word ''may'' from unqualified health claims to eliminate the uncertainty about the science underlying claims that meet SSA. FDA is requesting comments on whether the agency should make this change, whether there are alternatives to this change, and whether such a change would assist consumers in identifying the level of science supporting such health claims.

3. Interim Final Rules for Unqualified Health Claims

The Task Force recommended that FDA solicit comment on whether FDA should authorize unqualified health claims through interim final rules (IFRs) to expedite the availability of the health claim in food labeling. Before *Pearson*, the agency's general practice was to provide for the unqualified health claim through full notice-and-comment rulemaking, i.e., by issuing a proposed rule with a comment period, followed by a final rule authorizing the health claim (see section 403(r)(4)(A)(i) and § 101.70(j)). Although this practice has made for a relatively slow process, the comments received have proved useful to the agency (e.g., to more accurately

articulate the science and to better define the substance that is the subject of the claim). However, as a general matter, comments have not persuaded the agency that any particular proposed health claim should not be allowed.

In light of this consideration, after *Pearson*, FDA began using authority given to the agency by the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Pub. L. 105–115) amendments to the act to authorize some unqualified health claims faster (see 65 FR 59855 at 59856). FDA has authorized three health claims, based on a finding of SSA, through the IFR process under section 403(r)(7) of the act.[11] First, in the **Federal Register** of September 8, 2000 (65 FR 54686), FDA issued an IFR that authorized a health claim for plant sterol/stanol esters and reduced risk of coronary heart disease (CHD) ((§ 101.83) (21 CFR 101.83)). The agency intends to issue a final rule on this claim, that includes consideration of public comment. Second, in the **Federal Register** of October 2, 2002 (67 FR 61773), FDA issued an IFR that amended the health claim regulation in 21 CFR 101.81 authorizing a health claim about the relationship between beta-glucan soluble fiber from whole oat sources and reduced risk of CHD to include an additional eligible source of whole oat beta-glucan soluble fiber (the oatrim IFR). After consideration of comments, the agency adopted as a final rule, without change, the provisions of the oatrim IFR (68 FR 44207, July 28, 2003). Third, in the **Federal Register** of December 2, 2002 (67 FR 71461), FDA issued an IFR that amended the health claim regulation in 21 CFR 101.80 authorizing a health claim about the relationship between dietary sugar alcohols and dental carries to include the sugar D-tagatose (the D-tagatose IFR). After consideration of comments, the agency adopted as a final rule, without change, the provisions of the D-tagatose IFR (68 FR 39831, July 3, 2003).

FDA recognizes that the general rulemaking process (i.e., non-IFR process) for unqualified health claims may be lengthy; however, this process may help ensure the validity of the scientific evidence under the SSA standard before such a claim is authorized, and may help prevent the unfair market advantage that could arise if FDA were to inappropriately characterize a substance or misinterpret the publicly available scientific evidence. The agency is interested in comments on the balance between the priorities of timeliness and comprehensiveness in the agency's review of an unqualified health claim. FDA is requesting comments on whether the agency should continue to use the IFR process for some or all unqualified health claims as a means of expediting the agency's processing of these petitions. Are there specific circumstances when IFRs should or should not be considered appropriate for health claims that meet the SSA standard?

4. Use of Phrases Such as ''FDA authorized'' in Qualified and Unqualified Health Claims

The agency has for decades discouraged or prohibited use of such phrases as ''FDA authorized'' or ''FDA approved'' in labeling. The agency's policy on such statements was generally based on one of two reasons: (1) All products of the type were FDA approved, so that a label statement regarding one product implied a difference that did not exist; or (2) ''approval'' terminology was not appropriate because FDA did not approve any individual (or specific) product. FDA is requesting data or other information on whether a phrase indicating FDA authorization (e.g., ''FDA says * * *'') would encourage consumers to have more confidence in a claim it accompanied than in a claim without the phrase. FDA is interested in receiving evidence of data concerning any confusion or potential confusion. Should such a phrase be encouraged at all, even if it were to give the consumer confidence in the claim? Would such a phrase, when used with claims supported by different levels of science, confuse or potentially confuse consumers?

5. Consumer Education

The Task Force report noted growing evidence of a public health gap in knowledge and behavior with respect to substance/disease relationships. Even when the scientific evidence for substance/disease relationship does not meet the standard of SSA, there may be considerable evidence of a relationship between the substance and the disease, and consumers may find this information useful in planning their diets. FDA is requesting comments on how the agency could best educate consumers about the role of qualified health claims on food labeling, and how such claims may be used by consumers to advance their own understanding of diet and health matters.

6. Evaluations of Outside Scientific Groups

FDA has been requested on several occasions to consider accepting the evaluations of outside scientific groups as representing scientific consensus that could justify health claims. Some wanted to be able to convene their own groups of experts. Others wanted FDA to rely on such organizations as the American Heart Association or the American Dietetic Association, which evaluate scientific information and provide advice to their constituents on diet and health. In its report, the Task Force asked FDA to consider the recommendations of such groups as evidence of the strength of the science underlying a health claim. However, to make such a system work fairly to the benefit of all, including consumers, FDA would need to have confidence in the scientific validity of the group's conclusions about the particular claim in question. Some groups would have more expertise than others, and FDA is not aware of a mechanism for evaluating them fairly and accurately. FDA is requesting comment on whether the evaluations of non-governmental groups should be given weight in evaluating the strength of the science supporting a health claim. If the agency should give weight to the evaluations of these groups, how should this weight be determined?

FDA's Food Advisory Committee (FAC) is a body of experts chartered to advise the agency on scientific issues upon request; however, FDA does not believe that the FAC is an appropriate body to conduct the initial evaluation of the data supporting a proposed health claim. Because of the limited number of meetings in the FAC's charter and other issues that may be brought before the FAC, FDA does not believe that the FAC could conduct a timely evaluation of such data. On an interim basis, FDA has chosen to use experts identified by another Federal agency (i.e., Agency for Healthcare Research and Quality (AHRQ)) whose mission includes retaining large numbers of such experts

[11] Section 403(r)(7) of the act (21 U.S.C. 343(r)(7)) authorizes FDA (by delegation from the Secretary of Health and Human Services) to make regulations issued under section 403(r) of the act effective upon publication pending consideration of public comment and publication of a regulation that considers such comment, if the agency determines that such action is necessary for public health reasons. This authority enables FDA to act promptly on petitions that provide information that is necessary to: (1) Enable consumers to develop and maintain healthy dietary practices, (2) enable consumers to be informed promptly and effectively of important new knowledge regarding nutritional and health benefits of food, or (3) ensure that scientifically sound nutritional and health information is provided to consumers as soon as possible. Regulations made effective upon publication under this authority are deemed to be final agency action for purposes of judicial review. The legislative history indicates that such regulations should be issued as interim final rules (H.R. Rep. No. 105–399, at 98 (1997), reprinted in 1997 U.S.C.C.A.N. 2880, 2888).

under contract. Both FDA and AHRQ are agencies within the Department of Health and Human Services. This process should provide the scientific expertise and additional resources that FDA needs to conduct its scientific reviews within acceptable timeframes.

7. Competent and Reliable Scientific Evidence

FDA's July 2003 interim evidence-based ranking guidance (Ref. 2) describes a process for systematically evaluating the scientific evidence relevant to a substance/disease relationship that is the subject of a health claim petition. The scientific rating system provides a means by which the totality of the publicly available scientific evidence relevant to a substance/disease relationship can be assigned to one of four ranked levels.

The interim evidence-based ranking system presupposes that FTC's requirement of ''competent and reliable scientific evidence'' to substantiate a claim related to health or safety has been met. For purposes of FDA's evaluation of qualified health claims based upon credible evidence under *Pearson*, the Task Force recommended that FDA consider scientific evidence only if it is competent and reliable. FTC defines ''competent and reliable scientific evidence'' as ''tests, analyses, research, studies, or other evidence'' based upon the expertise of professionals in the relevant area, that has been ''conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted'' in the profession to ''yield accurate and reliable results.'' *In Re: Great Earth International, Inc.*, 110 F.T.C. 188 (1988).

FDA is requesting comments on the meaning and/or relevance of ''competent and reliable scientific evidence'' for the purposes of supporting a qualified health claim. FDA seeks these comments within the specific context of qualified health claims only. Any agency interpretation of ''credible evidence'' in the context of qualified health claims would not apply to the meaning of that term in other regulatory contexts within FDA's purview.

C. Issues for Future Consideration

Although the regulatory alternatives discussed previously focus primarily on assessing scientific data as a basis for qualified health claims, the Task Force recognized that there may be merit in developing greater flexibility in other areas of health claim regulation. The Task Force believed that more flexibility in regulating the use of health claims would further advance the use of reliable diet and health information to consumers via food labels. With respect to increased flexibility, the Task Force recommended that FDA solicit comments on two issues, in particular: (1) Disqualifying nutrient levels, and (2) minimum nutrient content requirements (referred to in the Task Force report as ''minimal nutrient limits'').

Disqualifying nutrient levels—Under existing regulations in § 101.14(a)(4), a health claim generally is not allowed on a food label or in food labeling when the food contains more than a specified level of total fat, saturated fat, cholesterol, or sodium.[12] However, when there is a public health benefit, FDA has made exceptions to these disqualifying nutrient levels. For example, FDA authorized a health claim in § 101.83 for plant sterol/stanol esters and reduced risk of CHD in labeling for dressings for salad and spreads even though these products exceed the disqualifying level for total fat because they contain more than 13 grams of fat per reference amount customarily consumed (RACC) (see § 101.83(c)(1)).

Minimum nutrient content requirement—Under § 101.14(e)(6) of FDA's general health claim regulations, a food may not bear a health claim unless the food contains 10 percent or more of the Reference Daily Intake or Daily Reference Value for vitamin A, vitamin C, iron, calcium, protein, or fiber per RACC prior to any nutrient addition. FDA has provided for some flexibility in this requirement in that nutrients that traditionally have been added through fortification in accordance with FDA's fortification policy may be considered to meet the 10-percent requirement (see, e.g., 58 FR 44036 at 44037; August 18, 1993). In addition, FDA has excepted some unqualified health claims from this general requirement (see, e.g., § 101.83(c)(1) (health claim about plant sterol/stanol esters and reduced risk of CHD on dressings for salad)). Here again, additional flexibility may be appropriate for considering health claims for foods that may not meet the minimum nutrient content requirement.

As the Task Force report noted, FDA received a petition from the National Food Processors Association (NFPA) on these two issues, among others. In response to the NFPA petition and a separate petition from the American Bakers Association, in the **Federal Register** of December 21, 1995 (60 FR 66206 (the 1995 proposed rule)), FDA proposed to amend its regulations on nutrient content claims and health claims to provide additional flexibility in the use of these claims on food products. The 1995 proposed rule proposed refinements to the agency's current regulations to allow additional synonyms for nutrient content claims without specific preclearance by the agency, to permit health claims on certain foods that do not currently qualify because they do not meet the minimum nutrient content requirement, to permit the use of shortened versions of authorized health claims under certain circumstances, to eliminate some of the required elements for health claims, and to specify the criteria that FDA will consider in evaluating petitions seeking exemption from the disqualifying nutrient levels.

FDA is identifying these two issues (i.e., disqualifying nutrient levels and minimum nutrient content requirement) in this ANPRM to acknowledge the Task Force report's recommendation that FDA solicit comment on them. However, because these issues were raised in the 1995 proposed rule, FDA intends, in the near future, to re-open the comment period on the 1995 proposed rule to solicit additional comments on these issues. Thus, to avoid duplication and confusion, FDA is not requesting comments on disqualifying nutrient levels and minimum nutrient content requirements for health claims in this ANPRM.

III. Dietary Guidance

Through the years, the Federal Government has worked to provide consistent and scientifically sound recommendations to consumers about healthy eating patterns and wise food choices. Such advice originated with the ''Basic Four'' and has progressed through today's ''Dietary Guidelines for Americans'' (developed jointly by U.S. Department of Health and Human Services and U.S. Department of Agriculture (USDA)) and USDA's ''Food Guide Pyramid.'' The agency believes that encouraging the use of dietary guidance statements on food labels is an important component of the Consumer Health Information for Better Nutrition Initiative.

The Task Force recommended that FDA not only seek opportunities to exercise flexibility in its evaluation of health claims in the areas discussed previously, but also to seek opportunities to promote the development and use of more dietary guidance statements on foods. The

[12] The disqualifying nutrient levels are 13.0 grams (g) of fat, 4.0 g of saturated fat, 60 milligrams (mg) of cholesterol, or 480 mg of sodium, per reference amount customarily consumed (RACC), per label serving size, and, only for foods with an RACC of 30 g or less or 2 tablespoons or less, per 50 g (§101.14(a)(4)).

purpose of such dietary guidance statements is to assist and encourage individuals in making better food choices and establishing healthier eating patterns. If FDA's mission is properly understood to include a role in assisting the public in making wise dietary choices that benefit long-term health, a number of possible strategies become evident. Those strategies include, for example, challenging industry to channel competitive energies into disseminating health information in food labeling and promoting food products on the basis of nutritional value, as well as taste, price, amount, and convenience. Importantly, as mentioned previously, there is also the possibility to pursue a range of consumer information options in collaboration with other Federal agencies, health researchers, and stakeholders as more information about diet/health relationships becomes available.

A. Regulatory Distinctions Between Dietary Guidance and Health Claims

As previously stated, section 403(r) of the act contains statutory provisions for the regulation of health claims, among other types of label statements. Under §§ 101.14 and 101.70, a ''health claim'' has a specific definition and is regulated differently from other types of statements on labels of conventional foods and dietary supplements. Health claims are specifically about the relationship between a substance and a disease; they are required to be reviewed and authorized by FDA prior to use. Health claims are limited to claims about disease risk reduction, and cannot be claims about the cure, mitigation, or treatment of disease. The latter claims are currently regarded as constituting drug claims under section 201(g) of the act (21 U.S.C. 321(g)) (see *Whitaker* v. *Thompson*, 239 F.Supp. 2d 43, 52–53 (D.D.C. 2003)). The following is an example of a health claim about the relationship between calcium (a substance) and osteoporosis (a disease): ''Calcium may reduce the risk of osteoporosis.'' In comparison, the following is an example of a drug claim: ''Consumption of 320 mg daily of Saw Palmetto extract may cure cancer.''

Unlike health claims, which target a specific substance and a specific disease or health-related condition, dietary guidance statements focus instead on general dietary patterns, practices, and recommendations that promote health. In addition, such statements can be made on conventional food and dietary supplement labels without FDA review or authorization before use. Like all statements in food labeling, dietary guidance statements must be truthful and nonmisleading as required under sections 201(n) and 403(a)(1) of the act. An example of a dietary guidance statement is: ''Diets rich in fruits and vegetables may reduce the risk of some types of cancer and other chronic diseases.'' As part of a cooperative effort with the National Cancer Institute (NCI), FDA recently encouraged the produce industry and food manufacturers to use this statement in the labeling of fruits, vegetables, and foods that meet the criteria for NCI's 5 A Day for Better Health Program (Ref. 5).

FDA addressed the issue of dietary guidance during the development of health claim regulations (58 FR 2478, January 6, 1993 (for conventional foods); 59 FR 395; (for dietary supplements)). In the preambles to the final rules, the agency stated that a health claim contains two basic elements: A substance and a disease or health-related condition. To clarify the difference between dietary guidance statements and health claims, FDA stated that it would use the term ''dietary guidance'' to refer to statements that do not contain both basic elements of a health claim[13] (58 FR 2478 at 2487 and 59 FR 395 at 418). Thus, dietary guidance statements may make reference to a disease or substance, but not both. For example, dietary guidance statements might focus on general dietary patterns or practices and broad categories of foods, rather than a specific substance. Alternatively, they may link a specific substance to a nondisease endpoint such as building bones, a healthy lifestyle, or promoting health. In this case, the substance element is present in the statement but not the disease element.

A health claim expressly or by implication characterizes the relationship of certain substances to a disease or health-related condition (21 U.S.C. 343(r)(1)(B)). Hence, the elements (i.e., the substance element, and the disease or health-related condition element) of a health claim may be either express or implied.

The term ''substance'' means a specific food or component of food, regardless of whether the food is in conventional food or dietary supplement form (§ 101.14(a)(2)). In discussing the definition of ''substance'' in the preamble to the final rule on general requirements for health claims for conventional foods (58 FR 2478 at 2479–2480), FDA noted that it agreed with comments that its proposed definition for substance interpreted the NLEA too narrowly with respect to the regulation of health claims about foods, and that Congress intended that foods (in addition to food components) could be the subject of health claims regulated under section 403(r) of the act. (As proposed, § 101.14(a)(2) stated: ''Substance means a component of a conventional food or of a dietary supplement of vitamins, minerals, herbs, or other nutritional substances'' (56 FR 60537 at 60563, November 27, 1991)). However, based upon the legislative history of the NLEA,[14] the agency noted that to be a health claim, a claim about a food must be, at least by implication, a claim about a substance in the food (58 FR 2478 at 2480). FDA further explained that when a consumer could reasonably interpret a claim about the relationship of a food to a disease or health-related condition to be an implied claim about a substance in that food, that claim would satisfy the first element of a health claim (i.e., the substance element). Id.

In addition, FDA concluded that a claim about the benefits of a broad class of foods (e.g., fruits or vegetables) that does not make an express or implied connection to a substance found in that class of foods would not constitute an implied claim, and that such a claim is not a health claim. Rather, such a statement would be dietary guidance because it is not expressly or impliedly about a substance. If a substance in a broad class of foods cannot be expressly identified, it may be possible to find that it is implied. For example, in the preamble to the final rule concerning a specific health claim about an association between antioxidant vitamins and cancer (58 FR 2622, January 6, 1993), FDA introduced the concept of a marker for the substance element of an implied health claim. In that final rule, FDA decided not to authorize a health claim about a relationship between antioxidant vitamins and cancer, and instead authorized a health claim relating substances in diets low in fat and high in fruits and vegetables to a reduced risk of cancer. In short, the agency authorized a health claim in which the subject was fruits and vegetables that were low in fat and were good sources of certain substances (e.g., fiber, vitamin A, or vitamin C). It was not clear whether the marker substances were actually the active substances or merely served as markers for other unidentified substances. The purpose of identifying

[13] In this ANPRM, FDA is using the term ''statement(s)'' in place of the term ''claim(s)'' to emphasize the distinction between a health claim and dietary guidance when the discussion relates specifically to dietary guidance.

[14] See H.R. Rep. No. 101–538, at 20 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3350.

the marker substances was to distinguish certain fruits and vegetables that were characterized by compositions known to help reduce cancer risk from other fruits and vegetables that might not provide the same benefit.

B. Issues Relating to Dietary Guidance

FDA recognizes the importance of dietary guidance in assisting and encouraging the U.S. population to make better food choices and establish healthier eating patterns. Although these types of statements are not health claims, consistent and scientifically sound dietary guidance statements can be useful to consumers when they are truthful and nonmisleading. As previously mentioned, FDA has no regulatory authority to review or authorize dietary guidance statements before use. When used in labeling for foods, however, such statements must be truthful and not misleading under sections 201(n) and 403(a)(1) of the act. The agency generally has viewed most dietary guidance for the general U.S. population as originating from Federal agencies with public health missions related to diet and disease. For example, major Federal documents such as the Dietary Guidelines for Americans issued by USDA and U.S. Department of Health and Human Services exemplify government consensus about dietary recommendations. Given the important role that information on food labels can play in affecting consumers' health and dietary decisions, FDA sees a need to foster enhanced federal cooperative efforts to identify and agree upon dietary guidance that is appropriate for food labels and how such guidance may be used.

1. Definitions

Dietary guidance—FDA requests comments on an appropriate definition of ''dietary guidance'' for labeling purposes, as well as the current approach, outlined previously, to distinguish between health claims and dietary guidance statements.

Substance—Since the distinction between dietary guidance statements and health claims often focuses on whether the ''substance'' element is present in the claim (whether express or implied), FDA requests comments on ways in which the definition of ''substance'' in § 101.14(a)(2) can or should be clarified. Additionally, in regard to the appropriate definition of ''substance'' for purposes of a health claim, FDA is interested in comments on whether a specific authorized health claim about whole grain foods (described later) properly refers to a substance as compared to a broad category of food. This health claim is authorized based on a statement from an authoritative body under section 403(r)(3)(C) of the act.[15]

On March 10, 1999, General Mills, Inc., submitted to the agency a notification containing a prospective claim about the relationship of whole grain foods and heart disease and certain cancers. The notification cited the following statement from the Executive Summary of the National Academy of Sciences report, ''Diet and Health: Implications for Reducing Chronic Disease Risk'' (page 8), as an authoritative statement: ''Diets high in plant foods—i.e., fruits, vegetables, legumes, and whole-grain cereals--are associated with a lower occurrence of coronary heart disease and cancers of the lung, colon, esophagus, and stomach.'' For purposes of eligibility to bear the prospective claim, the notification defined ''whole grain foods'' as foods that contain 51 percent or more whole grain ingredient(s) by weight per RACC. It suggested that compliance with this definition could be assessed by measuring the dietary fiber level of whole wheat, the predominant grain in the U.S. diet. The level of fiber was intended for compliance purposes only and was not defined as the substance that was the subject of the health claim or as a marker for that substance.

FDA's decision not to prohibit or modify the claim means that, as of July 8, 1999, manufacturers may use the following claim on the label and in labeling of any product that meets the eligibility criteria described in the notification: ''Diets rich in whole grain foods and other plant foods and low in total fat, saturated fat, and cholesterol, may help reduce the risk of heart disease and certain cancers.'' FDA seeks comments on whether this claim properly refers to a substance as compared to a broad category of food. The notification and additional materials regarding the claim are publicly available from the Division of Dockets Management (Docket No. 99P–2209) (see **ADDRESSES**).

[15] Under the provisions of the FDAMA, a manufacturer may submit to FDA a notification of a health claim based on an authoritative statement published by an appropriate authoritative body (i.e., a scientific body of the United States Government with official responsibility for public health protection or research directly relating to human nutrition (such as the National Institutes of Health or the Centers for Disease Control and Prevention) or the National Academy of Sciences or any of its subdivisions) (21 U.S.C. 343(r)(3)(C)). If FDA does not act to prohibit or modify such a claim within 120 days of receipt of the notification, the claim may be used.

2. The Substance as the Subject of a Health Claim

FDA's experience demonstrates that most substances that are the subject of an authorized health claim are substances that can be found in a number of foods (e.g., calcium) or spread throughout the food supply (e.g., saturated fat). FDA has provided for health claims that include reference to the common substance to assist consumers in their understanding of the nature of the diet/health relationship, and more importantly so that consumers recognize that they can construct healthy diets by using a variety of foods and nutrient sources rather than just one. For instance, in the example of the calcium/osteoporosis claim, FDA requires that the substance that is the basis of the claim (i.e., calcium) be included in the wording of the claim (21 CFR 101.72). FDA requests comments on the usefulness of statements that expressly include the substance that is the basis for the claim (e.g., ''Calcium-rich foods, such as yogurt, may reduce the risk of osteoporosis'') versus ''food-specific'' claims such as: ''Yogurt may reduce the risk of osteoporosis.''

3. The Use of Food Category ''Substitutions'' or ''Replacements'' as a Form of Dietary Guidance

FDA views food substitution/replacement recommendations as potentially helpful to consumers, but also potentially problematic because they might be misleading or confusing to consumers. For example, the message to substitute mono- and polyunsaturated fats for saturated fats to promote heart health is intended to help consumers reduce their intake of saturated fat and cholesterol within the dietary context of moderate fat intakes. A message to choose fish, shellfish, lean poultry and other lean meats, beans, or nuts daily while limiting intakes of high-fat processed meats has a similar intention. However, the likelihood that these messages will positively affect the ability of consumers to choose healthful diets depends on an understanding of the total dietary context of the message, which may prove confusing or difficult to effectively communicate to consumers. FDA is requesting comments on whether dietary guidance statements should include recommendations for making food or substance ''substitutions'' or ''replacements.'' If these types of dietary guidance statements are encouraged, how can FDA ensure that they are made in clear and nonmisleading ways that will enhance and benefit public health?

FDA notes that the agency has used certain criteria such as disqualifying or disclosure levels and minimum ''qualifying'' criteria to ensure that foods that bear a health claim fit within the context of a healthy diet and contain adequate amounts of the substance of interest. Given the absence of these types of criteria for dietary guidance statements, how can FDA ensure that recommendations for making food or substance ''substitutions'' or ''replacements'' are not misleading? FDA requests comments on how such statements can be provided for in a way that is based on sound science and is helpful and nonmisleading to consumers. Moreover, FDA requests comments on whether and how recommendations to make dietary substitutions or replacements can, or should, be differentiated from claims about the effects of biologically active substances for the purposes of food labeling and appropriate consumer communication.

4. Dietary Guidance on Food Labels

FDA is seeking comment on dietary guidance statements on food labels generally and on approaches appropriate for FDA to consider under its statutory authorities. As part of this consideration, FDA is requesting comments on whether providing a list of dietary guidance statements that FDA recommends for inclusion on food labels would be desirable or useful to manufacturers. In addition, FDA is requesting comments on these topics: (1) Whether and how the agency should partner with other Federal agencies to identify and agree upon recommended dietary guidance statements for food labeling, (2) the appropriate criteria for evaluating the scientific validity of dietary guidance statements that appear on products in the marketplace, and (3) whether and how the agency should address dietary guidance statements from non-federal sources (e.g., States, trade associations, professional associations, etc.).

IV. Future Analysis of Benefits and Costs

For the agency's future analysis of benefits and costs of the regulatory options for qualified health claims, FDA requests comments, including available data, on the following questions:

- What effects do health claims have on consumer purchases of foods and dietary supplements? What effects do health claims have on the total diet?
- Is there a difference between consumers' willingness to buy products with qualified health claims and consumers' willingness to buy products with health claims based on SSA?
- What effects would the different qualifying phrases described in the interim procedures for qualified health claims guidance[16] (Ref. 3) and the Task Force report (Ref. 4) have on the willingness of consumers to buy the products containing the claims? Is there evidence that consumers would find the differences among qualifying phrases to be substantial?
- What types of foods and dietary supplements are most likely to use qualified health claims in their labeling? What types of claims are most likely to be used by those products?
- What types of existing products will manufacturers re-formulate in order to be able to make qualified health claims? What types of claims are most likely to lead to re-formulation?
- What new products might be developed in response to qualified health claims?
- Would any of the regulatory options discussed in this ANPRM have a significant effect on small businesses or other small entities?
- What additional research should FDA, other government agencies, or other organizations sponsor to answer these questions?

V. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen between 9 a.m. and 4 p.m., Monday through Friday, except on Federal Government holidays. FDA has verified the Web site address, but is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.

1. Task Force Final Report, ''Consumer Health Information for Better Nutrition Initiative'' (July 10, 2003) (Internet addresses: *http://www.fda.gov/oc/mcclellan/chbn.html* or *http://www.fda.gov/ohrms/dockets/default.htm*).

2. ''Guidance for Industry and FDA: Interim Evidence-Based Ranking System for Scientific Data'' (Internet addresses: *http://www.cfsan.fda.gov/guidance.html* or *http://www.fda.gov/ohrms/dockets/default.htm*).

3. ''Guidance for Industry and FDA: Interim Procedures for Qualified Health Claims in the Labeling of Conventional Human Food and Human Dietary Supplements'' (Internet addresses: *http://www.cfsan.fda.gov/guidance.html* or *http://www.fda.gov/ohrms/dockets/default.htm*).

4. Task Force Final Report, Attachment A: ''Possible Regulatory Frameworks for Qualified Health Claims'' (Internet addresses: *http://www.fda.gov/oc/mcclellan/chbn.html* or *http://www.fda.gov/ohrms/dockets/default.htm*).

5. CFSAN, Office of Nutritional Products, Labeling and Dietary Supplements, ''Dietary Guidance Message About Fruits and Vegetables'' (July 29, 2003; revised August 28, 2003) (Internet address: *http://www.cfsan.fda.gov/~dms/lab-dg.html*).

[16] The guidance identifies three different qualifying phrases (or standardized qualifying language) for qualified health claims. These phrases are used according to a scientific ranking assigned to the claim (which is discussed in the interim evidence-based ranking system guidance (Ref. 2)). FDA has categorized these phrases as B, C, and D, as follows: *Category B*: ''Although there is scientific evidence supporting the claim, the evidence is not conclusive.''; *Category C*: ''Some scientific evidence suggests * * * however, FDA has determined that this evidence is limited and not conclusive.''; *Category D*: ''Very limited and preliminary scientific research suggests * * * FDA concludes that there is little scientific evidence supporting this claim.'' The Task Force report lists the same three qualifying phrases in its overview of the interim procedures for qualified health claims guidance.

VI. How to Submit Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: November 7, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–29448 Filed 11–21–03; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1304, 1306, and 1310

[Docket No. DEA–234P]

RIN 1117–AA71

Recordkeeping and Reporting Requirements for Drug Products Containing Gamma-Hydroxybutyric Acid (GHB)

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: DEA proposes to amend its regulations to require additional recordkeeping and reporting requirements for drug products containing gamma-hydroxybutyric acid (GHB) for which an application has been approved under the Federal Food, Drug, and Cosmetic Act. DEA proposes

these changes pursuant to section 4 of the ''Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000.'' These additional requirements are necessary to protect against the diversion of GHB for illicit purposes.

DATES: Comments must be postmarked by January 26, 2004.

ADDRESSES: Comments should be submitted to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative/CCR.

FOR FURTHER INFORMATION CONTACT: Patricia M. Good, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537. Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

What Is Gamma-Hydroxybutyric Acid?

Gamma-hydroxybutyric acid (GHB) is a central nervous system depressant drug. In recent years, the abuse of GHB has increased substantially. GHB is abused to produce euphoric and hallucinogenic states, and for its alleged role as an agent to stimulate muscle growth. GHB can produce drowsiness, dizziness, nausea, visual disturbances, unconsciousness, seizures, severe respiratory depression, and coma.

GHB can be produced in clandestine laboratories using a relatively simple synthesis with readily available and inexpensive source materials. Gamma-butyrolactone (GBL), a List I chemical, is an industrial solvent that is used in the illicit manufacture of GHB. GBL and 1,4-butanediol are also abused for their GHB-like effects. Due to their structural and pharmacological similarities to GHB, GBL and 1,4-butanediol may be considered controlled substance analogs and treated as Schedule I substances if they are intended for human consumption. GHB is usually manufactured in a clear solution that can be disguised by adding food coloring, flavorings, and/or storing it in different kinds of bottles and containers.

Regulatory History

On February 18, 2000, Public Law 106–172 (114 Stat. 7) the ''Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000'' was enacted. Pub. L. 106–172 declared GHB an imminent hazard to public safety that requires immediate regulatory action under the Controlled Substances Act. Pub. L. 106–172 requires the Attorney General to list GHB as a Schedule I controlled substance and designates GBL as a List I chemical. As a result of Pub. L. 106–172, DEA issued two final rules: Schedules of Controlled Substances: Addition of Gamma-Hydroxybutyric Acid to Schedule I (65 FR 13235, March 13, 2000) (corrected at 65 FR 17440, April 3, 2000) and Placement of Gamma-Butyrolactone in List I of the Controlled Substances Act (21 U.S.C. 802(34)) (65 FR 21645, April 24, 2000).

Under the March 13, 2000 final rule, GHB and its salts, isomers, and salts of isomers were placed in Schedule I and GHB became subject to the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, dispensing, importing, and exporting of a Schedule I controlled substance. As required by Pub. L. 106–172, the March 13, 2000 final rule created an exception for drug products containing GHB, including its salts, isomers, and salts of isomers, for which an application is approved under section 505 of the Federal Food, Drug, and Cosmetic Act (FFDCA). The exception placed these substances in Schedule III. Therefore, registered manufacturers and distributors of FDA-approved Drugs containing GHB are subject to Schedule III requirements.

On July 17, 2002, the Food and Drug Administration (FDA) approved Xyrem'', a drug containing gamma-hydroxybutyric acid, as a Schedule III controlled substance for the treatment of cataplexy associated with narcolepsy.

Additional Recordkeeping and Reporting Requirements Proposed for Schedule III GHB Drug Products

The March 13, 2000 final rule did not address the recordkeeping and reporting requirements recommended by Public Law 106–172 for drug products containing GHB, for which an application is approved under section 505 of the FFDCA. The additional requirements are necessary to prevent the diversion of Schedule III GHB drug products for illicit purposes and were intended by Congress to be part of the regulatory scheme for these products. Representative Thomas Bliley explained Congress' intent in legislating these requirements as follows:

> Also, under H.R. 2130, as amended, if a drug product that contains GHB receives FDA approval, the approved GHB drug product will be placed in Schedule III of the CSA. However, given the dangers involving this drug, H.R. 2130 adds additional reporting and accountability requirements to conform with the requirements for schedule I substances, schedule II drugs, and schedule III narcotics, and, significantly would maintain the strict schedule I criminal penalties for the unlawful abuse of the approved drug product. Simply put, these additional requirements and penalties in my opinion are needed to provide greater protection to our nation's youth, and to give our law enforcement agencies the ability to penalize those who abuse this product to the fullest extent under the law. (Mr. Bliley, Cong. Record Jan. 31, 2000, H61)

In response to Public Law 106–172, Section 4, this rule proposes recordkeeping requirements for practitioners dispensing Schedule III GHB drug products and reporting requirements for manufacturers and distributors of Schedule III GHB drug products. Under current 21 CFR 1304.22(c) dispensers of GHB, including pharmacies, are required to maintain the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser. In addition to these requirements, proposed 21 CFR 1304.26 would require pharmacies and practitioners dispensing GHB to maintain and make available for inspection the name of the prescribing practitioner, the prescribing practitioner's Federal and State registration numbers with expiration dates, verification that the prescribing practitioner possesses appropriate registration, and the patient's insurance provider, if available. Pub. L. 106–172, Section 4 also recommended that DEA establish a recordkeeping requirement for ''documentation by a medical practitioner licensed and registered to prescribe the drug of the patient's medical need for the drug.'' Part of this recommendation is currently satisfied by existing DEA requirements in 21 CFR 1306.04 which state that prescriptions ''must be issued for a legitimate medical purpose.'' To further satisfy this requirement, DEA is proposing the amendment of 21 CFR 1306.05 to require that the medical need be written on the prescription.

This rule also proposes to amend 21 CFR 1304.33 to include Schedule III GHB drug products as controlled substances that must be reported under the Automation of Reports and Consolidated Orders System (ARCOS). ARCOS is an automated, comprehensive drug reporting system, which monitors the flow of DEA controlled substances from their point of manufacture through commercial distribution channels to point of sale or distribution at the dispensing/retail level, *e.g.*, hospitals, retail pharmacies, practitioners, mid-level practitioners, and teaching institutions. Included in the list of controlled substance transactions tracked by ARCOS are the following: All Schedules I and II materials

(manufacturers and distributors); Schedule III narcotic materials (manufacturers and distributors); and selected Schedules III and IV psychotropic controlled substances (manufacturers only). This proposal would add Schedule III GHB drug products to this list.

In addition, Public Law 106–172, Section 4 (amending 21 U.S.C. 827(h)(6)) recommended that DEA apply the mail order reporting requirements of 21 U.S.C. 830(b)(3) to ''gamma hydroxybutyric acid to the same extent and in the same manner as such section applies with respect to the chemicals and drug products specified in subparagraph (A)(i) of such section.'' While DEA is proposing the amendment of its regulations to include these provisions, Congress also passed Pub. L. 106–310, the ''Children's Health Act of 2000'', Title XXXVI of which is the Methamphetamine Anti-Proliferation Act of 2000 (MAPA). One of the consequences of MAPA was to redesignate 21 U.S.C. 830(b)(3)(A)(i) as 21 U.S.C. 830(b)(3)(B)(i). Further, MAPA required mail order reporting requirements for export transactions involving ephedrine, pseudoephedrine, or phenylpropanolamine. These reporting requirements would not apply to distributions of drug products, including GHB, pursuant to a valid prescription, which were excluded under MAPA (21 U.S.C. 830(b)(3)(D)). Regulations implementing the Methamphetamine Anti-Proliferation Act of 2000 were published October 7, 2003 (68 FR 57799). Thus, the net effect is that all export transactions involving GHB be reported to DEA. Transactions involving prescriptions of GHB are not required to be reported to DEA.

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Assistant Administrator hereby certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation, and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities. This rulemaking creates new recordkeeping and reporting requirements which will have an extremely limited impact on a small number of registrants due to the restricted use of GHB for legitimate medical purposes. As a condition of Xyrem's® (the FDA-approved product containing GHB) approval, a risk management program was designed to limit its distribution. Under this program, Xyrem® will only be available to physicians and patients through a single centralized pharmacy. As a result of this program, at this time, controlled substances distributors and retail pharmacies will not be handling Xyrem® and, thus, will not be affected by these requirements. For those few persons affected by these proposed regulations, the information requested by these added records is readily and commonly available, and due to the limited distribution of GHB the impact on reporting requirements should be minimal.

Executive Order 12866

The Deputy Assistant Administrator further certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, Section 1(b). This action has been determined to be a ''significant regulatory action'' under Executive Order 12866, and accordingly this proposed rule has been reviewed by the Office of Management and Budget.

Executive Order 12988

This regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This rulemaking will not 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, and would not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

While, technically, this rule requires new, minimal recordkeeping and reporting requirements for drug products containing GHB, DEA does not believe that these recordkeeping and reporting requirements create any greater hour or cost burden for respondents than what already exists. Records required to be maintained by practitioners under proposed 21 CFR 1304.26, including the practitioner's name, address, state license and federal registration numbers, and the patient's insurance provider (if available) are all records which are maintained as a usual course of professional practice by a practitioner. The reporting requirements proposed under 21 CFR 1304.33 are part of an already-approved collection of information (OMB 1117–0003: ARCOS Transaction Reporting—DEA Form 333). DEA believes that the additional reporting requirements will have no impact on the hour or cost burden for respondents as reports are generated and submitted electronically. As has been stated previously, due to the risk management plan established for Xyrem'' (the FDA-approved product containing GHB) this product has an extremely limited distribution potential. Because of the nature of this product's distribution, DEA anticipates that fewer than five persons will be impacted by the requirement to report handling Schedule III GHB products to ARCOS, and those persons are already filing reports with DEA for other controlled substances handled. The system modifications necessary to generate this report will occur as a normal part of a registrant's handling of this product. Therefore, DEA is not submitting any changes or amendments to its active information collections under the Paperwork reduction Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects

21 CFR Part 1304

Drug traffic control, Reporting and recordkeeping requirements.

21 CFR Part 1306

Drug traffic control, Prescription drugs.

21 CFR Part 1310

Drug traffic control, List I and List II chemicals, Reporting and recordkeeping requirements.

For the reasons set out above, 21 CFR Parts 1304, 1306 and 1310 are proposed to be amended as follows:

PART 1304—RECORDS AND REPORTS OF REGISTRANTS [AMENDED]

1. The authority citation for 21 CFR Part 1304 continues to read as follows:

Authority: 21 U.S.C. 821, 827, 871(b), 958, 965, unless otherwise noted.

2. Section 1304.22 is proposed to be amended by revising paragraph (c) to read as follows:

§ 1304.22 Records for manufacturers, distributors, dispensers, researchers, importers and exporters.

* * * * *

(c) *Records for dispensers and researchers.* Each person registered or authorized to dispense or conduct research with controlled substances shall maintain records with the same information required of manufacturers pursuant to paragraph (a)(2) (i), (ii), (iv), (vii), and (ix) of this section. In addition, records shall be maintained of the number of units or volume of such finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser. In addition to the requirements of this paragraph practitioners dispensing gamma-hydroxybutyric acid pursuant to a prescription must also comply with § 1304.26.

* * * * *

3. Section 1304.26 is proposed to be added to read as follows:

§ 1304.26 Additional recordkeeping requirements applicable to drug products containing gamma-hydroxybutyric acid.

In addition to the recordkeeping requirements for dispensers and researchers provided in § 1304.22, practitioners dispensing gamma-hydroxybutyric acid that is manufactured or distributed in accordance with an application under section 505 of the Federal Food, Drug, and Cosmetic Act must maintain, and make available for inspection and copying by the Attorney General, all of the following records for each prescription:

(a) Name of the prescribing practitioner.

(b) Prescribing practitioner's Federal and State registration numbers, with the expiration dates of these registrations.

(c) Verification that the prescribing practitioner possesses the appropriate registration to prescribe this controlled substance.

(d) Patient's name and address.

(e) Patient's insurance provider, if available.

4. Section 1304.33 is proposed to be amended by revising paragraph (c) and the introductory text of paragraph (d)(1) to read as follows:

§ 1304.33 Reports to ARCOS.

* * * * *

(c) *Persons reporting.* For controlled substances in Schedules I, II, narcotic controlled substances in Schedule III, and gamma-hydroxybutyric acid drug product controlled substances in Schedule III, each person who is registered to manufacture in bulk or dosage form, or to package, repackage, label or relabel, and each person who is registered to distribute, including each person who is registered to reverse distribute, shall report acquisition/distribution transactions. In addition to reporting acquisition/distribution transactions, each person who is registered to manufacture controlled substances in bulk or dosage form shall report manufacturing transactions on controlled substances in Schedules I and II, each narcotic controlled substance listed in Schedules III, IV, and V, gamma-hydroxybutyric acid drug product controlled substances in Schedule III, and on each psychotropic controlled substance listed in Schedules III and IV as identified in paragraph (d) of this section.

(d) *Substances covered.* (1) Manufacturing and acquisition/distribution transaction reports shall include data on each controlled substance listed in Schedules I and II, on each narcotic controlled substance listed in Schedule III (but not on any material, compound, mixture or preparation containing a quantity of a substance having a stimulant effect on the central nervous system, which material, compound, mixture or preparation is listed in Schedule III or on any narcotic controlled substance listed in Schedule V), and on gamma-hydroxybutyric acid drug products listed in Schedule III. Additionally, reports on manufacturing transactions shall include the following psychotropic controlled substances listed in Schedules III and IV:

* * * * *

PART 1306—PRESCRIPTIONS [AMENDED]

1. The authority citation for Part 1306 continues to read as follows:

Authority: 21 U.S.C. 821, 829, 871(b).

2. Section 1306.05 is proposed to be amended by revising paragraph (a) to read as follows:

§ 1306.05 Manner of issuance of prescriptions.

(a) All prescriptions for controlled substances shall be dated as of, and signed on, the day when issued and shall bear the full name and address of the patient, the drug name, strength, dosage form, quantity prescribed, directions for use and the name, address and registration number of the practitioner. Where a prescription is for gamma-hydroxybutyric acid, the practitioner shall note on the face of the prescription the medical need of the patient for the prescription. A practitioner may sign a prescription in the same manner as he would sign a check or legal document (*e.g.*, J.H. Smith or John H. Smith). Where an oral order is not permitted, prescriptions shall be written with ink or indelible pencil or typewriter and shall be manually signed by the practitioner. The prescriptions may be prepared by the secretary or agent for the signature of a practitioner, but the prescribing practitioner is responsible in case the prescription does not conform in all essential respects to the law and regulations. A corresponding liability rests upon the pharmacist, including a pharmacist employed by a central fill pharmacy, who fills a prescription not prepared in the form prescribed by DEA regulations.

* * * * *

PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES [AMENDED]

1. The authority citation for part 1310 is revised to read as follows:

Authority: 21 U.S.C. 802, 827(h), 830, 871(b).

2. Section 1310.03 is proposed to be amended by revising paragraph (c) to read as follows:

§ 1310.03 Persons required to keep records and file reports.

* * * * *

(c) Each regulated person who engages in a transaction with a nonregulated person or who engages in an export transaction that involves ephedrine, pseudoephedrine, or phenylpropanolamine, or gamma-hydroxybutyric acid, including drug products containing these chemicals, and uses or attempts to use the Postal Service or any private or commercial carrier must file monthly reports of each such transaction as specified in § 1310.05 of this part.

Dated: November 14, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 03–29336 Filed 11–24–03; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1309, 1310

[Docket No. DEA–189P]

RIN 1117–AA67

Chemical Registration Waivers; Exemption From Chemical Registration Fees for Certain Persons

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: DEA is proposing amending its regulations to waive the requirement of registration for contract processors, medical/first aid kit providers, distributors of sample packages of drug products, and distributors of research/reference standards pursuant to 21 U.S.C. 822(d). These actions are being taken in response to industry comments and suggestions. DEA has determined that requiring registration for these activities is not necessary for effective enforcement under the Controlled Substances Act (CSA), and waiving the requirement of registration will ease regulatory burdens for the affected industries. DEA is also proposing exempting charitable organizations and governmental entities from initial and renewal registration fees. These fee exemptions will bring the chemical regulations into conformance with the controlled substances regulations (21 CFR 1301.21).

DATES: Written comments must be postmarked on or before January 26, 2004.

ADDRESSES: Comments should be submitted to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative/CCR.

FOR FURTHER INFORMATION CONTACT: Patricia M. Good, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Special Notice

Due to concerns regarding possible harmful side effects, the Food and Drug Administration (FDA) initiated action in November, 2000, to remove phenylpropanolamine from the market. As a result, many firms voluntarily discontinued marketing products containing phenylpropanolamine and removed them from the shelves for disposal. However, since some products containing phenylpropanolamine are still available, DEA has written these proposed regulations to include drug products containing phenylpropanolamine, where appropriate, as well as drug products containing pseudoephedrine.

I. Background

What Legislation Permits DEA to Regulate the Chemicals Industry, and What Laws Allow DEA To Waive Registration Requirements?

The Domestic Chemical Diversion Control Act of 1993 (DCDCA) established that persons distributing, importing, or exporting List I chemicals must register with DEA. In addition, it removed the exemption of single-entity ephedrine drug products from the chemical regulations. The Comprehensive Methamphetamine Control Act of 1996 (MCA) expanded on the registration requirement of the DCDCA by removing the exemption for pseudoephedrine, phenylpropanolamine and combination ephedrine drug products. Persons distributing, importing or exporting these drug products must register with DEA (21 U.S.C. 822, 957).

The registration requirement is not absolute. Section 302(c) of the CSA (21 U.S.C. 822(c)) provides that certain persons, including common or contract carriers and warehousemen, are not subject to the registration requirement. Further, section 302(d) of the CSA (21 U.S.C. 822(d)) provides that the Attorney General may waive the registration requirement for certain persons if it is consistent with the public health and safety.

As DEA has worked to implement the DCDCA and MCA, a number of issues have been raised regarding waiving the requirement of registration for persons engaged in certain activities under the regulations. In some cases there are parallels between identified activities and activities previously exempted from the registration requirement. DEA has reviewed the requests received from industry and has determined that the requirement of registration is not necessary for contract processors, medical/first aid kit providers, distributors of sample packages, and distributors of research/reference standards as discussed below. Further, DEA has determined that charitable organizations and governmental entities should be exempted from payment of the application fee for registration and reregistration, but that the requirement of registration itself must remain in effect for effective diversion control. These proposed fee exemptions are also discussed below.

How Will These Proposed Waivers and Exemptions Benefit the Regulated Industry?

Current DEA regulations require that any person who manufactures, distributes, imports, or exports a List I chemical must first register with DEA annually as a List I chemicals handler and pay a registration fee. DEA has recognized that, for certain industries, registration is unnecessary for effective enforcement of the law, and has accommodated the waiver of registration through Memoranda of Understanding (MOUs) between DEA and affected persons. In this rulemaking, DEA is proposing to waive the requirement of registration for contract processors, medical/first aid kit providers, distributors of sample packages, and distributors of research/reference standards. Were DEA not to propose these regulations, thereby codifying present Administration policy, each affected person would be required to register with DEA annually and pay an initial registration fee of $595 and annual reregistration fees of $477. If finalized, these proposed regulations will require exempt persons to notify DEA only once of their activities, at a cost of mailing one letter, as opposed to an annual registration fee. Industry would benefit from a significant cost savings as no fee would be charged for the one-time notification. Further, in this rulemaking DEA is proposing to exempt charitable organizations and governmental entities from payment of the application fee for registration and reregistration as List I chemical handlers. These exemptions will reduce regulatory requirements for the applicable industry, creating a cost savings for affected persons.

What Chemicals Would Be Affected by These Proposed Regulations?

The proposed waiver of the requirement of registration or reregistration for contract processors will affect all List I chemicals. List I chemicals have legitimate uses within commercial industry, being used for research and manufacturing purposes. List I chemicals include, but are not

limited to, ephedrine, pseudoephedrine and phenylpropanolamine (used in the manufacture of pharmaceutical products), benzaldehyde (used in the manufacture of perfumes and dyes), hydriodic acid (a disinfectant and chemical reagent), nitroethane (a solvent), and white phosphorus (used in the production of other phosphoric compounds). As a rule, with the exception of pseudoephedrine, phenylpropanolamine, and ephedrine, which are distributed to the public in regulated form as over-the-counter medications, List I chemicals in regulated form are usually distributed in commercial transactions between businesses and only rarely to the public in retail transactions. It is within this commercial arena that contract processors operate; they do not distribute at retail to the public.

The proposed waiver of the requirement of registration or reregistration for distributors of research/reference standards would affect the List I chemicals ephedrine, pseudoephedrine and phenylpropanolamine. The proposed waiver of the requirement of registration or reregistration for medical/first aid kit providers and distributors of sample packages would affect the List I chemical pseudoephedrine. Pseudoephedrine, a chemical widely used in over-the-counter medications, is a decongestant used for the temporary relief of nasal congestion due to the common cold, hay fever or other upper respiratory allergies. Products containing pseudoephedrine are widely available in a variety of dosage forms as a single entity or in combination with antihistamines, antitussives, analgesics, expectorants, and/or vitamins. Ephedrine is used for the temporary relief of shortness of breath, tightness of chest, and wheezing due to bronchial asthma.

The majority of the products purchased by the public containing pseudoephedrine are commonly used medications and are easily accessible at pharmacies, grocery stores, discounted department stores, and a variety of other retail stores. These products are available to the public without a prescription. A few products containing pseudoephedrine or ephedrine are prescription products and require a prescription issued by a practitioner prior to being dispensed to a patient. This proposed regulation will not adversely impact the public's ability to easily access these products.

II. Waivers of the Requirement of Registration

A. Contract Processors

What Are Contract Processors?

Contract processors, sometimes referred to within the industry as ''tollers'', are those persons who, through a legally binding agreement with a registrant, take physical possession of a listed chemical for the purpose of providing a processing service to the registrant. Such processes may include, but are not limited to, packaging a product and adding chemicals to a mixture. The contract processor never has legal ownership or control of the chemicals; legal title remains with the registrant. Following processing, the contract processor either returns all of the chemicals received to the registrant, or distributes them as required by the registrant.

Why Is DEA Waiving the Requirement of Registration for Contract Processors?

In reviewing this situation, DEA has noted that activities of certain contract processors parallel those of a warehouse at which chemicals are stored, for which an exemption from registration has been provided under 21 U.S.C. 822(c) (21 CFR 1309.23(b)(1)). As with the warehouseman, the contract processor merely carries out the processing requirements of the registrant; the contract processor does not have, at any time, legal title to or legal control of the chemicals. The registrant provides the material to the contract processor for a specific function, after which the material is returned to the registrant, thus maintaining a closed-loop system. DEA has determined that, under such circumstances, the requirement of registration is not necessary for effective chemical control. Therefore, DEA is proposing to amend the regulations to waive the requirement of registration for contract processors provided that chemicals are distributed only back to the registrant. As with warehousemen, a registrant utilizing a contract processor's services would be responsible for exercising due care in selection of the processor (21 CFR 1309.71, 21 CFR 1309.72). The registrant would have to ensure that the contract processor has in place appropriate procedures and safeguards to protect chemicals from diversion.

What Circumstances Are Not Permitted Under This Waiver?

Contract processors do not always operate within a closed-loop system. In some cases, a contract processor may receive chemicals from an outside source, process them, and distribute the chemicals to the registrant. In other cases, a registrant may provide the chemicals to the contract processor which processes them and, per the registrant's instructions, distributes the chemicals to other persons. These activities deviate from the closed-loop system between the registrant and contract processor and involve distributions to or from other registrants. Therefore, these types of activities will remain subject to the registration requirements under the law. DEA is proposing that, as with the existing provisions for warehouses, the waiver will apply only to those circumstances in which a registrant distributes directly to a contract processor which, in turn, will distribute only back to the registrant from which it received the chemicals.

B. Medical/First Aid Kit Providers

What Are Medical/First Aid Kit Providers?

Medical/first aid kit providers distribute small amounts of pseudoephedrine drug products, in individual transactions, to medical/first aid kits maintained by businesses for the personal medical use of employees in the workplace. The distributions are usually conducted in face-to-face transactions (an agent or employee of the distributor delivers the products directly to the customer), the products are distributed for the personal medical use of the employees of the customer, and are less than the retail threshold per transaction. [As used in this document and referenced in the Methamphetamine Anti-Proliferation Act of 2000 (Section XXXVI of Pub.L. 106–310), the term ''transaction'' is defined to mean the provision of regulated drug products to a specific location, *not* the provision of regulated drug products to a specific medical/first aid kit within a location. Thus, under the terms of this proposed waiver, if a location had multiple medical/first aid kits, the medical/first aid kit provider would be permitted to supply the location with a quantity of product below the retail per-transaction limit during each visit to that specific location. Product may be allocated to multiple medical/first aid kits throughout a specific location, without the medical/first aid kit provider being required to register with DEA, so long as the amount of product distributed does not exceed the retail per-transaction threshold.]

Why is DEA Waiving the Requirement of Registration for Medical/First Aid Kit Providers?

Medical/first aid kit provider activities closely parallel those of retail distributors; sales involve retail below-threshold amounts of the products, are made in face-to-face transactions, and are intended for the personal medical use of the employees of the business. DEA has determined that, where a medical/first aid provider's activities are restricted to retail below-threshold, face-to-face transactions to supply/replenish medical or first aid kits maintained for the personal medical use of employees in the workplace, application of the registration requirement is not necessary for effective enforcement of the chemical control program. Instead, the providers must submit written notice to DEA certifying that their activities will be limited to distribution of retail below-threshold quantities of a drug product containing pseudoephedrine that is regulated pursuant to § 1300.02(b)(28)(i)(D) for purposes of supplying/replenishing medical or first aid kits maintained by businesses for the use of their employees. (A model of the notice to be used may be found in proposed 1309.24(i).) Notice must be provided on official company letterhead to the Drug Enforcement Administration, Chemical Control Section, Washington, D.C. 20537.

Those medical/first aid kit providers currently operating pursuant to Memoranda of Understanding (MOU) with DEA will be required to request a waiver of the requirement of registration once the Final Rule implementing these regulations is published in the **Federal Register**.

Although medical/first aid kit providers conduct individual transactions in retail below-threshold quantities, they may store large quantities of drug products containing list I chemicals that are regulated pursuant to § 1300.02(b)(28)(i)(D) at any one time. Because of this, the issue of theft or loss of these drug products is of concern to DEA. It is extremely important that persons supplying/replenishing medical or first aid kits maintained by businesses for the use of their employees take adequate and appropriate measures to ensure the security of these drug products in their possession (21 CFR 1309.71–1309.73). Persons receiving a waiver of the requirement of registration should pay special attention to the storage and security of the regulated drug products. Further, waiver of the registration requirement does not obviate the need for complete and accurate recordkeeping and reporting to DEA (21 CFR 1310, 1313). The waiver of the requirement of registration may be revoked or suspended under the terms discussed in Section II.E. of this preamble and the proposed regulations.

C. Distributors of Sample Packages of Drug Products

What Are Sample Packages, and When May the Requirement of Registration Be Waived for Distributions of Sample Packages?

It is not unusual for manufacturers of drug products containing retail below-threshold amounts of pseudoephedrine that are regulated pursuant to § 1300.02(b)(28)(i)(D) to distribute free samples of their products directly to the public as part of marketing campaigns. The samples may be distributed through mass distributions in newspapers, magazines, or through the mail. A sample package contains not more than two solid dosage units of the product, or the equivalent of two dosage units in liquid form, not to exceed 10 milliliters of liquid per package. DEA has determined that application of the specific registration requirement is not necessary for effective enforcement of chemical controls, provided that the sampler does not distribute more than one sample package of a drug product containing retail below-threshold amounts of pseudoephedrine that is regulated pursuant to § 1300.02(b)(28)(i)(D) to an individual or residential address in any 30-day time period. Instead, DEA will require that the sampler must submit written notice to DEA certifying that their activities will be limited to individual distributions of sample packages containing not more than two solid dosage units of the product, or the equivalent of two dosage units in liquid form, not to exceed 10 milliliters of liquid per package, and that distributions will not exceed one per individual or residential address per 30-day time period. Notice must be provided on official company letterhead to the local field office of the Drug Enforcement Administration. Contact information for local DEA field offices may be obtained from the Drug Enforcement Administration Web site at *http://www.dea.gov*. Once notification has been received, the local field office will provide instruction on handling the product.

Those persons distributing sample packages currently operating pursuant to Memoranda of Understanding (MOU) with DEA will be required to request a waiver of the requirement of registration once the final rule implementing these regulations is published in the **Federal Register**.

Although distributors of sample packages may distribute only one sample package to an individual or residential address in a 30-day time period, they may store very large quantities of regulated drug products. The issue of theft or loss of these drug products is of concern to DEA. It is extremely important that persons making distributions of these sample packages take adequate and appropriate measures to ensure the security of these drug products in their possession (21 CFR 1309.71–1309.73). Persons receiving a waiver of the requirement of registration should pay special attention to the storage and security of the sample packages. Further, waiver of the requirement of registration does not obviate the need for accurate recordkeeping and reporting to DEA (21 CFR 1310, 1313). The waiver of the requirement of registration may be revoked or suspended under the terms discussed in Section II.E. of this preamble and the proposed regulations.

D. Distribution of Research/Reference Standards

What Are Distributions of Research/Reference Standards, and When May the Requirement of Registration Be Waived for These Distributions?

DEA registered manufacturers of regulated drug products sometimes maintain separate locations at which ephedrine, pseudoephedrine, and phenylpropanolamine research/reference standards are manufactured and distributed to other locations operated by the registrant for use in manufacturing processes. DEA has determined that requiring registration for such distributions is not necessary for effective enforcement of the chemical control program provided that the distributions are less than five (5) grams per transaction, not to exceed fifty (50) grams cumulatively per calendar month, and are made solely between locations operated by the same regulated person. The small amounts of material involved and the closed system within which the material is distributed do not present significant potential for diversion. Further, because these samples are used for research purposes, the controls surrounding these chemicals, as well as their chain of custody, are very strict. These added safeguards lessen the potential for diversion. Therefore, DEA is proposing the amendment of 21 CFR 1309.24 to waive the requirement of registration for the distribution of research/reference standards. The waiver of the

requirement of registration may be revoked or suspended under the terms discussed in Section II.E. of this preamble and the proposed regulations.

E. Waiver Revocations and Suspensions

Any waiver granted to any medical/first aid kit provider, distributor of sample packages, or distributor of research/reference standards under the provisions of this Notice of Proposed Rulemaking may be revoked or suspended. If the Administrator of DEA finds that continuation of the waiver of the requirement of registration for any person granted a waiver pursuant to these regulations would not be in the public interest, or would be subject to suspension or revocation pursuant to any other ground under Section 304 of the Act (21 U.S.C. 824), the Administrator shall serve upon the person an order to show cause why the waiver of registration should not be revoked or suspended as set forth in 21 CFR 1309.46(b), and, if applicable, why any pending applications for List I chemical registration should not be denied as set forth in 21 CFR 1309.46(a).

III. Fee Exemptions

A. Charitable Organizations

It is not unusual for charitable organizations to receive donations of drug products containing a List I chemical that are regulated pursuant to § 1300.02(b)(28)(i)(D) as part of their normal course of business. These donations may be received from a variety of sources including retail distributors, wholesale distributors and manufacturers. The charitable organizations distribute the products either directly to the ultimate users or to other foreign or domestic charitable organizations.

For purposes of these proposed regulations, DEA is defining a charitable organization as one meeting the requirements of the Internal Revenue Service Code (26 U.S.C. 501(c)(3)). When seeking an exemption from payment of application fees for registration or reregistration, such charitable organizations must present to DEA, along with their application for registration or reregistration, a copy of their advance determination letter or determination letter issued by the Internal Revenue Service as proof of their tax-exempt status under the provisions of 26 U.S.C. 508 and its implementing regulations.

Distributions made by charitable organizations directly to ultimate users are retail distributions; products are distributed in face-to-face transactions for personal medical use, and involve below-threshold amounts of listed chemicals. As retail transactions, they are not subject to the registration requirement.

However, distributions to other charitable organizations, whether domestic distribution or exportation, are subject to the registration requirement. Because the volume of drug products containing a List I chemical that are regulated pursuant to § 1300.02(b)(28)(i)(D) being distributed by these organizations can be significant, registration with DEA remains necessary, as well as the recordkeeping and reporting requirements. However, it is not DEA's intent that these organizations be financially penalized for their activities. Therefore, DEA is proposing amendments to the regulations exempting charitable organizations from registration fees.

B. Federal, State, and Local Agencies

It has been general practice and tradition that DEA does not assess other governmental entities—Federal, state or local—the fees required for registration or reregistration. This provision, which does exist for controlled substances registrants, was inadvertently not included in the chemical regulations. Therefore, to provide consistent registration fee requirements, DEA is proposing the amendment of the chemical regulations to exempt governmental entities from fees.

IV. Clarification of the Waiver of the Requirement of Registration for Certain Controlled Substances Registrants

Title 21 CFR 1309.24 provides that persons registered with DEA to distribute or dispense controlled substances are not required to obtain a separate chemical registration to distribute drug products containing a List I chemical that are regulated pursuant to § 1300.02(b)(28)(i)(D).

This provision is intended to allow controlled substances manufacturers, distributors, and dispensers to engage in activities with regulated drug products that are similar or equivalent to their activities with controlled substances, *i.e.*, manufacturers and distributors may engage in wholesale transactions and dispensers, such as retail pharmacies, may engage in retail transactions.

However, DEA has become aware of instances in which controlled substances dispensers, in particular retail pharmacies, have been engaging in listed chemical activities inconsistent with their controlled substances activities. DEA intended that the waiver for dispensers would apply to retail type transactions, *i.e.*, distributions of below-threshold amounts to individual customers for personal medical use, and not to distributions of above-threshold quantities or distributions not intended for the personal medical use of the customer. For example, a retail pharmacy may distribute retail quantities of drug products containing a List I chemical that are regulated pursuant to 21 CFR 1300.02(b)(28) under the chemical registration waiver, but must obtain a separate chemical registration for distributions above the retail threshold or distributions not intended for the personal medical use of the customer. Similarly, a controlled substances distributor would be exempt from obtaining a registration for distributing, but not manufacturing, regulated drug products. It was not DEA's intent to permit controlled substances registrants to use the waiver of the requirement of chemical registration to conduct activities inconsistent with their controlled substances activities. Therefore, DEA proposes to amend its regulations to clarify that controlled substances manufacturers, distributors, and dispensers may conduct similar or equivalent activities involving drug products containing a List I chemical that are regulated pursuant to § 1300.02(b)(28)(i)(D) without having to obtain a chemical registration.

V. Technical Corrections

What Technical Corrections Are Proposed in This Rulemaking?

While preparing this notice, DEA noted inaccurate citations for the definition of ''regulated transaction'' in 21 CFR Part 1310. Therefore, DEA is proposing the correction of these inaccurate citations.

Further, it was noted that Sections 1310.14 and 1310.15 have been superceded by the Comprehensive Methamphetamine Control Act of 1996 (MCA) which regulates all products containing ephedrine, whether single entity or combination ephedrine. Therefore, DEA is proposing the removal of Sections 1310.14 and 1310.15.

VI. Office of Management and Budget Information Collection Requirements

DEA is proposing two new collections of information: *Report of Medical/First Aid Kit Provider Business Activities* and *Report of Distribution of Sample Packages* under the Paperwork Reduction Act of 1995. This process is conducted in accordance with 5 CFR 1320.11.

These proposed information collections are published to obtain

comments from the public and affected agencies. Comments are encouraged and will be accepted until January 26, 2004. Written comments and suggestions are requested from the public and affected agencies concerning the proposed collections of information.

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.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument(s) with instructions, if applicable, or additional information, please contact Patricia M. Good, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7297.

Overview of *Report of Medical/First Aid Kit Provider Business Activities* Information Collection:

(1) *Type of information collection:* new collection.

(2) *The title of the form/collection:* Report of Medical/First Aid Kit Provider Business Activities.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form No.: None.

Applicable component of the Department sponsoring the collection: Office of Diversion Control, Drug Enforcement Administration, U.S. 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.

Other: None.

Abstract: The collection of this information is necessary to maintain appropriate oversight of the distribution of regulated drug products containing List I chemicals by requiring notification from businesses of their intent to distribute retail subthreshold quantities of pseudoephedrine drug products for the purpose of supplying/replenishing medical/first aid kits.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* 600 Respondents. 600 responses per year × 1 hour per response = 600 hrs.

(6) An estimate of the total public burden (in hours) associated with the collection: 600 annual burden hours. 600 respondents × 1 hour per respondent per year.

Overview of *Report of Distribution of Sample Packages* Information Collection:

(1) *Type of information collection:* new collection.

(2) *The title of the form/collection:* Report of Distribution of Sample Packages.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form No.: None.

Applicable component of the Department sponsoring the collection: Office of Diversion Control, Drug Enforcement Administration, U.S. 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.

Other: None.

Abstract: The collection of this information is necessary to maintain appropriate oversight of the distribution of regulated drug products containing retail below-threshold amounts of pseudoephedrine. By requiring notification from businesses of their intent to distribute sample packages containing not more than two solid dosage units, or the equivalent of two dosage units in liquid form, not to exceed 10 milliliters of liquid per package, to the general public. Distributions are limited to not more than one package distributed to an individual or residential address in any 30-day time period. Notice provides the business name and address and acknowledges distribution restrictions, compliance with the requirements of Title 21, Code of Federal Regulations (CFR), part 1310, the reporting and recordkeeping requirements, and the fact that exemption from the registration requirement applies to this activity only.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: 1,000 respondents. 1,000 responses per year × 1 hour per response = 1,000 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: 1,000 annual burden hours. 1,000 respondents × 1 hour per respondent per year.

If additional information is required regarding these collections of information, contact: Brenda E. Dyer, Deputy Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Regulatory Certifications

Regulatory Flexibility Act

The Deputy Assistant Administrator hereby certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small business entities. These proposed regulations would ease registrants', primarily small businesses, regulatory burdens including waiving the requirement of registration and exempting certain regulated persons from the imposition of registration fees.

Executive Order 12866

The Deputy Assistant Administrator further certifies that this rulemaking has been drafted in accordance with the principles in Executive Order 12866, Section 1(b). DEA has determined that this is a significant regulatory action. Therefore, this action has been reviewed by the Office of Management and Budget. Further, the proposed information collections, ''Report of Medical/First Aid Kit Provider Business Activities'' and ''Report of Distributions of Sample Packages'', have been submitted for review. This rulemaking eases the regulatory burden for registrants by waiving the requirement of registration for certain activities, as well as exempting certain regulated persons from the registration fees. Were DEA not to propose these regulations, thereby codifying present Administration policy, each affected person would be required to register with DEA annually and pay an initial registration fee of $595 and annual reregistration fees of $477. If finalized, these proposed regulations will require exempt persons to notify DEA only once of their activities, at a cost of mailing one letter, as opposed to an annual registration fee. Industry would benefit

from a significant cost savings as no fee would be charged for the one-time notification.

Executive Order 12988

This regulation meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13132

This rulemaking does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

Unfunded Mandates Reform Act of 1995

This 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 will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on 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.

List of Subjects

21 CFR Part 1309

Administrative practice and procedure, Drug traffic control, List I and List II chemicals, Security measures.

21 CFR Part 1310

Drug traffic control, List I and List II chemicals, Reporting requirements.

For the reasons set out above, 21 CFR parts 1309 and 1310 are proposed to be amended as follows:

PART 1309—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, IMPORTERS AND EXPORTERS OF LIST I CHEMICALS

1. The authority citation for part 1309 continues to read as follows:

Authority: 21 U.S.C. 821, 822, 823, 824, 830, 871(b), 875, 877, 958.

2. Section 1309.13 is proposed to be added to read as follows:

§ 1309.13 Exemptions from fees.

(a) The Administrator shall exempt from payment of an application fee for registration or reregistration any hospital or other institution which is operated by an agency of the United States (including the U.S. Army, Navy, Marine Corps, Air Force, and Coast Guard), of any State, or any political subdivision or agency thereof.

(b) The Administrator shall exempt from payment of an application fee for registration or reregistration any charitable organization as specified under Internal Revenue Service Code Title XXVI, United States Code, section 501(c)(3) which obtains a drug product containing a List I chemical that is regulated pursuant to § 1300.02(b)(28)(i)(D), and which distributes or exports the drug product to other charitable organizations as specified under Title XXVI, United States Code, section 501(c)(3) for ultimate distribution to the end user. Charitable organizations seeking an exemption from the payment of application fees for registration or reregistration must present to the Administration, along with their application for registration or reregistration, a copy of their advance determination letter or determination letter issued by the Internal Revenue Service as proof of tax-exempt status under the provisions of Title XXVI, United States Code, section 508 and its implementing regulations.

(c) Exemption from payment of an application fee for registration or reregistration does not relieve the registrant of any other requirements or duties prescribed by law.

3. Section 1309.23 is proposed to be amended by revising paragraph (b) to read as follows:

§ 1309.23 Separate registration for separate locations.

* * * * *

(b) The following locations shall be deemed to be places not subject to the registration requirement:

(1) A warehouse where List I chemicals are stored by or on behalf of a registered person, unless such chemicals are distributed directly from such warehouse to locations other than the registered location from which the chemicals were originally delivered;

(2) An office used by agents of a registrant where sales of List I chemicals are solicited, made, or supervised but which neither contains such chemicals (other than chemicals for display purposes) nor serves as a distribution point for filling sales orders; and

(3) A contract processor where List I chemicals are processed by or on behalf of a registered person, unless such chemicals are distributed directly from such contract processor to locations other than the registered location from which the chemicals were originally delivered.

4. Section 1309.24 is proposed to be revised to read as follows:

§ 1309.24 Waiver of registration requirement for certain activities.

(a) The requirement of registration is waived for any agent or employee of a person who is registered to engage in any group of independent activities, if such agent or employee is acting in the usual course of his or her business or employment.

(b) The requirement of registration is waived for any person who distributes a product containing a List I chemical that is regulated pursuant to 21 CFR 1300.02(b)(28)(i)(D), if that person is registered with the Administration to manufacture, distribute or dispense a controlled substance.

(c) The requirement of registration is waived for any person registered with the Administration to manufacture, distribute, or dispense controlled substances who is conducting similar or equivalent activities with a drug product containing a List I chemical that is regulated pursuant to 21 CFR 1300.02(b)(28)(i)(D). However, a separate chemical registration must be obtained for dissimilar activities. (For example, a retail pharmacy may distribute below-threshold retail quantities of drug products containing List I chemicals that are regulated pursuant to 21 CFR 1300.02(b)(28) to an individual for personal medical use under its retail distribution exemption, but must obtain a separate chemical registration for distributions of above-threshold quantities or distributions not intended for the personal medical use of an individual customer. Further, a controlled substances distributor may distribute drug products containing List I chemicals that are regulated pursuant to 21 CFR 1300.02(b)(28) under its controlled substances distribution registration, but must obtain a separate chemical registration to manufacture drug products containing List I

chemicals that are regulated pursuant to 21 CFR 1300.02(b)(28).)

(d) The requirement of registration is waived for any person who distributes a prescription drug product containing a List I chemical that is regulated pursuant to 21 CFR 1300.02(b)(28)(i)(D) of this chapter.

(e) The requirement of registration is waived for any retail distributor whose activities with respect to List I chemicals are limited to the distribution of below-threshold quantities of pseudoephedrine, phenylpropanolamine, or combination ephedrine product that is regulated pursuant to 21 CFR 1300.02(b)(28)(i)(D) of this chapter, in a single transaction to an individual for legitimate medical use, irrespective of whether the form of packaging of the product meets the definition of ''ordinary over-the-counter pseudoephedrine or phenylpropanolamine product'' under 21 CFR 1300.02(b)(31) of this chapter.

(f) The requirement of registration is waived for any person whose activities with respect to List I chemicals are limited to the distribution of red phosphorus, white phosphorus, or hypophosphorous acid (and its salts) to: another location operated by the same firm solely for internal end-use; or an EPA or State licensed waste treatment or disposal firm for the purpose of waste disposal.

(g) The requirement of registration is waived for any person whose distribution of red phosphorus or white phosphorus is limited solely to residual quantities of chemical returned to the producer, in reusable rail cars and intermodal tank containers which conform to International Standards Organization specifications (with capacities greater than or equal to 2,500 gallons in a single container).

(h) The requirement of registration is waived for any manufacturer of a List I chemical, if that chemical is produced solely for internal consumption by the manufacturer and there is no subsequent distribution or exportation of the List I chemical.

(i) The requirement of registration under this part is waived for any medical/first aid kit provider whose activities consist of distributing, in face-to-face transactions, a drug product containing retail below-threshold amounts of pseudoephedrine that is regulated pursuant to 21 CFR 1300.02(b)(28)(i)(D) to businesses for the sole purpose of supplying/replenishing a medical/first aid kit maintained for the personal use of employees in the workplace. For purposes of this paragraph, the term transaction is defined to mean the provision of regulated drug products to a specific location, not the provision of regulated drug products to a specific medical/first aid kit within a location.

(1) Persons requesting a waiver of the requirement of registration must submit a notification of this business activity on official company letterhead to the Drug Enforcement Administration, Office of Diversion Control, Chemical Control Section, Washington, DC 20537.

(2) Notification of this business activity should be in the following form:

I, _____ the _____ (title) of _____ (name of company) located at _____ (street address) _____ (city) _____ (state)_____ (ZIP code) am writing to request a waiver of the Drug Enforcement Administration (DEA) chemical registration requirement for _____ (name of company)'s activities involving the distribution of drug products containing pseudoephedrine that are regulated pursuant to Title 21, Code of Federal Regulations, § 1300.02(b)(28)(i)(D) to businesses for the purpose of supplying/replenishing medical or first aid kits maintained by those businesses for the personal medical use of their employees.

This is to certify that _____ (name of company) will comply with the provisions of Title 21, Code of Federal Regulations, Part 1309, namely:

1. The distribution of retail below-threshold amounts of drug products containing pseudoephedrine that are regulated pursuant to § 1300.02(b)(28)(i)(D) are to individual customers;

2. The distributions are made only in face-to-face transactions; and

3. The distributions are only for the purpose of supplying/replenishing medical or first aid kits maintained by businesses for the personal medical use of their employees.

_____ (name of company) distributes an average of _____ dosage units of pseudoephedrine products per year.

I understand that the waiver of the registration requirement applies only to those activities; any distribution of the products other than as described above is subject to the registration requirement.

Further, I understand that the waiver applies only to the registration requirement. The recordkeeping and reporting requirements set forth in Title 21, Code of Federal Regulations, Part 1310, still apply to both receipts and distributions of products containing a List I chemical that are regulated pursuant to Title 21, Code of Federal regulations, § 1300.02(b)(28)(i)(D). I understand that if I receive more than a non-retail threshold amount of pseudoephedrine, either singly or cumulatively, in a calendar month from a supplier, then I must keep a record of such receipt(s).

I understand that I will receive a written decision regarding my request for a waiver of the requirement of registration. I further understand that to engage in the distribution of drug products containing pseudoephedrine that are regulated pursuant to Title 21, Code of Federal Regulations, § 1300.02(b)(28)(i)(D) to medical/first aid kits I must either be registered with the Drug Enforcement Administration as a List I chemical handler or have received a written waiver of the requirement of registration. A copy of this letter will be kept in my records.

_____
(signature)

_____
(title)

_____
(date)

(3) The request for a waiver of the requirement of registration will be evaluated based on compliance with the above criteria and on public interest criteria as defined in 21 U.S.C. 823(h). Once a determination has been made regarding the request for waiver, DEA will notify the requestor in writing of the decision.

(4) Public reporting burden for collection of this information is estimated to average 1 hour per response, including the time to review instructions, write the request, and send it to the appropriate location. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Drug Enforcement Administration, Records Management Section, Washington, DC 20537; and to the Office of Management and Budget, Paperwork Reduction Project No. 1117–00xx, Washington, DC 20503.

(j) The requirement of registration under this part is waived for persons distributing sample packages of a product containing retail below-threshold amounts of pseudoephedrine that is regulated pursuant to 21 CFR 1300.02(b)(28)(i)(D) containing not more than two solid dosage units, or the equivalent of two dosage units in liquid form, not to exceed 10 milliliters of liquid per package. Distributions are limited to not more than one package distributed to an individual or residential address in any 30-day period.

(1) Persons requesting a waiver of the requirement of registration must submit a notification of this business activity on official company letterhead to the Special Agent in Charge of the Administration in the area in which the person is located.

(2) The Special Agent in Charge shall authorize and instruct the person distributing the sample packages on handling and security of the product.

(3) Public reporting burden for collection of this information is estimated to average 1 hour per response, including the time to review instructions, write the notification, and send it to the appropriate location. Send comments regarding this burden

estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Drug Enforcement Administration, Records Management Section, Washington, DC 20537; and to the Office of Management and Budget, Paperwork Reduction Project No. 1117–00??, Washington, DC 20503.

(k) For any person who manufactures ephedrine, pseudoephedrine or phenylpropanolamine at a registered location and also manufactures research/reference standards containing ephedrine, pseudoephedrine or phenylpropanolamine at a separate location, the requirement of registration under this part is waived for the location at which research/reference standards containing ephedrine, pseudoephedrine or phenylpropanolamine are manufactured and distributed, so long as the research/reference standards are distributed only to other locations operated by the same registered manufacturer. Distributions may not exceed five grams per transaction and fifty grams cumulatively per calendar month.

(l) If any person exempted under paragraph (b), (c), (d), (e), (f), (g) or (k) of this section also engages in the distribution, importation or exportation of a List I chemical, other than as described in such paragraph, the person shall obtain a registration for such activities, as required by § 1309.21 of this part.

(m) The Administrator may, upon finding that continuation of the waiver would not be in the public interest, suspend or revoke a waiver granted under paragraph (b), (c), (d), (e), (f), (g), (h), (i), (j) or (k) of this section pursuant to the procedures set forth in §§ 1309.43 through 1309.46 and 1309.51 through 1309.55 of this part. In considering the revocation or suspension of a person's waiver granted pursuant to paragraph (b) or (c) of this section, the Administrator shall also consider whether action to revoke or suspend the person's controlled substance registration pursuant to 21 U.S.C. 824 is warranted.

(n) Any person exempted from the registration requirement under this section shall comply with the security requirements set forth in §§ 1309.71 through 1309.73 of this part and the recordkeeping and reporting requirements set forth under parts 1310 and 1313 of this chapter.

§ 1309.62 [Amended]

5. In Section 1309.62(a) remove the word ''cases'' and add the word ''ceases'' in its place.

PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES

6. The authority citation for 21 CFR Part 1310 continues to read as follows:

Authority: 21 U.S.C. 802, 830, 871(b).

§ 1310.05 [Amended]

7. In § 1310.05(d), remove the reference to § 1310.01(f)(1)(iv) or § 1310.01(f)(1)(v) and add the reference § 1300.02(b)(28)(i)(D) or § 1300.02(b)(28)(i)(E)'' in its place.

§ 1310.06 [Amended]

8. In § 1310.06(h)(5), remove the reference to § 1310.01(f)(1)(iv) or § 1310.01(f)(1)(v) and add the reference ''§ 1300.02(b)(28)(i)(D) or § 1300.02(b)(28)(i)(E) in its place.

§ 1310.10 [Amended]

9. In § 1310.10(a), remove the reference to ''§ 1310.01(b)(28)(i)(D)'' and add the reference ''§ 1300.02(b)(28)(i)(D)'' in its place.

§ 1310.14 [Removed]

10. Remove § 1310.14.

§ 1310.15 [Removed]

11. Remove § 1310.15.

Dated: November 14, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 03–29236 Filed 11–24–03; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–138499–02]

RIN 1545–BB05

Changes in Use Under Section 168(i)(5)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of cancellation of a public hearing on proposed regulations relating to the depreciation of property subject to section 168 of the Internal Code (MACRS property).

DATES: The public hearing originally scheduled for Wednesday, December 3, 2003, at 10 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: Treena Garrett of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration), (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Monday, July 21, 2003, (68 FR 43047), announced that a public hearing was scheduled for Wednesday, December 3, 2003, at 10 a.m., in room 4718, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is proposed regulations under section 168 of the Internal Revenue Code. The public comment period for these proposed regulations expired on Monday, October 20, 2003. Outlines of oral comments were due on Wednesday, November 12, 2003.

The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit an outline of the topics to be addressed. As of Wednesday, November 19, 2003, no one has requested to speak. Therefore, the public hearing scheduled for Wednesday, December 3, 2003, is cancelled.

LaNita Van Dyke,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 03–29441 Filed 11–24–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD11–03–006]

RIN 1625–AA09

Drawbridge Operation Regulations; Mare Island Strait, Napa River, Vallejo, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulation governing the operation of the Mare Island Drawbridge, spanning the Napa River between the City of Vallejo and Mare Island, CA., by eliminating the rush-hour closure periods when the drawspan need not open for vessels and by increasing the hours when vessels provide advance notice for drawspan operation. The proposed action would

reduce bridge operating costs without reducing the ability of vessels to transit the drawbridge, thereby continuing to meet the reasonable needs of waterway traffic.

DATES: Comments and related material must reach the Coast Guard on or before January 26, 2004.

ADDRESSES: You may mail comments and related material to Commander (oan), Eleventh Coast Guard District, Bridge Section, Building 50–3, Coast Guard Island, Alameda, CA 94501–5100. This office maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Commander (oan), Eleventh Coast Guard District, Bridge Section, Building 50–3, Coast Guard Island, Alameda, CA 94501–5100 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, telephone (510) 437–3516.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD11–03–006], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public Meeting. You may submit a request for a meeting by writing to the Bridge Section, Eleventh Coast Guard District, at the address under **ADDRESSES** explaining why one would be beneficial. If we determine one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Mare Island Drawbridge crosses the Napa River between the City of Vallejo (''Vallejo'') and Mare Island, CA. The existing regulation governing the operation of the drawbridge, found at 33 CFR § 117.169, requires the drawbridge to open on signal from 7:30 a.m. to 3:45 p.m. and 4:45 p.m. to 10 p.m. Monday through Friday except Federal holidays, and from 6:30 a.m. to 10 p.m. on Saturdays, Sundays and holidays. The drawbridge need not open for the passage of vessels other than public vessels of the United States from 6:30 a.m. to 7:30 a.m. and 3:45 p.m to 4:45 p.m. except Saturdays, Sundays, and Federal holidays; and must be opened on signal from 10 p.m. to 6:30 a.m. daily, if at least two hours notice is given, and as soon as possible during this period for public vessels of the United States.

For the purpose of reducing the drawbridge operating costs, Vallejo has requested to increase the rush-hour closure periods and to increase the hours when vessels provide advance notice for drawspan operation. Drawbridge operation logs support increasing the hours of advance notice to include periods when vessels historically have not called for an opening.

However, the present morning and afternoon land traffic flows no longer justify rush-hour closure periods when the bridge need not open for passage of vessels. The current regulation was promulgated when the U.S. Navy was still based at Mare Island. Following the departure of the Navy from Mare Island, traffic across the Mare Island Drawbridge diminished significantly and the morning and evening rush-hour closure periods no longer are needed.

The proposed changes would increase the number of hours vessels provide advance notice for drawspan operation and eliminate the rush-hour closure periods. The proposed changes are expected to reduce bridge operating costs while continuing to meet the reasonable needs of waterway traffic.

Discussion of Proposed Rule

The proposed changes are expected to simplify the regulation and reduce drawbridge operating costs, while continuing to meet the reasonable needs of waterway traffic.

Vessel counts derived from drawbridge operating logs and land traffic counts show little demand for bridge openings during the evening hours and a significant decrease in rush-hour land traffic since the Navy departed from Mare Island.

The proposed operating schedule would require the Mare Island Drawbridge to open on signal between the hours of 9 a.m. and 7 p.m. daily, and upon two hours advance notice all other times. During advance notice periods, the bridge would be required to open as soon as possible for emergency vessel operation. Mariners presently contact the City of Vallejo Police Department Dispatch Office to provide two-hour advance notice or for emergency operation of the drawspan. This practice would be codified in the proposed regulation. Also, the rush-hour closure periods would be deleted and references to ''public vessels'' would be deleted.

Navigational charts show the affected waterway to be a combination of the Mare Island Strait and the Napa River with no drawbridges on any of the tributaries. The Mare Island crossing is a drawbridge and does not meet the definition of a ''causeway''. The existing drawbridge is no longer owned or operated by the Navy. Therefore references to ''tributaries'', ''causeway'' and ''U.S. Navy'' will be deleted and it will be referred to in the regulation as the Mare Island Drawbridge, Mare Island Strait and Napa River, mile 2.8, at Vallejo.

The Coast Guard is requesting comments from the mariners through individual correspondence, Local Notice to Mariners, and transmittal of this Notice of Proposed Rulemaking to established waterway representatives and known operators on the waterway.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. The proposed rule is not expected to result in significant negative impacts to the waterway users while providing relief to the bridge owner in the form of bridge operating costs. Impacts to the public waterway users are expected to be minimal based upon data provided by the bridge owner in the form of drawbridge operating logs and vessel traffic counts. This data indicates there is little or no requirement for keeping an operator on the drawbridge during the proposed periods of advance notice.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities, as none were identified that will be affected by the proposed changes.

Vessel traffic counts indicate the waterway users would continue to receive the same level of service at the bridge. The proposal is to decrease unnecessary manning of the bridge during times when the bridge historically has not been called for an opening. Eliminating the rush-hour closure periods would improve vessel access during periods when the bridge normally receives calls for openings.

If you think your business, organization, or governmental jurisdiction qualifies as a small entity and this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the Eleventh Coast Guard District Bridge Office in writing at the address under **ADDRESSES.**

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation, since promulgation of drawbridge regulations has been determined not to have any affect on the environment. A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. Section 117.169(a) is revised to read as follows:

§ 117.169 Mare Island Strait and The Napa River.

(a) The draw of the Mare Island Drawbridge, mile 2.8, at Vallejo shall open on signal between the hours of 9 a.m. and 7 p.m. daily, and upon two hours advance notice all other times. Mariners should contact the City of Vallejo Police Department Dispatcher, to provide the two hour advance notice or for emergency operation of the drawspan.

* * * * *

Dated: November 13, 2003.

K.J. Eldridge,

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

[FR Doc. 03–29389 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD05–03–121]

RIN 1625–AA09

Drawbridge Operation Regulations; Mantua Creek, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulations that govern the operation of the Consolidated Rail Corporation (CONRAIL) Railroad Bridge across Mantua Creek at mile 1.4, in Paulsboro, New Jersey. The proposed rule would increase vessel openings and eliminate the need for a bridge tender by allowing the bridge to be operated by a train crewmember. This change will provide for the reasonable needs of navigation.

DATES: Comments and related material must reach the Coast Guard on or before January 26, 2004.

ADDRESSES: You may mail comments and related material to Commander (oan-b), Fifth Coast Guard District, Federal Building, 4th Floor, 431 Crawford Street, Portsmouth, Virginia 23704–5004, or they may be hand delivered to the same address between 8 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. The telephone number is (757) 398–6222. The Commander (oan-b), Fifth Coast Guard District maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the above address.

FOR FURTHER INFORMATION CONTACT: Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District, at (757) 398–6222.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD05–03–121), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Commander, Fifth Coast Guard District at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

CONRAIL, who owns and operates this movable (swing-type) bridge, requested changes to the operating procedure for the drawbridge located at mile 1.4 across Mantua Creek, in Paulsboro, New Jersey. Currently, 33 CFR 117.729(a) requires the bridge to open on signal except, that from December 1 through March 1 the draw must open on signal at all times upon four hours notice.

In late spring of 2003, CONRAIL installed a Programmable Logic Controller and associated mechanical, electrical and signal apparatus on the CONRAIL Railroad Bridge over Mantua Creek in Paulsboro, New Jersey. The new equipment allows a radio-controlled system controlled from the cab of the locomotive to operate the opening and closing of the swing span to vessels. This rule proposes to change the operating schedule by allowing the bridge to remain in the open position to vessels for nine months (March through November) and requiring four hours notice for vessel openings during December through February.

This change is being requested to make the closure process of the CONRAIL Railroad Bridge more efficient during train crossings and periodic maintenance. Additionally, it will save operational costs by eliminating bridge tenders while providing greater bridge operating capabilities.

Discussion of Rule

The Coast Guard proposes to revise 33 CFR 117.729(a), which governs the CONRAIL Railroad bridge at mile 1.4 across Mantua Creek in Paulsboro, New Jersey. Currently, the draw opens on signal except that from December 1 through March 1 the draw shall open on signal at all times upon four hours notice.

Paragraph (a) would contain the proposed rule for the CONRAIL Railroad Bridge, mile 1.4, at Paulsboro. The rule would allow the draw of the CONRAIL Railroad Bridge, mile 1.4, at Paulsboro, to be operated by a train crewmember. From March through November, the bridge would be left in the open position to vessels and would only close for the passage of trains and to perform periodic maintenance authorized in accordance with subpart A of this part.

At all other times, the draw of the CONRAIL Railroad Bridge need only open on signal to vessels if at least four hours notice is given by calling (856) 231–2393.

From March through November and before the CONRAIL Railroad Bridge closes for any reason, an on-site train crewmember will assist in observing the waterway for approaching craft, which will be allowed to pass. The on-site train crewmember will then operate the bridge by control radiophone.

The CONRAIL Railroad Bridge would only be closed if the on-site train crewmember's visual inspection shows that the channel is clear and there are no vessels transiting in the area.

While the CONRAIL Railroad Bridge is moving from the full open position to the full closed position, the train crewmember will maintain constant surveillance of the navigation channel to ensure that no conflict with maritime traffic exists. In the event of failure or obstruction, the train crewmember will stop and return the bridge to the full open position to vessels.

During span movement, the channel traffic lights would change from flashing green to flashing red, the horn will sound twice, and an audio voice warning device will announce bridge movement, then two repeat blasts of the horn until the bridge is seated and locked down. When the bridge is seated and locked down to vessels, the channel traffic lights will extinguish.

When the rail traffic has cleared, the horn will automatically sound five times to indicate that the draw of the CONRAIL Railroad Bridge is about to return to its full open position to vessels. During the open span movement, the channel traffic lights

would flash red, the horn will sound twice, followed by a pause, and then an audio warning device will announce bridge movement, then five repeat blasts of the horn until the bridge is in the full open position to vessels. In the full open position to vessels, the bridge channel traffic lights will turn from flashing red to flashing green. After the train has cleared the bridge by leaving the track circuit, any delay in opening of the draw to vessels shall not exceed ten minutes except as provided in 33 CFR 117.31(b).

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. We reached this conclusion based on the fact that the proposed changes for the CONRAIL Railroad Bridge regulation will provide for greater flow of vessel traffic than the current regulations of the drawbridge.

Under the current regulations, the CONRAIL Railroad Bridge remains closed and opens only on signal to vessels. The proposed regulation will require the bridge to remain in the open position for nine months of the year permitting vessels to pass freely. The bridge will close only for train crossings and bridge maintenance. From December through February, the draw shall open on signal if at least four hours advance notice is given by telephone at (856) 231–2393. This proposed regulation will provide for the reasonable needs of navigation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This rule would not have a significant economic impact on a substantial number of small entities for the following reasons. The rule will provide for the CONRAIL Railroad Bridge to remain in the open position from March through November, allowing for the free flow of vessel traffic. The bridge would only close for the passage of trains and maintenance. From December through February, the draw shall open on signal to vessels if at least four hours notice is given by telephone at (856) 231–2393.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (*see* **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District, (757) 398–6222.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to security that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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. We invite your comments on how this rule might impact tribal governments, even if that input may not constitute a ''tribal implication'' under the Order.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

Authority: 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. Section 117.729(a) is revised to read as follows:

§ 117.729 Mantua Creek.

(a) The draw of the CONRAIL Railroad Bridge, mile 1.4 at Paulsboro, shall operate as follows:

(1) From March through November, the draw shall be left in the open position to vessels and will only be closed for the passage of trains and to perform periodic maintenance authorized in accordance with subpart A of this part.

(i) Trains shall be controlled so that any delay in opening of the draw shall not exceed ten minutes except as provided in § 117.31(b).

(ii) Before the bridge closes for any reason, an on-site train crewmember will observe the waterway for approaching craft, which will be allowed to pass. An on-site train crewmember will then operate the bridge by radiophone. The bridge shall only be closed if an on-site train crewmember's visual inspection shows that the channel is clear and there are no vessels transiting in the area.

(iii) While the CONRAIL Railroad Bridge is moving from the full open to the full closed position, an on-site train crewmember will maintain constant surveillance of the navigational channel to ensure no conflict with maritime traffic exists. In the event of failure or obstruction, the on-site train crewmember will stop the bridge and return the bridge to the open position to vessels.

(iv) During closing of the span, the channel traffic lights will change from flashing green to flashing red, the horn will sound twice, and an audio voice warning device will announce bridge movement, then two horn blasts will be repeated and the bridge will close. When the bridge is seated and locked down to vessels, the channel traffic lights will extinguish. When the rail traffic has cleared the swing span, the horn will automatically sound five times to signal the draw of the CONRAIL Railroad Bridge is about to return to its full open position to vessels.

(v) During open span movement, the channel traffic lights will flash red, the horn will sound twice, followed by a pause, and an audio voice warning will announce bridge movement, then five repeated blasts until the bridge is in the full open position. In the full open position, the channel traffic lights will then turn from flashing red to flashing green.

(2) From December through February, the draw may be left in the closed position and opened on signal if at least four hours notice is given by telephone at (856) 231–2393.

* * * * *

Dated: November 10, 2003.

Sally Brice-O'Hara,

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

[FR Doc. 03–29388 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP San Francisco Bay 03–029]

RIN 1625–AA00

Security Zones; San Francisco Bay, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish fixed security zones extending 25 yards in the U.S. navigable waters around all piers, abutments, fenders and pilings of the Golden Gate Bridge and the San Francisco-Oakland Bay Bridge, in San Francisco Bay, California. These security zones are needed for national security reasons to protect the public and ports from potential subversive acts. Entry into these security zones would be prohibited, unless doing so is necessary for safe navigation, to conduct official business such as scheduled maintenance or retrofit operations, or unless specifically authorized by the Captain of the Port San Francisco Bay or his designated representative.

DATES: Comments and related material must reach the Coast Guard on or before January 26, 2004.

ADDRESSES: You may mail comments and related material to the Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, Coast Guard Island, Alameda, California 94501. The Waterways Management Branch maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Waterways Management Branch between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Doug Ebbers, Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, at (510) 437–3073.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (COTP San Francisco Bay 03–029), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Waterways Management Branch at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a separate notice in the **Federal Register**.

Background and Purpose

Since the September 11, 2001 terrorist attacks on the World Trade Center in New York, the Pentagon in Arlington, Virginia and Flight 93, the Federal Bureau of Investigation (FBI) has issued several warnings concerning the potential for additional terrorist attacks within the United States. In addition, the ongoing hostilities in Afghanistan and Iraq have made it prudent for U.S. ports to be on a higher state of alert because Al-Qaeda and other organizations have declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

In its effort to thwart terrorist activity, the Coast Guard has increased safety and security measures on U.S. ports and waterways. As part of the Diplomatic Security and Antiterrorism Act of 1986 (Pub. L. 99–399), Congress amended section 7 of the Ports and Waterways Safety Act (PWSA), 33 U.S.C. 1226, to allow the Coast Guard to take actions, including the establishment of security and safety zones, to prevent or respond to acts of terrorism against individuals, vessels, or public or commercial structures.

The Coast Guard also has authority to establish security zones pursuant to the Act of June 15, 1917, as amended by the Magnuson Act of August 9, 1950 (50 U.S.C. 191 *et seq.*), and implementing regulations promulgated by the President in subparts 6.01 and 6.04 of part 6 of title 33 of the Code of Federal Regulations.

In this particular proposed rulemaking, to address the aforementioned security concerns and to take steps to prevent the catastrophic impact that a terrorist attack against the Golden Gate or San Francisco-Oakland Bay bridge would have on the public, the Coast Guard is proposing to establish fixed security zones extending 25 yards in the U.S. navigable waters around all piers, abutments, fenders and pilings. Theses security zones would help the Coast Guard to prevent vessels or persons from engaging in terrorist actions against these two bridges. Due to these heightened security concerns, and the catastrophic impact a terrorist attack on one of these bridges would have on the public, the transportation system, and surrounding areas and communities, security zones are prudent for these structures.

On February 13, 2003, we issued a rule under docket COTP San Francisco Bay 03–003 and published that rule in the **Federal Register** (68 FR 13228, March 19, 2003) creating temporary § 165.T11–078 of Title 33 of the Code of Federal Regulations (CFR). Under temporary § 165.T11–078, which expired at 11:59 p.m. PDT on September 30, 2003, the Coast Guard established 25-yard fixed security zones around all piers, abutments, fenders and pilings of the Golden Gate Bridge and the San Francisco-Oakland Bay Bridge, San Francisco Bay, California.

On September 8, 2003, a change in effective period temporary rule was issued, under docket COTP San Francisco Bay 03–003 and was published in the **Federal Register** (68 FR 55312, September 25, 2003), under the same previous temporary section 165.T11–078, extending the rule to 11:59 p.m. PST on March 31, 2004. The Captain of the Port has determined there is a need for continued security regulations.

We propose to create permanent security zones in the same areas currently protected by temporary security zones under § 165.T11–078. Our proposed rule would add § 165.1185, Security Zones; Golden Gate Bridge and the San Francisco-Oakland Bay Bridge, San Francisco Bay, California. The Coast Guard will utilize the extended effective period of the § 165.T11–078 to engage in notice and comment rulemaking to develop permanent regulations tailored to the present and foreseeable security environment with the Captain of the Port (COTP) San Francisco Bay.

Discussion of Proposed Rule

The Coast Guard proposes to establish fixed security zones extending 25 yards in the U.S. navigable waters around all piers, abutments, fenders and pilings of the Golden Gate and San Francisco-Oakland Bay bridges. In addition to restricting access to critical parts of bridge structures, these security zones would provide necessary standoff distance for blast and collision, a surveillance and detection perimeter, and a margin of response time for security personnel. This proposed rule, for security reasons, would prohibit entry of any vessel or person inside the security zone without specific authorization from the Captain of the Port or his designated representative.

Vessels or persons violating this section would be subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192. Pursuant to 33 U.S.C. 1232, any violation of the security zone described herein, is punishable by civil penalties (not to exceed $27,500 per violation, where each day of a continuing violation is a separate violation), criminal penalties (imprisonment up to 6 years and a maximum fine of $250,000) and in rem liability against the offending vessel. Any person who violates this section using a dangerous weapon, or who engages in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce this regulation also faces imprisonment up to 12 years. Vessels or persons violating this section are also subject to the penalties set forth in 50 U.S.C. 192: Seizure and forfeiture of the vessel to the United States, a maximum criminal fine of $10,000, and imprisonment up to 10 years.

The Captain of the Port would enforce these zones and may enlist the aid and cooperation of any Federal, State, county, municipal, and private agency to assist in the enforcement of the regulation. This regulation is proposed under the authority of 33 U.S.C. 1226 in addition to the authority contained in 50 U.S.C. 191 and 33 U.S.C. 1231.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this proposed rule restricts access to the waters encompassed by the security zones, the effect of this proposed rule would not be significant because: (i) The zones would encompass only a small portion of the waterway; (ii) vessels would be able to pass safely around the zones; and (iii) vessels may be allowed to enter these zones on a case-by-case basis with permission of the Captain of the Port or his designated representative.

The size of the proposed zones is the minimum necessary to provide adequate protection for the bridges. The entities most likely to be affected are commercial vessels transiting the main ship channel en route to the San Francisco Bay and Delta ports and pleasure craft engaged in recreational activities and sightseeing.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities.

The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. We expect this proposed rule may affect owners and operators of private vessels, some of which may be small entities, intending to fish or sightsee near bridge pilings or abutments affected by these security zones. The proposed security zones would not have a significant economic impact on a substantial number of small entities for several reasons: small vessel traffic would be able to pass safely around the area and vessels engaged in recreational activities, sightseeing and commercial fishing would have ample space outside of the security zones to engage in these activities. Small entities and the maritime public would be advised of these security zones via public notice to mariners.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Doug Ebbers, Waterways Management Branch, U.S. Coast Guard Marine Safety Office San Francisco Bay, at (510) 437–3073.

Collection of Information

This proposed rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because we are establishing a security zone.

A draft ''Environmental Analysis Check List'' and a draft ''Categorical Exclusion Determination'' (CED) are available in the docket where indicated under **ADDRESSES.** Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.1185, to read as follows:

165.1185 Security Zones; Golden Gate Bridge and the San Francisco-Oakland Bay Bridge, San Francisco Bay, California.

(a) *Location.* All waters, extending from the surface to the sea floor, within 25 yards of all piers, abutments, fenders and pilings of the Golden Gate Bridge and the San Francisco-Oakland Bay Bridge, in San Francisco Bay, California.

(b) *Regulations.* (1) In accordance with the general regulations in § 165.33 of this part, entry into these security zones is prohibited, unless doing so is necessary for safe navigation, to conduct official business such as scheduled maintenance or retrofit operations, or unless specifically authorized by the Captain of the Port San Francisco Bay or his designated representative.

(2) Persons desiring to transit the area of the security zone may contact the Captain of the Port at telephone number 415–399–3547 or on VHF–FM channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representative.

(c) *Enforcement.* All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. Patrol personnel comprise commissioned, warrant, and petty officers of the Coast Guard onboard Coast Guard, Coast Guard Auxiliary, local, state, and federal law enforcement vessels. Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel must proceed as directed.

Dated: November 4, 2003.

Gerald M. Swanson,

Captain, U.S. Coast Guard, Captain of the Port, San Francisco Bay, California.

[FR Doc. 03–29387 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–7442]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are requested on the proposed Base (1% annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

ADDRESSES: The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Doug Bellomo, P.E. Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

SUPPLEMENTARY INFORMATION: FEMA proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Mitigation Division Director of the Emergency Preparedness and Response Directorate certifies that this proposed rule is exempt from the requirements of the Regulatory Flexibility Act because proposed or modified BFEs are required by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and are required to establish and maintain community eligibility in the NFIP. No regulatory flexibility analysis has been prepared.

Regulatory Classification. This proposed rule is not a significant regulatory action under the criteria of Section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 12612, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 12612, Federalism, dated October 26, 1987.

Executive Order 12778, Civil Justice Reform. This proposed rule meets the applicable standards of Section 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376, *§ 67.4.*

2. The tables published under the authority of § 67.4 are proposed to be amended as follows:

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet. (NGVD)	
				Existing	Modified
Washington	Lewis County	Newaukum River	Confluence with Chehalis River	*182	*183
			Confluence of North and South Fork Newaukum River.	*267	*268
		Newaukum River Overflow	Approximately 750 feet upstream of Rice Road.	None	*185
			Approximately 2.1 miles upstream of Rice Road.	None	*199

#Depth in feet above ground
*Elevation in feet
Maps are available for inspection at Lewis County Public Works Department, 350 North Market Boulevard, Chehalis, Washington 98532.
Send comments to the Honorable Dennis Hadaller, Chairman, Lewis County Board of Commissioners, 351 Northwest North Street, Chehalis, Washington 98532.

Washington	Napavine (City), Lewis County.	Newaukum River	Approximately 2,000 feet downstream of Rush Road.	None	*224
			Approximately 100 feet upstream of Kirkland Road.	None	*240

#Depth in feet above ground
*Elevation in feet
Maps are available for inspection at 214 Second Avenue Northeast, Napavine, Washington 98565.
Send comments to the Honorable Gary McGuire, Mayor, City of Napavine, P.O. Box 810, Napavine, Washington 98565.

Washington	Chehalis (City), Lewis County.	Newaukum River	Approximately 500 feet upstream of Railroad.	*182	*184
			Approximately 3,650 feet upstream of Railroad.	*187	*185
		Newaukum River Overflow	Approximately 1,200 feet downstream of Rice Road.	None	*185
			Approximately 750 feet upstream of Rice Road.	None	*185

#Depth in feet above ground
*Elevation in feet
Maps are available for inspection at 1321 South Market Boulevard, Chehalis, Washington 98532.
Send comments to the Honorable Bob Saphr, Mayor, City of Chehalis, P.O. Box 871, Chehalis, Washington 98532.

Flooding source(s)	Location of referenced elevation	Elevation in feet *(NGVD)		Communities affected
		Effective	Modified	
Snohomish County and Incorporated Areas				
Ebey Slough	Approximately 1.2 miles downstream of Interstate Highway 5.	*9	*8	Snohomish County (Uninc. Areas) and City of Marysville.
	At divergence from Snohomish River	*18	*19	
Ebey-Steamboat Slough Connector.	At confluence with Steamboat Slough	*9	*12	Snohomish County (Uninc. Areas).
	At divergence from Ebey Slough	*9	*12	
Marshland	At Burlington Northern Railroad tracks	*19	*20	Snohomish County (Uninc. Areas) and City of Everett.
	At divergence from Snohomish River	*30	*23	
Snohomish River	Approximately 1.2 miles of State Highway 529	*9	*8	Snohomish County (Uninc. Areas), City of Monroe, City of Snohomish, and City of Everett.
	At confluence with Skykomish and Snoqualmie Rivers	*39	*41	
Steamboat Slough	Approximately 2.08 miles downstream of Burlington Northern Railroad bridge.	*9	*8	Snohomish County (Uninc. Areas), City of Marysville, and City of Everett.
	At divergence from Snohomish River	*12	*13	

Flooding source(s)	Location of referenced elevation	Elevation in feet *(NGVD)		Communities affected
		Effective	Modified	
Union Slough	Approximately 0.24 miles downstream of Burlington Northern Railroad bridge.	*9	*8	Snohomish County (Uninc. Areas) and City of Everett.
	Approximately 1,270 feet downstream of divergence from Snohomish River.	*12	*12	

Depth in feet above ground
*National Geodetic Datum

ADDRESSES

Unincorporated Areas of Snohomish County:

Maps are available for inspection at the Snohomish County Planning Department, 3000 Rockefeller Avenue, Everett, Washington 98201.

Send comments to the Honorable Bob J. Drewel, Snohomish County Executive, 3000 Rockefeller Avenue, Mail Stop 47, Everett, Washington 98201.

City of Monroe:

Maps are available for inspection at the Engineering Department, City Hall, 806 West Main Street, Monroe, Washington 98272.

Send comments to the Honorable Donnetta Walser, Mayor, City of Monroe, 806 West Main Street, Monroe, Washington 98272.

City of Marysville:

Maps are available for inspection at the Public Works Department, 80 Columbia Avenue, Marysville, Washington 98270.

Send comments to the Honorable David Weiser, Mayor, City of Marysville, 1049 State Avenue, Marysville, Washington 98270.

City of Everett:

Maps are available for inspection at the Public Works Department, 3200 Cedar Street, Everett, Washington 98201.

Send comments to the Honorable Frank Anderson, Mayor, City of Everett, 2930 Wetmore Avenue, Everett, Washington 98201.

City of Snohomish:

Maps are available for inspection at the Engineering Department, 116 Union Avenue, Snohomish, Washington 98290.

Send comments to the Honorable Cameron Bailey, Mayor, City of Snohomish, 116 Union Avenue, Snohomish, Washington 98290.

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance'')

Dated: November 18, 2003.

Anthony S. Lowe,

Mitigation Division Director, Emergency Preparedness and Response Directorate.

[FR Doc. 03–29355 Filed 11–24–03; 8:45 am]

BILLING CODE 9110–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 031107275–3275–01; I.D. 102803A]

RIN 0648–AP03

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic;Snapper-Grouper Fishery off the Southern Atlantic States; Amendment 13A

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement Amendment 13A to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). This rule would extend the current prohibitions on fishing for South Atlantic snapper-grouper in the experimental closed area and on retaining such species in or from the area. The experimental closed area constitutes a portion of the Oculina Bank Habitat Area of Particular Concern (HAPC), which is in the exclusive economic zone (EEZ) in the Atlantic Ocean off Ft. Pierce, FL. The intended effect is to continue the benefits of the closed area, namely, enhanced stock stability and increased recruitment of South Atlantic snapper-grouper by providing an area where deepwater snapper-grouper species can grow and reproduce without being subjected to fishing mortality.

DATES: Written comments on this proposed rule must be received no later than 5 p.m., eastern time, on January 9, 2004.

ADDRESSES: Copies of Amendment 13A may be obtained fromthe South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407–4699; phone: 843–571–4366 or toll free at 1–866–SAFMC–10; fax: 843–769–4520; e-mail: *safmc@noaa.gov*. Amendment 13A includes an Environmental Assessment (EA), an Initial Regulatory Flexibility Analysis (IRFA) that was supplemented by NMFS, a Regulatory Impact Review, and a Social Impact Assessment/Fishery Impact Statement.

Written comments on the proposed rule must be sent to Julie Weeder, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702. Comments also may be sent via fax to 727–570–5583. Comments will not be accepted if submitted via e-mail or Internet.

FOR FURTHER INFORMATION CONTACT: Julie Weeder, telephone: 727–570–5753, fax: 727–570–5583, e-mail: *Julie.Weeder@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery off the southern Atlantic states is managed under the FMP. The FMP was prepared by the South Atlantic Fishery Management Council (Council) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

In Amendment 6 to the FMP the Council proposed prohibitions on fishing for South Atlantic snapper-grouper in what is currently known as the experimental closed area and on retaining such species in or from the area. NMFS approved these prohibitions, and they became effective June 27, 1994 (59 FR27242, May 26, 1994). In the experimental closed area,

any South Atlantic snapper-grouper taken incidentally by hook-and-line gear must be released immediately by cutting the line without removing the fish from the water.

The experimental closed area is slightly less than 92 square nautical miles in the EEZ offshore from Ft. Pierce to Sebastian Inlet, FL. The geographical coordinates are specified at 50 CFR 622.35(c)(2). The experimental closed area constitutes a portion of the southern part of the Oculina Bank HAPC. In the entire HAPC no person may: (1) Use a bottom longline, bottom trawl, dredge, pot, or trap; (2) if aboard a fishing vessel, anchor, use an anchor and chain, or use a grapple and chain; or (3) fish for rock shrimp or possess rock shrimp in or from the area on board a fishing vessel.

Both the proposed and final rules for Amendment 6 stated that the measures applicable to the experimental closed area ''... will ''sunset'' after 10 years if not reauthorized by the Council.''(59 FR 9721, March 1, 1994 and 59 FR 27242, May 26, 1994, respectively).

As stated above, measures applicable to the experimental closed area were intended to enhance stock stability and increase recruitment of South Atlantic snapper-grouper by providing an area where deepwater snapper-grouper species could grow and reproduce without being subjected to fishing mortality. They were based on the Council's concern that traditional fishery management measures, such as minimum size limits and quotas, might not be sufficient to protect fully the snapper-grouper resources. The Council believed the measures would provide protection for overfished species in the management unit while minimizing adverse impacts upon user groups.

Based on limited information, there appear to be some encouraging signs of positive biological impacts from the initial 9–year prohibition of fishing for snapper grouper species within the experimental closed area since it was established in 1994. A study conducted in 2001 found that, in the few areas where habitat remained intact, there were more and larger groupers thanobserved in a 1995 study, and male gag and scamp were also common. The observation of male gag and scamp is particularly of interest because size, age, and proportion of males of these species have declined both in the Gulf of Mexico and South Atlantic regions. Other encouraging signs include theobservation of juvenile speckled hind, which is a candidate species for listing under the Endangered Species Act. However, species in the management unit remain overfished and continued protection is required.

Proposed Actions

Amendment 13A proposes to continue the current measures applicable to the experimental closed area indefinitely. Those measures at 50 CFR 622(c)(2) read as follows:

''(2) *Experimental closed area.* Within the Oculina Bank HAPC, the experimental closed area is bounded on the north by 27°53′ N. lat., on the south by 27°30′ N. lat., on the east by 79°56′ W. long., and on the west by 80°00′ W. long. No person may fish for South Atlantic snapper-grouper in the experimental closedarea, and no person may retain South Atlantic snapper-grouper in or from the area. In the experimental closed area, any South Atlantic snapper-grouper taken incidentally by hook-and-line gear must be released immediately by cutting the line without removing the fish from the water.''

The Council would review the configuration and size of the experimental closed area within 3 years of the publication date of the final rule that would implement Amendment 13A and would re-evaluate all measures applicable to the area after 10 years. The Council believes these actions provide the most biological, social, and economic benefits while allowing for adaptive management. Extending the prohibition on fishing for snapper-grouper species in the experimental closed area for an indefinite period will continue to protect snapper-grouper populations and protect *Oculina* coral and associated habitat. Such extension will also provide a hedge against the high degree of scientific uncertainty associated with the status of snapper-grouper species and reduce the possibility that these populations may fall below sustainable levels. Economically it is expected that the long-term benefits, such as ''insurance'' against the uncertainty of stock assessments and the non-use benefits of extending the prohibitions on snapper-grouper fishing in the closed area, outweigh the short-term benefits of opening the area to harvest. These measures are also expected to provide the most long-term positive social impacts because they allow for adaptive management which can be seen as an assurance to the public that the area will be monitored and reviewed. Should the Council find after the 3–year review on size and configuration that the boundaries of the area are not appropriate, they can be changed at that time. In addition, the 10–year re-evaluation period will assure the public that the area will not be closed and forgotten.

Availability of Amendment 13A

Additional background and rationale for the measures discussed above are contained in Amendment 13A. The availability of Amendment 13A was announced in the **Federal Register** on November 4, 2003, (68 FR 62422). Written comments on Amendment 13A must be received by January 5, 2004. All comments received on Amendment 13A or on this proposed rule during their respective comment periods will be addressed in the preamble to the final rule.

Classification

At this time, NMFS has not determined that Amendment 13A is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account the data, views, andcomments received during the comment period on Amendment 13A.

This proposed rule has been determined to be not significant for purposes of E.O. 12866.

The Council prepared, and NMFS supplemented, an IRFA, based on the RIR, that describes the economic impacts that this proposed rule, if adopted, would have on small business entities. A summary of the IRFA follows:

Amendment 6 to the Snapper-Grouper Fishery Management Plan, implemented in May 1994, established a harvest prohibition for snapper-grouper species in the *Oculina* Experimental Closed Area. This prohibition is scheduled to sunset in June 2004. The proposed rule would extend the prohibition for an indefinite period of time for the purpose of providing continued protection of snapper-grouper species, thereby reducing the possibility that these populations may fall below sustainable levels. Further, by restricting the ability to harvest fish from the area, the proposed rule is also expected to provide protection to the *Oculina* coral in the area. The Magnuson-Stevens Act, as amended, provides the statutory basis for the proposed rule.

No duplicative, overlapping, or conflicting Federal rules have been identified. The proposed rule does not impose any reporting or record keeping requirements.

There are two general classes of small entities that would be directly affected by the proposed rule, commercial fishing vessels and for-hire fishing vessels. The Small Business Administration defines a small business that engages in commercial fishing as a firm that is independently owned and

operated, is not dominant in its field of operation, and hasannual receipts up to $3.5 million per year. The revenue benchmark for a small business that engages in for-hire fishing is a firm that has annual receipts up to $6.0 million per year. There were 1,174 commercial vessels that participated in the snapper-grouper fishery in the South Atlantic during 2002. Of these vessels, 120 were homeported in the area of interest, where the ''area of interest'' is defined as those home port locations on the Florida Atlantic coast from Cape Canaveral south to West Palm Beach and are in the closest geographic proximity to the area covered by the proposed rule. Commercial vessels operating in the snapper-grouper fishery in this area are estimated to have average annual gross and net incomes of approximately $39,745 and $12,388, respectively. Based on this income profile, it is assumed that all commercial fishing entities that would be affected by the proposed rule are small entities.

For the for-hire sector, 1,221 snapper-grouper for-hire permits were issued to vessels in the southern Atlantic states in 2002. Of this total, 94 permits were issued to for-hire vessels in the area of interest. These vessels comprise two types of business operations, charterboats, which are smaller vessels (6 or fewer passengers) that book trips on a vessel basis, andheadboats, which are larger vessels that book passage on an individual angler basis. The average gross and net revenues in 1997 for charterboats operating off the Atlantic coast of Florida are estimated at $57,000 and $15,000 (2001 dollars), while that of headboats are estimated at $155,000 and $69,000 (2001dollars). Based on these gross revenue profiles, all for-hire vessels that would be affected by the proposed rule are assumed to be small entities.

The number of commercial and for-hire vessels that would fish in the closed area should the area reopen after sunset of the current rule is not known. However, all entities in the area of interest have the potential to enter the area. Since all such entities would be covered by the proposed rule and all said entities are small entities, it is concluded that a substantial number of small entities would be affected by the proposed rule. An IRFA was prepared to analyze the expected impacts on small entities. The proposed rule extending harvest prohibition for an indefinite period would not alter present fishing practices. Therefore, it would not affect the profitability of identified vessels. However, if there are any speculative decisions about the sunset of the existing rule in June 2004, there could be some reduction in future speculative earnings. The public is invited to comment and to provide any information that would enable NMFS to identify and assess any future potential economic impacts that could result from the proposed rule.

Five alternatives to the proposed rule were considered. One alternative differs from the proposed rule only in that it lacks a specific schedule for re-evaluation of the rule. Three alternatives also lack a re-evaluation schedule and differ from the proposed rule in the duration of the prohibition. No impacts have been identified associated with the presence or absence ofa prescribed re-evaluation schedule. These four alternatives, therefore, are expected to have the same effect on the affected entities as the proposed rule, and none would adversely affect current profitability but would, instead, eliminate potential increased short-term profits that might be derived from fishing activity directed into the *Oculina* area, should sunset occur. The fifth alternative, the no-action alternative, would allow forsunset of the prohibition and fishing in the area to occur. This alternative would, therefore, allow these potential short-term increases in profits to occur. However, if snapper-grouper populations become depleted as a result of directed effort insidethe area, the short-term gains would dissipate. Further, these potential short-term profits are not believed to be greater than the benefits that would accrue to continued protection of the resource and area. These benefits are expected to exceed potential short-term profits no matter how long the prohibition continues. The proposed rule, therefore, would best suit management needs and meet the Council's intent.

Changes to Regulatory Text

If approved, the measures in Amendment 13A would continue in effect in the current regulations. Accordingly, this proposed rule contains no changes to regulatory text. If Amendment 13A is disapproved, the regulatory text at 50 CFR 622.35(c)(2) would be removed effective June 27, 2004.

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

Dated: November 19, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 03–29444 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 68, No. 227

Tuesday, November 25, 2003

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

Foreign Agricultural Service

Trade Adjustment Assistance for Farmers

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice.

The Administrator, Foreign Agricultural Service (FAS), certified a petition for trade adjustment assistance (TAA) that was filed on October 8, 2003, by the Catfish Farmers of America, Indianola, Mississippi; Rutledge & Rutledge, Newport, Arkansas; and the Western Regional Chapter of the Kentucky Aquaculture Association, Farmington, Kentucky, on behalf of catfish producers in the states of Alabama, Arkansas, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Texas, and Utah. Producers are now eligible to apply for program benefits.

SUPPLEMENTARY INFORMATION: Upon investigation, the Administrator determined that increased imports of catfish and fillets of Vietnamese basa and tra contributed importantly to a decline in producer prices of farm-raised catfish in the above states by 20.9 percent during January 2002 through December 2002, when compared with the previous 5-year average.

Catfish farmers certified as eligible for TAA may apply to the Farm Service Agency for benefits through February 16, 2004. After submitting completed applications, producers shall receive technical assistance provided by the Extension Service at no cost and an adjustment assistance payment, if certain program criteria are met.

Producers of raw agricultural commodities wishing to learn more about TAA and how they may apply should contact the Department of Agriculture at the addresses provided below for General Information.

Producers Certified as Eligible for TAA, Contact: The Farm Service Agency service centers in your respective state.

For General Information about TAA, Contact: Jean-Louis Pajot, Coordinator, Trade Adjustment Assistance for Farmers, FAS, USDA, (202) 720–2916, e-mail: *trade.adjustment@fas.usda.gov.*

Dated: November 14, 2003.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service.

[FR Doc. 03–29398 Filed 11–24–03; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF THE AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–930–6333]

Correction to Notice of Availability (NOA) for the Final Supplemental Environmental Impact Statement (FSEIS) for the Clarification of Language in the 1994 Record of Decision for the Northwest Forest Plan; National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl (Proposal To Amend Wording About the Aquatic Conservation Strategy); Western Oregon and Washington, and Northwestern California

AGENCY: Forest Service, USDA; Bureau of Land Management, USDI.

ACTION: Correction notice.

SUMMARY: This notice amends the NOA for the FSEIS for the Clarification of Language in the 1994 Record of Decision for the Northwest Forest Plan; National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl (Proposal to Amend Wording about the Aquatic Conservation Strategy); Western Oregon and Washington, and Northwestern California printed in the **Federal Register**: Vol. 68, No. 211 on Friday, October 31, 2003. The correct Web site for obtaining an electronic copy of the FSEIS is *http://www.reo.gov/acs/.*

FOR FURTHER INFORMATION CONTACT: Joyce Casey; phone (503) 326–2430; e-mail: *jcasey01@fs.fed.us* or Leslie Frewing-Runyon; phone (503) 808–6088; E-mail: *lfrewing@or.blm.gov.*

Dated: November 14, 2003.

Judy Ellen Nelson,

Deputy State Director, Resource Planning, Use & Protection.

Dated: November 14, 2003.

Lisa E. Freedman,

Director, Resource Planning and Monitoring, Pacific Northwest Region.

[FR Doc. 03–29400 Filed 11–24–03; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF AGRICULTURE

Forest Service

Madera County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of Resource Advisory Committee meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act of 1972 (Pub. L. 92–463) and under the secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Sierra National Forest's Resource Advisory Committee for Madera County will meet on Monday, December 15, 2003. The Madera Resource Advisory Committee will meet at the U.S.D.A. Forest Service Office in North Fork, CA. The purpose of the meeting is: Review new RAC proposals, review progress of FY 2002 accounting, monitoring and evaluation, voting procedures proposal update, conference update, arrowhead presentation, review of Sierra business council book, and review of newsletter.

DATES: The Madera Resource Advisory Committee will be held Monday, December 15, 2003. The meeting will be held from 7 p.m. to 9 p.m.

ADDRESSES: The Madera County RAC meeting will be held at the U.S.D.A. Forest Service Office, Bass Lake Ranger District, 57003 Road 225, North Fork, CA 93643.

FOR FURTHER INFORMATION CONTACT: Dave Martin, U.S.D.A., Sierra National Forest, Bass Lake Ranger District, 57003 Road 225, North Fork, CA 93643, (559) 877–2218 ext. 3100; e-mail: *dmartin05@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Review new RAC proposals, (2) review progress

of FY 2002 accounting, (3) monitoring and evaluation, (4) voting procedures proposal update, (5) conference update, (6) Arrowhead presentation, (7) review of Sierra business council book, and, (8) review of newsletter. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: November 18, 2003.

David W. Martin,

District Ranger.

[FR Doc. 03–29343 Filed 11–24–03; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the New Jersey 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 planning meeting with briefing of New Jersey Advisory Committee will convene at 10 a.m. and adjourn at 4 p.m. on Tuesday, December 2, 2003, at the New Jersey State House, Room 4, 125 W. State Street, Trenton, NJ 08625. The purpose of the planning meeting with briefing is to (1) review the status of current activities, (2) plan new projects, and (3) receive briefings from invited speakers on civil rights developments in the state.

Persons desiring additional information, or planning a presentation to the Committee, should contact Edward Darden 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, November 17, 2003.

Ivy L. Davis,

Chief, Regional Program Coordination Unit.

[FR Doc. 03–29439 Filed 11–24–03; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 40–2003]

Foreign-Trade Zone No. 181, Application for Expansion, Amendment of Application

Notice is hereby given that the application of the Northeast Ohio Trade & Economic Consortium (NEOTEC), grantee of FTZ 181, for authority to expand and reorganize FTZ 181 in the Akron/Canton, Ohio area (Doc. 40–2003, 68 FR 51549, 8/27/03), has been amended to leave the 7 acres in the southern portion of the Akron-Canton Regional Airport. The application otherwise remains unchanged.

Comments on the change may be submitted to the Foreign-Trade-Zones Board, U.S. Department of Commerce, FCB—Suite 4100W, 1401 Constitution Ave., NW., Washington, DC 20230, by December 10, 2003.

Dated: November 18, 2003.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 03–29434 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–821]

Stainless Steel Wire Rod From Italy: Extension of Time Limit for Preliminary Results of Five-Year Sunset Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for preliminary results of five-year (''Sunset'') review: stainless steel wire rod from Italy.

SUMMARY: The Department of Commerce (''the Department'') is extending the time limit for preliminary results in the full sunset review of the countervailing duty order on stainless steel wire rod (''SSWR'') from Italy.[1] The Department intends to issue preliminary results of this sunset review on or before February 19, 2004. In addition, the Department intends to issue its final results of review not later than 120 days after the date of publication in the **Federal Register** of the preliminary results.

EFFECTIVE DATE: November 25, 2003.

FOR FURTHER INFORMATION CONTACT: Martha V. Douthit or Kelly Parkhill, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5050 or (202–482–3791.

Extension of Preliminary

On August 1, 2003, the Department initiated a sunset review of the countervailing duty order on SSWR from Italy.[2] The Department, in this proceeding, determined to conduct a full (240 day) sunset review of this order based on adequate responses to the notice of initiation on SSWR from Italy from the domestic and respondent interested parties. The Department's preliminary results of this review are scheduled for November 19, 2003. However, several issues have arisen regarding the recent revocation of the order with respect to Cogne Acciai Speciali S.r.l. (''CAS'') and its effect on this sunset review.[3]

Because of the complex issues in this proceeding, the Department has determined to extend the deadline. We are therefore extending the period for issuing preliminary results by 90 days pursuant to section 751(c)(5)(B) of the Act). Thus, the Department intends to issue the preliminary results not later than February 19, 2004, in accordance with section 751(c)(5)(B) of the Act. Final results of this sunset review will be issued not later than 120 days after the date of publication in the **Federal Register** of the preliminary results.

Dated: November 19, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03–29435 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–DS–P

[1] The Department normally will issue its preliminary results in a full sunset review not later than 110 days after the date of publication in the **Federal Register** of the notice of initiation. However, if the Secretary determines that a full sunset review is extraordinarily complicated under section 751(c)(5)(C) of the Act, the Secretary may extend the period for issuing final results by not more than 90 days. *See* section 751(c)(5)(B) of the Act.

[2] *See Initiation of Five-Year (Sunset) Reviews,* 68 FR 45219 (August 1, 2003).

[3] *See Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act: Countervailing Measures Concerning Certain Steel Products From the European Communities,* 68 FR 64858 (November 17, 2003).

DEPARTMENT OF COMMERCE

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of Issuance of an Amended Export Trade Certificate of Review, Application No. 92–7A001.

SUMMARY: The Department of Commerce has issued an amendment to the Export Trade Certificate of Review granted to Aerospace Industries Association of America, Inc. (''AIA'') on April 10, 1992. Notice of issuance of the Certificate was published in the **Federal Register** on April 17, 1992 (57 FR 13707).

FOR FURTHER INFORMATION CONTACT: Jeffrey C. Anspacher, Director, Office of Export Trading Company Affairs, International Trade Administration, by telephone at (202) 482–5131(this is not a toll-free number), or by E-mail at *oetca@ita.doc.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. Sections 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III are found at 15 CFR part 325 (2003).

The Office of Export Trading Company Affairs (''OETCA'') is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Department of Commerce to publish a summary of the certification in the **Federal Register**. Under Section 305(a) of the Act and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Amended Certificate

Export Trade Certificate of Review No. 92–00001, was issued to Aerospace Industries Association of America on April 10, 1992 (57 FR 13707, April 17, 1992) and previously amended on September 8, 1992 (57 FR 41920, September 14, 1992); October 8, 1993 (58 FR 53711, October 18, 1993); November 17, 1994 (59 FR 60349, November 23, 1994); June 26, 1995 (60 FR 36262, July 14, 1995); November 12, 1998 (63 FR 64061, November 18, 1998), and December 4, 2001 (66 FR 64216, December 12, 2001).

AIA's Export Trade Certificate of Review has been amended to: 1. Add each of the following companies as a new ''Member'' of the Certificate within the meaning of section 325.2(1) of the Regulations (15 CFR 325.2(1)): Areté Associates, Arlington, VA; AstroVision International, Inc., Bethesda, MD; B&E Tool Company, Inc., Southwick, MA; Celestica Corporation, Toronto, Ontario; Computer Sciences Corporation, El Segundo, CA; Crane Aerospace & Electronics, Lynwood, WA, (Controlling Entity: Crane Company, Stamford, CT); Dy 4 Systems Limited, Kanata, Ontario, (Controlling Entities: Force Computers, Fremont, CA, and Solectron Corporation, Milpitas, CA); EDO Corporation, New York, NY; EFW Inc., Fort Worth, TX; ESIS, Inc., San Diego, CA; Federation, Inc., Centennial, CO; HITCO Carbon Composites, Inc., Gardena, CA; JEDCO, Inc., Grand Rapids, MI; L–3 Communications Holdings, Inc., New York, NY; 3M Company, St. Paul, MN; Orbital Sciences Corporation, Dulles, VA; PerkinElmer, Inc., Wellesley, MA; Proficiency, Inc., Marlborough, MA; The Purdy Corporation, Manchester, CT; Remmele Engineering, Inc., New Brighton, MN; RTI International Metals, Inc., Niles, OH; Silicon Graphics, Inc., Mountain View, CA; SM&A, Newport Beach, CA; and Titan Corporation, San Diego, CA;

2. Delete the following companies as ''Members'' of the Certificate: The Aerostructures Corporation, Nashville, TN; Davis Tools, Inc., Hillsboro, OR; Fairchild Dornier Corporation, Wessling, Germany; The Fairchild Corporation, Dulles, VA, for the activities of Fairchild Fasteners, Dulles, VA; Genuity Solutions, Inc., Woburn, MA; Groen Brothers Aviation Incorporated, Salt Lake City, Utah; i2Technologies, Washington, DC; The NORDAM Group, Tulsa, OK; Robinson Helicopter Company, Torrance, CA; Space Access, LLC, Palmdale, CA; and TRW Inc., Cleveland, OH; and

3. Change the listing of the following Members: ''Stellex Aerostructures, Inc., Woodland Hills, CA'' to the new listing ''Stellex Aerostructures, Inc., Lebanon, NJ''; ''GenCorp, Sacramento, CA'' to the new listing ''Aerojet, Rancho Cordova, CA''; ''Parker Hannifin Corporation, Cleveland, OH'' to the new listing ''Parker Aerospace, Irvine, CA''; ''Embraer Aircraft Corporation, Brazil'' to the new listing ''Embraer Aircraft Holding, Inc., Fort Lauderdale, FL''; ''GKN Aerospace, Inc., Reston, VA'' to the new listing ''GKN Aerospace Services, Farnham, Surrey, UK''; ''The Boeing Company, Seattle, WA'' to the new listing ''Boeing Company, Chicago, IL''; ''Honeywell Incorporated, Morristown, NJ'' to the new listing ''Honeywell Aerospace, Phoenix, AZ''; ''MatrixOne, Inc., Chelmsford, MA'' to the new listing ''MatrixOne Inc., Westford, MA''; and ''Smiths Group, PLC, London, England, UK, for the activities of Smiths Aerospace Actuation Systems, Los Angeles, Duarte, CA'' to the new listing ''Smiths Aerospace Actuation Systems, Duarte, CA''.

A copy of the amended certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, Room 4102, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Dated: November 19, 2003.

Jeffrey A. Anspacher,

Director, Office of Export Trading, Company Affairs.

[FR Doc. 03–29339 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Visiting Committee on Advanced Technology

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of partially closed meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that the Visiting Committee on Advanced Technology, National Institute of Standards and Technology (NIST), will meet Tuesday, December 9, 2003, from 8:25 a.m. to 5:15 p.m. and Wednesday, December 10, 2003, from 8:15 a.m. to 11:30 a.m. The Visiting Committee on Advanced Technology is composed of fourteen members appointed by the Director of NIST; who are eminent in such fields as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. The purpose of this meeting is to review and make recommendations regarding general policy for the Institute, its organization, its budget, and its programs within the framework of applicable national policies as set forth by the President and the Congress. The agenda will include a NIST update on current NIST programs; strategic plan and program priorities; human resources, safety, and diversity; and program implementation and evaluation. The agenda will also include tours of two laboratory projects. Discussions scheduled to begin at 8:15 a.m. and to end at 11:30 a.m. on

December 10, 2003, on the NIST budget, planning information and feedback sessions will be closed. Agenda may change to accommodate Committee business. Final agenda will be posted on website. All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Please submit your name, time of arrival, e-mail address and phone number to Carolyn Peters no later than Thursday, December 4, 2003, and she will provide you with instructions for admittance. Mrs. Peter's e-mail address is *carolyn.peters@nist.gov* and her phone number is (301) 975–5607.

DATES: The meeting will convene December 9, 2003 at 8:25 a.m. and will adjourn at 11:30 a.m. on December 10, 2003.

ADDRESS: The meeting will be held in the Employees Lounge, Administration Building, at NIST, Gaithersburg, Maryland. Please note admittance instructions under **SUMMARY** paragraph.

FOR FURTHER INFORMATION CONTACT: Carolyn J. Peters, Visiting Committee on Advanced Technology, National Institute of Standards and Technology, Gaithersburg, Maryland 20899–1004, telephone number (301) 975–5607.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on February 25, 2003, that portions of the meeting of the Visiting Committee on Advanced Technology which deal with discussion of sensitive budget and planning information that would cause harm to third parties if publicly shared be closed in accordance with Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. app. 2.

Dated: November 20, 2003.

Arden L. Bement, Jr.,

Director.

[FR Doc. 03–29361 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Malcolm Baldrige National Quality Award Board of Overseers

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that there will be a meeting of the Board of Overseers of the Malcolm Baldrige National Quality Award on December 17, 2003. The Board of Overseers is composed of eleven members prominent in the field of quality management and appointed by the Secretary of Commerce, assembled to advise the Secretary of Commerce on the conduct of the Baldrige Award. The purpose of this meeting is to discuss and review information received from the National Institute of Standards and Technology with the members of the Judges Panel of the Malcolm Baldrige National Quality Award. The agenda will include: Report from the Judges' Panel, Baldrige Program Update, Booz Allen CEO Marketing Study, Baldrige Program Metrics, Role Model Characteristics in a Labor/Management Relations Environment, BNQP Hoshin for 2004, Topics for Discussion with NIST Director, New Business, and Recommendations to the NIST Director. All visitors to the National Institute of Standards and Technology site will have to pre-register to be admitted. Please submit your name, time of arrival, e-mail address and phone number to Virginia Davis no later than Monday, December 15, 2003, and she will provide you with instructions for admittance. Ms. Davis' e-mail address is *virginia.davis@nist.gov* and her phone number is (301) 975–2361.

DATE: The meeting will convene December 17, 2003 at 8:30 a.m. and adjourn at 3 p.m. on December 17, 2003.

ADDRESS: The meeting will be held at the National Institute of Standards and Technology, Administration Building, Lecture Room A, Gaithersburg, Maryland 20899. Please note admittance instructions under **SUMMARY** paragraph.

FOR FURTHER INFORMATION CONTACT: Dr. Harry Hertz, Director, National Quality Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975–2361.

Dated: November 20, 2003.

Arden L. Bement, Jr.,

Director.

[FR Doc. 03–29360 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Announcing a Workshop on Spam Technology

AGENCY: National Institute of Standards and Technology (NIST).

ACTION: Notice of public workshop and request for participation.

SUMMARY: The National Institute of Standards and Technology (NIST) announces a workshop to discuss various technical issues of e-mail spam.

DATE: The Spam Technology Workshop will be held on February 17, 2004, from 9 a.m. to 4 p.m.

ADDRESSES: The Spam Technology Workshop will be held in the Administration Building (Bldg. 101), Green Auditorium, National Institute of Standards and Technology, Gaithersburg, MD.

FOR FURTHER INFORMATION CONTACT: Further information may be obtained from the Spam Technology Web site at *http://csrc.nist.gov/spam* or by contacting Joan Hash, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8930, Gaithersburg, MD 20899–8930; telephone (301) 975–3357; fax (301) 975–4007, or e-mail *joan.hash@nist.gov.*

SUPPLEMENTARY INFORMATION: The workshop agenda topics will include filtering at the Internet/network and client sides (*e.g.*, how to detect spam and how to reduce it), input from standards bodies on relevant current activities, Internet service providers' current and future plans to deal with spam, and technical issues regarding the efficacy of proposals to create ''do not spam'' lists. NIST is also interested in hearing about research challenges to developing and measuring improvements in spam control and reduction technology.

NIST also wishes to discuss idea for criteria and procedures (that might be developed by NIST and others, resources permitting) by which the effectiveness of spam controls products might be tested (*e.g.*, by independent third party testing organizations).

Given the one-day workshop format, it is anticipated that following a keynote presentation and other opening remarks, there will be two sessions/panels in the morning and two in the afternoon. Anyone interested in speaking or coordinating a panel discussion should submit a paper or panel proposal to Joan Hash by December 31, 2003. Topics and proposed talks should not be ''sales pitches'' for specific commercial products or firms. Papers and additional information for distribution to workshop attendees and the website may also be submitted. (NIST may decide at its discretion not to include non-germane and product sales material.) Additional proposed agenda topics should be submitted immediately

for consideration by the NIST planning committee.

Because of NIST security regulations, advance registration is mandatory; there will be no on-site, same-day registration. To register, please register via the web at *http://www.nist.gov/conferences* or fax the registration form with your name, address, telephone, fax and e-mail address to 301–948–2067 (Attn: Spam Technology Workshop) by February 3, 2004. The registration fee will be $70. Payment can be made by credit card, check, purchase order, and government training form. Registration questions should be addressed to Teresa Vicente on 301–975–3883 or *teresa.vicente@nist.gov.*

Authority

This work effort is being initiated pursuant to NIST's responsibilities under the Federal Information Security Management Act of 2002, the Computer Security Act of 1987, the Information Technology Management Reform Act of 1996, Executive Order 13011, and OMB Circular A–130.

Dated: November 20, 2003.

Arden L. Bement, Jr.,

Director.

[FR Doc. 03–29359 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–CN–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 092403A]

Small Takes of Marine Mammals Incidental to Specified Activities; Seismic Retrofit of the Richmond-San Rafael Bridge, San Francisco Bay, CA

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

ACTION: Notice of issuance of an incidental harassment authorization.

SUMMARY: In accordance with provisions of the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) has been issued to the California Department of Transportation (CALTRANS) to take small numbers of Pacific harbor seals and possibly California sea lions, by harassment, incidental to seismic retrofit construction of the Richmond-San Rafael Bridge (the Bridge), San Francisco Bay (SFB), CA.

DATES: This authorization is effective from November 19, 2003 through November 18, 2004.

ADDRESSES: A copy of the application may be obtained by writing to P. Michael Payne, Chief, Marine Mammal Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, or by telephoning one of the contacts listed here.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, Office of Protected Resources, NMFS, (301) 713–2055, ext 128 or Monica DeAngelis, Southwest Regional Office, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Permission may be granted if NMFS finds that the taking will have no more than a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses and that the permissible methods of taking and requirements pertaining to the monitoring and reporting of such taking are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Under section 18(A), the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On September 22, 2003, NMFS received a letter from CALTRANS, requesting reauthorization of an IHA that was first issued to it on December 16, 1997 (62 FR 67045, December 23, 1997), was renewed on January 8, 2000 (65 FR 2375, January 14, 2000), September 19, 2001 (66 FR 49165, September 26, 2001), and September 23, 2002 (67 FR 61323, September 30, 2002).

The renewed authorization request is for the possible harassment of small numbers of Pacific harbor seals (*Phoca vitulina*) and possibly some California sea lions (*Zalophus californianus*), incidental to seismic retrofit construction of the Bridge.

The Bridge is being seismically retrofitted to withstand a future severe earthquake. Construction is scheduled to extend until the year 2005. A detailed description of the work planned is contained in the Final Natural Environmental Study/Biological Assessment for the Richmond-San Rafael Bridge Seismic Retrofit Project (CALTRANS, 1996). Among other things, seismic retrofit work will include excavation around pier bases, hydro-jet cleaning, installation of steel casings around the piers with a crane, installation of micro-piles, and installation of precast concrete jackets. Foundation construction will require approximately 2 months per pier, with construction occurring on more than one pier at a time. In addition to pier retrofit, superstructure construction and tower retrofit work will also be carried out. Because seismic retrofit construction between piers 52 and 57 has the potential to disturb harbor seals hauled out on Castro Rocks, an IHA is warranted. The duration for the seismic retrofit of foundation and towers on piers 52 through 57, which began this year, will take approximately 7 to 8 months to complete.

Comments and Responses

A notice of receipt of the application and proposed authorization was published on October 3, 2003 (68 FR

57430), and a 30–day public comment period was provided on the application and proposed authorization. No comments were received on this IHA application and proposed authorization.

Description of Habitat and Marine Mammals Affected by the Activity

A description of SFB ecosystem and its associated marine mammals can be found in the original CALTRANS application (CALTRANS 1997) and in CALTRANS (1996). Castro Rocks are a small chain of rocky islands located next to the Bridge and approximately 1500 ft (460 m) north of the Chevron Long Wharf. They extend in a southwesterly direction for approximately 800 ft (240 m) from pier 55. The rocks start at about 55 ft (17 m) from pier 55 (A rock) and end at approximately 250 ft (76 m) from pier 53 (F rock). The chain of rocks is exposed during low tides and inundated during high tide.

Marine Mammals

General information on harbor seals and other marine mammal species found in Central California waters can be found in Caretta et al. (2002, 2001), which are available at the following URL: *http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/sars.html*. Please refer to these documents for information on these species. The marine mammals likely to be affected by work in the Bridge area are limited to harbor seals and California sea lions.

The harbor seal is the only marine mammal species expected to be found regularly in the Bridge area. A detailed description of harbor seals was provided in the 1997 notification of proposed authorization (62 FR 46480, September 3, 1997) with corrections and clarifications provided in the notice of IHA issuance (62 FR 67045, December 23, 1997). This information is not repeated here, but may be found in the **Federal Register** notices mentioned previously in this document.

We note here however, that pups are born in mid- to late-March, peak numbers of pups are observed in early May, and, by the first week in June, all pups are weaned (Kopec and Harvey, 1995). Estimated pup counts at Castro Rocks were 35 in 1999, 40 in 2000 and 40 in 2001 (A. Bohorquez pers. comm in Green *et al.*, 2001). This represents approximately 22–24 percent of the pups born in SFB.

The California sea lion primarily uses the Central SFB area to feed. California sea lions are periodically observed at Castro Rocks. No pupping or regular haulouts occur in the project area.

Potential Effects on Marine Mammals

The impact to the harbor seals and California sea lions is expected to be disturbance by the presence of workers, construction noise, and construction vessel traffic. Disturbance from these activities is expected to have only a short-term negligible impact to a small number of harbor seals and sea lions. These disturbances will be reduced to the lowest level practicable by implementation of the proposed work restrictions and mitigation measures (*see* Mitigation).

Marine mammal monitoring under previous IHAs has been conducted at Castro Rocks and at two ''control'' haul-out locations in SFB, Mowry Slough and Yerba Buena Island (Green *et al.*, 2001, 2002) since 1998. To date, over 10,000 hours of observations have been conducted at these sites with two-thirds of those hours at Castro Rocks. While disturbances can consist of head alerts, approaches to the water, and flushes into the water, only the latter behavior is considered by NMFS to be Level B harassment. At Castro Rocks, of all flush disturbances monitored during the day, the major harassment sources were watercraft (*e.g.* motorboats, sailboats, tankers, kayaks and jet skis) with 0.128 disturbances per hour of field time (d/hr); wildlife (seals and birds) with 0.075 d/hr; anthropogenic (debris, workmen on bridge with 0.040 d/hr; and ''research'' with 0.021 d/hr. Construction activities resulted in 0.0165 d/hr. There were fewer flushes observed at night. For more detailed information on the extent of take by harassment at Castro Rocks by activities other than the requested authorization, please refer to Green *et al.* (2002).

During the Work Period (August 1 through February 14), the incidental harassment of harbor seals and, on rare occasions, California sea lions is expected to occur on a daily basis upon initiation of the retrofit work. In addition, the number of seals disturbed will vary daily depending upon tidal elevations. Monitoring by Green *et al.* (2002) indicates that although overall seal numbers each month of the year are not significantly different across years, there are differences in subsite use by seals at Castro Rocks during both the daytime and nighttime. For example, the average number of seals hauled out on Castro Rocks (rocks A and C) during the fall of 2001 (when construction activity was taking place within the area of the haul-out site) was significantly different than the average number of seals hauled out on Castro Rocks during 1998–2000, prior to the construction period. It was noted that fewer seals were using rock A, located closest to the Bridge and more seals were hauling out on rock C which was located farther from the Bridge than rock A. The number of seals hauled out on rocks B and E was not significantly different between years while the number hauled out on rocks D and F was greater during the fall of 2000 and 2001 than 1998 and 1999. For a more detailed discussion on the distribution of harbor seals during the work and non-work periods and levels of impact by various natural and anthropogenic disturbance sources, please see Green et al. (2002) which is available upon request (*see* **ADDRESSES**).

Although California sea lions have been shown to react to pile driving noise by porpoising quickly away from the site (SRS Technologies, 2001), it is not known whether they will react to general construction noise and move away from the rocks during construction activities. However, sea lions are generally thought to be more tolerant of human activities than harbor seals and are, therefore, less likely to be affected.

Potential Effects on Habitat

Short-term impacts of the activities are expected to result in a temporary reduction in utilization of the Castro Rocks haulout site while work is in progress or until seals acclimate to the disturbance. This will not likely result in any permanent reduction in the number of seals at Castro Rocks. The abandonment of Castro Rocks as a harbor seal haulout and rookery is not anticipated since existing traffic noise from the Bridge, commercial activities at the Chevron Long Wharf used for off-loading crude oil, and considerable recreational boating and commercial shipping that currently occur within the area have not caused long-term abandonment. In addition, mitigation measures and work restrictions are designed to preclude abandonment.

Therefore, as described in detail in CALTRANS (1996), other than the potential short-term abandonment by harbor seals of part or all of Castro Rocks during retrofit construction, no impact on the habitat or food sources of marine mammals are likely from this construction project.

Mitigation

Several mitigation measures to reduce the potential for general noise have been implemented by CALTRANS as part of their activity. General restrictions include: with the exception of the Concrete Trestle Section, no piles will be driven (*i.e.,* no repetitive pounding of piles) on the Bridge between 9 p.m. and 7 a.m.; an imposition of a construction noise limit of 86 dBA at 50 ft (15 m)

between 9 p.m. and 7 a.m.; and a limitation on construction noise levels for 24 hrs/day in the vicinity of Castro Rocks during the pupping/molting restriction period.

To minimize harassment of marine mammals, previous authorizations (1997–2001) required CALTRANS to comply with the following mitigation measures: (1) A February 15 through July 31 restriction on work in the water south of the Bridge center line and retrofit work on the Bridge substructure, towers, superstructure, piers, and pilings from piers 52 through 57; (2) no watercraft will be deployed by CALTRANS employees or contractors, during the year within the exclusion zone located between piers 52 and 57, except for when construction equipment is required for seismic retrofitting of piers 52 through 57; and (3) minimize vessel traffic to the greatest extent practicable in the exclusion zone when conducting construction activities between piers 52 and 57. From 1997 through September 2002, the boundary of the exclusion zone was rectangular in shape (1700 ft (518 m) by 800 ft (244 m)), completely enclosing Castro Rocks and piers 52 through 57, inclusive. The northern boundary of the exclusion zone was located 300 ft (91 m) from the most northern tip of Castro Rocks, and the southern boundary was located 300 ft (91 m) from the most southern tip of Castro Rocks. The eastern boundary was located 300 ft (91 m) from the most eastern tip of Castro Rocks, and the western boundary was located 300 ft (91 m) from the most western tip of Castro Rocks. The exclusion zone is restricted as a controlled access area and is marked off with buoys and warning signs for the entire year.

In 2002 (see 67 FR 61323, September 30, 2002), NMFS modified the Work/Boat Exclusion Zone (W/BEZ) so that the eastern boundary was shifted from 100 ft (30.5 m) east of Pier 57 to 100 ft (30.5 m) west of Pier 57. This maintains a 400-ft (122–m) ''buffer'' as opposed to the previous 600-ft (183–m) buffer, between the work at Pier 57 and ''A'' rock. This modification is reasonable based on observed seal behavior during the construction within the W/BEZ that harbor seals adjusted their location preference on Castro Rocks by moving westerly to rocks further from the construction (see discussion previously in this document). However, CALTRANS notes that there has not been a statistically significant change in the total numbers of animals that utilize the Castro Rocks haulout.

In addition to shifting the W/BEZ, in 2002, NMFS modified the Work Period in the vicinity of Castro Rocks from February 15th to March 1st. CALTRANS requested this modification due to unforseen circumstances affecting the ability of the contractor to conduct the seismic retrofit work on Pier 57. This modification allows the contractor to complete the work this coming season and to stay under budget. The previous Work Closure Period (February 15–July 31) was designed to encompass the entire harbor seals pupping and breeding seasons and nearly the entire molting season at Castro Rocks. Thus, the Work Closure Period included the entire pupping season at Castro Rocks and a substantial pre-pupping period when females are moving into pupping areas (see 62 FR 67045, December 23, 1997). Because moving the Work Closure Period from February 15th to March 1st still provides a 2–week window prior to the onset of successful pupping (March 15th), and because NMFS did not find scientific evidence indicating that female harbor seals need a ''quiet period'' from general noise in order to pup successfully, NMFS determined that shifting the Work Closure Period from February 15th to March 1st would not have a significant impact on harbor seal pupping.

In 2002, NMFS also modified the period in which work is allowed to start in the vicinity of Castro Rocks from August 1st to a new date of July 16th. As mentioned in previous documents, newborn harbor seal pups are able to swim immediately after birth (Zeiner *et al.*, 1990) and pups are weaned by the first week of June. Therefore, terminating the Work Closure Period on July 16th is not expected to affect pup survival. Under authorizations issued prior to the current IHA, the July 31st ending date for the Work Closure Period was established to protect harbor seals during the molting season. However, those documents also noted that NMFS believed that it is likely that harbor seals evolved adaptive mechanisms to deal with exposure to the water during the molt. For example, on some harbor seal haul-outs (such as Castro Rocks) during the molting season seals must enter the water once or even twice a day due to tidal fluctuations limiting access to the haul-out. Also, since harbor seals lose hair in patches during the molt, they are never completely hairless and would not be as vulnerable to heat loss in the water during this period compared to other seals (*e.g.,* elephant seals) that lose their all their hair at one time. Finally, NMFS notes that if the levels of harbor seal disturbance during the molt are relatively high, seals are likely to utilize other local haul-out sites during the molt (DeLong, R., pers. commun. 1997; Hanan, D., pers. commun. 1997; Harvey, J., pers. commun. 1997). Hanan (1996) found that although harbor seals tagged at an isolated southern California haul-out tended to exhibit site-fidelity during the molt, some seals were observed molting at other nearby haul-outs. Based on these reasons therefore, NMFS determined that terminating the Closure Period on July 16th would not significantly affect harbor seals in general or molting seals at Castro Rocks in particular.

Monitoring

NMFS will require CALTRANS to continue to monitor the impact of seismic retrofit construction activities on harbor seals at Castro Rocks. Monitoring will be conducted by one or more NMFS-approved monitors. CALTRANS is to monitor at least one additional harbor seal haulout within San Francisco Bay to evaluate whether harbor seals use alternative haulout areas as a result of seismic retrofit disturbance at Castro Rocks.

The monitoring protocol will be divided into the Work Period Phase (July 16 through February 28) and the Work Closure Period Phase (March 1 through July 15). During the Work Period Phase and Work Closure Period Phase, the monitor(s) will conduct observations of seal behavior at least 3 days/week for approximately one tidal cycle each day at Castro Rocks. The following data will be recorded: (1) Number of seals and sea lions on site; (2) date; (3) time; (4) tidal height; (5) number of adults, subadults, and pups; (6) number of individuals with red pelage; (7) number of females and males; (8) number of molting seals; and (9) details of any observed disturbances. Concurrently, the monitor(s) will record general construction activity, location, duration, and noise levels. At least 2 nights/week, the monitor will conduct a harbor seal census after midnight at Castro Rocks. In addition, during the Work Period Phase and prior to any construction between piers 52 and 57, inclusive, the monitor(s) will conduct baseline observations of seal behavior at Castro Rocks and at the alternative site(s) once a day for a period of 5 consecutive days immediately before the initiation of construction in the area to establish pre-construction behavioral patterns. During the Work Period and Work Closure Period Phases, the monitor(s) will conduct observations of seal behavior, and collect appropriate data, at the alternative Bay harbor seal haulout at least 3 days/week (Work Period) and 2 days/week (Work Closure Period), during a low tide.

In addition, NMFS will require that, immediately following the completion of the seismic retrofit construction of the Bridge, the monitor(s) will conduct observations of seal behavior, at Castro Rocks, at least 5 days/week for approximately 1 tidal cycle (high tide to high tide) each day, for one week/month during the months of April, July, October, and January. At least 2 nights/week during this same period, the monitor will conduct an additional harbor seal census after midnight.

Reporting

Under previous IHAs, CALTRANS has provided monitoring reports (Green *et al.* (2001, 2002). The findings from these reports have been summarized previously in this document.

CALTRANS will provide weekly reports to the Southwest Regional Administrator (Regional Administrator), NMFS, including a summary of the previous week's monitoring activities and an estimate of the number of harbor seals that may have been disturbed as a result of seismic retrofit construction activities. These reports will provide dates, time, tidal height, maximum number of harbor seals ashore, number of adults, sub-adults and pups, number of females/males, number of harbor seals with a red pelage, and any observed disturbances. A description of retrofit activities at the time of observation and any sound pressure levels measurements made at the haulout will also be provided. A draft interim report must be submitted to NMFS by April 30, 2004.

A draft final report must be submitted to the Regional Administrator within 90 days after the expiration of this IHA. A final report must be submitted to the Regional Administrator within 30 days after receiving comments from the Regional Administrator on the draft final report. If no comments are received from NMFS, the draft final report will be considered to be the final report.

CALTRANS will provide NMFS with a follow-up report on the post-construction monitoring activities within 18 months of project completion in order to evaluate whether haulout patterns are similar to the pre-retrofit haul-out patterns at Castro Rocks.

National Environmental Policy Act

NMFS prepared an Environmental Assessment (EA) in 1997 that concluded that the impacts of CALTRANS' seismic retrofit construction of the Richmond-San Rafael Bridge will not have a significant impact on the human environment. A copy of that EA, which includes the Finding of No Significant Impact (FONSI) is available upon request (see **ADDRESSES**). This action has not changed significantly from the action analyzed in the 1997 EA. Therefore, this proposed action is not expected to change the analysis or conclusion of the 1997 EA.

Endangered Species Act (ESA)

On January 27, 1997, NMFS completed consultation under section 7 of the ESA with the Federal Highway Administration (FHWA) on the CALTRANS' proposed seismic retrofit work on the Richmond-San Rafael Bridge. That consultation concluded that the project is not likely to adversely affect winter-run chinook salmon. However, issuance of this IHA to CALTRANS constitutes an agency action that authorizes an activity that may affect ESA-listed species and, therefore, is subject to section 7 of the ESA. Moreover, because the underlying action has not changed from that considered in the consultation, NMFS has determined that issuance of an IHA does not lead to any effects to listed species apart from those that were considered in the consultation on FHWA's action.

Conclusions

NMFS has determined that the short-term impact of the seismic retrofit construction of the Bridge should result, at worst, in the temporary modification in behavior by harbor seals and, possibly, by some California sea lions. While behavioral modifications, including temporarily vacating the haulout, may be made by these species to avoid the resultant visual and acoustic disturbance, this action is expected to have a negligible impact on the animals. In addition, no take by injury and/or death is anticipated, and harassment takes will be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document.

Authorization

For the reasons previously discussed, NMFS has issued an IHA for a 1-year period, for the incidental harassment of harbor seals and California sea lions by the seismic retrofit of the Richmond-San Rafael Bridge, San Francisco Bay, CA, provided the above mentioned mitigation, monitoring and reporting requirements are incorporated.

Dated: November 19, 2003.

Laurie K. Allen,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–29445 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton Textile Products Produced or Manufactured in Bangladesh

November 20, 2003.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting limits.

EFFECTIVE DATE: November 26, 2003.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the Bureau of Customs and Border Protection website at *http://www.customs.gov.* For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at *http://otexa.ita.doc.gov.*

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limit for Category 334 is being increase for special shift from Category 335, reducing the limit for Category 335.

A description of the textile and apparel categories in terms of HTS numbers is available in the Correlation: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (*see* **Federal Register** notice 68 FR 1599, published on January 13, 2003). *Also see* 67 FR 65339, published on October 24, 2002.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 20, 2003.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on October 18, 2002, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton and man-made fiber textile products, produced or manufactured in Bangladesh and exported during the twelve-month period which began

on January 1, 2003 and extends through December 31, 2003.

Effective on November 26, 2003, you are directed to adjust the limits for the following categories, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Adjusted twelve-month limit [1]
334	312,722 dozen.
335	461,588 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 2002.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.03–29421 Filed 11–25–03; 8:45 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits and Guaranteed Access Levels for Certain Cotton, Wool, Man-Made Fiber and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Jamaica

November 20, 2003.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection establishing limits and guaranteed access levels.

EFFECTIVE DATE: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the Bureau of Customs and Border Protection Web site at *http://www.customs.gov*. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel Web site at *http://otexa.ita.doc.gov*.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limits and Guaranteed Access Levels (GALs) for textile products, produced or manufactured in Jamaica and exported during the period January 1, 2004 through December 31, 2004 are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC).

These specific limits and guaranteed access levels do not apply to goods that qualify for quota-free entry under the Trade and Development Act of 2000.

In the letter published below, the Chairman of CITA directs the Commissioner, Bureau of Customs and Border Protection to establish limits and guaranteed access levels for the period January 1, 2004 through December 31, 2004.

These limits are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body. However, as the ATC and all restrictions thereunder will terminate on January 1, 2005, no adjustment for carryforward (borrowing from next year's limits for use in the current year) will be available.

A description of the textile and apparel categories in terms of HTS numbers is available in the Correlation: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (*see* **Federal Register** notice 68 FR 1599, published on January 13, 2003). Information regarding the 2004 Correlation will be published in the **Federal Register** at a later date.

Requirements for participation in the Special Access Program are available in **Federal Register** notice 63 FR 16474, published on April 3, 1998.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 20, 2003.

Commissioner,

Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 2004, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool, man-made fiber and other vegetable fiber textiles and textile products in the following categories, produced or manufactured in Jamaica and exported during the twelve-month period beginning on January 1, 2004 and extending through December 31, 2004, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
331pt./631pt. [1]	1,257,436 dozen pairs.
338/339/638/639	2,482,430 dozen.
340/640	1,160,849 dozen of which not more than 982,257 dozen shall be in shirts made from fabrics with two or more colors in the warp and/or the filling in Categories 340–Y/640–Y [2].
341/641	1,457,670 dozen.
345/845	359,686 dozen.
347/348/647/648	2,679,473 dozen.
352/652	4,003,636 dozen.
445/446	59,144 dozen.

[1] Category 331pt.: all HTS numbers except 6116.10.1720, 6116.10.4810, 6116.10.5510, 6116.10.7510, 6116.92.6410, 6116.92.6420, 6116.92.6430, 6116.92.6440, 6116.92.7450, 6116.92.7460, 6116.92.7470, 6116.92.8800, 6116.92.9400 and 6116.99.9510; Category 631pt.: all HTS numbers except 6116.10.1730, 6116.10.4820, 6116.10.5520, 6116.10.7520, 6116.93.8800, 6116.93.9400, 6116.99.4800, 6116.99.5400 and 6116.99.9530.

[2] Category 340–Y: only HTS numbers 6205.20.2015, 6205.20.2020, 6205.20.2046, 6205.20.2050 and 6205.20.2060; Category 640–Y: only HTS numbers 6205.30.2010, 6205.30.2020, 6205.30.2050 and 6205.30.2060.

The limits set forth above are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 2003 shall be charged to the applicable category limits for that year (*see* directive dated October 9, 2002) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such products shall be charged to the limits set forth in this directive.

Also pursuant to the ATC; and under the terms of the Special Access Program, as set forth in 63 FR 16474 (April 3, 1998), you are directed to establish guaranteed access levels for properly certified cotton, wool, man-made fiber and other vegetable fiber textile products in the following categories which are assembled in Jamaica from fabric formed and cut in the United States and re-exported to the United States from Jamaica during the twelve-month period which begins on January 1, 2004 and extends through December 31, 2004:

Category	Guaranteed access level
331pt./631pt. [1]	1,320,000 dozen pairs.
336/636	125,000 dozen.
338/339/638/639.	1,500,000 dozen.
340/640	300,000 dozen.
341/641	375,000 dozen.
342/642	200,000 dozen.
345/845	50,000 dozen.
347/348/647/648.	2,000,000 dozen.

Category	Guaranteed access level
352/652	10,500,000 dozen.
447	30,000 dozen.

Any shipment for entry under the Special Access Program which is not accompanied by a valid and correct certification in accordance with the provisions of the certification requirements established in the directive of February 19, 1987 (52 FR 6049) shall be denied entry unless the Government of Jamaica authorizes the entry and any charges to the appropriate specific limits. Any shipment which is declared for entry under the Special Access Program but found not to qualify shall be denied entry into the United States.

These specific limits and guaranteed access levels do not apply to goods that qualify for quota-free entry under the Trade and Development Act of 2000.

In carrying out the above directions, the Commissioner, Bureau of Customs and Border Protection should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of U.S.C.553(a)(1).

Sincerely,

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.03–29423 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Kuwait

November 20, 2003.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection establishing limits.

EFFECTIVE DATE: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the Bureau of Customs and Border Protection Web site at *http://www.customs.gov*. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel Web site at *http://otexa.ita.doc.gov*.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limits for textile products, produced or manufactured in Kuwait and exported during the period January 1, 2004 through December 31, 2004 are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC).

These limits are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body. However, as the ATC and all restrictions thereunder will terminate on January 1, 2005, no adjustment for carryforward (borrowing from next year's limits for use in the current year) will be available.

In the letter published below, the Chairman of CITA directs the Commissioner, Bureau of Customs and Border Protection to establish the limits for the 2004 period. The 2004 level for Category 361 is zero.

A description of the textile and apparel categories in terms of HTS numbers is available in the Correlation: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (*see* **Federal Register** notice 68 FR 1599, published on January 13, 2003). Information regarding the 2004 Correlation will be published in the **Federal Register** at a later date.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 20, 2003.

Commissioner,

Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 2004, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and man-made fiber textile products in the following categories, produced or manufactured in Kuwait and exported during the twelve-month period beginning on January 1, 2004 and extending through December 31, 2004, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
340/640	503,602 dozen.
341/641	276,982 dozen.
361	–0–

The limits set forth above are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 2003 shall be charged to the applicable category limits for that year (*see* directive dated November 1, 2002) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such products shall be charged to the limits set forth in this directive.

In carrying out the above directions, the Commissioner, Bureau of Customs and Border Protection should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 03–29422 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of an Import Restraint Limit for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Laos

November 20, 2003.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection establishing a limit.

EFFECTIVE DATE: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the Bureau of Customs and Border Protection Web site at *http://www.customs.gov*. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel Web site at *http://otexa.ita.doc.gov*.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The Bilateral Textile Agreement of June 23, 2000 between the Governments of the United States and the Lao People's Democratic Republic, establishes a limit for Categories 340/640 for the period January 1, 2004 through December 31, 2004.

In the letter published below, the Chairman of CITA directs the Commissioner, Bureau of Customs and Border Protection to establish the 2004 limit for Categories 340/640.

This limit may be revised if Laos becomes a member of the World Trade Organization (WTO) and the United States applies the WTO agreement to Laos.

A description of the textile and apparel categories in terms of HTS numbers is available in the Correlation: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 68 FR 1599, published on January 13, 2003). Information regarding the 2004 Correlation will be published in the **Federal Register** at a later date.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 20, 2003.

Commissioner of Customs,

Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: Pursuant to Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Bilateral Textile Agreement of June 23, 2000 between the Governments of the United States and the Lao People's Democratic Republic, you are directed to prohibit, effective on January 1, 2004, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and man-made fiber textile products in Categories 340/640, produced or manufactured in Laos and exported during the twelve-month period beginning on January 1, 2004 and extending through December 31, 2004, in excess of 213,794 dozen.

The limit set forth above is subject to adjustment pursuant to the current bilateral agreement between the Governments of the United States and the Lao People's Democratic Republic.

Products in the above categories exported during 2003 shall be charged to the applicable category limit for that year (see directive dated November 1, 2002) to the extent of any unfilled balance. In the event the limit established for that period has been exhausted by previous entries, such products shall be charged to the limit set forth in this directive.

This limit may be revised if Laos becomes a member of the World Trade Organization (WTO) and the United States applies the WTO agreement to Laos.

In carrying out the above directions, the Commissioner, Bureau of Customs and Border Protection should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 03–29420 Filed 11–24–03; 8:45 am]

BILLING CODE 3510–DR–S

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

AGENCY: Commodity Futures Trading Commission.

ACTION: Sunshine Act meetings.

TIME AND DATE: 10:30 a.m., Wednesday, December 10, 2003.

PLACE: 1155 21st St., NW., Washington, DC, Room 1012.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Rule Enforcement Review.

FOR FURTHER INFORMATION CONTACT: Jean A. Webb, (202) 418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 03–29618 Filed 11–21–03; 3:40 pm]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Draft Environmental Impact Statement for a Proposed Mill Creek Watershed Plan Including Potential Flood Damage Reduction Measures and Ecosystem Restoration, Davidson County, TN

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The Corps of Engineers, Nashville District, is preparing a Draft Environmental Impact Statement (DEIS) for a proposed Mill Creek Watershed Plan that includes Flood Damage Reduction and Ecosystem Restoration Alternatives. The Corps of Engineers is studying the possible impacts of maintaining, modifying, or adding to existing aquatic, riparian, and terrestrial habitat in combination with potential flood damage reduction measures. Forecasts of future development, floodplain management, stream habitat, endangered species protection, stream bank stabilization, storm water management, and water quality could be made to assess possible cumulative impacts for each of these resources within the watershed.

DATES: Written scoping comments on issues to be considered in the DEIS will be accepted by the Corps of Engineers until January 1, 2004.

ADDRESSES: Scoping comments should be mailed to: Ms. Joy Broach, Biologist, Project Planning Branch, Nashville District Corps of Engineers, PO Box 1070 (PM–P), Nashville, TN 37202–1070, or may be e-mailed to *joy.i.broach@lrn02.usace.army.mil.*

FOR FURTHER INFORMATION CONTACT: For additional information concerning the proposed action and DEIS, please contact Ms. Sue Ferguson, Project Manager, Project Planning Branch, (615) 736–7192.

SUPPLEMENTARY INFORMATION:

1. Study authority was granted by a resolution of the U.S. House Committee on Transportation and Infrastructure adopted September 14, 1995. The DEIS is necessary to provide National Environmental Policy Act (NEPA) compliance for proposed changes to the water quality, aquatic, riparian, and terrestrial habitat, and potential flood damage reduction measures within Mill Creek and its tributaries. Historical information regarding flooding, landuse, aquatic, and terrestrial ecology would be used as a baseline and has been described in previous NEPA documents including the 1986 report: *Metro Region of Nashville, Tennessee, Mill Creek, Final Interim Feasibility Report and Environmental Impact Statement.* The Nashville Metropolitan Water Services is the sponsor for this project.

2. The Mill Creek watershed has had a history of floods dating 1979, 1984, 1998, 2000, and 2003 that have endangered residents and have resulted in millions of dollars of flood related damage. Continued development within the watershed, has increased the flood potential and associated cost of damages. The intent of the DEIS is to provide NEPA compliance for changes in hydraulics and hydrology that could occur with implementation of any flood reduction measure. These measures could include detention ponds, swales,

depressions, channel widening, levees, floodwalls, vegetative berms, low-water dams, and dry dam storage. Structures might be raised or removed from the floodway fringe. Computer models would be used to predict water drainage patterns that would guide future planning in placing structures out of the floodway fringe. The Mill Creek models and data take a composite view of hydrology, hydraulic, and water quality processes occurring in the watershed. This includes future development effects, floodplain locations, erosion, storm water management, and point and non-point sources. Models would be used to compare different types, placement, or of combinations of flood reduction measures to minimize damage to existing and future structures.

3. The Mill Creek watershed is home to the state and Federally listed Nashville Crayfish (*Orconectes shoupi*). This endemic crayfish evolved in Mill Creek and is rarely found outside this watershed. Accelerated development within the watershed has reduced and fragmented the aquatic and riparian habitat of not only this endangered species, but also other native aquatic and riparian communities as well. The Mill Creek models and data would evaluate the impact of changing hydraulics and hydrology on the aquatic ecosystem. The Mill Creek model would be used to find stream locations where restoration and habitat protection measures would be the most successful. Preliminary restoration alternatives under consideration include restoration of wetlands, aquatic, riparian, and terrestrial habitats, sediment management structures, and bank stabilization. Land use changes could be considered to provide a continuous stream corridor that could include a greenway. The study aims to improve the overall health of the stream and its corridor and protect ecologically sensitive habitat of the endangered Nashville crayfish, while also reducing flood damage.

4. Key proposed project features to be evaluated in the DEIS include the following:

a. Flood Damage Reduction measures including peak flow retention structures, low-water dams, channel widening, levees, flood proofing or removing structures out of the floodplain.

b. Protection, enhancement, expansion, or creation of aquatic, riparian, and connected terrestrial habitat for listed species and increased ecosystem diversity.

c. The effects of modifying the flow of Mill Creek on streamside public, private, and commercial properties; fish spawning and nesting areas; adjacent low lying farmlands; creek bank erosion; cultural, archaeological, and historic sites; and overall changes to the hydraulics and hydrology of Mill Creek.

d. Development and use of computer models that predict flooding, identify placement of habitat structures and streambank protection features, and forecast effects of future development on the existing water resources within the watershed.

5. This notice serves to solicit scoping comments from the public; federal, state and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed activity. Any comments received during the comment period will be considered in the NEPA process. Comments are used to assess impacts on fish and wildlife, endangered species, historic properties, water quality, water supply and conservation, economics, aesthetics, wetlands, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, general environmental effects, cumulative effects, and in general, the needs and welfare of the people. Public meetings may be held, however, times, dates, or locations have not been determined.

6. This notice also serves to initiate the public involvement requirements of Section 106 of the National Historic Preservation Act of 1966, as amended. Section 106, implemented by regulations at 36 CFR part 800, requires the Corps of Engineers to consider the effects of its undertakings on historic properties. If required, appropriate architectural and archaeological investigations will be conducted within those areas affected by the proposed activities and resulting findings will be coordinated with the Tennessee State Historic Preservation Officer and other offices as necessary.

7. Other Federal, state and local approvals required for the proposed work include coordination with the U.S. Fish and Wildlife Service, including a Fish and Wildlife Coordination Act Report and consultation under section 7 of the Endangered Species Act; and state section 401 Water Quality Certification.

8. Significant issues to be analyzed in depth in the DEIS include flood damage reduction measures and ecosystem modifications that impact fisheries, endangered species, recreation, economics, water quality, historic and cultural resources, stream bank erosion, future development demands, and cumulative impacts. A DEIS should be available in April 2005.

Byron G. Jorns,

Lieutenant Colonel, Corps of Engineers, District Engineer.

[FR Doc. 03–29418 Filed 11–24–03; 8:45 am]

BILLING CODE 3710–GF–M

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: National Assessment Governing Board; U.S. Department of Education.

ACTION: Notice of Teleconference Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming teleconference meeting of the Reporting and Dissemination Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATES: December 11, 2003.

Time: 10 a.m., adjournment, approximately, 12 noon.

Location: National Assessment Governing Board; 800 North Capitol Street, NW., Suite #825, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Operations Officer, National Assessment Governing Board, 800 North Capitol Street, NW., Suite #825, Washington, DC 20002–4233, telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 302 of the National Assessment of Educational Progress Act (Pub. L. 107–279).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, developing guidelines for reporting and disseminating results, establishing standards and procedures for interstate and national comparisons, planning and executing the initial public release of reports, and exercising final authority on the appropriateness of all assessment items. On Thursday, December 11, 2003 the Reporting and Dissemination Committee will hold a teleconference meeting from 10 a.m. to 12 noon to review and approve background

questions proposed for use in assessments to be conducted by the National Assessment of Educational Progress in 2005.

A summary of the activities of the teleconference meeting, and other related matters which are informative to the public and consistent with the policy of the section 5 U.S.C. 552b(c), will be available to the public within 14 days after the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, 800 North Capitol Street, NW., Suite #825, Washington, DC 20002, from 8:30 a.m. to 5 p.m. (EST).

Dated: November 20, 2003.

Charles Smith,

Executive Director, National Assessment Governing Board.

[FR Doc. 03–29440 Filed 11–24–03; 8:45 am]

BILLING CODE 4001–01–M

DEPARTMENT OF ENERGY

[Number DE–PS07–04ID14435]

Nuclear Power 2010 Program—New Nuclear Power Plant Licensing Demonstration Projects

AGENCY: Idaho Operations Office (NE–ID), U.S. Department of Energy.

ACTION: Notice of solicitation inviting cooperative agreement applications.

SUMMARY: The U.S. Department of Energy (DOE) is seeking applications for financial assistance from power generation companies or teams led by power generation companies for projects that enable a new nuclear power plant to be ordered and licensed for deployment in the United States within the decade. For the purposes of this solicitation, project applications are sought which implement a power generation company plan of activities leading to a combined Construction and Operating License (COL) for a new nuclear power plant. The plan is expected to address power generation company activities for design completion of a standardized advanced reactor plant, preparation and submission of a COL application and support of NRC review and hearings associated with the application. For conduct of these projects, DOE encourages innovative business arrangements, such as consortia among power generation companies, plant owners/operators, reactor vendors, architect engineers and constructors with strong and common commitment to build and operate new nuclear power plants in the United States.

DATES: The issuance date of Solicitation Number DE–PS07–04ID14435 will be on November 19, 2003. Applications may be submitted at any time during the open solicitation period, December 20, 2003, through December 31, 2004. Applications will be evaluated as they are received. Merit selection and the issuance of an award may occur anytime during the application acceptance timeframe. Merit selection activities will take approximately six to eight weeks after DOE has received the initial technical application. Issuance of an award is expected to be complete approximately ten weeks after selection. A pre-bid submission briefing for all interested parties has been scheduled on December 11, 2003. This meeting will be held at the Residence Inn located on 550 Army Navy Drive in Arlington, Virginia, phone number: 703–413–6630. The meeting will begin at 1 p.m.

ADDRESSES: The solicitation in its full text will be available on the Internet at the following URL address: *http://e-center.doe.gov.* The Industry Interactive Procurement System (IIPS) provides the medium for disseminating solicitations, receiving financial assistance applications and evaluating the applications in a paperless environment. Completed applications are required to be submitted via IIPS. An IIPS ''User Guide for Contractors'' can be obtained on the IIPS Homepage and then clicking on the ''Help'' button. Questions regarding the operation of IIPS may be e-mailed to the IIPS Help Desk at *IIPS_HelpDesk@e-center.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Layne Isom, Contract Specialist, *isomla@id.doe.gov.*

SUPPLEMENTARY INFORMATION: Applications are limited to power companies or teams led by power companies and plant owners/operators with appropriate participation from reactor vendors, other suppliers, architect-engineers and constructors. A fifty percent (50%) minimum industry cost share, consisting of contributions from power generation companies and other participants, is required over the life of the cooperative agreements for all projects. Industry cost share may be provided as cash or as in-kind cost share. Industry cost share may not include other federal funding. In-kind cost share must directly relate to the scope of the specific project. It is anticipated that FY 2004 appropriations for Nuclear Power 2010 activities would contain sufficient funds to make up to $15,000,000 available to fund the first year of the effort anticipated by this solicitation. Subsequent year funding will depend upon future appropriations. The statutory authority for this program is section 31 of the Atomic Energy Act, 42 U.S.C. 2051.

The Catalog of Federal Domestic Assistance (CFDA) Number for this program is 81.121, Nuclear Energy Research, Development and Demonstration.

Issued in Idaho Falls on November 19, 2003.

Michael L. Adams,

Acting Director, Procurement Services Division.

[FR Doc. 03–29402 Filed 11–24–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meeting be announced in the **Federal Register**.

DATES: Wednesday, December 10, 2003—7 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, TN.

FOR FURTHER INFORMATION CONTACT: Pat Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, PO Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–5333 or e-mail: *halseypj@oro.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Discussion of cleanup progress to date
- Plans for FY 2004
- The lifecycle baseline
- Bechtel Jacobs Company closure contract

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements

pertaining to agenda items should contact Pat Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: Minutes of this meeting will be available for public review and copying at the Department of Energy's Information Center at 475 Oak Ridge Turnpike, Oak Ridge, TN between 8 a.m. and 5 p.m. Monday through Friday, or by writing to Pat Halsey, Department of Energy Oak Ridge Operations Office, PO Box 2001, EM–90, Oak Ridge, TN 37831, or by calling her at (865) 576–4025.

Issued at Washington, DC, on November 19, 2003.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 03–29403 Filed 11–24–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Secretary of Energy Advisory Board. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), requires that agencies publish these notices in the **Federal Register** to allow for public participation.

DATES: Wednesday, December 10, 2003, 9:15 a.m.–3:45 p.m.

ADDRESSES: Ritz-Carlton Washington DC, Salon IIIA, 1150 22nd Street, NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Burrow, Acting Executive Director, Secretary of Energy Advisory Board (AB–1), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–7092 or (202) 586–6279 (fax).

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Secretary of Energy Advisory Board (The Board) is to provide the Secretary of Energy with essential independent advice and recommendations on issues of national importance. The Board and its subcommittees provide timely, balanced, and authoritative advice to the Secretary of Energy on the Department's management reforms, research, development and technology activities, energy and national security responsibilities, environmental cleanup activities, and economic issues relating to energy.

Tentative Agenda

The agenda for the December 10th meeting has not been finalized. However, the meeting will include a series of briefings and discussions on issues and challenges facing the Department of Energy. The Board will review and discuss the following three SEAB subcommittee reports submitted for their approval:

The Laboratory Operations Board's draft final report, entitled *Management Best Practices for the National Laboratories;*

The Task Force on the Future of Science Programs at the Department of Energy's draft final report, entitled *Critical Choices: Science, Energy, and Security—Final Report of the Secretary of Energy Advisory Board's Task Force on the Future of Science Programs;* and

The Blue Ribbon Commission on the Use of Competitive Procedures for the Department of Energy Laboratories' draft final report, entitled *Competing the Management and Operations Contracts for DOE's National Laboratories—Report of the Blue Ribbon Commission on the Use of Competitive Procedures for the Department of Energy Laboratories.*

Copies of these three draft reports may be obtained from the Board's Web site, located at *http://www.seab.energy.gov/* under the heading ''What's New'' or by contacting the Office of the Secretary of Energy Advisory Board at (202) 586–7092. Members of the public are invited to comment on the these draft reports during the scheduled public comment period or by submitting written comments to the Secretary of Energy Advisory Board by 12 p.m. on December 8, 2003. Members of the public wishing to comment on issues before the Secretary of Energy Advisory Board will have an opportunity to address the Board during the scheduled public comment period from approximately 12:45 p.m. until 2:05 p.m. The final agenda will be available at the meeting.

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the Secretary of Energy Advisory Board and submit written comments or comment during the scheduled public comment period. The Chairman of the Board is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderly conduct of business. During its meeting in Washington, DC, the Board welcomes public comment. Members of the public will be heard in the order in which they sign up for public comment at the beginning of the meeting. The Board will make every effort to hear the views of all interested parties. You may submit written comments to Mr. Richard C. Burrow, Acting Executive Director, Secretary of Energy Advisory Board, AB–1, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. Comments may also be submitted by fax to (202) 586–6279.

Minutes: A copy of the minutes and a transcript of the meeting will be made available for public review and copying approximately 30 days following the meeting at the Freedom of Information Public Reading Room, 1E–190 Forrestal Building, 1000 Independence Avenue, SW., Washington, DC between 9 a.m. and 4 p.m., Monday through Friday except Federal holidays. Further information on the Secretary of Energy Advisory Board and its subcommittees may be found at the Board's Web site, located at *http://www.seab.energy.gov.*

Issued at Washington, DC, on November 20, 2003.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 03–29405 Filed 11–24–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Federal Energy Management Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of meeting postponement.

SUMMARY: On November 14, 2003, the Department of Energy published a notice of open meeting of the Federal Energy Management Advisory Committee 68 FR 64615. Today's notice is announcing the postponement of the meeting scheduled for December 3, 2003. The next meeting will be scheduled for early next year.

Issued in Washington, DC, on November 19, 2003.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 03–29404 Filed 11–24–03; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–336–022]

El Paso Natural Gas Company; Notice of Compliance Filing

November 18, 2003.

Take notice that on November 12, 2003, El Paso Natural Gas Company (El Paso) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1A, the tariff sheets listed in Appendices A and B to the filing, to become effective November 1, 2002 and September 1, 2003.

El Paso states that these tariff sheets revise the California Receipt Service and reservation charge crediting provisions of its tariff to comply with the Commission's October 27, 2003 Order in 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00378 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–56–000]

Great Lakes Gas Transmission Limited Partnership; Notice of Tariff Filing

November 18, 2003.

Take notice that on November 14, 2003, Great Lakes Gas Transmission Limited Partnership (Great Lakes) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, Fifteenth Revised Sheet No. 7 and Ninth Revised Sheet No. 48, proposed to be effective January 1, 2004.

Great Lakes states that the tariff sheets referenced above reflect a clarifying change to the date range stated in the tariff for the annual charge adjustment (ACA), and for the funding surcharges for the Gas Research Institute (GRI) for the year 2004.

Great Lakes states that these latter surcharges, which are at the same levels approved for use in 2003, were approved by the Commission in its Letter Order issued September 17, 2003, in Docket No. RP03–514–000, in which it also approved GRI's funding for its year 2004 research, development, and demonstration (RD&D) program and its 2004–2008 five-year RD&D plan.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00383 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–513–031]

Questar Pipeline Company; Notice of Negotiated Rates

November 18, 2003.

Take notice that on November 14, 2003, Questar Pipeline Company's (Questar) tendered for filing a tariff filing to reflect a new negotiated-rate tract with Williams Power Company, Inc. and the deletion of an expired contract with BP Energy Company. Questar's negotiated-rate contract provisions were authorized by Commission Orders issued October 27, 1999, and December 14, 1999, in Docket Nos. RP99–513, et al.

Questar states that the Commission approved Questar's request to implement a negotiated-rate option for Rate Schedules T–1, NNT, T–2, PKS, FSS and ISS shippers. Questar notes that it submitted its negotiated rate filing in accordance with the Commission's Policy Statement in Docket Nos. RM95–6–000 and RM96–7–000 issued January 31, 1996.

Questar states that a copy of this filing has been served upon all parties to this proceeding, Questar's customers, the Public Service Commission of Utah and the Public Service Commission of Wyoming.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the

''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00372 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. GT02–35–007]

Tennessee Gas Pipeline Company; Notice of Compliance Tariff Filing

November 18, 2003.

Take notice that on November 13, 2003, Tennessee Gas Pipeline Company (Tennessee), tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the tariff sheets listed in Appendix A to the filing, with an effective date of February 16, 2003.

Tennessee states that the revised tariff sheets in Appendix A are being filed in accordance with the Commission's October 24, 2003 order in the referenced proceeding, which relates to Tennessee's previous filings to revise certain of its tariff provisions that primarily deal with the demonstration and maintenance of creditworthiness by Tennessee's customers. Tennessee is filing the tariff sheets attached as Appendix B to incorporate tariff language that has been previously approved by the Commission in intervening orders that are unrelated to Tennessee's creditworthiness 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00374 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–55–000]

Transcontinental Gas Pipe Line Corporation; Notice of Tariff Filing

November 18, 2003.

Take notice that on November 13, 2003 Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, Forty-Ninth Revised Sheet No. 50, effective November 1, 2003.

Transco states that the purpose of the instant filing is to track fuel percentage changes attributable to transportation service purchased from Texas Gas Transmission Corporation, LLC (Texas Gas) under its Rate Schedule FT the costs of which are included in the rates and charges payable under Transco's Rate Schedule FT–NT. Transco states that included in Appendix A attached to the filing is the explanation of the fuel percentage changes and details regarding the computation of the revised FT–NT rates.

Transco states that copies of the filing are being mailed to each of its FT–NT customers 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 in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00382 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–54–000]

Young Gas Storage Company, Ltd.; Notice of Proposed Changes in FERC Gas Tariff

November 18, 2003.

Take notice that on November 12, 2003, Young Gas Storage Company, Ltd. (Young) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to become effective December 13, 2003:

Second Revised Sheet No. 47E
Second Revised Sheet No. 47F
Second Revised Sheet No. 47G
Fourth Revised Sheet No. 52A

Young states that it is proposing to revise its Tariff to reflect changes to its Available Daily Withdrawal Quantity and Reservoir Integrity Limit curves.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party

must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00381 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC04–15–000, et al.]

ESI Energy,LLC, et al.; Electric Rate and Corporate Filings

November 18, 2003.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. ESI Energy, LLC; FPL Energy Stateline Holdings, L.L.C.

[Docket No. EC04–15–000]

Take notice that on November 7, 2003, ESI Energy, LLC and FPL Energy Stateline Holdings, L.L.C. (Applicants) pursuant to Section 203 of the Federal Power Act, filed a joint application for approval of a corporate reorganization that will not change the ultimate ownership of the facilities.

Comment Date: November 28, 2003.

2. Central Mississippi Generating Company, LLC

[Docket Nos. EC04–16–000 and EL04–17–000]

Take notice that on November 7, 2003, Central Mississippi Generating Company, LLC (Central Mississippi) filed with the Federal Energy Regulatory Commission an application pursuant to Section 203 of the Federal Power Act for authorization in connection with the proposed change in ownership and operational control of jurisdictional facilities associated with an approximately 526–MW natural gas-fired generation facility located in Attala County, Mississippi, adjacent to Entergy's McAdams Substation, which is currently operated by Attala Generating Company, LLC. Central also requests the Commission to issue an order disclaiming jurisdiction over certain passive participants in the transaction.

Comment Date: November 28, 2003.

3. Entergy Asset Management, Inc., et al.

[Docket No. EC04–17–000]

Take notice that on November 10, 2003, Entergy Asset Management, Inc. (EAM), on behalf of itself and EK Holding I, LLC (EKH I), EK Holding II, LLC (EKH II), Entergy Investments Holding Company, Inc. (EIHC), Entergy Global Trading Holdings, Ltd. (EGTH), and Entergy Power Generation Corporation (EPGC and collectively with EAM, EKH I, EKH II, EIHC and EGTH, the Entergy Applicants), and ENTEROCK, LLC on its own behalf tendered for filing an application requesting all necessary authorizations under Section 203 of the Federal Power Act necessary for the Entergy Applicants to engage in a corporate reorganization that will alter the upstream ownership of certain facilities subject to the Commission's jurisdiction owned by Crete Energy Venture, LLC, Entergy Power Ventures, L.P., Entergy-Koch Trading, LP, Northern Iowa Windpower, LLC, and Warren Power, LLC and for ENTEROCK to acquire an indirect interest in jurisdictional facilities through acquisition of an interest in EAM.

EAM states that copies of this filing have been served on the Arkansas Public Service Commission, the Louisiana Public Service Commission, the City Council of New Orleans, the Mississippi Public Service Commission, and the Texas Public Utility Commission.

Comment Date: December 1, 2003.

4. Central Mississippi Generating Company, LLC

[Docket No. EG04–16–000]

On November 7, 2003, Central Mississippi Generating Company, LLC (Central Mississippi) filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Section 32 of the Public Utility Holding Company Act of 1935 and Part 365 of the Commission's regulations.

As more fully explained in the application, Central Mississippi states that it is a limited liability company that will be engaged either directly or indirectly and exclusively in the business of owning and operating an electric generation facility located in Mississippi.

Comment Date: November 28, 2003.

5. Redbud Energy LP

[Docket No. EG04–17–000]

On November 7, 2003, Redbud Energy LP filed with the Federal Energy Regulatory Commission an application for redetermination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment Date: November 28, 2003.

6. Morgan Stanley Capital Group Inc., South Eastern Electric Development Corporation, South Eastern Generating Corporation, Power Contract Finance, L.L.C., Power Contract Financing II, L.L.C., Power Contract Financing II, Inc., MS Retail Development Corp. (not consolidated)

[Docket Nos. ER94–1384–030, ER99–2329–002, ER00–1803–001, ER02–1485–003, ER03–1108–002, ER03–1109–002, and ER03–1315–001]

Take notice that on November 10, 2003 Morgan Stanley Capital Group Inc., on behalf of itself and its affiliates South Eastern Electric Development Corporation, South Eastern Generating Corporation, Power Contract Finance, L.L.C., Power Contract Financing II, L.L.C., Power Contract Financing II, Inc., and MS Retail Development Corp., tendered for filing an updated market power analysis in compliance with the Commission's orders authorizing each of them to engage in wholesale sales of electric power at market-based rates.

Comment Date: December 1, 2003.

7. GS Electric Generating Cooperative, Inc.

[Docket No. ER97–3583–002]

Take notice that on November 10, 2003, GS Electric Generating Cooperative, Inc. (GSE) tendered for filing with the Federal Energy Regulatory Commission its triennial updated market analysis (Triennial Analysis) in accordance with the Commission(s Order in Docket No. ER97–3853–000, which authorized GSE to sell power at market-based rates.

Comment Date: December 1, 2003.

8. Madison Gas and Electric Company

[Docket No. ER00–586–002]

Take notice that on November 10, 2003, Madison Gas and Electric Company (MGE) submitted for filing its updated market analysis in compliance with the Commission Order issued in Docket No. ER00–586–000 on February 9, 2000.

Comment Date: December 1, 2003.

9. Exelon Generation Company, L.L.C., PECO Energy Company, Commonwealth Edison Company, AmerGen Energy Company, L.L.C., Unicom Power Marketing, Inc., Exelon Energy Company

[Docket Nos. ER00–3251–005, ER99–1872–005, ER98–1734–006, ER99–754–008, ER97–3954–016, and ER01–1919–002]

Take notice that on November 7, 2003, Exelon Generation Company, L.L.C., PECO Energy Company, Commonwealth Edison Company and related companies (collectively, Applicants) tendered for filing a market power study update pursuant to the Commission's order in Exelon Generation Company L.L.C., *et al.*, 93 FERC ¶ 61,140 (2000).

Comment Date: November 28, 2003.

10. Entergy-Koch Trading, LP

[Docket No. ER01–2781–002]

Take notice that on October 30, 2003, Entergy-Koch Trading, LP (EKT) submitted for filing notification of a non-material change in the characteristics the Commission relied upon in granting EKT market-based rate authorization under Section 205 of the Federal Power Act.

Comment Date: November 28, 2003.

11. California Independent System Operator Corporation

[Docket No. ER03–1222–002]

Take notice that on November 7, 2003, the California Independent System Operator Corporation (ISO) pursuant to Commission' October 17, 2003 Order in Docket Nos. ER03–1222–000 and 001, submitted for filing FERC Electric Tariff, First Replacement Volume No. 1, Substitute Third Revised Sheet No. 385.

Comment Date: November 28, 2003.

12. FPL Energy Sooner Wind, LLC

[Docket No. ER03–1333–001]

Take notice that on November 6, 2003, FPL Energy Sooner Wind, LLC tendered for filing an amendment to the application for authorization to sell energy and capacity at market-based rates pursuant to Section 205 of the Federal Power Act filed on September 12, 2003.

Comment Date: November 28, 2003.

13. Arizona Public Service Company

[Docket No. ER03–347–002]

Take notice that on November 10, 2003, Arizona Public Service Company (APS) filed with the Commission a Refund Report in Compliance with the letter order issued July 9, 2003 in Docket No. ER03–347–000.

Comment Date: December 1, 2003.

14. Southern Company Services, Inc.

[Docket No. ER03–872–003]

Take notice that on November 10, 2003, Southern Company Services, Inc., on behalf of Georgia Power Company, made a compliance filing in accordance with the Federal Energy Regulatory Commission's Order in Southern Company Services, Inc., 105 FERC ¶ 61,055 (2003).

Comment Date: December 1, 2003.

15. Southern California Edison Company

[Docket No. ER04–160–000]

Take notice that on November 6, 2003, that Southern California Edison Company (SCE), submitted for filing a Notice of Cancellation of the Amended and Restated Edison-Banning Pacific Intertie Firm Transmission Service Agreement between SCE and the City of Banning.

Comment Date: November 28, 2003.

16. Southern California Edison Company

[Docket No. ER04–161–000]

Take notice that on November 6, 2003, Southern California Edison Compnay (SCE) tendered for filing a Notice of Cancellation of the Amended and Restated Edison-Azusa Pacific Intertie Firm Transmission Service Agreement between SCE and the City of Azusa.

Comment Date: November 28, 2003.

17. Southern California Edison Company

[Docket No. ER04–165–000]

Take notice that on November 6, 2003, Southern California Edison Company (SCE) tendered for filing a Notice of Cancellation of the Amended and Restated Edison-Colton Pacific Intertie Firm Transmission Service Agreement between SCE and the City of Colton.

Comment Date: November 28, 2003.

18. MxEnergy Electric Inc.

[Docket No. ER04–170–000]

Take notice that on November 6, 2003, MxEnergy Electric Inc.(MxEnergy) pursuant to 18 CFR 35.16 and 131.51 of the Commission's regulations, filed a Notice of Succession and a revised rate tariff.

Comment Date: November 28, 2003.

19. Geysers Power Company, LLC

[Docket No. ER04–171–000]

Take notice that on November 6, 2003, Geysers Power Company, LLC (Geysers) tendered for filing updated rate schedule sheets for calendar year 2004 for its Reliability Must-Run service agreements with the California Independent System Operator (ISO), designated as Rate Schedules FERC Nos. 4 and 5.

Geysers states that copies of the filing have been served upon the ISO and Pacific Gas and Electric Company.

Comment Date: November 28, 2003.

20. PJM Interconnection, L.L.C.

[Docket No. ER04–172–000]

Take notice that on November 6, 2003, PJM Interconnection, L.L.C. (PJM) submitted for filing amendments to Schedule 3 of the Amended and Restated Operating Agreement of PJM Interconnection L.L.C. to provide for proration of the $5,000 annual PJM membership fee for those entities that are members for less than 12 months in the initial calendar year of their membership.

PJM requests a waiver of the Commission's notice requirements to permit an effective date of November 7, 2003 the day after the date of this filing.

PJM states that copies of this filing have been served on all PJM members, and each state electric utility regulatory commission in the PJM region.

Comment Date: November 28, 2003.

21. California Independent System Operator Corporation

[Docket No. ER04–174–000]

Take notice that on November 6, 2003, the California Independent System Operator Corporation (ISO), tendered for filing a revised Participating Generator Agreement (PGA) between the ISO and Energia de Baja California, S. de R.L. de C.V. (EBC) for acceptance by the Commission. ISO states that the purpose of the filing is to conform the PGA to the ISO's new format for specification of the technical characteristics of a Generating Unit.

The ISO states that this filing has been served on EBC, the California Public Utilities Commission, and all entities that are on the official service lists for Docket Nos. ER02–2009 and ER03–617–000.

The ISO is requesting waiver of the 60-day prior notice requirement to allow the revised Schedule 1 to be made effective as of July 25, 2003.

Comment Date: November 28, 2003.

22. California Independent System Operator Corporation

[Docket No. ER04–175–000]

Take notice that on November 6, 2003, the California Independent System Operator Corporation (ISO), tendered for filing a revised Participating Generator Agreement between the ISO and City of Pasadena

for acceptance by the Commission. The purpose of this revision is to conform Schedule 1 of the Participating Generator Agreement to the ISO's new format for specification of the technical characteristics of a Generating Unit, and to add certain units and remove certain units from this Schedule.

The ISO states that this filing has been served on City of Pasadena, the California Public Utilities Commission, and all entities that are on the official service list for Docket No. ER99–3617. The ISO is requesting waiver of the 60-day prior notice requirement to allow the revised Schedule 1 to be made effective as of August 21, 2003.

Comment Date: November 28, 2003.

23. PPL Electric Utilities Corporation

[Docket No. ER04–176–000]

Take notice that on November 7, 2003, PPL Electric Utilities Corporation (PPL Electric) filed a supplement to Rate Schedule FERC No. 116, an umbrella Borderline Interchange Agreement between PPL Electric and Metropolitan Edison Company. PPL Electric states that the supplement identifies an additional borderline service customer.

PPL Electric states that a copy of this filing has been provided to Metropolitan Edison Company and to the Pennsylvania Public Utility Commission.

Comment Date: November 28, 2003.

24. El Paso Electric Company

[Docket No. ER04–177–000]

Take notice that on November 7, 2003, El Paso Electric Company (EPE) tendered for filing First Amended and Restated Interconnection Agreement, dated October 9, 2003, between EPE and Public Service Company of New Mexico. EPE seeks an effective date for the revised interconnection agreement of November 8, 2003.

Comment Date: November 28, 2003.

25. Southern California Edison Company

[Docket No. ER04–178–000]

Take notice that on November 7, 2003, Southern California Edison Company (SCE) tendered for filing a revised rate sheet to the Interconnection Facilities Agreement (IFA) Between Southern California Edison Company and State of California Department of Water Resources (CDWR). SCE states that the purpose of this filing is to reduce the Interconnection Facilities Charge under the IFA. SCE requests that the revised rate for these services be made effective May 7, 2002.

SCE states that copies of this filing were served upon the Public Utilities Commission of the State of California and CDWR.

Comment Date: November 28, 2003.

26. Illinois Power Company

[Docket No. ER04–179–000]

Take notice that on November 7, 2003, Illinois Power Company (Illinois Power) tendered for filing Second Revised Interconnection Agreement entered into by Illinois Power and AmerGen Energy Company, L.L.C. (First Revised Service Agreement No. 328). Illinois Power requests an effective date of November 4, 2003.

Comment Date: November 28, 2003.

27. Central Mississippi Generating Company, LLC

[Docket No. ER04–180–000]

On November 7, 2003, Central Mississippi Generating Company, LLC (Central Mississippi) filed, under Section 205 of the Federal Power Act, an application requesting that the Commission: (1) Accept for filing its proposed market-based FERC Rate Schedule No. 1; (2) grant blanket authority to make market-based wholesale sales of capacity and energy under the FERC Rate Schedule No. 1; (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: November 28, 2003.

28. American Electric Power Service Corporation

[Docket No. ER04–181–000]

Take notice that on November 10, 2003, the American Electric Power Service Corporation (AEPSC) tendered for filing an Amended Interconnection and Operation Agreement between Ohio Power Company and Duke Energy Hanging Rock, LLC. AEPSC states that the agreement is pursuant to the AEP Companies' Open Access Transmission Service Tariff (OATT) that has been designated as First Revised Service Agreement No. 315 to the Operating Companies of the American Electric Power System FERC Electric Tariff Third Revised Volume No. 6, effective July 31, 2001. AEP requests an effective date of November 7, 2003.

AEP states that a copy of the filing was served upon Duke Energy Hanging Rock, LLC and the Public Utilities Commission of Ohio.

Comment Date: December 1, 2003.

29. New York Independent System Operator, Inc.

[Docket No. ER04–182–000]

Take notice that on November 10, 2003, the New York Independent System Operator, Inc. (NYISO) filed revisions to its Market Administration and Control Area Services Tariff (Services Tariff) to amend the procedures for forecasting the Capability Year peak Loads for the purposes of determining Capability Year Unforced Capacity.

The NYISO states that it has served a copy of this filing upon all parties that have executed service agreements under the NYISO(s OATT and Services Tariff and to the electric utility regulatory agencies in New York, New Jersey, and Pennsylvania.

Comment Date: December 1, 2003.

30. Great Bay Hydro Corporation

[Docket No. ER04–183–000]

Take notice that on November 10, 2003, Great Bay Hydro Corporation (GBHC) filed an application for authority to sell electric energy, capacity and certain ancillary services at market-based rates under Section 205(a) of the Federal Power Act, 16 U.S.C. 824d(a), and accompanying requests for certain blanket approvals and for the waiver of certain Commission regulations. GBHC requests that the Commission accept its Original Rate Schedule FERC No. 1 for filing.

Comment Date: December 1, 2003.

31. California Independent System Operator Corporation

[Docket No. ER04–185–000]

Take notice that the California Independent System Operator Corporation (ISO), on November 10, 2003, tendered for filing a revision to the Metered Subsystem Agreement between the ISO and Silicon Valley Power (SVP) for acceptance by the Commission. The ISO states that the purpose of this revision is to conform Schedule 14 of the Metered Subsystem Agreement to the ISO's new format for specification of the technical characteristics of a Generating Unit.

The ISO states that this filing has been served on SVP, the California Public Utilities Commission, and all entities on the official service list for Docket No. ER02–2321–000.

The ISO is requesting waiver of the 60-day prior notice requirement to allow the revised Schedule 14 to be made effective as of May 30, 2003.

Comment Date: December 1, 2003.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00371 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM02–16–000]

Hydroelectric Licensing Under the Federal Power Act; Notice of Corrections Published in Federal Register

November 18, 2003.

On July 23, 2003, the Commission issued Order No. 2002, Final Rule, in Docket No. RM02–16–000, 104 FERC ¶ 61,109.

On October 30, 2003, the **Federal Register** published corrections to the Final Rule at Volume 68, Number 210, Pages 61742–61743.

On November 7, 2003, the **Federal Register** published editorial corrections to its October 30, 2003 issue at Volume 68, Number 216, Page 63194.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00376 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Intent To File Application for New License

November 18, 2003.

a. *Type of filing:* Notice of Intent to File Application for a New License.

b. *Project No.:* 2088–000.

c. *Date filed:* October 14, 2003.

d. *Submitted By:* South Feather Water and Power Agency.

e. *Name of Project:* South Fork Project.

f. *Location:* On the South Fork of the Feather River, Lost Creek, Slate Creek, near the City of Oroville, California, in Plumas, Butte and Yuba Counties, California. The project occupies land managed by the Plumas National Forest and the Bureau of Land Management.

g. *Filed Pursuant to:* Section 15 of the Federal Power Act; 18 CFR 16.6 of the Commission's regulations.

h. *Effective date of current license:* April 1, 1959.

i. *Expiration date of current license:* March 31, 2009.

j. The project consists of: The project consists of four developments. The Sly Creek Development consists of: (1) Four dams: Little Grass Valley, South Fork, Slate Creek, and Sly Creek diversion dams; (2) a diversion tunnel; (3) a penstock; (4) the Sly Creek powerhouse; and (5) a switchyard. The Woodleaf Development consists of (1) Lost Creek dam; (2) a power tunnel; (3) a penstock; (4) the Woodleaf powerhouse; and (5) a switchyard. The Forbestown Development consists of: (1) Forbestown diversion dam; (2) a power tunnel; (3) a penstock; (4) the Forbestown powerhouse; and (5) a switchyard. The Kelly Ridge Development consists of: (1) Pondersosa dam; (2) a diversion tunnel; (3) Miners Ranch conduit; (4) Miners Ranch tunnel; (5) Miners Ranch dam; (6) a power tunnel; (7) a penstock; (8) the Kelly Ridge powerhouse; and (9) a switchyard.

k. *Pursuant to 18 CFR 16.7, information on the project is available at:* Michael Glaze, South Feather Water and Power Agency, 2310 Oro-Quincy Highway, Oroville, CA 95966, (530) 533–4578

l. *FERC contact*: Tim Looney at (202) 502–6096 or by e-mail: *timothy.looney@ferc.gov*

m. Pursuant to 18 CFR 16.8, 16.9, and 16.10 each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by [2 years before expiration of existing license].

n. A copy of this filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number to access the document excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or TTY 202–502–8659. A copy is also available for inspection and reproduction at the address in item k above.

o. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support as shown in the paragraph above.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00375 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–4–000]

Lake Charles Express LLC; Notice Of Site Visit

November 18, 2003.

On December 9 through December 11, 2003, the Office of Energy Projects staff and representatives of Lake Charles Express LLC (Lake Charles Express) will conduct a site visit of the Lake Charles Express Project in Beauregard, Allen, Jefferson Davis, and Calcasieu Parishes, Louisiana.

All interested parties may attend. Those planning to attend must provide their own transportation. Interested parties can meet staff on December 9, at about 3:30 p.m., in the parking lot at the Best Suites of America, 401 Lakeshore Drive, Lake Charles, Louisiana. Staff will begin the inspection trip on December 10, and 11, at about 7:30 a.m.,

at the Best Suites of America. Mr. Monty Collins of Lake Charles Express can be contacted at telephone (713) 501–6526.

For further information, please contact the Office of External Affairs at 1–866–208–FERC.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00373 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP03–100–001]

OkTex Pipeline Company; Norteño Pipeline Company; Notice of Compliance Filing

November 18, 2003.

Take notice that on November 7, 2003, OkTex Pipeline Company (OkTex), tendered for filing OkTex Original Tariff Sheet No. 5C and Revised Tariff Sheet Nos. 3, 4, and 42, and Norteño Pipeline Company's (Norteño) Gas Tariff, First Volume No. 1 (Cancelled) in accordance with the Order issued by the Federal Energy Regulatory Commission on October 8, 2003, in Docket Nos. CP03–76–000, *et al.*

OkTex states that the purpose of the filing is to reflect Norteño's intended abandonment of facilities and cancellation of service and OkTex's subsequent assumption of Norteño's facilities, service, customers, delivery points, and firm and interruptible rates.

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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00384 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP03–608–001]

Williston Basin Interstate Pipeline Company; Notice of Compliance Filing

November 18, 2003.

Take notice that on November 14, 2003, Williston Basin Interstate Pipeline Company (Williston Basin), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, Substitute Second Revised Sheet No. 232D, to become effective October 16, 2003.

Williston Basin states that the tariff sheet expressly provides that it will hold an open season for an expansion project for which Williston Basin will reserve capacity available for firm service, and specifies when it will hold that open season, in compliance with the Commission's October 16, 2003 Order in the above referenced 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. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-Filing link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00379 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–34–000]

El Paso Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

November 18, 2003.

Take notice that on October 29, 2003, El Paso Natural Gas Company (El Paso) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1–A, Third Revised Sheet No. 113D, with a September 1, 2003 effective date.

EPNG states that this tariff sheet is filed to permit partial reservation charge crediting under Rate Schedule FT–1 for non-delivery of gas due to pipeline maintenance.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary''. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. The Commission strongly encourages electronic filings. See, 18 CFR 385.2001(a)(1)(iii) and the

instructions on the Commission's Web site under the ''e-Filing'' link.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00380 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM04–2–000]

Rules Concerning Certification of an Electric Reliability Organization and the Establishment, Approval, and Enforcement of Electric Reliability Standards; Corrected Notice of Conference

November 18, 2003.

The Federal Energy Regulatory Commission (Commission) will hold a conference on Monday, December 1, 2003, at FERC headquarters, 888 First Street, NE., Washington, DC, in the Commission Meeting Room (Room 2C), at 1:30 p.m. The conference is open to the public, and no registration is required.

The Commission seeks input from interested persons regarding the content of the rulemaking the Commission would be required to implement under the provisions of proposed comprehensive energy legislation that relate to the certification of an electric reliability organization that would be responsible for establishing and enforcing electric reliability standards.[1] The proposed legislation would require the Commission to issue a final rule to implement the provisions related to electric reliability not later than 180 days after enactment. In light of the short timeframe for a final rule as contemplated in legislation being considered by a Senate-House conference committee, we are issuing this Notice in order to be in a position to proceed immediately with the rulemaking process if the legislation is enacted in the near future.

The Commission is very interested in hearing from the public suggestions about how the reliability provisions of the comprehensive energy legislation should be implemented. Therefore, the conference will have an ''open mike'' format. People with a strong interest in speaking should contact by telephone or e-mail one of the Staff contacts identified below and identify the name of the speaker, his or her title, the person or entity the speaker represents, the speaker's telephone number and e-mail address, and a clear statement of the issue or issues to be addressed.

The Capitol Connection offers the opportunity for remote listening and viewing of the conference. It is available for a fee, live over the Internet, by phone or via satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at Capitol Connection (703–993–3100) as soon as possible or visit the Capitol Connection Web site at *http://www.capitolconnection.org* and click on ''FERC.''

For additional information please contact Jonathan First, 202–502–8529 or by e-mail at *Jonathan.First@ferc.gov* or William Longenecker, 202–502–8570 or by e-mail at *William.Longenecker@ferc.gov*.

Magalie R. Salas,

Secretary.

[FR Doc. E3–00377 Filed 11–24–03; 8:45 am]

BILLING CODE 6717–01–P

[1] The text of the proposed legislation is available at: *http://energy.senate.gov/legislation/energybill2003/energybill2003.cfm.*

ENVIRONMENTAL PROTECTION AGENCY

[OPPT–2003–0060; FRL–7333–1]

National Advisory Committee for Acute Exposure Guideline Levels; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: A meeting of the National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances (NAC/AEGL Committee) will be held on December 10–12, 2003, in San Antonio, TX. At this meeting, the NAC/AEGL Committee will address, as time permits, the various aspects of the acute toxicity and the development of Acute Exposure Guideline Levels (AEGLs) for the following chemicals: Acetyl chloride, acrylic acid, ammonia, benzonitrile, bromine, chloroacetyl chloride, dichloroacetyl chloride, disulfur dichloride, hydrogen iodide, methacrylonitrile, methyl chloride, methyl ethyl ketone, oleum, sulfur dichloride, sulfur trioxide, sulfuric acid, tetrachloroethylene, trichloroacetyl chloride, uranium hexafluoride, vinyl acetate monomer, and xylenes.

DATES: The meeting will be held on December 10, 2003, from 10 a.m. to 5:30 p.m.; December 11, 2003, from 8:30 a.m. to 5:30 p.m.; December 12, 2003, from 8 a.m. to 12:30 p.m.

Requests to participate in the meeting, identified by docket ID number OPPT–2003–0060, must be received on or before December 8, 2003.

ADDRESSES: The meeting will be held at La Mansion Del Rio, 112 College St., San Antonio, TX 78205.

Requests to participate in the meeting may be submitted to the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Barbara Cunningham, Director, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

For technical information contact: Paul S. Tobin, Economics and Technology Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8557; e-mail address: *tobin.paul@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may be of particular interest to anyone who may be affected if the AEGL values are adopted by government agencies for emergency planning, prevention, or response programs, such as EPA's Risk Management Program under the Clean Air Act and Amendments Section 112r. It is possible that other Federal agencies besides EPA, as well as State agencies and private organizations, may adopt the AEGL values for their programs. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

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

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPPT–2003–0060. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket,

the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

II. Background

The NAC/AEGL Committee develops AEGLs for use in chemical emergency programs. The NAC/AEGL Committee meets approximately four times each year. The next meeting of the NAC/AEGL Committee is tentatively scheduled for March 2004 in Washington, DC.

III. How Can I Request to Participate in this Meeting?

You may submit a request to participate in this meeting to the technical person listed under **FOR FURTHER INFORMATION CONTACT**. Do not submit any information in your request that is considered CBI. Requests to participate in the meeting, identified by docket ID number OPPT–2003–0060, must be received on or before December 8, 2003.

List of Subjects

Environmental protection, Acute Exposure Guideline Levels, Chemicals, Hazardous substances, Health.

Dated: November 13, 2003.

Charles M. Auer,

Director, Office of Pollution Prevention and Toxics.

[FR Doc. 03–29433 Filed 11–24–03; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7591–2]

EPA Public Meeting: Market Enhancement Opportunities for Water-Efficient Products; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is hosting a one-day public meeting to discuss market enhancement opportunities for water-efficient products. EPA's goal is to bring together stakeholders from Federal, state and local governments; utilities; manufacturers; building trade associations; consumer groups; and other interested parties to exchange information and views on promoting water-efficient products in the marketplace. The focus of the January meeting will be on activities and partnership building with utilities; state, regional, and local governments; and non-government organizations. The first meeting was held in Washington, DC on October 9, 2003. Two additional public meetings are being planned: one in Phoenix, AZ in February, and one in Seattle, WA in March; notice will be provided on locations and times when available.

The meeting will consist of several panel discussions, and is open to the public. The audience will have an opportunity to ask questions and provide comments at the conclusion of the meeting.

DATES: The meeting will begin at 9 a.m. on January 15, 2004.

ADDRESSES: The meeting will be held at the Austin Hilton, 500 East 4th St., Austin, TX 78701.

FOR FURTHER INFORMATION CONTACT: For more information on this meeting, please see EPA's Water Efficiency Web page at *http://www.epa.gov/owm/water-efficiency/index.htm*. To register online from the Water Efficiency Program page, click on the registration form link. You may also register by contacting ERG, Inc. by phone (781) 674–7374, or by downloading the registration form and sending the completed form to ERG via fax at (781) 674–2906 or mail to ERG, Conference Registration, 110 Hartwell Avenue, Lexington, MA 02421–3136. Seating is limited, therefore please register or request special accommodations no later than January 9, 2004.

Dated: November 18, 2003.

Sheila Frace,

Acting Director, Office of Wastewater Management.

[FR Doc. 03–29432 Filed 11–24–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7591–5]

Science Advisory Board Staff Office; Notification of a Workshop on Environmental Protection

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. EPA Science Advisory Board (SAB) Staff Office is announcing a one-day ''Science Workshop on Environmental Protection'' to be held in Washington, DC. The Workshop will provide the SAB with an overview of selected emerging topics that may be of interest to the EPA. Although the SAB is a Federal Advisory Committee, this workshop is an administrative meeting and, therefore, not subject to the open meeting requirements of the Federal Advisory Committee Act. The Workshop is open to the public, however, seating for the public will be limited and available on a first come basis only to those who pre-register (see Workshop Registration below).

DATES: *December 5, 2003*: Members of the public wishing to attend must pre-register no later than 12 noon (Eastern Time) on December 5, 2003. Please pre-register via e-mail or fax to Mr. Flaak (see below information). To pre-register, please provide your name, title, organization, mailing address, phone and e-mail. Pre-registration will end when all available public seating is allocated.

December 11, 2003: The workshop will beginning at 8:30 a.m. and adjourning no later than 5:30 p.m. (Eastern Time)

ADDRESSES: Horizon Ballroom, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW., Washington, DC 20004. Please note—the Ronald Reagan Federal Building is a secure facility and a government issued photo ID will be required for entry.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning this workshop should contact Mr. Robert Flaak, EPA Science Advisory Board Staff Office (1400A), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone (202) 564–4546; Fax (202) 501–0582 or 501–0256; or via e-mail at *flaak.robert@epa.gov.*

SUPPLEMENTARY INFORMATION: The Workshop will consist of five 90-minute presentation and discussion sessions on the following topics: (1) Air Pollution & Control/Transboundary Air Pollutants; (2) Emerging Contaminants (Chemicals and Microbials); (3) Invasive Species; (4) Nanotechnology; and (5) Genomics. Each session will be moderated and have several brief presentations followed by panel discussion.

A draft Workshop agenda is posted on the SAB Web site under ''Recent Additions'' (*http://www.epa.gov/sab/whatsnew.htm*). An updated Agenda will be posted prior to the Workshop. Workshop Proceedings will be available at a date to be announced on the SAB Web site.

The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice, consultation, and recommendations to the EPA Administrator on the technical basis for Agency positions and regulations. General information about the EPA Science Advisory Board, may be found on the SAB Web site (*http://www.epa.gov/sab*).

Meeting Access—Individuals requiring special accommodation at this workshop should contact Mr. Flaak at least five business days in advance so that appropriate arrangements can be made.

Dated: November 20, 2003.

Anthony Maciorowski,

Acting Associate Director, EPA Science Advisory Board Staff Office.

[FR Doc. 03–29430 Filed 11–24–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7591–6]

Science Advisory Board Staff Office; Notification of Multiple Upcoming Meetings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces upcoming multiple meetings of the:

(1) SAB Drinking Water Committee: Face to face meeting.

(2) SAB Cross-Agency Science and Technology Budget Review: Face to face meeting.

(3) Joint meeting of the SAB Environmental Health Committee, and the Integrated Health and Exposure Committee: Face to Face Meeting.

(4) The Advisory Council on Clean Air Compliance Analysis Special Council Panel for the Review of the Third 812 Analysis (Council Special Panel): Public teleconferences.

(5) The SAB Committee on Valuing the Protection of Ecological Systems and Services: Public teleconference.

DATES: *December 3, 2003:* The SAB Committee on Valuing the Protection of Ecological Systems and Services will hold a public teleconference from 1 p.m. to 2:30 p.m. (EST).

December 10, 2003: The SAB Drinking Water Committee will hold a face-to-face meeting from 9 a.m.. to 12:30 p.m. (EST).

December 10, 2003: The first of a series of public face-to-face meetings of the SAB Cross-Agency Science and Technology Budget Review will be held from 12:30 p.m. to 5:30 p.m. (EST).

December 12, 2003: A joint public face-to-face meeting of the SAB Environmental Health Committee, and the Integrated Health and Exposure Committee will be held from 9 a.m.. to 12:30 p.m. (EST).

December 19, 2003 and December 22, 2003: The Advisory Council on Clean Air Compliance Analysis Special Council Panel for the Review of the Third 812 Analysis (Council Special Panel) will hold a public teleconference from 12 p.m. to 2 p.m. (EST) both days.

ADDRESSES: *Face to Face Meetings*: The meeting location for the face to face meetings of the SAB Drinking Water Committee, SAB Cross-Agency Science and Technology Budget Review, SAB Environmental Health Committee, and the Integrated Health and Exposure Committee, is the Washington, DC. Metropolitan area. The specific meeting locations and agendas will be announced on the SAB Web site, *http://www.epa/sab* ten calendar days prior to the meetings.

Public teleconferences: Participation in the teleconference meetings will be by teleconference only. The agendas will be announced on the SAB Web site, *http://www.epa/sab* ten calendar days prior to the teleconferences.

FOR FURTHER INFORMATION CONTACT: To reach a central number at the EPA SAB Staff Office, please call via telephone (202) 564–4533, U.S. EPA Science Advisory Board (1400A), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. General information about the SAB can be found in the SAB Web site at *http://www.epa.gov/sab*.

Members of the public who wish to obtain the call in number and access code to participate in the teleconferences of the Council Special Panel, or the SAB Committee on Valuing the Protection of Ecological Systems, may contact Dr. Angela Nugent, Designated Federal Officer (DFO), via telephone, (202) 564–4562; or via e-mail at *nugent.angela@epa.gov*.

Any member of the public wishing further information regarding the face to face meetings of the SAB Drinking Water Committee, please contact Dr. James N. Rowe, DFO, via telephone (202) 564–6488; or via e-mail at *rowe.james@epa.gov*. For information regarding the SAB Cross-Agency Science and Technology Budget Review, please contact Mr. Thomas Miller, DFO, via telephone, (202) 564–4558; or via e-mail at *miller.tom@epa.gov*. For information regarding the SAB Environmental Health Committee, and the Integrated Health and Exposure Committee, please contact Dr. Suhair Shallal, DFO, via telephone (202) 564–4566; or via e-mail at *shallal.suhair@epa.gov*.

SUPPLEMENTARY INFORMATION:

Drinking Water Committee

The SAB Drinking Water Committee will be meeting with the Office of Water (OW) and the Office of Research and Development (ORD) on December 10, 2003, to receive informational briefings. OW will make presentations on (1) their overall process for implementing the regulatory and risk assessment program for the Safe Drinking Water Act (SDWA), and (2) discussion of the intersection between the Clean Water Act (CWA) and SDWA with regards to preserving and restoring drinking water sources. An overview of ORD's Multi-Year Plan (MYP) for drinking water research will be presented. The briefings will set the stage for a formal review of the Drinking Water MYP and consultations on CWA/SDWA interactions on drinking water sources during the spring and summer of FY 2004.

Science Advisory Board Cross-Agency Science and Technology Budget Review

The Board of the SAB will review EPA's cross agency science and technology budget for 2005.

Collectively, Board members have broad expertise in all aspects of environmental sciences and their expertise is appropriate to addressing EPA's charge. Further, these SAB members have been appointed by the Administrator, to provide advice on broad issues of research planning, budgeting, and management as well as a variety of specific scientific and technical issues.

The Board will hold a series of meetings that will be used to receive briefings on the content of EPA's science and technology programs across the Agency and to review the EPA FY 2005 science and technology budget itself. The briefing meetings will begin on December 10, 2003, and continue into January 2004. During February, the SAB will meet and deliberate on the Agency's FY 2005 science and technology budget. Some meetings will be conducted as face to face meetings of the participants while others will be conducted by telephone conference. All meetings will be open to the public, however, seating is limited and available on a first come basis.

The purpose of this meeting is to: (1) Receive presentations from EPA representatives on the science and technology programs conducted in support of two of EPA's strategic Goal areas, Goal 1 (Clean Air and Global Climate Change) and Goal 2 (Clean and Safe Water), (2) to discuss these programs with Agency representatives and to clarify specific points of interest raised by the Panelists; (3) to make and discuss Panel assignments for the review; and (4) to receive public comments if any are offered.

At a face to face meeting in February 2004, the Board will review the science and technology components of the EPA Fiscal Year 2005 Budget Request and prepare a report to the EPA Administrator on their findings and recommendations.

Environmental Health Committee, and the Integrated Human Exposure Committee

The Environmental Health Committee, and the Integrated Human Exposure Committee will hold a joint meeting to receive informational briefings from various offices within EPA concerning ongoing initiatives for improving risk assessment methodologies. This information will serve as background for upcoming reviews that Environmental Health Committee and the Integrated Human Exposure Committee will participate in during FY 2004.

The Advisory Council on Clean Air Compliance Analysis Special Council Panel for the Review of the Third 812 Analysis (Council Special Panel)

The Council Special Panel will hold a public teleconference call, as described above, to advise the Agency on its plan to develop the third in a series of statutorily mandated comprehensive analyses of the total costs and benefits of programs implemented pursuant to the Clean Air Act. Background on the Council Special Panel and this advisory project was provided in a **Federal Register** notice published on February 14, 2003 (68 FR 7531–7534).

The public teleconference on December 19, 2003, described above, is planned for the Council Special Panel to review and act on a draft report entitled ''Advisory on Plans for Health Effects Analysis in the Analytical Plan for EPA's Second Prospective Analysis—Benefits and Costs of the Clean Air Act, 1990–2020,'' developed by the Council's Health Effects Subcommittee.

The public teleconference on December 22, 2003, described above, is planned for the Council Special Panel to review and act on a draft report finalizing an Advisory related to the Council Special Panel's review of the Revised Analytical Plan for EPA's Second Prospective Analysis.

Both draft reports identified above will be posted on the SAB Web site as a draft report (consult the following page: *http://www.epa.gov/science1/drrep.htm*).

SAB Committee on Valuing the Protection of Ecological Systems and Services

The SAB Committee on Valuing the Protection of Ecological Systems and Services will hold a public meeting, as described above, to plan its future work, including a public advisory meeting tentatively planned for January 20–22, 2004.

Background on the Committee and its charge was provided in a **Federal Register** notice published on March 7, 2003 (68 FR 11082–11084). The overall charge to the Committee is to assess Agency needs and the state of the art and science of valuing protection of ecological systems and services, and then to identify key areas for improving knowledge, methodologies, practice, and research.

Procedures for Providing Public Comment. It is the policy of the EPA SAB Staff Office to accept written public comments of any length, and to accommodate oral public comments whenever possible. The EPA SAB Staff Office expects that public statements presented at the meetings described above will not be repetitive of previously submitted oral or written statements. *Oral Comments:* In general, each individual or group requesting an oral presentation at a face to face meeting will be limited to a total time of ten minutes (unless otherwise indicated). For teleconference meetings, opportunities for oral comment will usually be limited to no more than three minutes per speaker and no more than fifteen minutes total. Interested parties should contact the DFO in writing (e-mail, fax or mail) at least one week prior to the meeting in order to be placed on the public speaker list for the meeting. Speakers should bring at least 35 copies of their comments and presentation slides for distribution to the participants and public at the meeting. *Written Comments:* Although written comments are accepted until the date of the meeting (unless otherwise stated), written comments should be received in the SAB Staff Office at least one week prior to the meeting date so that the comments may be made available to the committee for their consideration. Comments should be supplied to the DFO at the address/contact information noted above in the following formats: One hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat, WordPerfect, Word, or Rich Text files (in IBM–PC/Windows 95/98 format)). Those providing written comments and who attend the meeting are also asked to bring 35 copies of their comments for public distribution.

Meeting Accommodations: Individuals requiring special accommodation to access these meetings, should contact the SAB Staff Office, at least five business days prior to the meeting so that appropriate arrangements can be made. Meeting space is limited and on a first-come first-served basis.

Dated: November 20, 2003.

Anthony F. Maciorowski,

Acting Associate Director, EPA Science Advisory Board Staff Office.

[FR Doc. 03–29431 Filed 11–24–03; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

November 14, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before January 26, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0849

Title: Commercial Availability of Navigation Devices, CS Docket No. 97–80

Form Number: N/A

Type of Review: Revision of a currently approved collection

Respondents: Business or other for-profit entities; Individuals or households

Number of Respondents: 215

Estimated Time per Response: 10 mins. to 40 hrs.

Frequency of Response: Quarterly and semi-annual reporting requirements; Third Party Disclosure

Total Annual Burden: 3,416 hours

Total Annual Costs: $33,450

Needs and Uses: On April 25, 2003 the FCC released an Order and Further Notice of Proposed Rulemaking (''Order and FNPRM''), In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97–80, FCC 03–89. In this Order and FNPRM the Commission extends by eighteen months the existing 2005 deadline in Section 76.1204(a)(1) prohibiting the deployment of integrated navigation devices by multichannel video programming distributors in order to promote the retail sale of non-integrated host devices. This extension was granted in light of ongoing negotiations between the cable and consumer electronics industries that may affect the technical specifications relating to host devices and associated point-of-deployment modules. The Commission also committed to completing a reassessment of the upcoming ban on integrated devices, based in part upon the status of these negotiations, prior to January 1, 2005. In order to complete its assessment in a timely manner, the FCC has requested that the cable and consumer electronics industries file progress reports with the Commission on the status of their negotiations at 90, 180, and 270 day intervals following release of the Order and FNPRM. The proposed progress reports would be used as a partial basis to elicit public comment as a part of a rulemaking proceeding pursuant to the Order and FNPRM on the appropriateness of the new July 1, 2006 ban on integrated devices, based upon the status of these negotiations. This objective is commensurate with our statutory directive in Section 629 of the Communications Act of 1934, as amended, to act ''in consultation with appropriate industry standard-setting organizations'' to assure the commercial availability of navigation devices used in conjunction with services provided by multichannel video programming distributors (''MVPDs'').

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–29347 Filed 11–24–03; 8:45 am]

BILLING CODE 6712–10–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

November 17, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 26, 2003. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments regarding this Paperwork Reduction Act submission to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0798.

Title: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization.

Form No: FCC Form 601.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households, business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 250,520.

Estimated Time Per Response: .50–1.25 hours.

Frequency of Response: On occasion and every 10 year reporting requirements, recordkeeping requirement, and third party disclosure requirement.

Total Annual Burden: 219,205 hours.

Total Annual Cost: $50,104,000.

Needs and Uses: FCC Form 601 is a multi-purpose form used to apply for an authorization to operate radio stations, amend pending applications, modify existing licenses and perform a variety of other miscellaneous tasks in the Pubic Mobile Services, Personal Communications Services, General Wireless Communications Services, Private Land Mobile Radio Services, Broadcast Auxiliary Services, Fixed Microwave Services, Maritime Services (excluding ships) and Aviation Services (excluding aircraft). The form has been revised to include the Instructional Television Fixed Service (ITFS) and the Multipoint Distribution Service (MDS) previously held in the Broadband Licensing System (BLS) as these services will be integrated into the Universal Licensing System (ULS).

OMB Control No.: 3060–0816.

Title: Local Competition and Broadband Reporting, CC Docket No. 99–301.

Form No: FCC Form 477.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 429 respondents; 858 responses.

Estimated Time Per Response: 11.4 hours.

Frequency of Response: Semi-annual reporting requirement.

Total Annual Burden: 45,278 hours.

Total Annual Cost: N/A.

Needs and Uses: The FCC Form 477 seeks to gather information on the development of local competition and deployment of broadband service also known as advanced telecommunications services. The data are necessary to evaluate the status of developing competition in local exchange telecommunications markets and to evaluate the status of broadband deployment. The information is used by Commission staff to advise the Commission about the efficacy of Commission rules and policies adopted to implement the Telecommunications Act of 1996.

OMB Control No.: 3060–0972.

Title: Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers.

Form Nos: FCC Forms 507, 508, and 509.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, and not-for-profit institutions.

Number of Respondents: 1,249 respondents; 7,594 responses.

Estimated Time Per Response: 1–93 hours.

Frequency of Response: Annual reporting requirement and third party disclosure requirement.

Total Annual Burden: 31,923 hours.

Total Annual Cost: $45,000.

Needs and Uses: The Commission modified this collection by adding additional reporting requirements and eliminated reporting requirements that have been met or are no longer necessary. Specifically, the Commission aligned the interstate access rate structure more closely with the manner in which cost are incurred, and created a universal service support mechanism to replace implicit support in interstate access charges with explicit support that is portable to all eligible telecommunications carriers. The Commission also tailored to the needs of small and mid-sized local telephone companies serving rural and high-cost areas, and will help provide certainty and stability for rate-of-return carriers, encourage investment in rural America, and provide important consumer benefits.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–29348 Filed 11–24–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

November 17, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 26, 2003. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0856.

Title: Universal Service—Schools and Libraries Universal Service Program Reimbursement Forms.

Form Nos.: FCC Forms 472, 473, and 474.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 31,800 respondents; 39,300 responses.

Estimated Time Per Response: 1.5 hours.

Frequency of Response: On occasion, annual and quarterly reporting

requirements and third party disclosure requirement.

Total Annual Burden: 58,950 hours.

Total Annual Cost: N/A.

Needs and Uses: In an effort to administer the requirements and obligations of the Universal Service program, FCC Forms 472, 473 and 474 and their instructions have been modified to make editorial changes, date adjustments and clarification statements. These forms instructions have also been modified to include invoice deadlines and extension request sections for the filing requirements.

OMB Control No.: 3060–XXXX.

Title: Section 1.929(c)(1), Composite Interference Contour (CIC).

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local and tribal government.

Number of Respondents: 50.

Estimated Time Per Response: 2 hours.

Frequency of Response: On occasion reporting requirement and recordkeeping requirement.

Total Annual Burden: 100 hours.

Total Annual Cost: N/A.

Needs and Uses: Under Section 1.929(c)(1) of the Commission's rules, any increase in the composite interference contour (CIC) of a site-based licensee in the Paging and Radiotelephone Service, Rural Radiotelephone Service, or 800 MHz Specialized Mobile Radio Service is a major modification of license that requires prior Commission approval. However, the Commission released a Notice of Proposed Rulemaking (NPRM) in WT Docket No. 03–103 (68 FR 44003), proposing to amend this rule section to specify that expansion of a CIC of a site-based licensee in the Paging and Radiotelephone Service, as well as the Rural Radiotelephone Service and 800 MHz Specialized Mobile Radio Service, over water on a secondary, non-interference basis should be classified as a minor (rather than major) modification of a license. Such reclassification would eliminate the filing requirements associated with these license modifications, but require site-based licensees to provide the geographic area licensee (on the same frequency) with the technical and engineering information necessary to evaluate the site-based licensee's operations over water.

OMB Control No.: 3060–0465.

Title: Section 74.985, Signal Booster Stations.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 6,300.

Estimated Time Per Response: .083—8.25 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement, and third party disclosure requirement.

Total Annual Burden: 919 hours.

Total Annual Cost: $2,252,500.

Needs and Uses: Section 74.985 requires signal booster stations to: (1) Submit engineering data or showings in specified formats to the FCC's duplicating contractor; (2) to serve a copy of the application and accompanying engineering materials on affected co-channel or adjacent channel parties; and (3) retain a copy of the application at the transmitter site. The data are used to ensure that MDS and ITFS applicants and licensees have considered the potential harmful interference from their facilities. The Commission is submitting this to the OMB for extension (no change) to obtain the full three year clearance.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–29349 Filed 11–24–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

November 14, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction (PRA) comments should be submitted on or before January 26, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0780.

Title: Uniform Rate-Setting Methodology.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; and State, Local and Tribal Government.

Number of Respondents: 160.

Estimated Time per Response: 20 to 50 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 3,500 hours.

Total Annual Cost: None.

Needs and Uses: The uniform rates proposals will be filed with the Commission and served on all affected local franchise areas (LFAs). The Commission will review the rate proposals, comments received from the LFAs, and replies received from cable operators in considering whether the interests of subscribers will be protected under the new rate proposal.

OMB Control Number: 3060–0427.

Title: Section 73.3523, Dismissal of Applications in Renewal Proceedings.

Form Number: N/A.

Type of Review: Extension of currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1.

Estimated time per response: 1 hour.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 1 hour.

Total Annual Costs: $1,600.

Needs and Uses: 47 CFR 73.3523 requires an applicant for a construction permit to obtain approval from the FCC to dismiss or withdraw its application when that application is mutually exclusive with a renewal application. This request for approval must contain a copy of any written agreement and an affidavit stating that it has not received any consideration (pre-Initial Decision), or it has not received any consideration in excess of legitimate and prudent expenses (post-Initial Decision) for the dismissal/withdrawal of its application. In addition, within 5 days of the applicant's request for approval, each remaining competing applicant and the renewal applicant must submit an affidavit certifying that it has not paid any consideration (pre-Initial Decision), or that it has not paid consideration in excess of legitimate and prudent expenses (post-Initial Decision) for the dismissal/ withdrawal of a competing application. The FCC staff uses the data to ensure that an application was filed under appropriate circumstances and not to extract payments prohibited by the Commission.

OMB Control Number: 3060–0561.

Title: Section 76.913, Assumption of Jurisdiction by the Commission.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: State, local or tribal government.

Number of Respondents: 10.

Estimated Time per Response: 8 hours.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 80 hours.

Total Annual Cost: None.

Needs and Uses: 47 CFR section 76.913 permits a local franchising authority (LFA) that is unable to meet certification standards to petition the FCC to regulate the basic service cable rates of its franchisee. The FCC uses this information collected under this control number to identify situations where the Commission should exercise jurisdiction over basic service and equipment rates in place of local franchising authority. Without this information, the basic cable rates of some franchising areas, which are not subject to effective competition, would remain unregulated in contravention of the goals of the 1992 Cable Act.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–29350 Filed 11–24–03; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–03–55–B (Auction No. 55); DA 03–3235]

Auction of Licenses in the 900 MHz Specialized Mobile Radio (''SMR'') Service Scheduled for February 11, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the procedures and minimum opening bids for the upcoming auction of licenses in the 900 MHz SMR Service. This document is intended to familiarize prospective bidders with the procedures and minimum opening bids for the auction.

DATES: Auction No. 55 is scheduled to begin on February 11, 2004.

FOR FURTHER INFORMATION CONTACT: *Auctions and Industry Analysis Division:* Legal questions: Robert Krinsky at (202) 418–0660. General auction questions: Lyle Ishida at (202) 418–0660 or Linda Sanderson at (717) 338–2888. *Media Contact:* Press inquiries: Chelsea Fallon at (202) 418–7991. *Commercial Wireless Division:* Legal questions: Evan Baranoff at (202) 418–7142. Technical questions: Bettye Woodward at (202) 418–1345 or Gary Devlin at (717) 338–2618.

SUPPLEMENTARY INFORMATION: This is a summary of the *Auction No. 55 Procedures Public Notice* released on October 17, 2003. The complete text of the *Auction No. 55 Procedures Public Notice,* including attachments, as well as related Commission documents, are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room C–A257, Washington, DC, 20554. The *Auction No. 55 Procedures Public Notice* and related Commission documents 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.* When ordering documents from Qualex, please provide the appropriate FCC document number (for example, FCC 95–395 for the *900 MHz Second Order on Reconsideration and Order*). The *Auction No. 55 Procedures Public Notice* and related documents are also available on the Internet at the Commission's Web site: *http://wireless.fcc.gov/auctions/55/.*

I. General Information

A. Introduction

1. The *Auction No. 55 Procedures Public Notice* announces the procedures and minimum opening bids for the upcoming auction of licenses in the SMR Service scheduled for February 11, 2004 (Auction No. 55). On September 17, 2003, in accordance with the Balanced Budget Act of 1997, the Bureau released a public notice seeking comment on reserve prices or minimum opening bids and the procedures to be used in Auction No. 55. The Bureau received no comments in response to the *Auction No. 55 Comment Public Notice,* 68 FR 55955 (September 29, 2003).

i. Background of Proceeding

2. On April 17, 1995, the Commission released the *900 MHz Second Report and Order and Second Further Notice of Proposed Rule Making,* 60 FR 21987 (May 4, 1995), in which it adopted final service rules and requested comment on proposed auction rules for licensing 900 MHz SMR spectrum. On September 14, 1995, the Commission released the *900 MHz Second Order on Reconsideration and Seventh Report and Order,* 60 FR 48913 (September 21, 1995), adopting final auction rules for the 900 MHz SMR service. In 1996, the Commission concluded an auction of 900 MHz SMR licenses in Auction No. 7.

ii. Licenses To Be Auctioned

3. Auction No. 55 will offer 60 licenses based on Major Trading Areas (''MTAs''). The MTAs are based on the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition. The Commission Rand McNally and Company has authorized interested parties to use MTAs under a blanket license agreement, which covers certain services, including the 900 MHz SMR Service. The Commission uses 51 MTAs, which include the 47 established by Rand McNally, with the following exceptions and additions: Alaska is separated from the Seattle MTA and is licensed separately, Guam and the Northern Marianas Islands are licensed as a single MTA-like area; Puerto Rico and the U.S. Virgin Islands are licensed in a single MTA-like area; and American Samoa is licensed as a single MTA-like area. The spectrum to be auctioned was previously associated with licenses that have been cancelled or terminated. A complete list of the licenses available in Auction No. 55 is included in

Attachment A of the *Auction No. 55 Procedures Public Notice.*

4. The following table contains the channel block/frequency cross-reference for the 896–901 MHz and 935–940 MHz bands:

Channel block	Channel Nos.	Frequency (MHz)	Channel block	Channel Nos.	Frequency (MHz)
A	1–10	896.00625–896.13125 935.00625–935.13125	B	21–30	896.25625–896.38125 935.25625–935.38125
C	41–50	896.50625–896.63125 935.50625–935.63125	D	61–70	896.75625–896.88125 935.75625–935.88125
E	81–90	897.00625–897.13125 936.00625–936.13125	F	101–110	897.25625–897.38125 936.25625–936.38125
G	121–130	897.50625–897.63125 936.50625–936.63125	H	141–150	897.75625–897.88125 936.75625–936.88125
I	161–170	898.00625–898.13125 937.00625–937.13125	J	181–190	898.25625–898.38125 937.25625–937.38125
K	201–210	898.50625–898.63125 937.50625–937.63125	L	221–230	898.75625–898.88125 937.75625–937.88125
M	241–250	899.00625–899.13125 938.00625–938.13125	N	261–270	899.25625–899.38125 938.25625–938.38125
O	281–290	899.50625–899.63125 938.50625–938.63125	P	301–310	899.75625–899.88125 938.75625–938.88125
Q	321–330	900.00625–900.13125 939.00625–939.13125	R	341–350	900.25625–900.38125 939.25625–939.38125
S	361–370	900.50625–900.63125 939.50625–939.63125	T	381–390	900.75625–900.88125 939.75625–939.88125

Note: For Auction No. 55, Licenses Are Not Available in Every Market or for Each Channel Block Listed in the Table. In One Case, a License Is Available for Only Part of a Market. See Attachment A To Determine Which Licenses Will Be Offered.

B. Rules and Disclaimers

i Relevant Authority

5. Prospective bidders must familiarize themselves thoroughly with the Commission's rules relating to the 900 MHz SMR Service contained in title 47, part 90, of the Code of Federal Regulations, and those relating to application and auction procedures, contained in title 47, part 1, of the Code of Federal Regulations. Prospective bidders must also be thoroughly familiar with the procedures, terms and conditions (collectively, ''terms'') contained in the *Auction No. 55 Procedures Public Notice; the Auction No. 55 Comment Public Notice;* and the *Second Order on Reconsideration and Seventh Report and Order,* 60 FR 48913 (September 21, 1995) (as well as prior and subsequent Commission proceedings regarding competitive bidding procedures).

6. The terms contained in the Commission's rules, relevant orders, and public notices are not negotiable. The Commission may amend or supplement the information contained in our public notices at any time, and will issue public notices to convey any new or supplemental information to applicants. It is the responsibility of all applicants to remain current with all Commission rules and with all public notices pertaining to this auction.

ii. Prohibition of Collusion

7. To ensure the competitiveness of the auction process, § 1.2105(c) of the Commission's rules prohibits applicants for any of the same geographic license areas from communicating with each other during the auction about bids, bidding strategies, or settlements unless such applicants have identified each other on their FCC Form 175 applications as parties with whom they have entered into agreements under § 1.2105(a)(2)(viii). Thus, applicants for any of the same geographic license areas must affirmatively avoid all discussions with each other that affect, or in their reasonable assessment have the potential to affect, bidding or bidding strategy. This prohibition begins at the short-form application filing deadline and ends at the down payment deadline after the auction. For purposes of this prohibition, § 1.2105(c)(7)(i) defines applicant as including all controlling interests in the entity submitting a short-form application to participate in the auction, as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity.

8. Applicants for licenses in any of the same geographic license areas are encouraged not to use the same individual as an authorized bidder. A violation of the anti-collusion rule could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between the applicants he or she is authorized to represent in the auction. A violation could similarly occur if the authorized bidders are different individuals employed by the same organization (*e.g.*, law firm or consulting firm). In such a case, at a minimum, applicants should certify on their applications that precautionary steps have been taken to prevent communication between authorized bidders and that applicants and their bidding agents will comply with the anti-collusion rule. However, the Bureau cautions that merely filing a certifying statement as part of an application will not outweigh specific evidence that collusive behavior has occurred, nor will it preclude the initiation of an investigation when warranted.

9. The Commission's anti-collusion rules allow applicants to form certain agreements during the auction, provided the applicants have not applied for licenses covering the same geographic areas. In addition, applicants that apply to bid for all markets will be precluded from communicating with all other applicants until after the down payment deadline. However, all applicants may enter into bidding agreements before filing their FCC Form 175, as long as they disclose the existence of the agreement(s) in their Form 175. If parties agree in principle on all material terms prior to the short-form filing deadline, those parties must be

identified on the short-form application pursuant to § 1.2105(c), even if the agreement has not been reduced to writing. If the parties have not agreed in principle by the filing deadline, an applicant would not include the names of those parties on its application, and may not continue negotiations with other applicants for licenses covering any of the same geographic areas. By signing their FCC Form 175 short-form applications, applicants are certifying their compliance with § 1.2105(c).

10. Section 1.65 of the Commission's rules requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission within 30 days of any substantial change that may be of decisional significance to that application. Thus, § 1.65 requires auction applicants that engage in communications of bids or bidding strategies that result in a bidding agreement, arrangement or understanding not already identified on their short-form applications to promptly disclose any such agreement, arrangement or understanding to the Commission by amending their pending applications. In addition, § 1.2105(c)(6) requires all auction applicants to report prohibited discussions or disclosures regarding bids or bidding strategy to the Commission in writing immediately but in no case later than five business days after the communication occurs, even if the communication does not result in an agreement or understanding regarding bids or bidding strategy that must be reported under § 1.65.

11. A summary listing of documents issued by the Commission and the Bureau addressing the application of the anti-collusion rules may be found in Attachment G of the *Auction No. 55 Procedures Public Notice.*

iii. Interference Protection for Incumbent Licensees

12. Incumbent SMR systems in the 900 MHz MTA blocks are entitled to co-channel protection by MTA licensees. Among other licensing and technical rules, MTA licensees will be required to afford interference protection to incumbent SMR systems, on a fixed separation basis as provided in § 90.621. Secondary sites for which applications were filed on or before August 9, 1994, are also afforded complete co-channel protection.

13. Incumbents may modify or add sites so long as they do not exceed their existing 40 dBu signal strength contour. In fact, incumbent systems are not allowed to expand beyond existing service areas unless they obtain the MTA license for the relevant channels.

14. Potential bidders seeking licenses for MTAs that border Canada or Mexico are subject to coordination arrangements with those respective countries.

iv. Due Diligence

15. Potential applicants are reminded that there are a number of incumbent licensees operating on 900 MHz SMR channels that are subject to the upcoming auction. Incumbent licenses were originally granted in 1986 in 46 ''Designated Filing Areas'' (''DFAs''). Incumbent systems are entitled to protection from co-channel interference within their 40 dBu signal strength contour by any new entrant who obtains a 900 MHz SMR MTA license at the auction. We therefore caution potential bidders in formulating their bidding strategies to investigate and consider the extent to which 900 MHz SMR channel blocks are occupied by incumbents.

16. Potential applicants are solely responsible for identifying associated risks and for investigating and evaluating the degree to which such matters may affect their ability to bid on, otherwise acquire, or make use of licenses available in Auction No. 55.

17. Potential applicants also should be aware that certain applications (including those for modification), petitions for rulemaking, requests for special temporary authority (''STA''), waiver requests, petitions to deny, petitions for reconsideration, and applications for review may be pending before the Commission and relate to particular applicants, incumbent licensees, or the licenses available in Auction No. 55. In addition, certain judicial proceedings that may relate to particular applicants or incumbent licensees, or the licenses available in Auction No. 55, may be commenced, or may be pending, or may be subject to further review. We note that resolution of these matters could have an impact on the availability of spectrum in Auction No. 55. In addition, although the Commission will continue to act on pending applications, requests and petitions, some of these matters may not be resolved by the time of the auction.

18. In addition, potential applicants may research the licensing database for the Wireless Telecommunications Bureau on the Internet in order to determine which frequencies are already licensed to incumbent licensees. The Commission makes no representations or guarantees regarding the accuracy or completeness of information in its databases or any third party databases, including, for example, court docketing systems. Furthermore, the Commission makes no representations or guarantees regarding the accuracy or completeness of information that has been provided by incumbent licensees and incorporated into the database. Potential applicants are strongly encouraged to physically inspect any sites located in, or near, the service area for which they plan to bid.

19. Potential bidders may obtain information about licenses available in Auction No. 55 through the Bureau's licensing database on the World Wide Web at *http://wireless.fcc.gov/uls.* Potential applicants may query the database online and download a copy of their search results if desired. Detailed instructions on using License Search (including frequency searches and the GeoSearch capability) and downloading query results are available online by selecting the ''?'' button at the upper right-hand corner of the License Search screen.

20. Potential applicants should direct questions regarding the search capabilities to the FCC Technical Support hotline at (202) 414–1250 (voice) or (202) 414–1255 (TTY), or via e-mail at *ulscomm@fcc.gov.* The hotline is available to assist with questions Monday through Friday, from 8 a.m. to 6 p.m. ET. In order to provide better service to the public, *all calls to the hotline are recorded.*

v. Bidder Alerts

21. The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC license constitute a guarantee of business success. Applicants and interested parties should perform their own due diligence before proceeding, as they would with any new business venture.

22. As is the case with many business investment opportunities, some unscrupulous entrepreneurs may attempt to use Auction No. 55 to deceive and defraud unsuspecting investors.

23. Information about deceptive telemarketing investment schemes is available from the FTC at (202) 326–2222 and from the SEC at (202) 942–7040. Complaints about specific deceptive telemarketing investment schemes should be directed to the FTC, the SEC, or the National Fraud Information Center at (800) 876–7060. Consumers who have concerns about

specific proposals regarding Auction No. 55 may also call the FCC Consumer Center at (888) CALL–FCC ((888) 225–5322).

vi. National Environmental Policy Act Requirements

24. Licensees must comply with the Commission's rules regarding the National Environmental Policy Act (''NEPA''). The construction of a wireless antenna facility is a federal action and the licensee must comply with the Commission's NEPA rules for each such facility.

C. Auction Specifics

i. Auction Date

25. The auction will begin on Wednesday, February 11, 2004. The initial schedule for bidding will be announced by public notice at least one week before the start of the auction. Unless otherwise announced, bidding on all licenses will be conducted on each business day until bidding has stopped on all licenses.

ii. Auction Title

26. Auction No. 55—900 MHz Specialized Mobile Radio Service.

iii. Bidding Methodology

27. The bidding methodology for Auction No. 55 will be simultaneous multiple round bidding. The Commission will conduct this auction over the Internet, and telephonic bidding will be available as well. As a contingency plan, bidders may also dial in to the FCC Wide Area Network. Qualified bidders are permitted to bid telephonically or electronically.

iv. Pre-Auction Dates and Deadlines

28. The following is a list of important dates related to Auction No. 55:

Auction Seminar	December 3, 2003
Short-Form Application (FCC FORM 175) Filing Window Opens.	December 3, 2003; 12 p.m. ET
Short-Form Application (FCC FORM 175) Filing Window Deadline.	December 15, 2003; 6 p.m. ET
Upfront Payments (via wire transfer).	January 15, 2004; 6 p.m. ET
Mock Auction	February 6, 2004
Auction Begins	February 11, 2004

v. Requirements For Participation

29. Those wishing to participate in the auction must:

- Submit a short-form application (FCC Form 175) electronically by 6 p.m. ET, December 15, 2003.
- Submit a sufficient upfront payment and an FCC Remittance Advice Form (FCC Form 159) by 6 p.m. ET, January 15, 2004.
- Comply with all provisions outlined in the *Auction No. 55 Procedures Public Notice.*

vi. General Contact Information

30. The following is a list of general contact information related to Auction No. 55:

GENERAL AUCTION INFORMATION General Auction Questions Seminar Registration	FCC Auctions Hotline (888) 225–5322, Press Option #2 or direct (717) 338–2888 Hours of service: 8 a.m.—5:30 p.m. ET, Monday through Friday
AUCTION LEGAL INFORMATION Auction Rules, Policies, Regulations	Auctions and Industry Analysis Division Legal Branch (202) 418–0660
LICENSING INFORMATION Rules, Policies, Regulations Licensing Issues Due Diligence Incumbency Issues	Commercial Wireless Division (202) 418–0620
TECHNICAL SUPPORT Electronic Filing FCC Automated Auction System	FCC Auctions Technical Support Hotline (202) 414–1250 (Voice), (202) 414–1255 (TTY) Hours of service: 8 a.m.—6 p.m. ET, Monday through Friday
PAYMENT INFORMATION Wire Transfers Refunds	FCC Auctions Accounting Branch (202) 418–0578 (202) 418–2843 (Fax)
TELEPHONIC BIDDING	Will be furnished only to qualified bidders (800) 418–3676 (outside Washington, DC) (202) 418–3676 (in the Washington Area)
FCC FORMS	*http://www.fcc.gov/formpage.html*
FCC INTERNET SITES	*http://www.fcc.gov* *http://wireless.fcc.gov/auctions* *http://wireless.fcc.gov/uls*

II. Short-Form (FCC Form 175) Application Requirements

31. Guidelines for completion of the short-form (FCC Form 175) are set forth in Attachment D of the *Auction No. 55 Procedures Public Notice.*

A. License Selection

32. In Auction No. 55, FCC Form 175 will include a mechanism that allows an applicant to create customized lists of licenses. The applicant will select the filter criteria and the system will produce a list of licenses satisfying the specified criteria. The applicant may apply for all the licenses in the list (by using the ''Save all filtered licenses'' option) or select and save individual licenses separately from the list.

B. Ownership Disclosure Requirements (FCC Form 175 Exhibit A)

33. All applicants must comply with the uniform part 1 ownership disclosure standards and provide information required by §§ 1.2105 and 1.2112 of the Commission's rules.

C. Consortia and Joint Bidding Arrangements (FCC Form 175 Exhibit B)

34. Applicants will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings that relate in any way to the licenses being auctioned, including any agreements relating to post-auction market structure. Applicants will also be required to certify on their short-form applications that they have not entered

into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular licenses on which they will or will not bid.

35. A party holding a non-controlling, attributable interest in one applicant will be permitted to acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with other applicants for licenses in the same geographic license area provided that (i) the attributable interest holder certifies that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has formed a consortium or entered into a joint bidding arrangement; and (ii) the arrangements do not result in a change in control of any of the applicants. While the anti-collusion rules do not prohibit non-auction related business negotiations among auction applicants, applicants are reminded that certain discussions or exchanges could touch upon impermissible subject matters because they may convey pricing information and bidding strategies.

D. Eligibility

i. Bidding Credit Eligibility (FCC Form 175 Exhibit C)

36. A bidding credit represents the amount by which a bidder's winning bids are discounted. The size of the bidding credit depends on the average of the aggregated annual gross revenues for each of the preceding three years of the bidder, its affiliates, its controlling interests, and the affiliates of its controlling interests.

37. For Auction No. 55, bidding credits will be available to small businesses or consortia thereof, as follows:

- A bidder with attributed average annual gross revenues of not more than $15 million for the preceding three years will receive a 10 percent discount on its winning bids;
- A bidder with attributed average annual gross revenues of not more than $3 million for the preceding three years will receive a 15 percent discount on its winning bids.

Small business bidding credits are not cumulative; a qualifying applicant receives the 10 percent or 15 percent bidding credit on its winning bid, but only one credit per license.

ii. Tribal Land Bidding Credit

38. To encourage the growth of wireless services in federally recognized tribal lands the Commission has implemented a tribal land bidding credit. *See* section V.F. of the *Auction No. 55 Procedures Public Notice.*

iii. Attribution Rules

39. *Attribution for small business eligibility.* In determining which entities qualify as small businesses, the Commission will consider the gross revenues of the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests. The Commission does not impose specific equity requirements on controlling interest holders. Once the principals or entities with a controlling interest are determined, only the revenues of those principals or entities, the affiliates of those principals or entities, the applicant and its affiliates, will be counted in determining small business eligibility.

40. Each member of a consortium of small businesses must disclose its gross revenues along with those of its affiliates, its controlling interests, and the affiliates of its controlling interests.

iv. Supporting Documentation

41. Applicants should note that they will be required to file supporting documentation to their FCC Form 175 short-form applications to establish that they satisfy the eligibility requirements to qualify as a small business (or consortia of small businesses) for this auction.

42. Applicants should further note that submission of an FCC Form 175 application constitutes a representation by the certifying official that he or she is an authorized representative of the applicant, has read the form's instructions and certifications, and that the contents of the application and its attachments are true and correct. Submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

43. *Small business eligibility (Exhibit C).* Entities applying to bid as small businesses (or consortia of small businesses) will be required to disclose on Exhibit C to their FCC Form 175 short-form applications, *separately and in the aggregate,* the gross revenues for the preceding three years of each of the following: (i) The applicant, (ii) its affiliates, (iii) its controlling interests, and (iv) the affiliates of its controlling interests. Certification that the average annual gross revenues for the preceding three years do not exceed the applicable limit is not sufficient. A statement of the total gross revenues for the preceding three years is also insufficient. The applicant must provide separately for itself, its affiliates, its controlling interests, and the affiliates of its controlling interests, a schedule of gross revenues for *each* of the preceding three years, as well as a statement of total average gross revenues for the three-year period. If the applicant is applying as a consortium of small businesses, this information must be provided for each consortium member.

E. Provisions Regarding Defaulters and Former Defaulters (FCC Form 175 Exhibit D)

44. Each applicant must certify on its FCC Form 175 application under penalty of perjury that the applicant, its controlling interests, its affiliates, and the affiliates of its controlling interests, as defined by § 1.2110, are not in default on any payment for Commission licenses (including down payments) and not delinquent on any non-tax debt owed to any Federal agency. In addition, each applicant must attach to its FCC Form 175 application a statement made under penalty of perjury indicating whether or not the applicant, its affiliates, its controlling interests, or the affiliates of its controlling interests, as defined by § 1.2110, have ever been in default on any Commission licenses or have ever been delinquent on any non-tax debt owed to any Federal agency. Applicants must include this statement as Exhibit D of the FCC Form 175.

45. ''Former defaulters''—*i.e.,* applicants, including their attributable interest holders, that in the past have defaulted on any Commission licenses or been delinquent on any non-tax debt owed to any Federal agency, but that have since remedied all such defaults and cured all of their outstanding non-tax delinquencies—are eligible to bid in Auction No. 55, provided that they are otherwise qualified. However, as discussed *infra* in section III.D.iii, former defaulters are required to pay upfront payments that are fifty percent more than the normal upfront payment amounts.

F. Installment Payments

46. Installment payment plans will not be available in Auction No. 55.

G. Other Information (FCC Form 175 Exhibits E and F)

47. Applicants owned by minorities or women, as defined in 47 CFR 1.2110(c)(2), may attach an exhibit

(Exhibit E) regarding this status. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of ''designated entities'' in its auctions. Applicants wishing to submit additional information may do so on Exhibit F (Miscellaneous Information) to the FCC Form 175.

H. Minor Modifications to Short-Form Applications (FCC Form 175)

48. After the short-form filing deadline (6 p.m. ET on December 15, 2003), applicants may make only minor changes to their FCC Form 175 applications. Applicants will not be permitted to make major modifications to their applications (*e.g.*, change their license selections, change the certifying official, change control of the applicant, or change bidding credits). *See* 47 CFR 1.2105. Permissible minor changes include, for example, deletion and addition of authorized bidders (to a maximum of three) and revision of exhibits. Applicants should make these modifications to their FCC Form 175 electronically and submit a letter, briefly summarizing the changes, by electronic mail to the attention of Margaret Wiener, Chief, Auctions and Industry Analysis Division, at the following address: *auction55@fcc.gov.* The electronic mail summarizing the changes must include a subject or caption referring to Auction No. 55. The Bureau requests that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents.

49. A separate copy of the letter should be faxed to the attention of Kathryn Garland at (717) 338–2850.

I. Maintaining Current Information in Short-Form Applications (FCC Form 175)

50. Section 1.65 of the Commission's rules requires an applicant to maintain the accuracy and completeness of information furnished in its pending application and to notify the Commission within 30 days of any substantial change that may be of decisional significance to that application. Amendments reporting substantial changes of possible decisional significance in information contained in FCC Form 175 applications, as defined by 47 CFR 1.2105(b)(2), will not be accepted and may in some instances result in the dismissal of the FCC Form 175 application.

III. Pre-Auction Procedures

A. Auction Seminar

51. On Wednesday, December 3, 2003, the FCC will sponsor a free seminar for Auction No. 55 at the Federal Communications Commission, located at 445 12th Street, SW., Washington, DC. The seminar will provide attendees with information about pre-auction procedures, auction conduct, the FCC Automated Auction System, auction rules, and the 900 MHz SMR service rules. A registration form is attached as Attachment B of the *Auction No. 55 Procedures Public Notice.*

B. Short-Form Application (FCC Form 175)—Due December 15, 2003

52. In order to be eligible to bid in this auction, applicants must first submit an FCC Form 175 application. This application must be submitted electronically and received at the Commission no later than 6 p.m. ET on December 15, 2003. Late applications will not be accepted.

53. There is no application fee required when filing an FCC Form 175.

i. Electronic Filing

54. Applicants must file their FCC Form 175 applications electronically. Applications may generally be filed at any time beginning at noon ET on December 3, 2003, until 6 p.m. ET on December 15, 2003. Applicants are strongly encouraged to file early and are responsible for allowing adequate time for filing their applications. Applicants may update or amend their electronic applications multiple times until the filing deadline on December 15, 2003.

55. Applicants must press the ''SUBMIT Application'' button on the ''Submission'' page of the electronic form to successfully submit their FCC Form 175s. Any form that is not submitted will not be reviewed by the FCC. Information about accessing the FCC Form 175 is included in Attachment C of the *Auction No. 55 Procedures Public Notice.* Technical support is available at (202) 414–1250 (voice) or (202) 414–1255 (text telephone (TTY)); hours of service are Monday through Friday, from 8 a.m. to 6 p.m. ET. In order to provide better service to the public, *all calls to the hotline are recorded.*

ii. Completion of the FCC Form 175

56. Instructions for completing the FCC Form 175 are in Attachment D of the *Auction No. 55 Procedures Public Notice.*

iii. Electronic Review of FCC Form 175

57. The FCC Form 175 electronic review system may be used to locate and print applicants' FCC Form 175 information. There is no fee for accessing this system. *See* Attachment C of the *Auction No. 55 Procedures Public Notice* for details on accessing the review system.

58. Applicants may also view other applicants' completed FCC Form 175 after the filing deadline has passed and the FCC has issued a public notice explaining the status of the applications. NOTE: Applicants should not include sensitive information (*i.e.*, TIN/EIN) on any exhibits to their FCC Form 175 applications.

C. Application Processing and Minor Corrections

59. After the deadline for filing the FCC Form 175 applications has passed, the FCC will process all timely submitted applications to determine which are acceptable for filing, and subsequently will issue a public notice identifying: (i) Those applications accepted for filing; (ii) those applications rejected; and (iii) those applications which have minor defects that may be corrected, and the deadline for filing such corrected applications.

D. Upfront Payments—Due January 15, 2004

60. In order to be eligible to bid in the auction, applicants must submit an upfront payment accompanied by an FCC Remittance Advice Form (FCC Form 159). After completing the FCC Form 175, filers will have access to an electronic version of the FCC Form 159 that can be printed and faxed to Mellon Bank in Pittsburgh, PA. All upfront payments must be received at Mellon Bank by 6 p.m. ET on January 15, 2004. For specific instructions regarding upfront payments, see section III.D of the *Auction No. 53 Procedures Public Notice.* Failure to deliver the upfront payment by the January 15, 2004, deadline will result in dismissal of the application and disqualification from participation in the auction.

i. Making Auction Payments by Wire Transfer

61. Wire transfer payments must be received by 6 p.m. ET on January 15, 2004. To avoid untimely payments, applicants should discuss arrangements (including bank closing schedules) with their banker several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline.

62. Applicants must fax a completed FCC Form 159 (Revised 2/03) to Mellon Bank at (412) 209–6045 at least one hour before placing the order for the wire transfer (but on the same business day). On the cover sheet of the fax, write ''Wire Transfer—Auction Payment for Auction Event No. 55.'' In order to meet the Commission's upfront payment deadline, an applicant's payment must be credited to the Commission's account by the deadline. Applicants are responsible for obtaining confirmation from their financial institution that Mellon Bank has timely received their upfront payment and deposited it in the proper account. Detailed instructions for completion of FCC Form 159 are included in Attachment E of the *Auction No. 55 Procedures Public Notice.*

ii. Amount of Upfront Payment

63. In the *Part 1 Order* the Commission delegated to the Bureau the authority and discretion to determine appropriate upfront payment(s) for each auction. In addition, in the *Part 1 Fifth Report and Order,* the Commission ordered that ''former defaulters,'' *i.e.*, applicants that have ever been in default on any Commission license or have ever been delinquent on any non-tax debt owed to any Federal agency, be required to pay upfront payments fifty percent greater than non-''former defaulters.'' For purposes of this calculation, the ''applicant'' includes the applicant itself, its affiliates, its controlling interests, and affiliates of its controlling interests, as defined by § 1.2110 of the Commission's rules (as amended in the *Part 1 Fifth Report and Order*).

64. The upfront payment determines the number of bidding units on which a bidder may place bids. In order to bid on a license, otherwise qualified bidders that applied for that license on Form 175 must have an eligibility level that meets or exceeds the number of bidding units assigned to that license. At a minimum, therefore, an applicant's total upfront payment must be enough to establish eligibility to bid on at least one of the licenses applied for on Form 175, or else the applicant will not be eligible to participate in the auction. An applicant does not have to make an upfront payment to cover all licenses for which the applicant has applied on Form 175, but rather to cover the maximum number of bidding units that are associated with licenses on which the bidder wishes to place bids and hold high bids at any given time.

65. In the *Auction No. 55 Comment Public Notice,* the Bureau proposed upfront payments on a license-by-license basis using the following formula:

5% (five percent) of the net amount of the winning bid in Auction No. 7 for the corresponding license (same MTA and channel block).

66. We received no comments on this issue. Therefore, the Bureau adopts its proposed formula for determining upfront payments. The specific upfront payments and bidding units for each license are set forth in Attachment A of the *Auction No. 55 Procedures Public Notice.*

67. In calculating its upfront payment amount, an applicant should determine the *maximum* number of bidding units on which it may wish to be active (bidding units associated with licenses on which the bidder has the standing high bid from the previous round and licenses on which the bidder places a bid in the current round) in any single round, and submit an upfront payment covering that number of bidding units. In order to make this calculation, an applicant should add together the upfront payments for all licenses on which it seeks to bid in any given round. Applicants should check their calculations carefully, as there is no provision for increasing a bidder's maximum eligibility after the upfront payment deadline.

EXAMPLE: UPFRONT PAYMENTS AND BIDDING FLEXIBILITY

Market No.	Market name	Bidding units	Upfront payment
MTA005	Detroit	54,000	$54,000
MTA007	Dallas-Fort Worth	42,000	42,000

If a bidder wishes to bid on both licenses in a round, it must have selected both on its FCC Form 175 and purchased at least 96,000 bidding units (54,000 + 42,000). If a bidder only wishes to bid on one, but not both, purchasing 54,000 bidding units would meet the requirement for either license. The bidder would be able to bid on either license, *but not both at the same time.* If the bidder purchased only 42,000 bidding units, it would have enough eligibility for the Dallas-Fort Worth license but not for the Detroit license.

68. Former defaulters should calculate their upfront payment for all licenses by multiplying the number of bidding units they wish to purchase by 1.5. In order to calculate the number of bidding units to assign to former defaulters, the Commission will divide the upfront payment received by 1.5 and round the result up to the nearest bidding unit.

Note: An applicant may, on its FCC Form 175, apply for every applicable license being offered, but its actual bidding in any round will be limited by the bidding units reflected in its upfront payment.

iii. Applicant's Wire Transfer Information for Purposes of Refunds of Upfront Payments

69. The Commission will use wire transfers for all Auction No. 55 refunds. To ensure that refunds of upfront payments are processed in an expeditious manner, the Commission is requesting that all pertinent information as listed be supplied to the FCC.

Name of Bank
ABA Number
Contact and Phone Number
Account Number to Credit
Name of Account Holder
FCC Registration Number (FRN)
Taxpayer Identification Number
Correspondent Bank (if applicable)
ABA Number
Account Number

Applicants can provide the information electronically during the initial short-form filing window after the form has been submitted. Wire Transfer Instructions can also be manually faxed to the FCC, Financial Operations Center, Auctions Accounting Group, ATTN: Gail Glasser, at (202) 418–2843 by January 15, 2004. All refunds will be returned to the payer of record as identified on the FCC Form 159 unless the payer submits written authorization instructing otherwise. For additional information, please call Gail Glasser at (202) 418–0578.

E. Auction Registration

70. Approximately ten days before the auction, the FCC will issue a public notice announcing all qualified bidders for the auction. Qualified bidders are those applicants whose FCC Form 175 applications have been accepted for filing and have timely submitted upfront payments sufficient to make

them eligible to bid on at least one of the licenses for which they applied.

71. All qualified bidders are automatically registered for the auction. Registration materials will be distributed prior to the auction by two separate overnight mailings, one containing the confidential bidder identification number (BIN) and the other containing the SecurID cards, both of which are required to place bids. These mailings will be sent only to the contact person at the contact address listed in the FCC Form 175.

72. Applicants that do not receive both registration mailings will not be able to submit bids. Therefore, any qualified applicant that has not received both mailings by noon on Wednesday, February 4, 2004, should contact the Auctions Hotline at (717) 338–2888. Each applicant is responsible for ensuring it has received all of the registration material.

73. Qualified bidders should note that lost bidder identification numbers or SecurID cards can be replaced only by appearing *in person* at the FCC headquarters, located at 445 12th St., SW., Washington, DC 20554. Only an authorized representative or certifying official, as designated on an applicant's FCC Form 175, may appear in person with two forms of identification (one of which must be a photo identification) in order to receive replacements. Qualified bidders requiring replacements must call technical support prior to arriving at the FCC.

F. Remote Electronic Bidding

74. The Commission will conduct this auction over the Internet, and telephonic bidding will be available as well. As a contingency plan, bidders may also dial in to the FCC Wide Area Network. Each applicant should indicate its bidding preference—electronic or telephonic—on the FCC Form 175. In either case, each authorized bidder must have its own SecurID card, which the FCC will provide at no charge. For security purposes, the SecurID cards and the FCC Automated Auction System user manual are only mailed to the contact person at the contact address listed on the FCC Form 175. SecurID cards issued for other auctions or obtained from a source other than the FCC will not work for Auction No. 55. The telephonic bidding phone number will be supplied in the first overnight mailing, which also includes the confidential bidder identification number.

75. The SecurID cards can be recycled, and we encourage bidders to return the cards to the FCC.

G. Mock Auction

76. All qualified bidders will be eligible to participate in a mock auction on Friday, February 6, 2004. The mock auction will enable applicants to become familiar with the FCC Automated Auction System prior to the auction. Participation by all bidders is strongly recommended. Details will be announced by public notice.

IV. Auction Event

77. The first round of bidding for Auction No. 55 will begin on Wednesday, February 11, 2004. The initial bidding schedule will be announced in a public notice listing the qualified bidders.

A. Auction Structure

i. Simultaneous Multiple Round Auction

78. In the *Auction No. 55 Comment Public Notice,* we proposed to award all licenses in Auction No. 55 in a simultaneous multiple round auction. We received no comments on this issue. We conclude that it is operationally feasible and appropriate to auction the 900 MHz SMR licenses through a simultaneous multiple round auction. Unless otherwise announced, bids will be accepted on all licenses in each round of the auction. This approach allows bidders to take advantage of synergies that exist among licenses and is administratively efficient.

ii. Maximum Eligibility and Activity Rules

79. In the *Auction No. 55 Comment Public Notice,* we proposed that the amount of the upfront payment submitted by a bidder would determine the initial (maximum) eligibility (as measured in bidding units) for each bidder. We received no comments on this issue.

80. For Auction No. 55 we adopt this proposal. The total upfront payment defines the maximum number of bidding units on which the applicant will be permitted to bid and hold high bids in a round. As there is no provision for increasing a bidder's eligibility after the upfront payment deadline, applicants are cautioned to calculate their upfront payments carefully. The total upfront payment does not affect the total dollar amount a bidder may bid on any given license.

81. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. Bidders are required to be active on a specific percentage of their current eligibility during each round of the auction.

82. A bidder's activity level in a round is the sum of the bidding units associated with licenses on which the bidder is active. A bidder is considered active on a license in the current round if it is either the high bidder at the end of the previous bidding round and does not withdraw the high bid in the current round, or if it submits a bid in the current round (*see* ''Minimum Acceptable Bids and Bid Increments'' in section IV.B.iii,). The minimum required activity is expressed as a percentage of the bidder's current bidding eligibility, and increases by stage as the auction progresses. Because these procedures have proven successful in maintaining the pace of previous auctions (as set forth under ''Auction Stages'' in section IV.A.iii and ''Stage Transitions'' in section IV.A.iv), we adopt them for Auction No. 55.

iii. Auction Stages

83. In the *Auction No. 55 Comment Public Notice,* we proposed to conduct the auction in three stages and employ an activity rule. We further proposed that, in each round of Stage One, a bidder desiring to maintain its current eligibility would be required to be active on licenses encompassing at least 80 percent of its current bidding eligibility. In each round of Stage Two, a bidder desiring to maintain its current eligibility would be required to be active on at least 90 percent of its current bidding eligibility. Finally, we proposed that a bidder in Stage Three, in order to maintain its current eligibility, would be required to be active on 98 percent of its current bidding eligibility. We received no comments on this proposal.

84. We adopt our proposals for the activity rules and stages. The following are the activity levels for each stage of the auction. The Bureau reserves the discretion to further alter the activity percentages before and/or during the auction.

Stage One: During the first stage of the auction, a bidder desiring to maintain its current eligibility will be required to be active on licenses encompassing at least 80 percent of its current bidding eligibility in each bidding round. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage One, reduced eligibility for the next round will be calculated by multiplying the bidder's current activity (the sum of bidding units of the bidder's standing high bids and bids during the current round) by five-fourths (5/4).

Stage Two: During the second stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on 90 percent of its current bidding eligibility. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage Two, reduced eligibility for the next round will be calculated by multiplying the bidder's current activity (the sum of bidding units of the bidder's standing high bids and bids during the current round) by ten-ninths (10/9).

Stage Three: During the third stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on 98 percent of its current bidding eligibility. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). In this final stage, reduced eligibility for the next round will be calculated by multiplying the bidder's current activity (the sum of bidding units of the bidder's standing high bids and bids during the current round) by fifty-fortyninths (50/49).

Caution: Since activity requirements increase in each auction stage, bidders must carefully check their current activity during the bidding period of the first round following a stage transition. This is especially critical for bidders that have standing high bids and do not plan to submit new bids. In past auctions, some bidders have inadvertently lost bidding eligibility or used an activity rule waiver because they did not re-verify their activity status at stage transitions. Bidders may check their activity against the required activity level by using the bidding system's bidding module.

iv. Stage Transitions

85. In the *Auction No. 55 Comment Public Notice,* we proposed that the auction would generally advance to the next stage (*i.e.,* from Stage One to Stage Two, and from Stage Two to Stage Three) when the auction activity level, as measured by the percentage of bidding units receiving new high bids, is below 20 percent for three consecutive rounds of bidding in each Stage. We further proposed that the Bureau would retain the discretion to change stages unilaterally by announcement during the auction. This determination, we proposed, would be based on a variety of measures of bidder activity, including, but not limited to, the auction activity level, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue. We received no comments on this issue.

86. We adopt our proposal. Thus, the auction will start in Stage One and will generally advance to the next stage (*i.e.,* from Stage One to Stage Two, and from Stage Two to Stage Three) when, in each of three consecutive rounds of bidding, the high bid has increased on 20 percent or less of the licenses being auctioned (as measured in bidding units). In addition, the Bureau will retain the discretion to regulate the pace of the auction by announcement. This determination will be based on a variety of measures of bidder activity, including, but not limited to, the auction activity level, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue.

v. Activity Rule Waivers and Reducing Eligibility

87. Each bidder will be provided three activity rule waivers that may be used in any round during the course of the auction. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required level. An activity rule waiver applies to an entire round of bidding and not to a particular license.

88. The FCC Automated Auction System assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver (known as an ''automatic waiver'') at the end of any round where a bidder's activity level is below the minimum required unless: (i) there are no activity rule waivers available; or (ii) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the minimum requirements. If a bidder has no waivers remaining and does not satisfy the required activity level, the current eligibility will be permanently reduced, possibly eliminating the bidder from the auction.

89. A bidder with insufficient activity that wants to reduce its bidding eligibility rather than use an activity rule waiver must affirmatively override the automatic waiver mechanism during the round by using the reduce eligibility function in the bidding system. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described in ''Auction Stages'' (*see* section IV.A.iii). Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

90. Finally, a bidder may proactively use an activity rule waiver as a means to keep the auction open without placing a bid. If a bidder submits a proactive waiver (using the proactive waiver function in the FCC Automated Auction System) during a round in which no bids are submitted, the auction will remain open and the bidder's eligibility will be preserved. However, an automatic waiver triggered during a round in which there are no new bids or withdrawals will not keep the auction open. **Note:** Once a proactive waiver is submitted during a round, that waiver cannot be unsubmitted.

vi. Auction Stopping Rules

91. For Auction No. 55, the Bureau proposed to employ a simultaneous stopping rule. The Bureau also sought comment on a modified version of the stopping rule. The modified version of the stopping rule would close the auction for all licenses after the first round in which no bidder submits a proactive waiver, a withdrawal, or a new bid on any license on which it is not the standing high bidder.

92. The Bureau further proposed retaining the discretion to keep the auction open even if no new bids or proactive waivers are submitted and no previous high bids are withdrawn in a round. In this event, the effect will be the same as if a bidder had submitted a proactive waiver. Thus, the activity rule will apply as usual, and a bidder with insufficient activity will either use an activity rule waiver (if it has any left) or lose bidding eligibility.

93. In addition, we proposed that the Bureau reserve the right to declare that the auction will end after a designated number of additional rounds (''special stopping rule''). If the Bureau invokes this special stopping rule, it will accept bids in the final round(s) only for licenses on which the high bid increased in at least one of the preceding specified number of rounds. We proposed to exercise this option only in circumstances such as where the auction is proceeding very slowly, where there is minimal overall bidding activity or where it appears likely that the auction will not close within a reasonable period of time.

94. We adopt the proposals concerning the auction stopping rules. Auction No. 55 will begin under the simultaneous stopping rule, and the Bureau will retain the discretion to invoke the other versions of the stopping rule.

vii. Auction Delay, Suspension, or Cancellation

95. We adopt our proposed auction cancellation rules. By public notice or by announcement during the auction, the Bureau may delay, suspend, or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and competitive conduct of competitive bidding. In such cases, the Bureau, in its sole discretion, may elect to resume the auction starting from the beginning of the current round, resume the auction starting from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. We emphasize that exercise of this authority is solely within the discretion of the Bureau, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers.

B. Bidding Procedures

i. Round Structure

96. The initial bidding schedule will be announced in the public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction. Each bidding round is followed by the release of round results. Multiple bidding rounds may be conducted in a given day. Details regarding round results formats and locations will also be included in the qualified bidders public notice.

97. The FCC has discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureau may increase or decrease the amount of time for the bidding rounds and review periods, or the number of rounds per day, depending upon the bidding activity level and other factors.

ii. Reserve Price or Minimum Opening Bid

98. In the *Auction No. 55 Comment Public Notice,* the Bureau proposed to establish minimum opening bids for Auction No. 55 and to retain discretion to lower the minimum opening bids. Specifically, for Auction No. 55, the Bureau proposed the following license-by license formula for calculating minimum opening bids:

5% (five percent) of the net amount of the winning bid in Auction No. 7 for the corresponding license (same MTA and channel block).

99. In the alternative, the Bureau sought comment on whether, consistent with the Balanced Budget Act, the public interest would be served by having no minimum opening bid or reserve price.

100. No comments were received. Therefore, the Bureau adopts its proposed minimum opening bids for Auction No. 55. The minimum opening bids we adopt for Auction No. 55 are reducible at the discretion of the Bureau. We emphasize, however, that such discretion will be exercised, if at all, sparingly and early in the auction, *i.e.,* before bidders lose all waivers and begin to lose substantial eligibility. During the course of the auction, the Bureau will not entertain requests to reduce the minimum opening bid on specific licenses.

101. The specific minimum opening bids for each license available in Auction No. 55 are set forth in Attachment A of the *Auction No. 55 Procedures Public Notice.*

iii. Minimum Acceptable Bids and Bid Increments

102. In Auction No. 55 we will use a smoothing methodology to calculate minimum acceptable bids. The smoothing methodology is designed to vary the increment for a given license between a maximum and minimum percentage based on the bidding activity on that license. This methodology allows the increments to be tailored to the activity on a license, decreasing the time it takes for licenses receiving many bids to reach their final prices. The formula used to calculate this increment is included as Attachment F of the *Auction No. 55 Procedures Public Notice.* We will initially set the weighting factor at 0.5, the minimum percentage increment at 0.1 (10%), and the maximum percentage increment at 0.2 (20%). Hence, at these initial settings, the percentage increment will fluctuate between 10% and 20% depending upon the number of bids for the license.

103. In each round, each eligible bidder will be able to place a bid on a particular license for which it applied in any of nine different amounts. The FCC Automated Auction System will list the nine bid amounts for each license.

104. Once there is a standing high bid on a license, the FCC Automated Auction System will calculate a minimum acceptable bid for that license for the following round, as described in Attachment F of the *Auction No. 55 Procedures Public Notice.* The difference between the minimum acceptable bid and the standing high bid for each license will define the bid increment—*i.e.,* bid increment = (minimum acceptable bid) − (standing high bid). The nine acceptable bid amounts for each license consist of the minimum acceptable bid (the standing high bid plus one bid increment) and additional amounts calculated using multiple bid increments (*i.e.,* the second bid amount equals the standing high bid plus two times the bid increment, the third bid amount equals the standing high bid plus three times the bid increment, etc.).

105. At the start of the auction and until a bid has been placed on a license, the minimum acceptable bid for that license will be equal to its minimum opening bid. Corresponding additional bid amounts will be calculated using bid increments defined as the difference between the minimum opening bid times one plus the percentage increment, rounded as described in Attachment F of the *Auction No. 55 Procedures Public Notice,* and the minimum opening bid—*i.e.,* bid increment = (minimum opening bid)(1 + percentage increment) {rounded} − (minimum opening bid). At the start of the auction and until a bid has been placed on a license, the nine acceptable bid amounts for each license consist of the minimum opening bid and additional amounts calculated using multiple bid increments (*i.e.,* the second bid amount equals the minimum opening bid plus the bid increment, the third bid amount equals the minimum opening bid plus two times the bid increment, etc).

106. In the case of a license for which the standing high bid has been withdrawn, the minimum acceptable bid will equal the second highest bid received for the license. The additional bid amounts are calculated using the difference between the second highest bid times one plus the minimum percentage increment, rounded, and the second highest bid.

107. The Bureau retains the discretion to change the minimum acceptable bids and bid increments and the methodology for determining the minimum acceptable bids and bid increments if it determines that circumstances so dictate. The Bureau will do so by announcement in the FCC Automated Auction System. The Bureau may also use its discretion to adjust the minimum bid increment without prior notice if circumstances warrant.

iv. High Bids

108. At the end of each bidding round, the high bids will be determined based on the highest gross bid amount received for each license. A high bid from a previous round is sometimes

referred to as a ''standing high bid.'' A ''standing high bid'' will remain the high bid until there is a higher bid on the same license at the close of a subsequent round. Bidders are reminded that standing high bids count towards bidding activity.

109. A Sybase® SQL pseudo-random number generator based on the L'Ecuyer algorithms will be used to select a high bid in the event of identical high bids on a license in a given round (*i.e.,* tied bids). The tied bid having the highest random number will become the standing high bid. The remaining bidders, as well as the high bidder, will be able to submit a higher bid in a subsequent round. If no bidder submits a higher bid in a subsequent round, the high bid from the previous round will win the license. If any bids are received on the license in a subsequent round, the high bid will once again be determined on the highest gross bid amount received for the license.

v. Bidding

110. During a round, a bidder may submit bids for as many licenses as it wishes (subject to its eligibility), withdraw high bids from previous bidding rounds, remove bids placed in the same bidding round, or permanently reduce eligibility. Bidders also have the option of making multiple submissions and withdrawals in each round. If a bidder submits multiple bids for a single license in the same round, the system takes the last bid entered as that bidder's bid for the round. Bidders should note that the bidding units associated with licenses for which the bidder has removed or withdrawn its bid do not count towards the bidder's activity at the close of the round.

111. All bidding will take place remotely either through the FCC Automated Auction System or by telephonic bidding. Telephonic bidders are reminded to allow sufficient time to bid by placing their calls well in advance of the close of a round. Normally, five to ten minutes are necessary to complete a bid submission.

112. A bidder's ability to bid on specific licenses in the first round of the auction is determined by two factors: (i) The licenses applied for on FCC Form 175 and (ii) the upfront payment amount deposited. The bid submission screens will allow bidders to submit bids on only those licenses for which the bidder applied on its FCC Form 175.

113. In order to access the bidding function of the FCC Automated Auction System, bidders must be logged in during the bidding round using the bidder identification number provided in the registration materials, and the password generated by the SecurID card. Bidders are strongly encouraged to print bid confirmations for each round *after* they have completed all of their activity for that round.

114. For each license, the FCC Automated Auction System interface will list the nine acceptable bid amounts in a drop-down box. Bidders may use the drop-down box to select from among the nine bid amounts. The FCC Automated Auction System also includes an import function that allows bidders to upload text files containing bid information and a Type Bids function that allows bidders to enter specific licenses for filtering.

115. Finally, bidders are cautioned to select their bid amounts carefully because, as explained in the following section, bidders that withdraw a standing high bid from a previous round, even if the bid was mistakenly or erroneously made, are subject to bid withdrawal payments.

vi. Bid Removal and Bid Withdrawal

116. In the *Auction No. 55 Comment Public Notice,* we proposed bid removal and bid withdrawal procedures. With respect to bid withdrawals, we proposed limiting each bidder to withdrawals in no more than two rounds during the course of the auction. The two rounds in which withdrawals are used, we proposed, would be at the bidder's discretion. We received no comments on this issue.

117. *Procedures.* Before the close of a bidding round, a bidder has the option of removing any bids placed in that round. By using the ''remove bid'' function in the bidding system, a bidder may effectively ''unsubmit'' any bid placed within that round. A bidder removing a bid placed in the same round is not subject to withdrawal payments. Removing a bid will affect a bidder's activity for the round in which it is removed, *i.e.,* a bid that is removed does not count toward bidding activity.

118. Once a round closes, a bidder may no longer remove a bid. However, in later rounds, a bidder may withdraw standing high bids from previous rounds using the withdraw bid function in the FCC Automated Auction System (assuming that the bidder has not reached its withdrawal limit). A high bidder that withdraws its standing high bid from a previous round during the auction is subject to the bid withdrawal payments specified in 47 CFR 1.2104(g).

Note: Once a withdrawal is submitted during a round, that withdrawal cannot be unsubmitted.

119. The Bureau will limit the number of rounds in which bidders may place withdrawals to two rounds. These rounds will be at the bidder's discretion and there will be no limit on the number of bids that may be withdrawn in either of these rounds. Withdrawals during the auction will be subject to the bid withdrawal payments specified in 47 CFR 1.2104(g). Bidders should note that abuse of the Commission's bid withdrawal procedures could result in the denial of the ability to bid on a market.

120. *Calculation.* Generally, the Commission imposes payments on bidders that withdraw high bids during the course of an auction. If a bidder withdraws its bid and there is no higher bid in the same or subsequent auction(s), the bidder that withdrew its bid is responsible for the difference between its withdrawn bid and the high bid in the same or subsequent auction(s). In the case of multiple bid withdrawals on a single license, within the same or subsequent auctions(s), the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids, in either the same or subsequent auctions(s), equals or exceeds that withdrawn bid.

121. In instances in which bids have been withdrawn on a license that is not won in the same auction, the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the withdrawn bids. The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed after subsequent auction of the license. The *Part 1 Fifth Report and Order* provides specific examples showing application of the bid withdrawal payment rule.

vii. Round Results

122. Bids placed during a round will not be made public until the conclusion of that bidding period. After a round closes, the Bureau will compile reports of all bids placed, bids withdrawn, current high bids, new minimum acceptable bids, and bidder eligibility status (bidding eligibility and activity rule waivers), and post the reports for public access. Reports reflecting bidders' identities for Auction No. 55 will be available before and during the auction. Thus, bidders will know in advance of this auction the identities of the bidders against which they are bidding.

viii. Auction Announcements

123. The FCC will use auction announcements to announce items such as schedule changes and stage transitions. All FCC auction announcements will be available by clicking a link on the FCC Automated Auction System.

V. Post-Auction Procedures

A. Down Payments and Withdrawn Bid Payments

124. After bidding has ended, the Commission will issue a public notice declaring the auction closed and identifying winning bidders, down payments and any withdrawn bid payments due.

125. Within ten business days after release of the auction closing notice, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Commission for Auction No. 55 to 20 percent of the net amount of its winning bids (gross bids less any applicable small business bidding credits). In addition, by the same deadline, all bidders must pay any bid withdrawal payments due under 47 CFR 1.2104(g), as discussed in ''Bid Removal and Bid Withdrawal,'' section IV.B.vi. (Upfront payments are applied first to satisfy any withdrawn bid liability, before being applied toward down payments.)

B. Final Payments

126. Each winning bidder will be required to submit the balance of the net amount of its winning bids within 10 business days after the deadline for submitting down payments.

C. Auction Discount Voucher

127. On June 8, 2000, the Commission awarded Qualcomm, Inc., a transferable Auction Discount Voucher (''ADV'') in the amount of $125,273,878.00. Subject to the terms and conditions set forth in the Commission's Order, Qualcomm or its transferee could use this ADV, in whole or in part, to adjust a winning bid in any spectrum auction prior to June 8, 2003. On April 28, 2003, the Bureau granted Qualcomm an additional year, until June 8, 2004, to use the remaining amount of its ADV. The remaining $48,240,547.95 of Qualcomm's ADV could be used to adjust winning bids in any FCC Auction, including Auction No. 55.

D. Long-Form Application (FCC Form 601)

128. Within ten business days after release of the auction closing notice, winning bidders must electronically submit a properly completed long-form application (FCC Form 601) and required exhibits for each license won through Auction No. 55. Winning bidders that are small businesses must include an exhibit demonstrating their eligibility for small business bidding credits. *See* 47 CFR 1.2112(b). Further filing instructions will be provided to auction winners at the close of the auction.

E. Ownership Disclosure Information Report (FCC Form 602)

129. At the time it submits its long-form application (FCC Form 601), each winning bidder also must comply with the ownership reporting requirements as set forth in 47 CFR 1.913, 1.919, and 1.2112. Effective December 10, 2002, electronic filing of the Ownership Disclosure Information Report (FCC Form 602) became mandatory. Accordingly, forms filed manually will not be accepted. Winning bidders without a current Form 602 already on file with the Commission must submit a properly completed Form 602 at the time they submit their long-form applications. Further filing instructions will be provided to auction winners at the close of the auction.

F. Tribal Land Bidding Credit

130. A winning bidder that intends to use its license(s) to deploy facilities and provide services to federally recognized tribal lands that are unserved by any telecommunications carrier or that have a telephone service penetration rate equal to or below 70 percent is eligible to receive a tribal land bidding credit as set forth in 47 CFR 1.2107 and 1.2110(f). A tribal land bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify.

131. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal land bidding credit *after* winning the auction when it files its long-form application (FCC Form 601).

132. For additional information on the tribal land bidding credit, including how the amount of the credit is calculated, applicants should review the Commission's rule making proceeding regarding tribal land bidding credits and related public notices. Relevant documents can be viewed on the Commission's Web site by going to *http://wireless.fcc.gov/auctions* and clicking on the *Tribal Land Credits* link.

G. Default and Disqualification

133. Any high bidder that defaults or is disqualified after the close of the auction (*i.e.,* fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full payment, or is otherwise disqualified) will be subject to the payments described in 47 CFR 1.2104(g)(2). In such event the Commission may re-auction the license or offer it to the next highest bidder (in descending order) at its final bid. In addition, if a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

H. Refund of Remaining Upfront Payment Balance

134. All applicants that submit upfront payments but are not winning bidders for a license in Auction No. 55 may be entitled to a refund of their remaining upfront payment balance after the conclusion of the auction. No refund will be made unless there are excess funds on deposit from the applicant after any applicable bid withdrawal payments have been paid. All refunds will be returned to the payer of record, as identified on the FCC Form 159, unless the payer submits written authorization instructing otherwise.

135. Bidders that drop out of the auction completely may be eligible for a refund of their upfront payments before the close of the auction. Qualified bidders that have exhausted all of their activity rule waivers, have no remaining bidding eligibility, and have not withdrawn a high bid during the auction must submit a written refund request. The request must also include wire transfer instructions, Taxpayer Identification Number (TIN) and FCC Registration Number (FRN). Send refund request to: Federal Communications Commission, Financial Operations Center, Auctions Accounting Group, Gail Glasser, 445 12th Street, SW., Room 1–C863, Washington, DC 20554.

136. Bidders are encouraged to file their refund information electronically using the refund information portion of the FCC Form 175, but bidders can also fax their information to the Auctions Accounting Group at (202) 418–2843. Once the information has been approved, a refund will be sent to the party identified in the refund information.

Note: Refund processing generally takes up to two weeks to complete. Bidders with questions about refunds should contact Gail Glasser at (202) 418–0578.

Federal Communications Commission.

Gary Michaels,

Chief, Legal Branch, Auctions and Industry Analysis Division.

[FR Doc. 03–29449 Filed 11–24–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

[Docket No. 03–14]

Revocation of Licenses and Order To Discontinue Operations in U.S.—Foreign Trades for Failure To Comply With the Requirements of the Ocean Shipping Reform Act of 1998; Notice of Show Cause Proceeding

November 20, 2003.

Notice is given that, on November 17, 2003, the Federal Maritime Commission (''Commission'') served an Order to Show Cause (''Order'') on fourteen (14) non-vessel-operating common carrier (''NVOCC'')/ocean transportation intermediaries (''OTIs'').

Commission regulations require that each NVOCC in the United States must be licensed and, among other requirements, file a Form FMC–1 indicating the location of its electronically published tariff. The 14 NVOCCs listed in the Commission's Order each maintain an OTI license issued by the Commission, but have otherwise failed to establish or maintain an electronically published tariff and to maintain a current Form FMC–1 on file with the Commission. The Commission now proposes to revoke the licenses of these NVOCCs for said failures, and to direct them to cease and desist from operating in the U.S.-foreign trades.

The Order directs the 14 NVOCCs to show cause why the Commission should not revoke their respective licenses for failure to comply with sections 8 and 19 of the Shipping Act of 1984, 46 U.S.C. app. § 1707 and § 1718, as amended, and 46 CFR part 515.

The Order's full text may be viewed on the Commission's Home page at *http://www.fmc.gov,* or at the Office of the Secretary, Room 1046, 800 N. Capitol Street, NW., Washington, DC. Any person having an interest and desiring to intervene in this proceeding shall file a petition for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72, and the procedural schedule set forth in the Commission's November 17, 2003 Order.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–29415 Filed 11–24–03; 8:45 am]

BILLING CODE 6730–01–P

GENERAL SERVICES ADMINISTRATION

Office of Governmentwide Policy; Revision of a Standard Form by the Department of the Treasury

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Notice.

SUMMARY: The Department of the Treasury revised SF 3881, ACH Vendor/Miscellaneous Payment Enrollment to:

Remove the CTP checkbox and the OMB expiration; and

Authorize form for local reproduction. This was due to low demand in the Federal Supply Service.

You can obtain the updated form in two ways:

On the internet. Address: *http://w3.gsa.gov/web/c/newform.nsf/MainMenu?OpenForm* or;

From GSA, Forms-MCF, Attn.: Barbara Williams, (202) 501–0581.

FOR FURTHER INFORMATION CONTACT: Ms. Lois Holland (202) 622–1563. This contact is for information about completing the form only.

DATES: Effective November 25, 2003.

Dated: November 18, 2003.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer, General Services Administration.

[FR Doc. 03–29362 Filed 11–24–03; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Scientific Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice; correction.

SUMMARY: The Office of the Secretary, HHS, published a notice in the **Federal Register** of November 10, 2003, concerning a finding of scientific misconduct regarding Dr. Gelband. The document contained a typographical error.

FOR FURTHER INFORMATION CONTACT: Director, Division of Investigative Oversight, Office of Research Integrity, 301–443–5330.

Correction

In the **Federal Register** of November 10, 2003, in FR Doc. 03–28197, on page 63799 in the first column at letter ''B'' replace the first sentence to read: ''Hypertension 2000 paper #2: Figure 1A merited retraction.''

Dated: November 18, 2003.

Lawrence J. Rhoades,

Acting Director, Office of Research Integrity.

[FR Doc. 03–29335 Filed 11–24–03; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. 2002E–0099, 2002E–0184, and 2003E–0255]

Determination of Regulatory Review Period for Purposes of Patent Extension; XIGRIS

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for XIGRIS and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of three applications to the Director of Patents and Trademarks, Department of Commerce, for the extension of three patents which claim that human biological product.

ADDRESSES: Submit written comments and petitions to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments.*

FOR FURTHER INFORMATION CONTACT: Claudia V. Grillo, Office of Regulatory Policy (HFD–013), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 240–453–6699.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Public Law 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the

amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human biological product XIGRIS (droctrecogin alpha). XIGRIS is indicated for the reduction of mortality in adult patients with severe sepsis (sepsis associated with severe organ dysfunction) who have a high risk of death. Subsequent to this approval, the Patent and Trademark Office received three patent term restoration applications for XIGRIS (U.S. Patent Nos. 4,775,624; 5,681,932; and 5,270,040) from Eli Lilly & Co., and the Patent and Trademark Office requested FDA's assistance in determining these patents' eligibility for patent term restoration. In a letter dated December 30, 2002, FDA advised the Patent and Trademark Office that this human biological product had undergone a regulatory review period and that the approval of XIGRIS represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for XIGRIS is 2,493 days. Of this time, 2,193 days occurred during the testing phase of the regulatory review period, while 300 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective*: January 26, 1995. The applicant claims January 25, 1995, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was January 26, 1995, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262)*: January 26, 2001. FDA has verified the applicant's claim that the biological license application (BLA) for XIGRIS (BLA 125029/0) was initially submitted on January 26, 2001.

3. *The date the application was approved*: November 21, 2001. FDA has verified the applicant's claim that BLA 125029/0 was approved on November 21, 2001.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,397 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may submit to the Division of Dockets Management (see **ADDRESSES**) written comments and ask for a redetermination by January 26, 2004. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 24, 2004. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Division of Dockets Management. Three copies of any mailed information 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. Comments and petitions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: October 30, 2003.

Jane A. Axelrad,

Associate Director for Policy, Center for Drug Evaluation and Research.

[FR Doc. 03–29333 Filed 11–24–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2001P–0075]

Joint Meeting of the Nonprescription Drugs Advisory Committee and the Advisory Committee for Reproductive Health Drugs; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committees: Nonprescription Drugs Advisory Committee and the Advisory Committee for Reproductive Health Drugs.

General Function of the Committees: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on December 16, 2003, from 8 a.m. to 5 p.m.

Addresses: Electronic comments should be submitted to *http://www.fda.gov/dockets/ecomments*. Select ''01P–0075—Switch Status of Emergency Contraceptives from Rx to OTC'' and follow the prompts to submit your statement. Written comments should be submitted to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Location: Hilton Washington DC North/Gaithersburg, The Ballrooms, 620 Perry Pkwy., Gaithersburg, MD.

Contact Person: Karen M. Templeton-Somers, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093) Rockville, MD 20857, 301–827–7001, or e-mail: *SomersK@cder.fda.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area) codes 12541 and 12537. Please call the Information Line for up to date information on this meeting.

Agenda: The committees will consider the safety and efficacy of new drug application 21–045, proposing over-the-counter use of Plan B (levonorgestrel), Women's Capitol Corp., for reducing the chance of pregnancy after unprotected sex (if contraceptive failed or if birth control was not used). The sponsor proposes a 0.75 milligram (mg) tablet taken as soon as possible, but no later than 72 hours after unprotected

sex with a second 0.75 mg tablet taken 12 hours after the first tablet.

The background material will become available no later than the day before the meeting and will be posted under the Nonprescription Drugs Advisory Committee (NDAC) docket Web site at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2003 and scroll down to NDAC meetings.)

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions must be made to the contact person by December 5, 2003. Oral presentations from the public will be scheduled between approximately 11 a.m. and 12 noon. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before December 5, 2003, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Karen Templeton-Somers at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: November 17, 2003.

Peter J. Pitts,

Associate Commissioner for External Relations.

[FR Doc. 03–29334 Filed 11–24–03; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Listing of Grants for Research Projects

AGENCY: National Institutes of Health, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: Section 52.1(b) of the regulations governing grants for research projects, codified at 42 CFR part 52, provides that the Secretary of Health and Human Services will periodically publish a list of all of the research project grant programs to which the research project grant regulations apply. This Notice provides the most recent list of the programs covered by the regulations and supersedes and replaces the prior Notice published October 24, 1996 (61 FR 55102–55106).

EFFECTIVE DATE: November 25, 2003.

FOR FURTHER INFORMATION CONTACT: Jerry Moore, NIH Regulations Officer, Office of Management Assessment, 6011 Executive Boulevard, Room 601, MSC 7669, Rockville, MD 20892, telephone (301) 496–4607 (not a toll-free number), fax (301) 402–0169, e-mail *jm40z@nih.gov.*

SUPPLEMENTARY INFORMATION: The National Institutes of Health (NIH) published a final rule in the **Federal Register** on October 24, 1996 (61 FR 55102–55106), amending the regulations at 42 CFR part 52, Grants for Research Projects, which govern Public Health Service (PHS) research project grants. The regulations were amended to apply to all research project grant programs administered by NIH and the Department of Health and Human Services (Department), except for grants for health services research, demonstration, and evaluation projects administered by the Agency for Health Care Policy and Research (AHCPR), to make it unnecessary to include a long list of programs in the regulations or to go through the lengthy process of amending the regulations each time a new program is established. At that time we provided in the preamble a listing of the applicable programs and indicated that we would periodically publish a list of the research project grant programs to which the regulations apply, and the applicability of the regulations to new programs would be announced as Department components initiated new programs.

We are publishing the list of programs to which the regulations apply to reflect the addition of new authorities in sections 317J, 317K, 317L, 330E, 399M, 399N, 409E, 434A, 445I, 447B, and 1261 of the Public Health Service Act (PHS Act), as amended. Section 317J of the PHS Act (42 U.S.C. 247b–11), as amended by section 601 of the Children's Health Act of 2000, Public Law 106–310, concerns research with respect to education and training for health professionals and the general public relating to the effects of folic acid in preventing birth defects. Section 317K of the PHS Act (42 U.S.C. 247b–12), as amended by section 901 of Public Law 106–310, concerns research relating to risk factors, prevention strategies, and the roles of the family, health care providers, and the community in safe motherhood. Section 317L of the PHS Act (42 U.S.C.247b–13), as amended by section 911 of Public Law 106–310, concerns epidemiological research on the prevention of prenatal and postnatal smoking, alcohol, and illegal drug use. Section 330E of the PHS Act (42 U.S.C. 254c–5), as amended by section 801 of Public Law 106–310, concerns research relating to intervention strategies to improve the lives of persons with epilepsy, particularly children. Section 399M of the PHS Act (42 U.S.C. 280g–1), as amended by section 702 of Public Law 106–310, concerns research relating to the efficacy of new screening techniques and technology, including clinical studies on the efficacy of new interventions, regarding hearing loss in infants. Section 399N of the PHS Act (42 U.S.C. 280g–2), as amended by section 1101 of Public Law 106–310, concerns research relating to improving the outcomes among children with childhood cancers and resultant secondary conditions. Section 409E of the PHS Act (42 U.S.C. 284i), as amended by section 1901 of Public Law 106–310, concerns research relating to autoimmune diseases. Section 434A of the PHS Act (42 U.S.C. 285c–9), as amended by section 402 of Public Law 106–310, concerns long-term epidemiology studies relating to type 1 or juvenile diabetes. Section 445I of the PHS Act (42 U.S.C. 285e–10a), as added by section 801 of the Public Health Improvement Act, Public Law 106–505, concerns Alzheimer's Disease Clinical Research and Training Awards to enhance and promote the translation of new scientific knowledge into clinical practice related to the diagnosis, care, and treatment of individuals with Alzheimer's disease. Section 447B of the PHS Act (42 U.S.C. 285f–3), as amended by section 901 the Public Health Improvement Act, Public Law 106–505, concerns Sexually Transmitted Disease Clinical Research and Training Awards to enhance and promote the translation of new scientific knowledge into clinical practice related to the diagnosis, care, and treatment of individuals with sexually transmitted diseases. Finally, section 1261 of the PHS Act (42 U.S.C. 300d–61), as amended by section 1303 of Public Law 106–310, concerns basic and applied research regarding traumatic brain injury, including the development, modification, and evaluation of therapies and programs of rehabilitation toward reaching or restoring normal capabilities.

The regulations codified at 42 CFR part 52 apply to all Public Health Service research project grant programs except for grants for health services research, demonstration, and evaluation projects administered by the AHCPR. Specifically, the research project grant authorities to which the Grants for Research Projects regulations apply include:

(1) Research into the cause, diagnosis, treatment, control, or prevention of the physical or mental diseases, injuries, or impairments to human life, as authorized by sections 301, 302, and related provisions of the PHS Act (42 U.S.C. 241, 242);

(2) Research into the prevention and control of childhood lead poising, as authorized under section 301 of the PHS Act (42 U.S.C. 241);

(3) Epidemiologic studies, and state-based research capacity building projects for the prevention of primary and secondary disabilities, as authorized under section 301 of the PHS Act (42 U. S C. 241);

(4) Ecological and epidemiologic research studies in Lyme disease, including disease surveillance, development and evaluation of prevention and control studies, and development of improved diagnostic tests, as authorized under section 301 of the PHS Act (42 U.S.C. 241);

(5) Research for the development of knowledge and approaches to the epidemiology, eitology, diagnosis, treatment, control and prevention of narcotic addiction and intravenous (IV)-related AIDS and drug abuse, as authorized under sections 301 and 302 of the PHS Act (42 U.S.C. 241, 242);

(6) Investigations to identify strategies for prevention of childhood deaths from diarrhea, as authorized under sections 301 and 317(k) of the PHS Act (42 U.S.C. 241, 247b(k));

(7) HIV/AIDS surveillance, HIV serosurveillance surveys and studies, and epidemiologic research studies of AIDS and HIV infection, as authorized under sections 301 and 317(k) of the PHS Act (42 U.S.C. 241, 247b(k));

(8) Surveillance and epidemiologic studies for the prevention of infectious diseases and injuries in children in child day care settings, as authorized under sections 310, 317(k), and 391 of the PHS Act (42 U.S.C. 241, 247b(k), 280(b));

(9) Research into prevention and control of tuberculosis, especially research concerning strains of tuberculosis resistant to drugs and research concerning cases of tuberculosis that affect certain populations, as authorized by section 317E of the PHS Act (42 U.S.C. 247b–6);

(10) Research with respect to education and training for health professionals and the general public relating to the effects of folic acid in preventing birth defects, as authorized by section 317J of the PHS Act (42 U.S.C. 247b–11);

(11) Research relating to risk factors, prevention strategies, and the roles of the family, health care providers, and the community in safe motherhood, as authorized by section 317K of the PHS act, as amended by section 901 of Public Law 106–310 (42 U.S.C. 424b–12);

(12) Epidemiological research on the prevention of prenatal and postnatal smoking, alcohol, and illegal drug use, as authorized by section 317L of the PHS Act, as amended by section 911 of Public Law 106–310 (42 U.S.C. 247b–13);

(13) Research relating to intervention strategies to improve the lives of persons with epilepsy, particularly children, as authorized by section 330E of the PHS Act (42 U.S.C. 254c–5);

(14) Injury prevention and control research, as authorized by section 391 of the PHS Act (42 U.S.C. 280b);

(15) Research relating to the efficacy of new screening techniques and technology, including clinical studies of screening methods and studies on the efficacy of new interventions, regarding hearing loss in infants, as authorized by section 399M of the PHS Act, as amended by section 702 of Public Law 106–310 (42 U.S.C. 280g–1);

(16) Research relating to improving the outcomes among children with childhood cancers and resultant secondary conditions, as authorized by section 399N of the PHS Act, as amended by section 1101 of Public Law 106–310 (42 U.S.C. 280g–2);

(17) Research on osteoporosis, Paget's disease and related bone disorders, as authorized by section 409A of the PHS Act (42 U.S.C. 284e);

(18) Research relating to autoimmune diseases, as authorized by section 409E of the PHS Act, as amended by section 1901 of Public Law 106–310 (42 U.S.C. 284i);

(19) Long-term epidemiology studies relating to type 1 or juvenile diabetes, as authorized by section 434A of the PHS Act, as amended by section 402 of Public Law 106–310 (42 U.S.C. 285c–9);

(20) Biomedical research in areas relating to Alzheimer's disease and related dementias, as authorized by section 445B of the PHS Act (42 U.S.C. 285e–4);

(21) Clinical research and training to enhance and promote the translation of new scientific knowledge into clinical practice related to the diagnosis, care and treatment of individuals with Alzheimer's disease, as authorized by section 445I of the PHS Act (42 U.S.C. 285e–10a);

(22) Clinical research and training to enhance and promote the translation of new scientific knowledge into clinical practice related to the diagnosis, care, and treatment of individuals with sexually transmitted diseases, as authorized by section 447B of the PHS act, as amended by section 901 of Public Law 106–505 (42 U.S.C. 285f–3);

(23) Research relating to medical rehabilitation, as authorized by section 452 of the PHS Act (42 U.S.C. 285g–4);

(24) Research on clinical and health services on eye care and diabetes, as authorized by section 456 of the PHS Act (42 U.S.C. 285i–1);

(25) Research on multiple sclerosis, especially research on the effects of genetics and hormonal changes on the progress of the disease , as authorized by section 460 of the PHS Act (42 U.S.C. 285j–3);

(26) Research on the social, behavioral, and biomedical etiology, mental and physical health consequences, and social and economic consequences of alcohol abuse and alcoholism, as authorized by 464H of the PHS Act (42 U.S.C. 285n);

(27) Health services research activities with respect to the prevention of alcohol abuse and treatment of alcoholism, as authorized by section 464H of the PHS Act (42 U.S.C. 285n) and defined in section 409 of the PHS Act (42 U.S.C. 284d);

(28) Research under the Medication Development Program to encourage and promote the development and use medications to treat drug addiction; and to collect, analyze, and disseminate data, as authorized by section 464P of the PHS Act (42 U.S.C. 285o–4);

(29) Research on health related educational technologies, medical library science and related activities, and for the development or dissemination of new knowledge, techniques, systems, and equipment for processing, storing, retrieving, and distributing information pertaining to health sciences, as authorized by section 473 of the PHS Act (42 U.S.C. 286b–4);

(30) Research in the biomedical , contraceptive, development, behavioral and program implementation fields related to family planning and population, as authorized by section 1004 of the PHS Act (42 U.S.C. 300a–2);

(31) Basic and applied research regarding traumatic brain injury, including the development, modification, and evaluation of

therapies and programs of rehabilitation toward reaching or restoring normal capabilities, as authorized by section 1261 of the PHS Act, as amended by section 1301 of Public Law 106–310 (42 U.S.C. 300d–61);

(32) Research on the causes, consequences and approaches of coping with adolescent sexual relations, contraceptive use, pregnancy, and parenthood , as authorized by section 2008 of the PHS Act (42 U.S.C. 300z–7);

(33) Research relating to the evaluation of drug treatments for AIDS not approved by the Commissioner of Food and Drugs, as authorized by section 2314 of the PHS Act (42 U.S.C. 300cc–14);

(34) International research relating to the development and evaluation of vaccines and treatments for AIDS, as authorized by section 2315 of the PHS Act (42 U.S.C. 300cc–15);

(35) Long-term research into treatments for AIDS, as authorized by section 2320 of the PHS Act (42 U.S.C. 300cc–20);

(36) Research relating to AIDS conducted outside of the United States by qualified foreign professionals and collaborative research involving American and foreign participants, as authorized by section 2354 of the PHS Act (42 U.S.C. 300cc–41);

(37) Basic research to identify, characterize, and quantify risks to human health from air pollutants, as authorized by section 103 of the Clean Air Act, as amended (42 U.S.C. 7403);

(38) Electronic product radiation control research programs designed to protect the public health and safety from electronic product radiation, as authorized by section 532 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 360ii);

(39) Research into areas where a microgravity environment may contribute to significant progress in the understanding and treatment of diseases and other medical conditions , as authorized by section 603 of the National Aeronautics and Space Administration Authorization Act, Fiscal Year 1993 (42 U.S.C. 2487b);

(40) Support for radiation studies and research, as authorized under section 301 of the PHS Act (42 U.S.C. 241) and by section 20(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 669(a));

(41) Research on occupational safety and health problems in industry, as authorized by section 20(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 669(a)) and section 501 of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 951); and

(42) Research to stimulate health-related technological innovation, especially through the use of small business, minority, and disadvantaged firms and increased private sector commercialization of innovations derived from federal research and development, as authorized under section 301 of the PHS Act (42 U.S.C. 241), in accordance with the procedures prescribed pursuant to section 2 [9] of the Small Business Innovation Development Act of 1982, as amended (15 U.S.C. 638).

The Catalogue of Federal Domestic Assistance (CFDA) numbered programs affected by title 42 of the Code of Federal regulations, part 52, are:

93.113—Biological Response to Environmental Health Hazards
93.114—Applied Toxicological Research and Testing
93.115—Biometry and Risk Estimation'' Health Risks from Environmental Exposures
93.118—Acquired Immunodeficiency Syndrome (AIDS) Activity
93.121—Oral Diseases and Disorders Research
93.135—Centers for Research and Demonstration for Health Promotion and Disease Prevention
93.136—Injury Control Research Projects
93.154—Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome (AIDS)
93.172—Human Genome Research
93.173—Biological Research Related to Deafness and Communicative Disorders
93.184—Disabilities Prevention
93.198—Biological Models and Materials Resources Program
93.242—Mental Health Research Grants
93.262—Occupational Safety and Health Research Grants
93.271—Alcohol Scientist Development Award; Scientist Development Award for Clinicians; and Research Scientist Award
93.172—Human Genome Research
93.273—Alcohol Research Programs
93.277—Drug Abuse Scientist Development Award for Clinicians, and Scientist Development Awards
93.279—Drug Abuse Research Programs
93.281—Mental Health Research Scientist Development Award, Research Scientist Development Award for Clinicians, and Research Scientist Award
93.283—Centers for Disease Control-Investigation and Technical Assistance
93.306—Comparative Medicine Program (formerly called Laboratory Animal Sciences and Primate Research)
93.333—General Clinical Research Centers
93.361—Nursing Research
93.371—Biomedical Research Technology
93.389—Research Centers in Minority Institutions
93.390—Academic Research Enhancement Award
93.393—Cancer Cause and Prevention Research
93.394—Cancer Detection and Diagnosis Research
93.395—Cancer Treatment Research
93.396—Cancer Biology Research
93.821—Biophysics and Physiological Sciences Research
93.837—Heart and Vascular Diseases Research
93.838—Lung Diseases Research 13
93.839—Blood Diseases and Resources Research
93.846—Arthritis, Musculoskeletal and Skin Diseases Research
93.847—Diabetes, Endochrinology and Metabolic Research
93.848—Digestive Diseases and Nutrition Research
93.849—Kidney Diseases, Urology and Hematology Research
93.853—Clinical Research Related to Neurological Disorders
93.854—Biological Basic Research in the Neurosciences
93.855—Allergy, Immunology, and Transplantation Research
93.856—Microbiology and Infectious Diseases Research
93.859—Pharmacological Sciences
93.862—Genetics Research
93.863—Cellular and Molecular Basis of Disease Research
93.864—Population Research
93.865—Research for Mothers and Children
93.866—Aging Research
93.867—Vision Research
93.879—Medical Library Assistance
93.929—Center for Medical Rehabilitation Research
93.934—Fogarty International Research Collaboration Award
93.939—Blood Diseases and Resources Research
93.941—HIV Demonstration, Research, Public and Professional Education Projects
93.942—Research, Treatment and Education Programs on Lyme Disease in the United States
93.943—Epidemiologic Research Studies of Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV) Infection in Selected Population Groups
93.947—Tuberculosis Demonstration, Research, Public and Professional Education

Dated: September 29, 2003.

Elias A. Zerhouni,

Director, National Institutes of Health.

Approved: November 10, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–29410 Filed 11–25–03; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed new information collections. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), this notice seeks comments concerning customer satisfaction with Building Science & Technology publications that contain guidance on construction practices in reducing damage from natural and man-made hazards.

SUPPLEMENTARY INFORMATION: Executive Order 12862 requires Federal agencies to survey their customers in order to determine the kind and quality of services they want and their level of satisfaction with existing services. FEMA wishes to obtain feedback from users of Buildings Science and Technology (BS&T) publications, particularly from those who have ordered publications in the past three years. The publications offer state-of-the-art construction practices for building safety and to reduce the risk of future damage from natural and man-made hazards. The feedback project is an opportunity for customers to evaluate publications as a whole, with a special focus on construction in flood hazard areas, including coastal area. With customer feedback information, BS&T can revise and otherwise improve the presentation of technical information to better suit the needs and desires of customers, thereby improving building safety and successfully reducing future building losses from natural and man-made hazards.

Collection of Information

Title: Building Science & Technology (BS&T) Publications Customer Satisfaction Research, FEMA.

Type of Information: New.

Abstract: (1) 2004 On-Line Survey: Since BS&T's mission is to improve the safety of the built environment, the feedback project evaluates customer satisfaction with building science publications, as well as customer reports on how the publications are used, their impact on building safety, and how they could be improved. (2) 2004 Focus Groups (4): With completion of the on-line survey, subject matter experts who use the publications will be recruited to participate in regional focus groups to solicit feedback on the format and content of BS&T publications. (3) 2005–6 Ongoing Customer Feedback: BS&T will use the findings of the benchmark survey not only to make needed changes immediately but to establish a base-line of information for judging whether customer satisfaction is changing over time. With each publication ordered, a self-mailer postcard will be included that encourages the customer to provide feedback on the usefulness of specific publications and any comments.

Affected Public: The people and organizations affected by this survey include: (a) Individuals or households, (b) business or other for-profit, (c) not-for-profit institutions (d) Federal government, and (e) State, local or tribal government.

Estimated Total Annual Burden Hours: 496 hours.

FEMA forms	Number of respondents (A)	Frequency of response (B)	Hours per response (C)	Annual burden hours (A × B × C)
2004 On-Line Survey	1,000	1	0.17	200
Focus Groups (4)	48	1	6.0	288
2005–2006 On-Going Customer Feedback	390	1	0.02	8
Total	1438	1	0.02	496

Estimated Cost: $10,396.00.

Program	Burden hours	Median hourly rate $	Average cost/respondent hour $	Annualized cost all respondents
On-Line Survey/Pre-Survey	200	20.96	3.56	$4,192.00
Focus Groups	288	20.96	3.56	6,036.00
On-Going Customer Feedback	8	20.96	3.56	168.00
Grand total	496	.....	.....	10,396.00

Comments: Written comments are solicited to: (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. Comments should be

received within 60 days of the date of this notice.

ADDRESSES: Interested persons should submit written comments to Muriel B. Anderson, Chief, Records Management Branch, Information Resources Management Division, Information Technology Services Directorate, Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security, 500 C Street SW., Room 316, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Contact Gary L. Sepulvado, Sr., Policy Analyst, BS&T, FEMA/DHS, 202–646–3355. You may contact Ms. Anderson for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *Information.Collections@fema.gov.*

Dated: November 18, 2003.

Edward W. Kernan,

Division Director, Information Resources Management Division, Information Technology Services Directorate.

[FR Doc. 03–29353 Filed 11–24–03; 8:45 am]

BILLING CODE 9110–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No.FR–4815–N–92]

Notice of Submission of Proposed Information Collection to OMB: Alaska Native/Native Hawaiian Institutions Assisting Communities (AN/NHAIC)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been 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.

This is a request to reinstate the information collection requirements for the grants application and reporting for Alaska Native/Native Hawaiian colleges and universities. These competitive grants promote CDEG eligible activities to expand their role and effectiveness in helping their communities with neighborhood revitalization, housing, and economic development.

DATES: *Comments Due Date:* December 26, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2528–0206) and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; E-mail *Lauren_Wittenberg@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov*; telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins or on HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35). The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This Notice also lists the following information:

Title of Proposal: Alaska Native/Native Hawaiian Institutions Assisting Communities (AN/NHAIC).

OMB Approval Number: 2528–0206.

Form Numbers: HUD–424, HUD–424B, HUD–424C, HUD424–CB, SFLLL, HUD–2880, HUD–2991, HUD–2990, HUD–2993, and HUD–2994.

Description of the Need for the Information and its Proposed Use: This is a request to reinstate the information collection requirements for the grants application and reporting for Alaska Native/Native Hawaiian colleges and universities. These competitive grants promote CDEG eligible activities to expand their role and effectiveness in helping their communities with neighborhood revitalization, housing, and economic development.

Respondents: Not-for-profit institutions, Business or other for-profits.

Frequency of Submission: On occasion, Semi-annually, Other Final.

Reporting Burden: Number of Respondents 115; Average annual responses per respondent 2.2; Total annual responses 256; Average burden per response 24 hrs.

Total Estimated Burden Hours: 6,196.

Status: Reinstatement of previously approved collection for which approval has expired.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: November 19, 2003.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 03–29332 Filed 11–24–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. 4800–FA–23]

Announcement of Funding Award—FY 2003 Healthy Homes Grant Program

AGENCY: Office of the Secretary—Office of Healthy Homes and Lead Hazard Control, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of additional funding decisions made by the Department in a competition for funding under the Healthy Homes and Lead Technical Studies Program Notice of Funding Availability (NOFA). This announcement contains the name and address of the award recipient and the amount of award.

FOR FURTHER INFORMATION CONTACT: Peter J. Ashley, Department of Housing and Urban Development, Office of Healthy Homes Initiative and Lead Hazard Control, Room P3206, 451 Seventh Street, SW., Washington, DC, 20410, telephone (202) 755–1785, ext. 115. Hearing- and speech-impaired persons may access the number above via TTY by calling the toll free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The authority for making funding available under the Healthy Homes and Lead Technical Studies Program NOFA is authorized under sections 1011(g)(1), 1011(o), 1051–1053 of the residential Lead Based Paint Hazard Reduction Act of 1992, which is Title X of the Housing and Community Development Act of 1992; sections 501 and 502 of the Housing and Urban Development Act of 1970; and the Consolidated Appropriations Resolution of 003, Pub. L. 108–7, signed February 20, 2003.

These awards were the result of a competition announced in a **Federal Register** NOFA published on April 25, 2003 (68 FR 21347). The purpose of the competition was to award grant funding of approximately $5,000,000 for grants and cooperative agreements for the Healthy Homes and Lead Technical Studies Programs. Applications were scored and selected on the basis of selection criteria contained in that Notice.

A total of $4,841,559 was awarded to eight grantees. In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of this awards as follows:

Awardee	Address	Award Amount
Howard University	600 W Street, NW., Washington, DC 20001	$999,998
Xavier University	1 Drexel Drive, New Orleans, LA 70125	693,635
Panhandle Health District	114 W Riverside Kellogg, ID 83837	252,072
University of Illinois	109 Coble Hall Champaign, IL 61820	249,999
University of Cincinnati	P.O. Box 670553 Cincinnati, OH 45267	233,420
Research Triangle	3040 Cornwallis Road Research Triangle Park, NC 27709	403,163
University of Illinois	801 South Wright Street, Champaign, ILL 61820	280,266
Georgia Tech	505 Tenth Street, NW., Atlanta, GA 30332–0420	249,864
Tulane University	1440 Canal Street, Suite 800, Box TW–43, New Orleans, LA	854,909
University of Minnesota	200 Oak Street, SE, Minneapolis, MN 55455–2070	624,233

(The Catalog of Federal Domestic Assistance number for this program is 14.902.)

Dated: November 5, 2003.

Joseph F. Smith,

Deputy Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 03–29328 Filed 11–24–03; 8:45 am]

BILLING CODE 4210–70–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4800–FA–25]

Announcement of Funding Award—FY 2003 Lead-Based Paint Hazard Control Grant Program

AGENCY: Office of the Secretary—Office of Healthy Homes and Lead Hazard Control, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of additional funding decisions made by the Department in a competition for funding under the Lead-Based Paint Hazard Control Grant Program Notice of Funding Availability (NOFA). The purpose of the Lead-Based Paint Hazard Control Grant Program is to assist states, Native American Tribes and local governments in undertaking comprehensive programs to identify and control lead-based paint hazards in eligible privately owned housing for rental or owner-occupants in partnership with nonprofit organizations including grassroots faith-based and other community-based organizations. This announcement contains the name and address of the award recipient and the amount of award.

FOR FURTHER INFORMATION CONTACT: Matthew E. Ammon, Department of Housing and Urban Development, Office of Healthy Homes and Lead Hazard Control, Room P3206, 451 Seventh Street SW., Washington, DC, 20410, telephone (202) 755–1785 ext. 158. Hearing- and speech-impaired persons may access the number above via TTY by calling the toll free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: HUD's authority for making funding available under the Lead-Based Paint Hazard Control Program NOFA is the Consolidated Appropriations Resolution of 2003, Pub. L. 108–7, approved February 20, 2003. These awards were the result of a competition announced in a **Federal Register** notice published on April 25, 2003 (68 FR 21279). The purpose of the competition was to award grant funding of approximately $96 million in Fiscal Year 2003 and approximately $7 million in previous year recaptured funds for grants and cooperative agreements for the Lead-Based Paint Hazard Control Grant Program. Applications were scored and selected on the basis of selection criteria contained in that NOFA.

A total of $74,440,446 was awarded to thirty (30) grantees. In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of this awards as follows:

Awardee	Address	Amount awarded
City of Woonsocket	169 Main Street, Woonsocket, RI 02895	$585,000
City of El Paso	Two Civic Center Plaza-9th Floor, El Paso, TX 79901–1196	721,300
City of National City	1243 National City Blvd., San Diego, CA 91950	2,984,152.00
Hennepin County	417 North 5th Street, Room 320 Hennepin, MN 55401–1362	2,999,834.00
City of Rochester	30 Church Street, Room 028B, Rochester, NY 14614	2,918,430.00
City of Harrisburg	10 N 2nd Street, Suite 206, Harrisburg, PA 17110	3,000,000.00
District of Columbia	801 N. Capitol Street, Washington, DC 20002	2,997,743.00
City of Dubuque	1805 Central Avenue, Dubuque, IA 52001–3656	2,417,399.00
Shelby County	1075 Mullins Station Rd., Memphis, TN 38134	3,000,000.00

Awardee	Address	Amount awarded
State of Penn	P.O. Box 90, 7th Floor, East Wing,Harrisburg, PA 17108–0090	3,000,000.00
City of Burlington	149 Church Street, Room 32, Burlington, VT 05401	1,567,019.00
State of Connecticut	25 Sigourney Street, Hartford, CT 06106	3,000,000.00
City of Waterloo	620 Mulberry Street, Waterloo, IA 50703	2,105,800.00
State of Kansas	1000 SW Jackson, Suite 200, Topeka, KS 66612	2,999,955.00
State of New Jersey	101 South Broad Street, PO Box 806, Trenton, NJ 08625–0806	3,000,000.00
City of Sheboygan	807 Center Avenue, Sheboygan, WI 53081	3,000,000.00
State of Maryland	100 Community Place, Crownsville, MD 21032–2032	3,000,000.00
City of Grand Rapids	300 Monroe Avenue, NW, Grand Rapids, MI 49503	2,966,651.00
Cochise County	1415 Melody Lane, Bldg A, Bisbee, AZ 85603	1,981,624.00
City of Roanoke	215 Church Ave., SW, Roanoke, VA 24011	1,543,704.00
East Hartford	740 Main Street, East Hartford, CT 06108	3,000,000.00
City of Erie	826 Parade Street, Erie, PA 16503	3,000,000.00
City of Toledo	One Government Center, Suite 1800, Toledo, OH 43604	2,958,448.00
State of Minnesota	121 East 7th Place, St. Paul, MN 55101	2,453,664.00
City of New Orleans	1340 Poydras Street, Suite 1000, New Orleans Orleans, LA 70112	2,904,733.00
City of Warwick	City Hall, Warwick, RI 02886	1,887,814.00
County of Santa Cruz	701 Ocean Street, Room 312, Santa Cruz,CA 95060	2,102,118.00
City of Allentown	City of Allentown, Allentown, PA 18101	1,149,077.00
Westchester County	48 Martine Avenue, Room 414, White Plains, NY 10601	3,000,000
City of Jacksonville	128 E. Forsyth Street, Jacksonville, FL 32202–3325	2,196,000

(The Catalog of Federal Domestic Assistance number for this program is 14.900.)

Dated: November 5, 2003.

Joseph F. Smith,

Deputy Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 03–29329 Filed 11–24–03; 8:45 am]

BILLING CODE 4210–70–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4851–FA–02]

Announcement of Funding Award—FY 2003 Lead Hazard Reduction Demonstration Grant Program

AGENCY: Office of the Secretary—Office of Healthy Homes and Lead Hazard Control, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of additional funding decisions made by the Department in a competition for funding under the Lead Hazard Reduction Demonstration Grant Program Notice of Funding Availability (NOFA). The purpose of the Lead Hazard Reduction Demonstration Grant Program is to assist areas with the highest lead paint abatement needs in undertaking programs for abatement, inspections, risk assessments, temporary relocations, and interim control of lead-based paint hazards in eligible privately-owned, single-family housing units, and multi-family buildings that are occupied by low-income families. This announcement contains the name, address of the award recipient and the amount of award.

FOR FURTHER INFORMATION CONTACT: Matthew E. Ammon, Department of Housing and Urban Development, Office of Healthy Homes and Lead Hazard Control, Room P3206, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 755–1785 ext. 158. Hearing- and speech-impaired persons may access the number above via TTY by calling the toll free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: HUD's authority for making funding available under the Lead Hazard Reduction Demonstration Grant Program NOFA is the Consolidated Appropriations Resolution of 2003, Pub. L. 108–7, approved February 20, 2003.

These awards were the result of a competition announced in a **Federal Register** NOFA published on July 1, 2003 (68 FR 39400). The purpose of the competition was to award grant funding of approximately $49,675,000 for grants and cooperative agreements for the Lead Hazard Reduction Demonstration Grant Program. Applications were scored and selected on the basis of selection criteria contained in that NOFA.

A total of $49,675,000 was awarded to 20 grantees. In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of this awards as follows:

Awardee	Address	Award amount
City of Cleveland	1925 St. Clair Avenue, Cleveland, OH 44114	$2,713,421
City of Baltimore	210 Guilford Avenue—2nd Floor, Baltimore, MD 21202	2,600,000
City of Rochester	30 Church Street, Room 028B, Rochester, NY 14614	2,568,248
Westchester County	148 Martine Avenue, Room 414, White Plains, NY 10601	2,000,000
City of Boston	38 Winthrop Street, Hyde Park, MA 02136	2,600,000
City of Memphis	701 North Main Street, Memphis, TN 38107	2,599,715
City of St. Louis	1015 Locust Street, Suite 1200, St. Louis, MO 63101	2,600,000
State of Connecticut	25 Sigourney Street, Hartford, CT 06106	2,600,000
City of New York	100 Gold Street, Room 9–08, New York, NY 10038	2,600,000
City of Philadelphia	2100 West Girard Avenue, PNH, Bldg. 3, Philadelphia, PA 19130–1400	2,599,998
City of Milwaukee	841 N. Broadway, Milwaukee, WI 53202	2,600,000
District of Columbia	801 North Capitol Street, NE, Room 320 Washington, DC 20002	2,000,000
City of Los Angeles	1200 W. Olympic, 9th Floor, Los Angeles, CA 90017	2,593,618
San Bernadino County	351 North Mountain View Avenue, Room 305 San Bernardino, CA 92415	2,600,000
Hennepin County	417 North 5th Street, Room 320, Hennepin, MN 55401–1362	2,000,000

Awardee	Address	Award amount
Mahoning County	21 West Boardman Street, Youngstown, OH 44503	$2,600,000
City of Grand Rapids	300 Monroe Avenue, NW, Grand Rapids, MI 49503	2,000,000
City & County of SF	25 Van Ness Avenue, Suite 600, San Francisco, CA 94012	2,600,000
City of Chicago	333 South State Street, Chicago, IL 60604	2,600,000
City of Syracuse	201 East Washington Street, Syracuse, NY 13202	2,600,000

(The Catalog of Federal Domestic Assistance number for this program is 14.905.)

Dated: November 4, 2003.

Joseph F. Smith,

Deputy Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 03–29327 Filed 11–24–03; 8:45 am]

BILLING CODE 4210–70–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4800–FA–26]

Announcement of Funding Award—FY 2003 Operation Lead Elimination Action Program (LEAP)

AGENCY: Office of the Secretary—Office of Healthy Homes and Lead Hazard Control, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of additional funding decisions made by the Department in a competition for funding under the Operation Lead Elimination Action Program (LEAP) Notice of Funding Availability (NOFA). The purpose of the LEAP program is to leverage private sector resources to eliminate lead poisoning as a major public health threat to young children. This announcement contains the name and address of the award recipient and the amount of award.

FOR FURTHER INFORMATION CONTACT: John Baker, Department of Housing and Urban Development, Office of Healthy Homes and Lead Hazard Control, Room P3206, 451 Seventh Street SW., Washington, DC, 20410–3000, telephone (804) 771–2100 ext. 3765. Hearing- or speech-impaired persons may access the number above via TTY by calling the toll free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The authority for making funding available under the LEAP NOFA is Division K of the Consolidated Appropriations Resolution of 2003, Pub. L. 108–7, approved February 20, 2003.

These awards were the result of a competition announced in a **Federal Register** NOFA published on April 25, 2003 (68 FR 21413). The purpose of the competition was to award grant funding of approximately $9,935,000 for grants and cooperative agreements for LEAP. Applications were scored and selected on the basis of selection criteria contained in that NOFA.

A total of $9,935,000 was awarded to seven grantees. In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of this awards as follows:

Awardee	Address	Amount awarded
ACORN Associates	1024 Elysian Fields Avenue New Orleans LA 70117	$999,974.00
National Coalition for Lead Safe Kids	P.O. Box 535, Olney, MD 20830	1,265,415.00
Environmental Education Association	2929 Main Street Buffalo, NY 14214	1,892,349.00
Middle Tennessee State University	1500 Greenland Avenue Murfreesboro, TN 37132	1,871,740.00
Alliance to End Childhood Lead Poisoning.	227 Massachusetts Avenue, NE Suite 200, Washington, DC 20002	2,477,295.00
CONNOR Environmental Services	1421 Clarkview Road, Suite 100, Baltimore, MD 21209	194,623.00
O.C. Community Development Council, Inc.	12640 Knott Street Garden Grove, CA 92841	1,233,604.00

(The Catalog of Federal Domestic Assistance number for this program is 14.903.)

Dated: November 4, 2003.

Joseph F. Smith,

Deputy Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 03–29330 Filed 11–24–03; 8:45 am]

BILLING CODE 4210–70–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4800–FA–27]

Announcement of Funding Award—FY 2003; Lead Outreach Grant Programs.

AGENCY: Office of the Secretary—Office of Healthy Homes and Lead Hazard Control Grant Programs.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of additional funding decisions made by the Department in a competition for funding under the Lead Outreach Grant Program Notice of Funding Availability (NOFA). This announcement contains the name and address of the award recipient and the amount of award.

FOR FURTHER INFORMATION CONTACT: Warren Friedman, Department of Housing and Urban Development, Office of Healthy Homes Initiative and Lead Hazard Control, Room P3206, 451 Seventh Street, SW., Washington, DC, 20410, telephone (202) 755–1785, ext. 159. Hearing- and speech-impaired persons may access the number above via TTY by calling the toll free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The authority for making funding available under the Lead Outreach Grant Program is section 1011(e)(8) & (g)(1) of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X of the Housing and Community Development Act of 1992), and Division K of the Consolidated Appropriations Resolution of 2003, Public Law 108–7, signed February 20, 2003. These awards were the result of a competition announced in a **Federal Register** NOFA published

on April 25, 2003 (68 FR 21399). The purpose of the competition was to award grant funding of approximately $2,200,000 for grants and cooperative agreements for the Healthy Homes Lead Outreach Grants Programs. Applications were scored and selected on the basis of selection criteria contained in that NOFA.

A total of $2,402,972 was awarded to six grantees. In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of this awards as follows:

Awardee	Address	Award amount
City of New York	100 Gold Street, New York, NY 10038	$500,000
City of Kansas City	2400 Troost Ave., Suite 4000, Kansas City, MO 64108	250,000
City of Charlotte	600 East Trade Street, Charlotte, NC 28202	288,457
City of Minneapolis	250 South 4th Street Room 510, Minneapolis, MN 55415	370,824
City of Los Angeles	1200 West 7th St., 9th Floor, Los Angeles, CA 90017	514,764
City of San Diego	9601 Ridgehaven Court, Suite 320, Diego San Diego, CA 92123–1636.	478,927

The Catalog of Federal Domestic Assistance number for this program is 14.904.

Dated: November 4, 2003.

Joseph F. Smith,

Deputy Director, Office of Healthy Homes and Lead Hazard Control.

[FR Doc. 03–29331 Filed 11–24–03; 8:45 am]

BILLING CODE 4210–70–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–600–1120–PI–241A]

Notice of Meeting, Southwest Resource Advisory Council (Colorado)

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Southwest Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting will be held on December 12, 2003, at the Ridgeway State Park Headquarters, 28555 U.S. Highway 550, Ridgeway, Colorado and will begin at 9 a.m. The public comment periods will be at 9:30 a.m. and 3 p.m.

SUPPLEMENTARY INFORMATION: The 15 member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Southwest, Colorado. Planned agenda topics include:

Manager reports
Public Comment
Discussion of Old Business
Discussion of Energy Development
Impacts on Local Communities

All meetings are open to the public. The public can make oral statements to the Council at 9:30 a.m. and 3 p.m. or written statements may be submitted for the Councils consideration. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Summary minutes for the Council Meeting will be maintained in the Western Slope Center Office and will be available for public inspection and reproduction during regular business hours within thirty (30) days following the meeting.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management (BLM), Western Slope Center, 2465 S. Townsend Ave., Montrose, Colorado 81401. Phone (970) 240–5300.

Dated: July 15, 2003.

Barry A. Tollefson,

Acting Western Slope Center Manager.

[FR Doc. 03–29344 Filed 11–24–03; 8:45 am]

BILLING CODE 4310–JB–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–930–1430–ET; COC–34653]

Proposed Modification of Public Land Order No. 6761; Opportunity for Public Meeting; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management proposes to modify the withdrawal of the Windy Gap Archaeological Sites to allow for disposal. This modification will have no effect on the restrictions imposed by Public Land Order No. 6761 and the lands containing these sites will not be disposed of until the archaeological values have been mitigated. The lands have been and remain open to mineral leasing.

DATES: Comments and requests for a public meeting must be received by February 23, 2004.

FOR FURTHER INFORMATION CONTACT: Doris E. Chelius, BLM Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215–7076, 303–239–3706.

SUPPLEMENTARY INFORMATION: The Secretary of the Interior has approved a petition allowing the Bureau of Land Management to file an application to modify Public Land Order 6761. This order will affect the following described land:

Sixth Principal Meridian

T.2 N., R. 76 W.,
Sec. 17, lots 3 and 4;
Sec 20, lots 1, 2, and 7.
T. 2 N., R. 77 W.,
Sec. 23, lot 8;
Sec. 24, lot 4;
Sec. 25, lots 1 and 2;
Sec. 26, lot 1.

The areas described aggregate approximately 397.80 acres of public land in Grand County.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed modification may present their views in writing to the Colorado State Director at the address shown above, Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed modification. All interested persons who desire a public meeting for the purposes of being heard on the proposed action must submit a written request to the Colorado State Director within 90 days of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting. This application will be processed in

accordance with the regulations set forth in 43 CFR 2300.

Dated: November 17, 2003.

Jenny L. Saunders,

Realty Officer.

[FR Doc. 03–29401 Filed 11–24–03; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Request for Small Reclamation Projects Act Loan To Construct Narrows Dam in Sanpete County, UT

AGENCY: Bureau of Reclamation (Interior), Lead Agency; U.S. Forest Service (Agriculture); and U.S. Army Corps of Engineers (Army), Cooperating Agencies.

ACTION: Notice of intent to prepare a supplemental draft environmental impact statement.

SUMMARY: The Bureau of Reclamation (Reclamation), the Federal agency with administrative authority under the Small Reclamation Projects Act (SRPA), in cooperation with the U.S. Forest Service and U.S. Army Corps of Engineers, intends to prepare a supplemental draft environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended, and 40 CFR 1502.9. The supplemental draft EIS will describe the effects of granting a SRPA loan and authorizing use of withdrawn lands to the Sanpete Water Conservancy District (SWCD) for the purpose of constructing the Narrows Dam and Reservoir and rehabilitating the existing Gooseberry (Narrows) Tunnel. The purpose of the proposed action is to enable the SWCD to develop an existing Gooseberry Project right to 5,400 acre-feet of water.

FOR FURTHER INFORMATION CONTACT: Mr. Kerry Schwartz, Bureau of Reclamation, Provo Area Office, 302 East 1860 South, Provo, Utah 84606–7317; telephone (801) 379–1150; faxogram (801) 379–1159; e-mail: *kschwartz@uc.usbr.gov.*

SUPPLEMENTARY INFORMATION: The draft EIS for this proposed action was prepared and published for public comment in 1998. The supplemental draft EIS will incorporate comments received on the draft EIS in 1998 as well as new information received since that time. When the supplemental draft EIS is complete, a Notice of Availability will be published in the **Federal Register**. That notice will contain information about public hearings that will be held to receive comments on the supplemental draft EIS. Public comments on the draft document will be solicited for a 60-day comment period.

Background

Water development in the Gooseberry Creek drainage in Utah has a lengthy history dating back to the early 20th century. The proposed action for which this supplemental draft EIS is being prepared was initiated in 1981 by a Notice of Intent published in the **Federal Register** by the SWCD to apply for a SRPA loan to help finance construction of the Narrows Dam and Reservoir and rehabilitation of the existing Gooseberry (Narrows) Tunnel. The proposed reservoir would have a total capacity of 17,000 acre-feet of water and would provide active storage of no more than 14,500 acre-feet of water for the purpose of receiving 5,400 acre-feet per year of water from Gooseberry Creek by transmountain diversion through the Gooseberry (Narrows) Tunnel, under a water right approved by the Utah State Engineer on January 7, 1985.

A draft EIS analyzing the potential impacts of the proposed action was prepared by Reclamation and circulated for public review in 1993. A final EIS and Record of Decision were completed in 1995, but the Record of Decision was rescinded later in 1995. A new draft EIS was published in March 1998 for public review and comment, and public hearings were held to receive comments on the draft EIS in April 1998. Since that time, Reclamation has addressed and incorporated comments received on the 1998 draft EIS and engaged in written and oral communications with the interested public, including its cooperating agencies, and other state and Federal regulatory agencies. Because of new information either received or developed from comments received on the 1998 draft EIS, Reclamation and its cooperating agencies have determined that a supplemental draft EIS should be prepared and published for public review and comment rather than proceeding with publication of a final EIS. Specifically, the supplemental draft EIS will update or add new information as follows:

- Updated hydrology studies through 2002.
- Updated water quality studies through 2002.
- Updated population and demographics based on a 2000 census.
- Updated water usage data.
- Updated recreation data.
- Added discussion regarding Skyline Mine water development.
- Updated brown trout habitat suitability curves.
- Updated project cost estimates.
- Updated wetlands delineations.
- Added discussion and analysis related to Wild and Scenic Rivers proposed designation for Gooseberry Creek.
- Updated Endangered Species Act compliance for Colorado pikeminnow use of the lower Price River

Purpose and Need for Action

Reclamation has received an application for a SRPA Loan from the SWCD for the purposes of constructing the Narrows Project. The primary purpose of the Narrows Project is to develop an irrigation and municipal and industrial supply source for water users in north Sanpete County, Utah. The following water needs would be addressed by the proposed

- Demand for municipal water for present and future use currently exceeds the available supply. The proposed Narrows Project would develop through exchange an additional supply of municipal water to offset current shortages and accommodate anticipated population growth in the project area;
- The current water supply for agricultural irrigation does not provide adequate supply and storage during July, August, and September of each year. The proposed Narrows Project would provide late season irrigation water to offset at least some of the current shortages; and
- The Gooseberry (Narrows) Tunnel in Sanpete County is in need of rehabilitation to maintain and enhance its dependability and capability to deliver water to Sanpete County users. The proposed Narrows Project would include such rehabilitation work to prevent tunnel failure and ensure the tunnel's continuing usefulness.

In addition to the primary purpose of supplying water to Sanpete County, the project would have the additional benefit of providing improved and additional recreation and fishery opportunities in Sanpete County.

Proposed Action

Reclamation proposes to approve the SWCD's loan application under the SRPA and authorize use of withdrawn lands to enable the SWCD to construct the Narrows Project. If the loan and use of the land are approved, a supplemental water supply would be developed for presently irrigated lands and municipal water users in north Sanpete County. A dam and reservoir would be built on Gooseberry Creek and water would be diverted through the existing Gooseberry (Narrows) Tunnel (which would be rehabilitated) to Cottonwood Creek. Pipelines would be

built to deliver the water to existing water distribution systems. Recreation facilities would be developed and a 2,500 acre-foot minimum pool for fish habitat would be provided. Mitigation measures would be implemented to offset adverse impacts to wetlands, terrestrial wildlife, and stream fisheries. Additional water conservation measures would be implemented independent of this proposed action, but water users would be required to use or agree to implement conservation measures to be eligible to receive project water.

Public Disclosure

It is Reclamation's practice to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

Dated: October 21, 2003.

Rick L. Gold,

Regional Director, Upper Colorado Region, Bureau of Reclamation.

[FR Doc. 03–29345 Filed 11–24–03; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-Day Notice of Information Collection Under Review: FBI Questionnaire for National Security Positions.

The Department of Justice (DOJ), Federal Bureau of Investigations (FBI) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 68, Number 150, page 46227 on August 5, 2003, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until December 26, 2003. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202)–395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* FBI Questionnaire for National Security Positions.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: FD–957, Federal Bureau of Investigation, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Federal Government. Other: Individuals. In accordance with the FBI's efforts to re-engineer the hiring process for FBI employment and in accordance with the Paperwork Reduction Act of 1995, Public Law 104.13.109 Stat.163, the FBI has determined that suitability determinations and the granting/denying of security clearances can be made based on information provided by applicants on the SF–86, Questionnaire for National Security Positions in addition to a supplemental FBI form to collect collateral information. This form has been designated as FD–957, FBI Questionnaire for National Security Positions.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 50,000 respondents with an average response rate of one-half hour to complete each form.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 25,000 total annual burden hours associated with this collection.

FOR FURTHER INFORMATION CONTACT: Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: November 20, 2003.

Brenda E. Dyer,

Deputy Clearance Officer, Department of Justice.

[FR Doc. 03–29358 Filed 11–24–03; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

November 18, 2003.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of this ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor. To obtain documentation contact Darrin King on (202) 693–4129 (this is not a toll-free number) or E-Mail *king.darrin@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Employee Benefits Security

Administration (EBSA), Office of Management and Budget, Room 10235, Washington, DC 20503 (202) 395–7316/ this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: Employee Benefits Security Administration.

Type of Review: Extension of a currently approved collection.

Title: Annual Report for Multiple Employer Welfare Arrangements and Certain Entities Claiming Exception.

OMB Number: 1210–0116.

Affected Public: Business or other for-profit; Not-for-profit institutions; and Individuals or households.

Frequency: Annually.

Type of Response: Reporting.

Number of Respondents: 741.

Number of Annual Responses: 3,718.

Estimated Time Per Response: Varies from 2 hours and 50 minutes for fully insured filers to 3 hours and 35 minutes for filers not fully insured.

Total Burden Hours: 564.

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (operating/ maintaining systems or purchasing services): $348,997.

Description: The Health Insurance Portability and Accountability Act of 1996 (HIPAA), codified as part 7 of Title I of the Employee Retirement Security Act of 1974 (ERISA), was enacted to improve the portability and continuity of health care coverage for participants and beneficiaries of group health plans. In the interest of assuring compliance with part 7, HIPAA also added section 101(g) to ERISA permitting the Secretary of Labor (the Secretary) to require multiple employer welfare arrangements (MEWA) as defined in section 3(40) of ERISA to report to the Secretary in such form and manner as the Secretary might determine. Under 29 CFR 2520.101–2, Form M–1 is required to be filed by MEWAs and by other entities described in the regulation. The purpose of the information collection is to provide the Secretary with information to determine the extent to which the requirements of part 7 of ERISA are being carried out in connection with the provision of benefits consisting of medical care.

Ira L. Mills,

Departmental Clearance Officer

[FR Doc. 03–29364 Filed 11–21–03; 8:45 am]

BILLING CODE 4510–29–M

DEPARTMENT OF LABOR

Office of the Secretary

Bureau of International Labor Affairs; U.S. National Administrative Office; North American Agreement on Labor Cooperation; Extension of Comment Period

AGENCY: Office of the Secretary, Labor.

ACTION: Extension of comment period.

SUMMARY: Article 10(1)(a) of the North American Agreement on Labor Cooperation (NAALC) calls for the Council for the Commission for Labor Cooperation to review the operation and effectiveness of the NAALC. The Council completed a review of the Agreement in 1998, for the period 1994–1998, and issued a report titled ''Review of the North American Agreement on Labor Cooperation.'' In that report, the Council agreed to undertake a second review in the year 2002. The U.S. National Administrative Office hereby extends by 60 days the period for filing public comments for the purpose of that report. This action is taken to permit additional comments from interested persons.

DATES: Written comments on the operation and effectiveness of the NAALC should be submitted by February 3, 2004.

ADDRESSES: Send written comments to the National Administrative Office, U.S. Department of Labor, Room S–5205, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Lewis Karesh, Acting Director, National Administrative Office, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–5205, Washington, DC 20210. Telephone: (202) 693–4900 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The North American Agreement on Labor Cooperation (NAALC) was signed by the Presidents of the United States of America and of the United Mexican States, and the Prime Minister of Canada in September 1993 and entered into force on January 1, 1994. Article 10(1)(a) of the NAALC provides that the Council shall ''oversee the implementation and develop recommendations on the further elaboration of this Agreement and, to this end, the Council shall, within four years after the date of entry into force of this Agreement, review its operation and effectiveness in light of experience * * *.'' The Council carried out the first review of the Agreement in 1998 and issued a report titled ''Review of the North American Agreement on Labor Cooperation.'' In that report, the Council agreed to undertake a second comprehensive review in the year 2002. As part of the review, the National Administrative Office is seeking public comments on the operation and effectiveness of the NAALC from 1999 to the present. This request for public comments was previously announced in the **Federal Register** of November 5, 2003 (68 FR 62620), with a deadline of December 5, 2003. However, it has been decided to extend the deadline by an additional 60 days to February 3, 2004, to provide the public with more time to submit comments. Written comments and/or an electronic version (preferred in Microsoft Word format) may be sent to the National Administrative Office. In the event that a response to this notice is going to be sent by electronic mail, please use the following address—*USNAO@DOL.GOV*—and the following subject heading: Response to Request for Comments on NAALC Review 2004.

A text of the NAALC can be obtained at the following Internet address: *http://www.dol.gov/ILAB/regs/naalc/ naalc.htm*. A text of the first four year review can be obtained at the following Internet address: *http://www.naalc.org/ english/publications/review.htm* or by calling (202) 693–4900.

Signed at Washington, DC on November 18, 2003.

Lewis Karesh,

Acting Director, National Administrative Office.

[FR Doc. 03–29365 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,966]

Andrew Corporation, Dallas, TX; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 24, 2003, in response to a worker petition on behalf of workers at Andrew Corporation, Dallas, Texas.

The petitioners have requested that the petition be withdrawn. Therefore, this investigation has been terminated.

Signed at Washington, DC this 6th day of November, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29380 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,673]

Belden Wire & Cable. Richmond, IN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on August 25, 2003 in response to a worker petition which was filed by a company official on behalf of workers at Belden Wire & Cable, Richmond, Indiana (TA–W–52,673).

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC this 3rd day of October 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29376 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,515]

Buffalo China, Buffalo, NY; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 11, 2003 in response to a worker petition filed by a union official on behalf of workers at Buffalo China, Buffalo, New York.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 5th day of September, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29366 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,699]

Delphi Automotive Systems, Moraine, OH; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 28, 2003 in response to a worker petition filed by a union official on behalf of workers at Delphi Automotive Systems, Moraine, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of October, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29377 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,361]

Duluth, Missabe and Iron Range Railway Company, Duluth, MN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 28, 2003, in response to a worker petition filed by a company official on behalf of workers at Duluth, Missabe and Iron Range Railway Company, Duluth, Minnesota.

The petitioning worker group is included in a petition filed on October 15, 2003 (TA–W–53,274), that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would serve no purpose and the investigation has been terminated.

Signed at Washington, DC this 6th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29383 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,355]

Fairchild Semiconductor, Mountaintop, PA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 27, 2003 in response to a petition filed by a company official on behalf of workers at Fairchild Semiconductor, Mountaintop, Pennsylvania.

The petitioning group of workers is covered by an earlier petition instituted on October 24, 2003 (TA–W–53,335), that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC this 6th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29382 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,759]

Fishing Vessel (F/V) K2, Cordova, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 4, 2003, in response to a petition filed by a company official on behalf of workers of Fishing Vessel (F/V) K2, Cordova, Alaska.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of

fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC this 25th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29371 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,892]

Fishing Vessel (F/V) Sea Comber Sitka, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 22, 2003 in response to a petition filed by a company official on behalf of workers of F/V Sea Comber, Sitka, Alaska.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC this 25th day of September 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29375 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,851]

General Mills Inc., Eden Prairie, MN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 2, 2003 in response to a petition filed on behalf of workers of General Mills Inc., Eden Prairie, Minnesota.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of October 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29379 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,526]

Halliburton Energy Services, Anchorage, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on August 12, 2003, in response to a worker petition filed by a company official on behalf of workers at Halliburton Energy Services, Anchorage, Alaska.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC this 4th day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29367 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,748]

Honeywell Industry Solutions, Power Generation, Phoenix, AZ; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 3, 2003 in response to a worker petition filed on behalf of workers at Honeywell Industry Solutions, Power Generation, Phoenix, Arizona.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 2nd day of October, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29378 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,883]

Interceptor, Kodiak, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 22, 2003, in response to a petition filed by a company official on behalf of workers of Interceptor, Kodiak, Alaska.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC this 25th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29369 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,845]

Ranco North America; Brownsville, TX; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 12, 2003 in response to a worker petition filed on behalf of workers at Ranco North America, Brownsville, Texas.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 25th day of September, 2003

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29373 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,896]

Rubicon, Kodiak, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 23, 2003, in response to a petition filed by a company official on behalf of workers of Rubicon, Kodiak, Alaska.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC this 25th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29370 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,382]

Rubicon, Kodiak, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 30, 2003, in response to a petition filed by a company official on behalf of workers of Rubicon, Kodiak, Alaska.

The petition is a duplicate of a petition filed on September 23, 2003 (TA–W–52,896). Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC this 6th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29385 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,898]

State of Alaska Commercial Fisheries Entry Commission Permit #S04K62143 Kodiak, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 23, 2003 in response to a petition filed by a company official on behalf of the group of workers covered by State of Alaska Commercial Fisheries Entry Commission Permit #S04K62143, Kodiak, Alaska.

The petition regarding the investigation has been deemed invalid. In order to establish a valid worker group, there must be at least three full-time workers employed at some point during the period under investigation. Workers of the group subject to this investigation did not meet this threshold level of employment. Consequently, the investigation has been terminated.

Signed at Washington, DC this 25th day of September 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29374 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,781]

Wellington Synthetic Fibers, Leesville, SC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 9, 2003, in response to a petition filed by a company official on behalf of workers at Wellington Synthetic Fibers, Leesville, South Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 22nd day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29368 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,756]

West Point Fisheries, Kodiak, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 4, 2003, in response to a petition filed by a company official on behalf of workers of West Point Fisheries, Kodiak, Alaska.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC this 25th day of September, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29372 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,366]

Zinisar Corporation, Sunnyvale, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 28, 2003, in response to a petition filed on behalf of workers at Zinisar Corporation, Sunnyvale, California.

This petition is a duplicate of an ongoing investigation for workers for Zinisar Corporation, Sunnyvale,

California, petition number TA–W–53,290. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 30th day of October, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29384 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,350]

Zytec America, Inc., Greensboro, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 24, 2003, in response to a worker petition filed by a company official on behalf of workers at Zytec America, Inc., Greensboro, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 31st day of October, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29381 Filed 11–24–03; 8:45 am]

BILLING CODE 4510–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extension of a currently approved information collection used in all NARA research rooms, museums, and Presidential Libraries for customers to provide comments, suggestions, and complaints about NARA service. Additionally, customers can provide comments on the objectivity, usefulness, or integrity of NARA's information. The information will be used to improve service and plan future services. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before January 26, 2004 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740–6001; or faxed to 301–837–3213; or electronically mailed to tamee.fechhelm@nara.gov.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collections and supporting statements should be directed to Tamee Fechhelm at telephone number 301–837–1694, or fax number 301–837–3213.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed collection information is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Customer Comment Form.

OMB number: 3095–0007.

Agency form number: NA Form 14045.

Type of review: Regular.

Affected public: Individuals.

Estimated number of respondents: 9,600.

Estimated time per response: 5 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 800 hours.

Abstract: The information collection is a customer comment form made available to persons who use NARA services or visit NARA museums. The form is voluntary and is used to record comments, complaints, and suggestions, from NARA customers about our services, products, and the objectivity, usefulness, or integrity of our information. NARA uses the information collected from our customers to correct problems and improve service.

Dated: November 17, 2003.

L. Reynolds Cahoon,

Assistant Archivist for Human Resources and Information Services.

[FR Doc. 03–29363 Filed 11–24–03; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Advisory Committee on the Records of Congress; Meeting

AGENCY: National Archives and Records Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Archives and Records Administration (NARA) announces a meeting of the Advisory Committee on the Records of Congress. The committee advises NARA on the full range of programs, policies, and plans for the Center for Legislative Archives in the Office of Records Services.

DATES: December 8, 2003 from 10 a.m. to 11 a.m.

ADDRESSES: National Archives and Records Administration Building, Washington, DC, Jefferson Room.

FOR FURTHER INFORMATION CONTACT: Richard H. Hunt, Acting Director; Center for Legislative Archives; (202) 501–5350.

SUPPLEMENTARY INFORMATION:

Agenda; Security Enhancements and the New Legislative Treasures Vault; Congressional Papers Roundtable and Guidelines for Congressional Policy Centers; Legislative records outside of official custody; Activities report of the Center for Legislative Archives; Other current issues and new business.

The meeting is open to the public.

Dated: November 18, 2003.

Mary Ann Hadyka,

Committee Management Officer.

[FR Doc. 03–29144 Filed 11–24–03; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–007]

Exelon Generation Company, LLC, Clinton Early Site Permit; Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process

Exelon Generation Company, LLC (Exelon) has submitted an application for an early site permit (ESP) for property co-located with the existing Clinton Power Station facility near Clinton, Illinois identified as the Clinton ESP site. The site is located near the town of Clinton in DeWitt County, Illinois. The application for the ESP was submitted by letter dated September 25, 2003, pursuant to 10 CFR part 52. The application also includes a site redress plan in accordance with 10 CFR 52.17(c) and 52.25. If a site redress plan is incorporated in an approved ESP, the applicant may carry out certain site preparation work and limited construction activities. A notice of receipt and availability of the application, which included the environmental report (ER), was published in the **Federal Register** on October 24, 2003 (68 FR 61020). A notice of acceptance for docketing of the application for the ESP was published in the **Federal Register** on October 30, 2003 (68 FR 61835). The purpose of this notice is to inform the public that the U.S. Nuclear Regulatory Commission (NRC) will be preparing an environmental impact statement (EIS) in support of the review of the ESP application and to provide the public with an opportunity to participate in the environmental scoping process as defined in 10 CFR 51.29. In addition, as outlined in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' the NRC plans to coordinate compliance with section 106 of the National Historic Preservation Act in meeting the requirements of the National Environmental Policy Act (NEPA).

In accordance with 10 CFR 52.17(a)(2), 51.45, and 51.50, Exelon submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR parts 51 and 52 and is available for public inspection at the NRC Public Document Room (PDR) located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or from the Publicly Available Records component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible at *http://www.nrc.gov/reading-rm/adams.html,* which provides access through the NRC's Public Electronic Reading Room (PERR) link. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, or 301–415–4737, or by e-mail to *pdr@nrc.gov.* The application may also be viewed on the Internet at *http://www.nrc.gov/reactors/new-licensing/license-reviews/esp/clinton.html.* In addition, the Vespasian Warner Public Library, located at 310 N. Quincy Street, Clinton, Illinois 61727–1300, has agreed to make the ER available for public inspection.

The following key reference documents related to the ESP applications and the NRC staff's review process are available through the NRC's Web site *http://www.nrc.gov:*

a. 10 CFR part 51, Environmental protection regulations for domestic licensing and related regulatory functions.

b. 10 CFR part 52, Early site permits; standard design certifications; and combined licenses for nuclear power plants.

c. 10 CFR part 100, Reactor site criteria.

d. NUREG–1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants.

e. NUREG/BR–0298, Brochure on Nuclear Power Plant Licensing Process.

f. Regulatory Guide 4.7, General Site Suitability Criteria for Nuclear Power Stations.

g. Fact Sheet on Nuclear Power Plant Licensing Process.

h. Draft Review Standard RS–002, Processing Applications for Early Site Permits.

i. NRR Office Instruction LIC–203, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues.

The regulations, NUREG-series documents, regulatory guide, and fact sheet can be found under Document Collections in the Electronic Reading Room on the NRC web page. The draft review standard is at *http://www.nrc.gov/reactors/new-licensing/license-reviews/esp/esp-public-comments-rs-002.html.* Finally, Office Instruction LIC–203 can be found in ADAMS in two parts under accession numbers ML011710073 (main text) and ML011780314 (charts and figures).

This notice advises the public that the NRC intends to gather the information necessary to prepare an EIS in support of the review of the application for an ESP and the site redress plan at the Clinton ESP site. Possible alternatives to the proposed action (issuance of the ESP at the Clinton ESP site) include no action and consideration of alternative sites. The NRC is required by 10 CFR 52.18 to prepare an EIS in connection with the issuance of an ESP. This notice is being published in accordance with NEPA and the NRC's regulations found in 10 CFR Part 51.

The NRC will first conduct a scoping process for the EIS and, as soon as practicable thereafter, will prepare a draft EIS for public comment. Participation in this scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the draft EIS will be used to accomplish the following:

a. Define the proposed action which is to be the subject of the EIS.

b. Determine the scope of the EIS and identify the significant issues to be analyzed in depth.

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant.

d. Identify any environmental assessments and other EISs that are being or will be prepared that are related to but are not part of the scope of the EIS being considered.

e. Identify other environmental review and consultation requirements related to the proposed action.

f. Indicate the relationship between the timing of the preparation of environmental analyses and the Commission's tentative planning and decision-making schedule.

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the EIS to the NRC and any cooperating agencies.

h. Describe how the EIS will be prepared, including any contractor assistance to be used.

The NRC invites the following entities to participate in the scoping:

a. The applicant, Exelon Generation Company, LLC.

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved, or that is authorized to develop and enforce relevant environmental standards.

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards.

d. Any affected Indian tribe.

e. Any person who requests or has requested an opportunity to participate in the scoping process.

f. Any person who intends to petition for leave to intervene.

In accordance with 10 CFR 51.26, the scoping process for an EIS may include

a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC will hold a public meeting for the EIS regarding the Clinton ESP application and the associated site redress plan. The scoping meeting will be held in the Vespasian Warner Public Library, located at 310 N. Quincy Street, Clinton, Illinois, on Thursday, December 18, 2003. The meeting will convene at 7 p.m. and will continue until 9:30 p.m., as necessary. The meeting will be transcribed and will include the following: (1) An overview by the NRC staff of the NEPA environmental review process, the proposed scope of the EIS, and the proposed review schedule; and (2) the opportunity for interested Government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the EIS. Additionally, the NRC staff will host informal discussions one hour prior to the start of the meeting at the Vespasian Warner Public Library. No formal comments on the proposed scope of the EIS will be accepted during the informal discussions. To be considered, comments must be provided either during the transcribed portion of the public meeting or in writing, as discussed below. Persons may pre-register to attend or present oral comments at the meeting on the scope of the NEPA review by contacting Ms. Jennifer Davis by telephone at 1 (800) 368–5642, extension 3835, or by Internet at *ClintonEIS@nrc.gov* no later than December 5, 2003. Members of the public may also register to speak at the meeting within 15 minutes of the start of the session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Public comments will be considered in the scoping process for the EIS. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Ms. Davis' attention no later than December 5, 2003, so that the NRC staff can determine whether the request can be accommodated.

Members of the public may send written comments on the environmental scope of the Clinton ESP and site redress plan review to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Comments may also be hand-delivered to the NRC at 11545 Rockville Pike, Rockville, Maryland, Room T–6D59, from 7:30 a.m. to 4:15 p.m. during Federal workdays. To be considered in the scoping process, written comments should be postmarked by January 9, 2004. Electronic comments may be sent by the Internet at *ClintonEIS@nrc.gov.* Electronic submissions should be sent no later than January 9, 2004, to be considered in the scoping process. Comments will be available electronically and accessible through the NRC's PERR link *http://www.nrc.gov/reading-rm/adams.html* at the NRC Homepage.

Participation in the scoping process for the EIS does not entitle participants to become parties to the proceeding to which the EIS relates. Notice of a hearing regarding the application for an ESP will be the subject of a future **Federal Register** notice.

At the conclusion of the scoping process, the NRC will prepare a concise summary of the determination and conclusions reached, including the significant issues identified, and will send a copy of the summary to each participant in the scoping process. The summary will also be available for inspection through the NRC's PERR link. The staff will then prepare and issue for comment the draft EIS, which will be the subject of separate notices and a separate public meeting. Copies will be available for public inspection at the above-mentioned addresses, and one copy per request will be provided free of charge. After receipt and consideration of the comments, the NRC will prepare a final EIS, which will also be available for public inspection.

Information about the proposed action, the EIS, and the scoping process may be obtained from Ms. Davis at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 19th day of November 2003.

For the Nuclear Regulatory Commission.

K. Steven West,

Acting Program Director, License Renewal and Environmental Impacts, Division of Regulatory Improvements Program, Office of Nuclear Reactor Regulation.

[FR Doc. 03–29351 Filed 11–24–03; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97–415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97–415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from, October 31, through November 13, 2003. The last biweekly notice was published on November 12, 2003 (68 FR 64133).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period.

However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By December 26, 2003, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff, or may be delivered to the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that petitions for leave to intervene and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101 or by e-mail to *hearingdocket@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and because of continuing disruptions in delivery of mail to United States Government offices, it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions,

supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs.

Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland.

Date of amendments request: October 14, 2003.

Description of amendments request: The proposed amendment would change the frequency of surveillance testing for some engineered safety features (ESF) components.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Would not involve a significant increase in the probability or consequences of an accident previously evaluated.

Integrated testing of the ESF trains takes place while the unit is shut down. The equipment being tested is normally used to respond to an accident when the Unit is in Modes 1, 2, or 3. Changing the test Frequency to a longer period does not affect the scope of the testing or the methods used during the testing. Therefore, there is no increase in the probability of an accident previously evaluated caused by the testing itself.

The components tested during the integrated ESF test are components needed to mitigate the consequences of an accident. Increasing the length of time between integrated tests increases the likelihood of undetected equipment failure. This creates a change in plant risk. This change in risk is analyzed and quantified using probabilistic risk assessment techniques. The risk analysis provides results that show the proposed increase in ESF component surveillance testing Frequency meets the guidance of Regulatory Guide 1.174, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis.'' The increase in risk is within the guidelines of the regulatory guidance. There is no significant change in the probability that the equipment will suffer an undetected failure in the increased time between Surveillance tests. Therefore, there is no significant increase in the consequences o[f] an accident previously evaluated.

An additional change is proposed to delete a Surveillance Requirement because the signal tested in the Surveillance Requirement is no longer installed in the plant. This deletion has no impact on plant operations or the response of the plant in an accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequence of an accident previously evaluated.

2. Would not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change would extend the Surveillance Frequency of the integrated ESF test. This change does not affect the scope of the testing or the methods used during the testing. Plant equipment will continue to operate as designed. Only the testing frequency is changed. Because there are no changes in the scope or method of testing and this proposed change does not affect the operation of the equipment in other circumstances, no new accident initiators have been introduced.

An additional change is proposed to delete a Surveillance Requirement because the signal tested in the Surveillance Requirement is no longer installed in the plant. This deletion has no impact on plant operations or the response of the plant and therefore would not create the possibility of a new or different kind of accident from any previously evaluated.

Therefore, this proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Would not involve a significant reduction in [a] margin of safety.

Surveillance testing is performed to evaluate the operability of equipment used to perform safety functions at the Unit. The components tested during the integrated ESF test are components needed to mitigate the consequences of an accident. Increasing the length of time between integrated tests increases the likelihood of undetected equipment failure. This creates a change in plant risk. This change in risk is analyzed and quantified using probabilistic risk assessment techniques. The risk analysis provides results that show the proposed increase in ESF component surveillance testing Frequency meets the guidance of Regulatory Guide 1.174. The increase in risk is within the guidelines of the regulatory guidance. There is no significant change in the probability that the equipment will suffer an undetected failure in the increased time between Surveillance tests. Since the function of Surveillance testing is to evaluate the operability of equipment, and the increased time between Surveillance tests has been evaluated and found to be acceptable under regulatory guidance, the proposed change would not involve a significant reduction in [a] margin of safety.

An additional change is proposed to delete a Surveillance Requirement because the signal tested in the Surveillance Requirement is no longer installed in the plant. This deletion has no impact on plant operations or the response of the plant in an accident and does not impact the margin of safety.

Therefore, this proposed change does not significantly reduce [a] margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendments request involves no significant hazards consideration.

Attorney for licensee: James M. Petro, Jr., Esquire, Counsel, Constellation Energy Group, Inc., 750 East Pratt Street, 5th floor, Baltimore, MD 21202.

NRC Section Chief: Richard J. Laufer.

Consumers Energy Company, Docket No. 50–155, Big Rock Point Nuclear Plant, Charlevoix County, Michigan.

Date of amendment requests: August 6, 2003.

Description of amendment requests: The Big Rock Point Plant is in the 6th year of decommissioning. The reactor was defueled and certified as permanently shutdown by letter to the Nuclear Regulatory Commission dated September 22, 1997. As of March 26, 2003, all the spent fuel has been permanently removed from the plant's spent fuel pool and located to an Independent Spent Fuel Storage Installation (ISFSI). The spent fuel has been loaded into an NRC approved and licensed Spent Fuel Dry Storage System and will be temporarily stored at this installation until such time that a permanent repository is available. The requirements associated with the wet storage of the spent fuel as described in Defueled Technical Specifications are no longer applicable and are being revised.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

No. The proposed change is an administrative change to update the facility's Operating License and Defueled Technical Specifications to reflect the permanent removal of the spent fuel from the Spent Fuel Pool. Requirements for safe storage and handling of irradiated fuel, definitions, design features and administrative controls that were applicable to the facility when spent fuel was stored in the spent fuel pool are no longer valid and are being removed to provide clarity to the licensing basis of the facility in its current configuration. The accidents previously evaluated in the Updated Final Hazards Safety Analysis are based on spent nuclear fuel being stored in the spent fuel pool. Since the spent fuel has been permanently removed from the spent fuel pool, the accidents previously analyzed are no longer credible. The spent fuel has been loaded into an NRC approved and licensed Spent Fuel Dry Storage System and will be temporarily stored at this installation until such time that a permanent repository is available. The spent fuel is now controlled by a different set of approved technical specifications issued and approved pursuant to 10 CFR part 72. Therefore, the proposed administrative change does not affect the consequences of any accident described and evaluated in the Updated Final Hazards Summary Report, and the accidents and transients associated with spent fuel stored in the facility's spent fuel pool are no longer applicable.

Therefore, the proposed administrative change to the Operating License and Defueled Technical Specifications does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Will the proposed change create the possibility of a new or different type of accident from any accident previously evaluated?

No. The spent fuel has been loaded into an NRC approved and licensed Spent Fuel Dry Storage System and will be temporarily stored at this installation until such time that a permanent repository is available. In accordance with 10 CFR part 72, ''Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste,'' credible accidents have been evaluated as part of the licensing and approval process for the Dry Fuel Storage System. The requirement to evaluate credible accidents has not changed.

Therefore this proposed administrative change does not create the possibility of a new or different kind of accident previously evaluated.

3. Will the proposed change involve a significant reduction in a margin of safety?

The proposed activity is an administrative change to the Operating License and Defueled Technical Specifications to reflect the permanent removal of the spent fuel from the spent fuel pool and does not involve any significant reduction in any margin of safety that is usually associated with the design and performance of systems, structures and components. Requirements for safe storage and handling of irradiated fuel, definitions, design features and administrative controls that were applicable to the facility when spent fuel was stored in the spent fuel pool are no longer applicable and are being removed to provide clarity to the licensing basis of the facility in its current configuration.

Therefore, the proposed administrative change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David A. Mikelonis, Esquire, Consumers Energy Company, One Energy Plaza, Jackson, MI 49201–2276.

NRC Section Chief: Claudia Craig.

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan.

Date of amendment request: October 10, 2003.

Description of amendment request: The proposed amendment would modify Technical Specification (TS) 3.7.3, ''Control Room Emergency Filtration (CREF) System,'' Surveillance Requirement (SR) 3.7.3.6, to permit a one-time extension of SR 3.7.3.6 until startup from the next refueling outage (RF–10) to preclude a mid-cycle shutdown solely for the performance of this SR. SR 3.7.3.6 requires verifying that unfiltered inleakage from CREF system duct work outside the control room envelope that is at negative pressure during accident conditions is within limits. This SR is required to be performed every 36 months, and can be performed only when the CREF system is not required to be Operable (*i.e.*, in MODES 4 or 5, with no operations with a potential for draining the reactor vessel and with no fuel movement of recently irradiated fuel in progress).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change allows a one-time extension of SR 3.7.3.6 until startup from the next refueling outage (approximately 10 to 12 months beyond its critical completion date). The Control Room Emergency Filtration (CREF) system provides a configuration for mitigating radiological consequences of accidents; however, it is not considered an initiator of any previously analyzed accident. Therefore, the proposed change cannot increase the probability of any previously evaluated accident.

The CREF system provides a radiologically controlled environment from which the plant can be safely operated following a radiological accident. The current TS surveillance (SR 3.7.3.6) measures inleakage from four sections of CREF system duct work outside the Control Room Envelope (CRE) that are at negative pressure during accident conditions. Based on the results of previous surveillance testing, and the continued performance of SR 3.7.3.3 and 3.7.3.5 on their normal schedule, the delay in performing SR 3.7.3.6 by approximately 10 to 12 months will provide essentially the same degree of assurance that CRE integrity is being maintained as before. It is expected that CRE integrity will remain essentially unchanged from what it is today. Therefore, the proposed change does not significantly increase the radiological consequences of any previously analyzed accident.

Based on the above, the proposed change does not significantly increase the probability or consequences of any accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change to allow a one-time extension of SR 3.7.3.6 until startup from the next refueling outage (approximately 10 to 12 months beyond its critical completion date) does not alter the design or function of the system involved, nor does it introduce any new modes of plant or CREF system operation. Therefore, the proposed change does not create the potential for a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in the margin of safety.

The proposed change to allow a one-time extension of SR 3.7.3.6 until startup from the next refueling outage (approximately 10 to 12 months beyond its critical completion date) will not affect the radiological release from a design basis accident. Based on the results of previous surveillance testing and the continued performance of SR 3.7.3.3 and 3.7.3.5 on their normal schedule, the delay in performing SR 3.7.3.6 by approximately 10 to 12 months will provide essentially the same degree of assurance that CRE integrity is being maintained as existed before; and, the postulated dose to the control room occupants as a result of an accident will remain approximately the same. Therefore, the proposed changes will not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Peter Marquardt, Legal Department, 688 WCB, Detroit Edison Company, 2000 2nd Avenue, Detroit, Michigan 48226–1279.

NRC Section Chief: L. Raghavan.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi.

Date of amendment request: October 24, 2003.

Description of amendment request: The proposed amendment would revise Technical Specification 3.1.8, ''Scram Discharge Volume (SDV) Vent and Drain Valves,'' to allow a vent or drain line with one inoperable valve to be isolated instead of requiring the valve to be restored to Operable status within 7 days.

The NRC staff issued a notice of opportunity for comment in the **Federal Register** on February 24, 2003 (68 FR 8637), on possible amendments to revise the action for one or more SDV vent or drain lines with an inoperable valve, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line-item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on April 15, 2003 (68 FR 18294). The licensee affirmed the applicability of the model NSHC determination in its application dated October 24, 2003.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

A change is proposed to allow the affected SDV vent and drain line to be isolated when there are one or more SDV vent or drain lines with one valve inoperable instead o[f] requiring the valve to be restored to operable status within 7 days. With one SDV vent or drain valve inoperable in one or more lines, the isolation function would be maintained since the redundant valve in the affected line would perform its safety function of isolating the SDV. Following the completion of the required action, the isolation function is fulfilled since the associated line is isolated. The ability to vent and drain the SDVs is maintained and controlled through administrative controls. This requirement assures the reactor protection system is not adversely affected by the inoperable valves. With the safety functions of the valves being maintained, the probability or consequences of an accident previously evaluated are not significantly increased.

Criterion 2—The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. Thus, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The proposed change does not involve a significant reduction in the margin of safety.

The proposed change ensures that the safety functions of the SDV vent and drain valves are fulfilled. The isolation function is maintained by redundant valves and by the required action to isolate the affected line. The ability to vent and drain the SDVs is maintained through administrative controls. In addition, the reactor protection system will prevent filling of an SDV to the point that it has insufficient volume to accept a full scram. Maintaining the safety functions related to isolation of the SDV and insertion of control rods ensures that the proposed change does not involve a significant reduction in the margin of safety.

The NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, NW., 12th Floor, Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont.

Date of amendment request: July 31, 2003, as supplemented on October 10, 2003.

Description of amendment request: This amendment request incorporates a revision to the licensing basis of the Vermont Yankee Nuclear Power Station (VYNPS) that supports a full scope application on an Alternative Source Term (AST) methodology.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the Code of Federal Regulations (10 CFR) Section 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Will the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Adoption of the AST and those plant systems affected by implementation of the AST do not initiate DBAs [design basis accidents]. The proposed change does not affect the design or manner in which the facility is operated; rather, once the occurrence of an accident has been postulated, the new accident source term is an input to analyses that evaluate the radiological consequences. Therefore, the proposed change does not involve an increase in the probability of an accident previously evaluated.

The structures, systems and components (SSCs) affected by the proposed change act as mitigators to the consequences of accidents. Based on the revised analyses, the proposed changes do revise certain performance requirements; however, the proposed changes do not involve a revision to the parameters or conditions that could contribute to the initiation of a design basis accident discussed in Chapter 14 of the Updated Final Safety Analysis Report.

Because of the changed methodology, it is difficult to draw a quantitative comparison of before and after accident consequences due to the use of different dose calculations, conversion factors, source term, and other assumptions. However qualitatively, it can be shown that there is no significant increase in offsite doses, although there may be small variations in potential doses for postulated accidents. Plant-specific radiological analyses have been performed using the AST methodology. Based on the results of these analyses, it has been demonstrated that the dose consequences of the limiting events considered in the analyses meet the regulatory guidance provided for use with the AST, and the offsite doses are well within acceptable limits. This guidance is presented in 10 CFR 50.67, Regulatory Guide 1.183, and Standard Review Plan (SRP) Section 15.0.1.

Therefore, the proposed amendment does not result in a significant increase in the consequences or increase the probability of any previously evaluated accident.

2. Will the proposed changes create the possibility of a new or different kind of accident from any previously evaluated?

Implementation of AST and the proposed changes does not alter or involve any design basis accident initiators. These changes do not affect the design function or mode of operations of SSCs in the facility prior to a postulated accident. Since SSCs are operated essentially no differently after the AST implementation, no new failure modes are created by this proposed change.

Therefore, the proposed license amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will the proposed changes involve a significant reduction in a margin of safety?

The changes proposed are associated with a revision to the licensing basis for the VYNPS. Approval of the licensing basis change from the original source term to the alternative source term is requested by this application for a license amendment. The results of the accident analyses revised in support of the proposed change are subject to the acceptance criteria in 10 CFR 50.67. The analyzed events have been carefully selected, and the analyses supporting these changes have been performed using approved methodologies to ensure that analyzed events are bounding and safety margin has not been reduced. The dose consequences of these limiting events are within the acceptance criteria presented in 10 CFR 50.67, Regulatory Guide 1.183, and SRP 15.0.1. Thus, by meeting the applicable regulatory

limits for AST, there is no significant reduction in a margin of safety.

Therefore, because the proposed changes continue to result in dose consequences within the applicable regulatory limits, the changes are considered to not result in a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. David R. Lewis, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037–1128.

NRC Section Chief: James W. Clifford.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2 (BVPS–1 and 2), Beaver County, Pennsylvania.

Date of amendment request: October 17, 2003.

Description of amendment request: The proposed amendments revise the action requirements of Technical Specification (TS) 3/4 6.3, ''Containment Isolation Valves [CIVs],'' to more clearly define action requirements for inoperable CIVs. The proposed changes to the action requirements also include: (1) Provisions for allowing the intermittent unisolation of penetration flow paths which have been isolated per action requirements under administrative control; (2) use of check valves as an isolation device; and (3) an increase in the allowed outage time to 72 hours for CIVs associated with closed systems inside containment. The proposed amendments also revise the TS surveillance requirements (SRs) for CIVs by replacing existing SRs with new SRs similar to those in NUREG–1431, Revision 2, ''Standard Technical Specifications for Westinghouse Plants.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change does not involve any changes to plant equipment, system design functions or a change in the methods governing normal plant operation. Therefore, the probability of a malfunction of a structure, system or component to perform its design function will not be increased.

The proposed change modifies existing action requirements for inoperable containment isolation valves. Action requirements and their associated allowed outage times are not initiating conditions for any accident previously evaluated and the accident analyses do not assume that repaired equipment is out of service prior to the analyzed event. In addition, changes that are consistent with the ISTS [improved Standard Technical Specifications] have been previously evaluated and found not to adversely affect the safe operation of Westinghouse plants or the initiation of any accident previously evaluated. Based on the conclusions of the plant specific evaluation associated with the changes and the evaluation performed in developing the ISTS, the proposed revised action requirements do not result in operating conditions that will significantly increase the probability of initiating an analyzed event. The revised action requirements provide appropriate remedial actions to be taken in response to the degraded condition considering the operability status of the redundant systems of required features, and the capability of remaining features while minimizing the risk associated with continued operation. As a result, the consequences of any accident previously evaluated are not significantly increased.

The proposed change also modifies and deletes some surveillance requirements. Surveillances are not initiators to any accident previously evaluated. Consequently, the probability of an accident previously evaluated is not significantly increased. The equipment specified in the Limiting Condition for Operation is still required to be operable and capable of performing the accident mitigation functions assumed in the accident analysis. This equipment will continue to be tested in a manner and at a frequency to give confidence that the equipment can perform its assumed safety function. The proposed changes are generally made to conform to the ISTS and have been evaluated to not be detrimental to plant safety. As a result, the proposed surveillance requirement changes do not significantly affect the consequences of any accident previously evaluated. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve any changes to plant equipment, system design functions or a change in the methods governing normal plant operation. The [technical] specification for containment isolation valves provide[s] controls for maintaining the containment pressure boundary. The revised action requirements and revised surveillance requirements are sufficient to ensure the containment isolation valves are capable of performing their accident mitigation functions. No new accident initiators are introduced by these changes. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The revised action requirements do not involve a significant reduction in the margin of safety. The proposed actions for inoperable containment isolation valves minimize the risk of continued operation under the specified conditions, considering the operability status of the redundant containment isolation barriers, a reasonable time for repairs or replacement of the isolation feature, and the low probability of a design basis accident occurring during the repair period.

The revised surveillance requirements do not involve a significant reduction in the margin of safety. The proposed surveillance requirements provide the required verifications for ensuring containment isolation valves operability. Containment isolation valve testing will continue to be performed in a manner and at a frequency necessary to give confidence that the equipment can perform its assumed safety function.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mary O'Reilly, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Richard J. Laufer.

FirstEnergy Nuclear Operating Company, Docket No. 50–346, Davis-Besse Nuclear Power Station, Unit 1, Ottawa County, Ohio.

Date of amendment request: December 17, 2001, as supplemented by letter dated June 4, 2002.

Description of amendment request: The proposed amendment would change Technical Specification (TS) Section 3/4.3.1, ''Reactor Coolant System Instrumentation,'' to delete an action involving either reducing core thermal power and the high neutron flux reactor trip setpoint or monitoring quadrant power tilt when a reactor protection system (RPS) channel is inoperable. Additionally, changes to the content and format of TS Tables 3.3–1 and 4.3–1 are proposed to enhance specification clarity.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided their analysis of

the issue of no significant hazards consideration. The staff has reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's review is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change does not result in an increase in the probability of an accident previously evaluated because no change is being made to any accident initiator. The proposed change does not result in an increase in the consequences of an accident previously evaluated because TS 3/4.2.4, ''Quadrant Power Tilt,'' continues to ensure the radial power distribution of the core is within the limits assumed in the accident analyses. In addition, compensatory actions will continue to be required should a single channel of RPS High Flux or Flux-'Flux-Flow become inoperable. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes affect the TS requirements for the RPS instrumentation. The proposed changes do not change the RPS design function or result in the RPS being operated outside its design operating range. There are no new or different equipment failure modes introduced by the proposed changes. The proposed changes do not introduce any new or different accident initiators. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The proposed changes affect the TS requirements for the RPS instrumentation. The capability of the RPS to perform its required functions is not adversely affected by the proposed changes. The proposed changes do not alter any initial conditions contributing to accident severity or consequences. There will be no changes to the plants' systems, structures, or components, nor in the manner in which they will be operated as a result of the proposed changes. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

Based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mary E. O'Reilly, Attorney, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Anthony J. Mendiola.

Maine Yankee Atomic Power Company, Docket No. 50–309, Maine Yankee Atomic Power Station, Lincoln County, Maine.

Date of amendment request: September 11, 2003.

Description of amendment request: Revise the dose model for the containment activated concrete, rebar (hereafter referred to as activated concrete) and liner, by incorporating more realistic radionuclide release rates and to change the associated derived concentration guideline limit (DCGL) for activated concrete.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The requested license amendment does not authorize any plant activities beyond those allowed by 10 CFR Chapter I or beyond those considered in the DSAR. The bounding accident described in the Defueled Safety Analysis Report (DSAR) for potential airborne activity is the postulated resin cask drop accident in the Low Level Radioactive Waste Storage Building. This accident is expected to contain more potential airborne activity than can be released from other decommissioning events. The radionuclide distribution assumed for the spent resin cask has a greater inventory of transuranic radionuclides (the major dose contributor) than the distribution of plant derived radionuclides in the components involved in other decommissioning accidents. The other accidents considered in the DSAR include: (1) Explosion of liquid petroleum gas (LPG) leaked from a front end loader or forklift; (2) Explosion of oxyacetylene during segmenting of the reactor vessel shell; (3) Release of radioactivity from the RCS decontamination ion exchange resins; (4) Gross leak during in-situ decontamination; (5) Segmentation of RCS piping with unremoved contamination; (6) Fire involving contaminated clothing or combustible waste; (7) Loss of local airborne contamination control during blasting or jackhammer operations; (8) Temporary Loss of Services; (9) Dropping of Contaminated Concrete Rubble; (10) Natural phenomena; and (11) Transportation accidents. The probabilities and consequences for these accidents are estimated in the basis documentation for DSAR Section 7. No systems, structures, or components that could initiate or be required to mitigate the consequences of an accident are affected by the proposed change in any way not previously evaluated in the DSAR. Since Maine Yankee does not exceed the salient parameters associated with the plant referenced in the basis documentation in any material respects, it is concluded that these probabilities and consequences are not increased. Therefore, the proposed change to the Maine Yankee license does not involve any increase in the probability or consequences of any accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The requested license amendment does not authorize any plant activities that could precipitate or result in any accidents beyond those considered in the DSAR. The accidents previously evaluated in the DSAR are described above. These accidents are described in the basis documentation for DSAR Section 7. The proposed change does not affect plant systems, structures, or components in any way not previously evaluated in the DSAR. Since Maine Yankee does not exceed the salient parameters associated with the plant referenced in the basis documentation in any material respects, it is concluded that these accidents appropriately bound the kinds of accidents possible during decommissioning. Therefore, the proposed change to the Maine Yankee license would not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The margin of safety defined in Maine Yankee's license basis for the consequences of decommissioning accidents has been established as the margin between the bounding decommissioning accident and the dose limits associated with the need for emergency plan offsite protection, namely the Environmental Protection Agency Protective Action Guidelines EPA-PAGs. As described above, the bounding decommissioning accident is the postulated resin cask drop accident in the Low Level Radioactive Waste Storage Building. Since the bounding decommissioning accident is expected to contain more potential airborne activity than can be released from other decommissioning events and since the radionuclide distribution assumed for the spent resin cask has more transuranics (the major dose contributor) than the distribution in the components involved in other decommissioning accidents, the margin of safety associated with the consequences of decommissioning accidents cannot be reduced. The margin of safety defined in the statements of consideration for the final rule on the Radiological Criteria for License Termination is described as the margin between the 100 mrem/yr public dose limit established in 10 CFR 20.1301 for licensed operation and the 25 mrem/yr dose limit to the average member of the critical group at a site considered acceptable for unrestricted use. This margin of safety accounts for the potential effect of multiple sources of radiation exposure to the critical group. Since the license termination plan (LTP) was designed to comply with the radiological criteria for license termination for unrestricted use, the margin of safety cannot be reduced. Therefore, the proposed changes to the Maine Yankee license would not involve a significant reduction in any margin of safety.

Conclusion

Based on the above, Maine Yankee concludes that the proposed amendment presents no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendment involves no significant hazards consideration.

Attorney for licensee: Joe Fay, Esquire, Maine Yankee Atomic Power Company, 321 Old Ferry Road, Wiscasset, Maine 04578.

NRC Section Chief: Claudia M. Craig.

Nuclear Management Company, LLC (NMC), Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant (PBNP), Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of amendment request: September 26, 2003.

Description of amendment request: The proposed amendments would modify TS 5.6.5.b to add a reference to a Nuclear Regulatory Commission (NRC) letter that would approve the use of a new master curve methodology for Unit 2. The NRC staff is currently reviewing an associated exemption request by NMC to use this new methodology. The requested exemption would allow the use of the master curve methodology described in Babcock & Wilcox Report BAW–2308, Revision 1, ''Initial RT_{NDT} [reference nil-ductility temperature] of Linde 80 Weld Materials,'' for determining the adjusted RT_{NDT} of the Unit 2 reactor vessel limiting circumferential weld metal. This method is used for the pressurized thermal shock screening evaluation. The proposed amendments would also make editorial changes to TS 5.6.5.b.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

1. Operation of PBNP in accordance with the proposed amendments does not result in a significant increase in the probability or consequences of any accident previously evaluated.

The proposed change references the NRC safety evaluation [currently under NRC staff review] accepting the new Master Curve Methodology used in the evaluation of the revised P/T [pressure/temperature] limits and LTOP [low-temperature overpressure protection] setpoints. Implementation of revisions to Topical Reports would still be reviewed in accordance with 10 CFR 50.59 and, where required, receive NRC review and approval. The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility or the manner in which the plant is operated and maintained. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed change does not increase the types or amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures. The proposed change is consistent with safety analysis assumptions and resultant consequences. Therefore, it is concluded that this change does not increase the probability of occurrence of an accident previously evaluated.

2. Operation of PBNP in accordance with the proposed amendments does not result in a new or different kind of accident from any accident previously evaluated.

The proposed change references the NRC safety evaluation [currently under NRC staff review] accepting the new Master Curve Methodology used in the evaluation of the revised P/T limits and LTOP setpoints. Implementation of revisions to Topical Reports would still be reviewed in accordance with 10 CFR 50.59 and, where required, receive NRC review and approval. The change does not involve a physical alteration of the plant (*i.e.*, no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. In addition, the changes do not impose any new or different requirements or eliminate any existing requirements. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Operation of PBNP in accordance with the proposed amendments does not result in a significant reduction in a margin of safety.

The proposed change references the NRC safety evaluation [currently under NRC staff review] accepting the new Master Curve Methodology used in the evaluation of the revised P/T limits and LTOP setpoints. Implementation of revisions to Topical Reports would still be reviewed in accordance with 10 CFR 50.59 and, where required, receive NRC review and approval. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The setpoints at which protective actions are initiated are not altered by the proposed changes. Sufficient equipment remains available to actuate upon demand for the purpose of mitigating an analyzed event.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jonathan Rogoff, Esquire, Vice President, Counsel & Secretary, Nuclear Management Company, LLC, 700 First Street, Hudson, WI 54016.

NRC Section Chief: L. Raghavan.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California.

Date of amendment requests: September 12, 2003.

Description of amendment requests: The proposed license amendments would revise Technical Specification (TS) 3.3.1, ''Reactor Trip System (RTS) Instrumentation,'' and TS 3.3.2, ''Engineered Safety Feature Actuation System (ESFAS) Instrumentation,'' to change the current steam generator (SG) narrow range (NR) water level-low low setpoints from greater than or equal to 7.0 percent allowable value and 7.2 percent nominal value, to greater than or equal to 14.8 percent allowable value and 15.0 percent nominal value.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The protection system performance will remain within the bounds of the previously performed accident analyses since there are no hardware changes and the actuation logic changes are conservative. The design of the steam generator (SG) water level sensing equipment and the coincidence logic will be unaffected. The only physical change to the reactor trip system (RTS) and the engineered safety feature actuation system (ESFAS) instrumentation is the increased actuation setpoints. These changes have already been implemented in the plant through the design change process. These changes are in the conservative direction, *i.e.*, a trip actuation signal will be generated sooner for an event that challenges the ability of the SGs to provide a heat sink for the reactor. In all other regards, the design of the RTS and ESFAS instrumentation will be unaffected. These protection systems will continue to function in a manner consistent with the plant design basis.

The probability and consequences of accidents previously evaluated in the Final Safety Analysis Report Update (FSARU) are not adversely affected because changes to the RPS and ESFAS trip setpoints assure a conservative response of the affected trip functions, consistent with the safety analyses and licensing basis.

The proposed changes will not affect the probability of any accident initiators. There will be no degradation in the performance of, or an increase in the number of challenges imposed on, safety-related equipment assumed to function during an accident. There will be no change to normal plant operating parameters or accident mitigation performance.

The proposed changes will not alter any assumptions or change any mitigation actions in the radiological consequence evaluations in the FSARU.

Therefore the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not change any hardware or the design functions of any structures, systems or components involved, other than to revise the SG narrow range (NR) water level-low low setpoints; changes that have already been implemented. The proposed changes will not affect the normal method of plant operation or change any operating parameters. No new accidents, accident initiators, or failure mechanisms are created by the proposed changes.

Therefore, the proposed changes do not create the possibility of a new or different accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The SG NR water level-low low setpoints specified in the Technical Specifications have already been increased in the conservative direction. The safety analysis limits assumed in the transient and accident analyses remain unchanged. None of the acceptance criteria for any accident analysis are changed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Richard F. Locke, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

NRC Section Chief: Stephen Dembek.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California.

Date of amendment requests: October 22, 2003.

Description of amendment requests: The proposed license amendments would revise Surveillance Requirement 3.6.3.7 of Technical Specification (TS) 3.6.3, ''Containment Isolation Valves,'' by extending the leakage rate testing frequency of the containment purge supply and exhaust and vacuum/pressure relief valves, all with resilient seals, from 184 days to 24 months. The amendments would also delete the requirement to leakage rate test the containment vacuum/pressure relief valves within 92 days after opening.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Operability and leakage control effectiveness of the containment purge supply and exhaust and containment vacuum/pressure relief isolation valves have no effect on whether an accident occurs. Consequently, increasing the interval between surveillances of isolation valve leak rate does not involve any significant increase in the probability of an accident previously evaluated. The consequences of a unisolated reactor containment building at the time of a fuel-handling accident or loss of coolant accident (LOCA) are the release of radionuclides to the environment. Offsite exposures due to containment leakage during a LOCA and fuel-handling accident have been evaluated in Final Safety Analysis Report Update (FSARU) sections 15.5.17.3 and 15.5.22, respectively. For a LOCA, the Diablo Canyon Power Plant (DCPP) analyses assume containment leakage of 0.1 percent of the containment volume per day for the first 24 hours and 0.05 percent per day for the rest of the duration of the accident. Calculated radiological exposures from the LOCA are listed in FSARU Chapter 15, Table 15.5–75 and are within the 10 CFR part 100 limits. The good performance history of these valves, along with the very low total containment leakage rate, are reasonable bases that there should not be any significant increase in the consequences of [an] accident previously evaluated. For the fuel-handling accident inside containment, DCPP analyses do not credit these valves to provide a containment isolation function. It was assumed that activity released from the containment refueling pool is transported to the environment over a short time period through the open equipment hatch. Calculated radiological exposures from the fuel-handling accident inside containment are listed in FSARU Chapter 15, Table 15.5–50 and are also within the 10 CFR part 100 limits. In summary, increasing the interval between leakage rate surveillances of these isolation valves will not involve any significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not involve a modification to the physical configuration of the plant (*i.e.*, no new equipment will be installed) or change in the methods governing normal plant operation. The proposed change will not impose any new or different requirements or introduce a new accident initiator, accident precursor, or malfunction mechanism. The functions of the containment purge and containment vacuum/pressure relief systems are not altered by this change. Therefore, the proposed change does not create the possibility of a new or different accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

This proposed change only increases the interval between surveillance tests of the containment purge supply and exhaust, and containment vacuum/pressure relief valves. These valves have a good performance history and should be able to perform their intended containment isolation function reliably when called upon. In FSARU Chapter 15, two offsite exposure scenarios are applicable to the containment isolation function. These scenarios are LOCA containment leakage and fuel-handling accident inside containment. For LOCA containment leakage, the DCPP analyses assume containment leakage of 0.1 percent of the containment volume per day for the first 24 hours and 0.05 percent per day for the remainder of the accident. Calculated radiological exposures from a LOCA are listed in FSARU Chapter 15, Table 15.5–75 and meet the 10 CFR part 100 limits. For the fuel-handling accident inside containment, the DCPP analyses do not credit these valves to provide a containment isolation function. The analyses assume that activity released from the containment refueling pool is transported to the environment over a short time period through the open equipment hatch. Calculated radiological exposures from the fuel-handling accident inside containment are listed in FSARU Chapter 15, Table 15.5–50 and also meet the 10 CFR part 100 limits. If in the unlikely event that these valves exceed their leakage rate limits due to the extension of the surveillance interval, the consequences will be consistent with the containment leakage assumed in the accident analyses. Therefore, the extension of leakage rate test interval will have an insignificant radiological consequence, and the proposed change will not involve any significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the

amendment requests involve no significant hazards consideration.

Attorney for licensee: Richard F. Locke, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

NRC Section Chief: Stephen Dembek.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California.

Date of amendment requests: October 22, 2003.

Description of amendment requests: The proposed license amendments would revise Technical Specifications (TS) Section 5.5.9, ''Steam Generator (SG) Tube Surveillance Program,'' and TS Section 5.6.10, ''Steam Generator (SG) Tube Inspection Report,'' to allow use of leak limiting Alloy 800 sleeves to repair degraded SG tubes as an alternative to plugging the SG tubes. The proposed amendments would also remove an unnecessary reporting requirement contained in TS Table 5.5.9–2, ''Steam Generator (SG) Tube Inspection.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The leak limiting Alloy 800 sleeves are designed using the applicable American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code and, therefore, meet the design objectives of the original steam generator (SG) tubing. The applied stresses and fatigue usage for the sleeves are bounded by the limits established in the ASME Code. Mechanical testing has shown that the structural strength of sleeves under normal, upset, emergency, and faulted conditions provides margin to the acceptance limits. These acceptance limits bound the most limiting (three times normal operating pressure differential) burst margin recommended by NRC Regulatory Guide 1.121, ''Bases for Plugging Degraded PWR Steam Generator Tubes.'' Burst testing of sleeve-tube assemblies has confirmed the analytical results and demonstrated that no unacceptable levels of primary-to-secondary leakage are expected during any plant condition.

The leak limiting Alloy 800 sleeve depth-based structural limit is determined using NRC guidance and the pressure stress equation of ASME Code, Section III with additional margin added to account for the configuration of long axial cracks. A sleeved tube will be plugged on detection of an imperfection in the sleeve or in the pressure boundary portion of the original tube wall in the leak limiting sleeve/tube assembly.

Evaluation of the repaired SG tube testing and analysis indicates no detrimental effects on the leak limiting Alloy 800 sleeve or sleeved tube assembly from reactor system flow, primary or secondary coolant chemistries, thermal conditions or transients, or pressure conditions as may be experienced at Diablo Canyon Power Plant (DCPP) Units 1 and 2. Corrosion testing and historical performance of sleeve-tube assemblies indicates no evidence of sleeve or tube corrosion considered detrimental under anticipated service conditions.

The implementation of the proposed change has no significant effect on either the configuration of the plant or the manner in which it is operated. The consequences of a hypothetical failure of the leak limi[ti]ng Alloy 800 sleeve-tube assembly is bounded by the current SG tube rupture (SGTR) analysis described in the DCPP Final Safety Analysis Report Update. Due to the slight reduction in the inside diameter caused by the sleeve wall thickness, primary coolant release rates through the parent tube would be slightly less than assumed for the SGTR analysis and therefore, would result in lower total primary fluid mass release to the secondary system. A main steam line break or feedwater line break will not cause a SGTR since the sleeves are analyzed for a maximum accident differential pressure greater than that predicted in the DCPP safety analysis. The sleeve-tube assembly leakage during plant operation would be minimal and is well within the Technical Specification (TS) leakage limits.

The proposed change to TS 5.5.9 Table 5.5.9–2, ''Steam Generator (SG) Tube Inspection,'' to delete the requirement to notify the NRC pursuant to 10 CFR 50.72(b)(2) if the first sample inspection or the second sample inspection results in a C–3 classification, is an administrative change only and does not affect plant equipment or accident analyses.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The leak limiting Alloy 800 sleeves are designed using the applicable ASME Code as guidance, and therefore meet the objectives of the original SG tubing. As a result, the functions of the SG will not be significantly affected by the installation of the proposed sleeve. The proposed sleeves do not interact with any other plant systems. Any accident as a result of potential tube or sleeve degradation in the repaired portion of the tube is bounded by the existing SGTR accident analysis. The continued integrity of the installed sleeve-tube assembly is periodically verified by the TS requirements and a sleeved tube will be plugged on detection of an imperfection in the sleeve or in the pressure boundary portion of the original tube wall in the leak limiting sleeve/tube assembly.

Implementation of the proposed change has no significant effect on either the configuration of the plant, or the manner in which it is operated. The proposed change to delete the requirement to notify the NRC pursuant to 10 CFR 50.72(b)(2) from TS 5.5.9 Table 5.5.9–2 is an administrative change only and does not affect plant equipment or accident analyses.

Therefore, the proposed change does not create the possibility of a new or different accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The repair of degraded SG tubes with leak limiting Alloy 800 sleeves restores the structural integrity of the degraded tube under normal operating and postulated accident conditions and thereby maintains current core cooling margin as opposed to plugging the tube and taking it out of service. The design safety factors utilized for the sleeves are consistent with the safety factors in the ASME Boiler and Pressure Vessel Code used in the original SG design. The sleeve and portions of the installed sleeve-tube assembly that represent the reactor coolant pressure boundary will be monitored and a sleeved tube will be plugged on detection of an imperfection in the sleeve or in the pressure boundary portion of the original tube wall in the leak limiting sleeve/tube assembly. Use of the previously identified design criteria and design verification testing assures that the margin to safety is not significantly different from the original SG tubes.

The proposed change to delete the requirement to notify the NRC pursuant to 10 CFR 50.72(b)(2) from TS 5.5.9 Table 5.5.9–2 is an administrative change only, does not affect plant equipment or accident analyses, does not relax any safety system settings, and does not relax the bases for any limiting conditions for operations.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Richard F. Locke, Esq., Pacific Gas and Electric Company, P.O. Box 7442, San Francisco, California 94120.

NRC Section Chief: Stephen Dembek.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas.

Date of amendment request: November 4, 2003.

Description of amendment request: The proposed amendments would revise the South Texas Project, Units 1 and 2 Technical Specifications for the Remote Shutdown System to reflect requirements consistent with those in NUREG–1431, ''Standard Technical Specifications—Westinghouse Plants.''

The proposed changes would increase the allowed outage time for inoperable Remote Shutdown System components to a time that is more consistent with their safety significance. It would also relocate the description of the required components to the Bases where it will be directly controlled by the licensee.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Because the proposed changes do not involve potential accident initiators, there is no significant increase in the probability of an accident previously evaluated. There is no proposed change to the design basis or configuration of the plant and the extension of the allowed outage time of the Remote Shutdown System functions does not have a significant effect on safety. Consequently there is no significant increase in the consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not affect how the plant is operated or involve any physical changes to the plant. Therefore there is no possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Except for extending the allowed outage time for Remote Shutdown System function from 7 days to 30 days, the proposed changes are essentially administrative. The evaluation of the extension of the allowed outage time demonstrated that there was no significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: A. H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Section Chief: Robert A. Gramm.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan.

Date of application for amendment: June 24, 2003.

Brief description of amendment: The amendment revises Technical Specification 3.1.8, ''Scram Discharge Volume (SDV) Vent and Drain Valves,'' to allow a vent or drain line with one inoperable valve to be isolated instead of requiring the valve to be restored to Operable status within 7 days.

Date of issuance: October 30, 2003.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 157.

Facility Operating License No. NPF–43: Amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** August 19, 2003 (68 FR 49815).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 30, 2003.

No significant hazards consideration comments received: No.

Duke Energy Corporation, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina.

Date of application of amendments: July 10, 2003.

Brief description of amendments: The amendments revised the Technical Specifications to remove requirements that are no longer applicable because the implementation of the automatic feedwater isolation system modification has been completed on all three Oconee units.

Date of Issuance: November 5, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 336, 336, & 337.

Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** August 19, 2003 (68 FR 49816). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 5, 2003.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi.

Date of application for amendment: April 3, 2003.

Brief description of amendment: The changes revise the Updated Final Safety Analysis Report to change the Reactor Vessel Material Surveillance Program. The change reflects participation in the Boiling Water Reactor Vessel and Internals Project Integrated Surveillance Program.

Date of issuance: November 4, 2003.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No: 160.

Facility Operating License No. NPF–29: The amendment revises the Updated Final Safety Analysis Report.

Date of initial notice in ***Federal Register:*** May 13, 2003 (68 FR 25653).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 4, 2003.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York.

Date of application for amendment: October 23, 2001, as supplemented on March 29 and December 17, 2002, and June 12, 2003.

Brief description of amendment: The amendment revised Technical Specification (TS) 5.5.10, ''Ventilation Filter Testing Program,'' to adopt the requirements of the American Society for Testing and Materials Standard D3803–1989, ''Standard Test Method for Nuclear-Grade Activated Carbon.'' The TS revisions are in response to Nuclear Regulatory Commission (NRC) Generic Letter (GL) 99–02, ''Laboratory Testing of Nuclear-Grade Activated Charcoal.'' The amendment revises the TSs: (1) To provide a control room ventilation system (CRVS) methyl iodide removal efficiency of greater than or equal to 95.5% and remove the notation that there is a 1-inch charcoal bed depth; (2) to allow for the continued use of the existing CRVS through Refueling Outage 13, in order to design, fabricate, and install a 2-inch charcoal filter bed; and (3) to add a note in the TS requiring a demonstration of charcoal efficiency of 93% when changing the charcoal in the existing CRVS bed prior to any fuel movement in the upcoming Refueling Outage 12 and every 6 months thereafter until the new beds are installed. The NRC had previously published a notice of consideration on December 12, 2001 (66 FR 64292) regarding a similar proposal from the licensee in response to GL 99–02. However, in response to a request for additional information from the NRC dated March 29, 2002, the licensee revised its application and withdrew the prior request to change the maximum CRVS differential pressure in TS 5.5.10.d.

Date of issuance: October 30, 2003.

Effective date: As of the date of issuance and shall be implemented 30 days from the date of issuance.

Amendment No.: 219.

Facility Operating License No. DPR–64: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 18, 2003 (68 FR 12951).

The March 29 and December 17, 2002, and June 12, 2003, letters provided clarifying information that did not enlarge the scope of the amendment request or change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 30, 2003.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana.

Date of amendment request: December 16, 2002, as supplemented by letters dated July 30, and September 29, 2003.

Brief description of amendment: The amendment adds Combustion Engineering topical report CEN–372–P–A, May 1990, ''Fuel Rod Maximum Allowable Gas Pressure,'' to the list of topical reports in Technical Specification 6.9.1.11.1, used to determine the Waterford Steam Electric Sation, Unit 3 core operating limits. In addition, the amendment approves the deletion of applicable dates and revision numbers for CEN–372–P–A and other topical reports listed in TS 6.9.1.11.1.

Date of issuance: October 31, 2003.

Effective date: As of the date of issuance and shall be implemented 60 days from the date of issuance.

Amendment No.: 191.

Facility Operating License No. NPF–38: The amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** February 4, 2003 (68 FR 5673). The July 30, and September 29, 2003, supplemental letters provided clarifying information that did not change the scope of the original **Federal Register** notice or the original no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 31, 2003.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois.

Date of application for amendments: March 31, 2003.

Brief description of amendments: The amendments revise Appendix A, Technical Specifications (TS), of Facility Operating License Nos. NPF–11 and NPF–18. Specifically, the changes modify TS 5.7, ''High Radiation Area,'' by incorporating the wording and requirements from NUREG–1434, ''Standard Technical Specifications General Electric Plants, BWR/6,'' Revision 2, dated June 2001. The revision also includes administrative changes regarding access control and terminology for high radiation areas.

Date of issuance: October 31, 2003.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos.: 161/147.

Facility Operating License Nos. NPF–11 and NPF–18: The amendments revised the Technical Specifications.

Date of initial notice in **Federal Register:** May 27, 2003 (68 FR 28852).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 31, 2003.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353.

Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania.

Date of application for amendments: December 20, 2002, as supplemented May 30, 2003.

Brief description of amendments: The amendments removed the current facility reactor material specimen surveillance schedule from the Technical Specifications for Limerick Generating Station, Units 1 and 2 (LGS–1 and 2). The licensee also revised the Updated Final Safety Analysis Report (UFSAR) for LGS–1 and 2 to reflect implementation of the Boiling Water Reactor Vessel and Internals Project reactor pressure vessel integrated surveillance program as the basis for demonstrating the compliance with the requirements of Appendix H, ''Reactor Vessel Material Surveillance Program Requirements,'' to title 10 of the Code of Federal Regulations, Part 50.

Date of issuance: November 4, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment Nos.: 167 and 130.

Facility Operating License Nos. NPF–39 and NPF–85: The amendments revised the Technical Specifications and authorized changes to the UFSAR for LGS–1 and 2.

Date of initial notice in **Federal Register:** February 4, 2003 (68 FR 5669). The supplement dated May 30, 2003, provided additional information that

clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluationdated November 4, 2003.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, and PSEG Nuclear LLC,

Docket Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station,

Units 2 and 3, (PBAPS-2 and 3) York County and Lancaster County, Pennsylvania.

Date of application for amendments: December 20, 2002, as supplemented May 30, 2003.

Brief description of amendments: The amendments revised the Updated Final Safety Analysis Report (UFSAR) for Peach Bottom Atomic Power Station, Units 2 and 3, by allowing implementation of the Boiling Water Reactor Vessel and Internals Project reactor pressure vessel integrated surveillance program as the basis for demonstrating the compliance with the requirements of Appendix H, ''Reactor Vessel Material Surveillance Program Requirements,'' to Title 10 of the Code of Federal Regulations, Part 50.

Date of issuance: November 4, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment Nos.: 249 and 253.

Renewed Facility Operating License Nos. DPR–44 and DPR–56: The amendments authorized changes to the UFSAR for PBAPS–2 and 3.

Date of initial notice in **Federal Register:** February 4, 2003 (68 FR 5669). The supplement dated May 30, 2003, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 4, 2003.

No significant hazards consideration comments received: No.

Indiana Michigan Power Company, Docket No. 50–316, Donald C. Cook Nuclear Plant, Unit 2, Berrien County, Michigan.

Date of application for amendment: March 27, 2003, as supplemented August 15, 2003.

Brief description of amendment: The amendment lowers the trip setpoint and allowable value contained in Technical Specification (TS) Table 3.3–4 for the pressurizer pressure low safety injection signal. The amendment also lowers the value for the P–11 setpoint in TS Table 3.3–3. These changes increase the margin between the low pressurizer pressure safety injection actuation setpoint and the minimum pressurizer pressure that occurs immediately following a reactor trip.

Date of issuance: November 12, 2003.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment No.: 263.

Facility Operating License No. DPR–74: Amendment revises the Technical Specifications.

Date of initial notice in **Federal Register:** May 27, 2003 (68 FR 28853).

The supplemental letter contained clarifying information and did not change the initial no significant hazards consideration determination and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 12, 2003.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska.

Date of amendment request: December 31, 2002, as supplemented by letter dated July 24, 2003.

Brief description of amendment: The amendment revises the Updated Safety Analysis Report (USAR) reflecting a change of the reactor vessel material surveillance program to incorporate the Boiling Water Reactor Vessel and Internals Project Integrated Surveillance Program into the licensing basis.

Date of issuance: October 31, 2003.

Effective date: As of the date of issuance. The amendment shall be implemented within 30 days of issuance and the USAR changes shall be implemented in the next periodic update to the USAR in accordance with 10 CFR 50.71(e).

Amendment No.: 201.

Facility Operating License No. DPR–46: Amendment revised the USAR.

Date of initial notice in **Federal Register:** February 4, 2003 (68 FR 5678).

The July 24, 2003, supplemental letter provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register** on February 4, 2003 (68 FR 5678).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 31, 2003.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska.

Date of amendment request: January 27, 2003, as supplemented by letter dated August 1, 2003.

Brief description of amendment: The amendment authorizes revisions to the Updated Safety Analysis Report (USAR) to incorporate the NRC approval of the GOTHIC 7.0 computer program for performing containment analyses.

Date of issuance: November 5, 2003.

Effective date: November 5, 2003, and shall be implemented within 30 days of the date of issuance. The implementation of the amendment includes the incorporation into the USAR the changes discussed above, as described in the licensee's application dated January 27, 2003, and supplement dated August 1, 2003, and evaluated in the staff's Safety Evaluation attached to the amendment.

Amendment No.: 222.

Renewed Facility Operating License No. DPR–40: The amendment revised the USAR.

Date of initial notice in **Federal Register:** March 18, 2003 (68 FR 12956).

The August 1, 2003, supplemental letter provided additional clarifying information, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 5, 2003.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska.

Date of amendment request: January 27, 2003, as supplemented by letter dated October 14, 2003.

Brief description of amendment: The amendment deletes Technical Specification (TS) 2.3(2)i and the corresponding Bases that allows the performance of the surveillance test of Table 3–2, Item 20 (Recirculation Actuation Logic Channel Functional Test) under administrative controls, while components in excess of those allowed by Conditions a, b, d, and e of TS 2.3(2) are inoperable, provided they are returned to operable status within one hour. This allowance was granted in Amendment No. 206 issued April 19, 2002, and only applied until the end of Cycle 21.

Date of issuance: November 10, 2003.

Effective date: November 10, 2003, and shall be implemented within 60 days from the date of issuance.

Amendment No.: 223.

Renewed Facility Operating License No. DPR–40: The amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** March 18, 2003 (68 FR 12955).

The October 14, 2003, supplemental letter provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 10, 2003.

No significant hazards consideration comments received: No.

PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania.

Date of application for amendments: May 6, 2003, as supplemented by letters dated August 12 and September 18, 2003.

Brief description of amendments: These amendments deleted Technical Specification (TS) 3.3.1.3, ''Oscillation Power Range Monitor (OPRM) Instrumentation,'' and revised TS 3.4.1, ''Recirculation Loops Operating,'' to formally extend the currently implemented requirements, which define appropriately conservative restrictions to plant operation and operator response to thermal hydraulic instability events. In addition, the amendments revise TS 3.4.1 to refer to the power flow map in the core operating limits report and include a reference in TS 5.6.5.

Date of issuance: October 29, 2003.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment Nos.: 215 and 190.

Facility Operating License Nos. NPF–14 and NPF–22: The amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register****:* June 24, 2003 (68 FR 37582).

The supplemental letters dated August 12 and September 18, 2003, provided clarifying information that did not change the scope of the amendment as described in the initial notice of the proposed action published in the **Federal Register** notice (68 FR 37582, June 24, 2003), or the U.S. Nuclear Regulatory Commission staff's proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 29, 2003.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket Nos. 50–259, 50–260, and 50–296, Browns Ferry Nuclear Plant, Units 1, 2, and 3, Limestone County, Alabama.

Date of application for amendments: July 25, 2003.

Description of amendment request: The amendments revised Technical Specification 3.1.8, ''Scram Discharge Volume (SDV) Vent and Drain Valves,'' to allow a vent or drain line with one inoperable valve to be isolated instead of requiring the valve to be restored to operable status within 7 days.

Date of issuance: November 3, 2003.

Effective date: Date of issuance, to be implemented within 60 days.

Amendment Nos.: 248, 285, and 243.

Facility Operating License Nos. DPR–33, DPR–52, and DPR–68. Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 18, 2003 (68 FR 54753).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 17th day of November, 2003.

For the Nuclear Regulatory Commission.

Eric Leeds,

Deputy Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 03–29107 Filed 11–24–03; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Employees' Group Life Insurance Program: New Option B Premiums

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: The Office of Personnel Management (OPM) is announcing new Federal Employees' Group Life Insurance (FEGLI) premiums for the upper age bands of Option B. The premiums will be maintained on the FEGLI Web site at *http://www.opm.gov/insure/life.*

EFFECTIVE DATE: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Karen Leibach, (202) 606–0004.

SUPPLEMENTARY INFORMATION: On December 30, 2002, OPM published a **Federal Register** notice (67 FR 79659) announcing premium changes for FEGLI and new age bands for Options B and C. The premiums for the new Option B age bands are being phased in over a 3-year period. The first set of premiums for these age bands was effective the first pay period beginning on or after January 1, 2003.

This notice announces the second phase of the Option B premium changes. These premiums are effective the first pay period beginning on or after January 1, 2004.

OPTION B PREMIUM PER $1,000 OF INSURANCE

Age band	Biweekly	Monthly
70–74	$1.03	$2.232
75–79	1.43	3.098
80 and over	1.83	3.965

The premiums for compensationers, who are paid every 4 weeks, are 2 times the biweekly premium amounts.

Premiums for other FEGLI coverages, including premiums for other Option B age bands, are not changing.

U.S. Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 03–29438 Filed 11–24–03; 8:45 am]

BILLING CODE 6325–50–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48800; File No. SR–Amex–2002–116]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto by the American Stock Exchange LLC Relating to Specialist Stabilization Requirements for Derivative Products

November 17, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 27, 2002, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Items I, II, and III below, which Items have been prepared by the Exchange. On April 23, 2003, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] On June 3, 2003, the Exchange submitted Amendment No. 2 to the proposed rule change.[4] On October 3, 2003, the Exchange submitted Amendment No. 3 to the proposed rule change.[5] On October 22, 2003, the Exchange submitted Amendment No. 4 to the proposed rule change.[6] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Amex Rules 170, 1000(a), and 1000 A(a) to: (1) Eliminate specialist stabilization requirements and other technical requirements for ''derivative products;'' and (2) correct erroneous cross references in the Exchange's rules to the definition of the term ''derivative product.'' Below is the text of the proposed rule change. Proposed deleted language is bracketed. Proposed new language is *italicized.*

* * * * *

Registration and Functions of Specialists

Rule 170. (a) through (e). No change.

Commentary

.01 through .11 No change.

.12 The following provisions of this Rule shall not apply to the trading of derivative products (as defined in Article I, Section 3(d) of the Exchange Constitution): *Commentary .01, .02, .06 (to the extent that the SEC has granted ''no action'' relief or otherwise exempted the security from the ''Short Sale Rule''), and .07.*

Portfolio Depositary Receipts

Rule 1000 (a) Applicability. The Rules in this Chapter (Trading of Certain Equity Derivatives) are applicable only to Portfolio Depositary Receipts. Except to the extent that specific Rules in this Chapter govern, or unless the context otherwise requires, the provisions of the Constitution and all other rules and policies of the Board of Governors shall be applicable to the trading on the Exchange of such securities. Pursuant to the provisions of Article 1, Section 3([i]*j*) of the Constitution, Portfolio Depositary Receipts are included within the definition of ''security'' or ''securities'' as such terms are used in the Constitution and Rules of the Exchange. In addition, pursuant to the provisions of *Article I, Section 3(d)* [Article IV, Section 1(b)(4)] of the Constitution, Portfolio Depositary Receipts are included within the definition of ''derivative products'' as that term is used in the Constitution and Rules of the Exchange.

Index Fund Shares

Rule 1000A. (a) Applicability. The Rules in this Section are applicable only to Index Fund Shares. Except to the extent specific Rules in this Section govern or unless the context otherwise requires, the provisions of the Constitution and all other rules and policies of the Board of Governors shall be applicable to the trading on the Exchange of such securities. Pursuant to the provisions of Article I, Section 3([i]*j*) of the Constitution, Index Fund Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Constitution and Rules of the Exchange. In addition, pursuant to the provisions of *Article I, Section 3(d)* [Article IV, Section 1(b)(4)] of the Constitution, Index Fund Shares are included within the definition of ''derivative products'' as that term is used in the Constitution and Rules of the Exchange.

* * * * *

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Since the 1930s,[7] specialists on the Amex and New York Stock Exchange, Inc. (''NYSE'') have been subject to requirements that generally prohibit them from buying on plus ticks or selling on minus ticks except with the permission of a Floor Official. The Exchange believes that while these rules may have made sense in the 1930s or in the 1960s (when they were formally enacted by the Amex and NYSE), changes in market structure and technology in the succeeding decades, such as the shift to trading in penny increments, dispersion of order flow to multiple competing market centers, consolidation and availability of market data, and enhancements in trading, communications, and surveillance technology, have made these stabilization rules anticompetitive anachronisms. In addition, the Exchange believes that the policy considerations behind the implementation of stabilization rules for common stocks do not apply in the context of derivatively priced securities.[8] In this regard, the Commission previously approved an Amex rule change that eliminated stabilization rules and other technical requirements of Rule 170 related to stabilization requirements as applied to

[3] *See* letter from William Floyd-Jones, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated April 22, 2003 (''Amendment No. 1''). Amendment No. 1 removed proposed language that would have allowed approved persons to trade the same derivatives as an affiliated specialist and replaced the proposed rule change in its entirety.

[4] *See* letter from William Floyd-Jones, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated June 2, 2003 (''Amendment No. 2''). Amendment No. 2 provided further details on the description of the proposed exemption of derivative products from the requirements of Commentaries .05, .06 and .07 to Amex Rule 170 and also replaced the proposed rule change in its entirety.

[5] *See* letter from William Floyd-Jones, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated October 2, 2003 (''Amendment No. 3''). Amendment No. 3 made technical corrections to the proposed rule text and replaced the proposed rule change in its entirety.

[6] *See* letter from William Floyd-Jones, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated October 21, 2003 (''Amendment No. 4''). Amendment No. 4 explained why the Exchange believes that the maximum quote spread rules for options should not be applicable to transactions in derivative products. In addition, Amendment No. 4 proposes to continue to apply Commentary .05 to Rule 170 to specialist transactions in derivative products. Amendment No. 4 also replaced the proposed rule change, as amended, in its entirety.

[7] *See* Saperstein Interpretation, Securities Exchange Act Release No. 1117 (March 30, 1937).

[8] The Exchange notes that stabilization rules, which limit the ability of Amex and NYSE specialists to buy on plus ticks or sell on minus ticks, are an objective expression of a specialist's ''negative'' obligation to refrain from trading except in connection with transactions that assist in maintaining a fair and orderly market. According to the Exchange, these rules were intended to prevent Amex and NYSE specialists from ''leading the market'' in their specialty stocks.

Exchange traded options.[9] Thus, the only ''derivative products''[10] currently subject to stabilization requirements on the Amex are Portfolio Depository Receipts, Index Fund Shares and Trust Issued Receipts (collectively ''Exchange Traded Funds'' or ''ETFs''). The Exchange, accordingly, is proposing to eliminate stabilization rules and other technical requirements of Rule 170 related to stabilization requirements with respect to ETFs.

The Exchange believes that eliminating stabilization rules with respect to ETFs is appropriate in view of the fact that ETFs, like options, are priced derivatively, based upon the value of an underlying basket of securities. Thus, the Exchange believes that there should be no concern that specialist ETF transactions would ''lead the market'' with respect to the price of an ETF if he or she effected purchases of plus or zero-plus ticks, or effected sales on minus or zero-minus ticks.

In this regard, the Exchange notes that the Commission has, in many instances, granted ''no action'' relief for short sales of ETFs with respect to the Commission's ''Short Sale Rule'' (Rule 10a–1 under the Act) in large part due to the derivative pricing of ETFs.[11] The Exchange also notes that the Commission recently approved an Amex rule change that allowed side-by-side trading of broad based ETFs and the related options as a result of the derivative pricing of ETFs.[12] In both situations, according to the Exchange, the Commission discounted the possibility of inappropriate activity by ETF specialists due to the derivative pricing of these securities. The Exchange also believes that requiring a Floor Official to review a proposed transaction on a destabilizing ''tick'' prior to execution is contrary to the interests of investors in the context of derivately priced ETFs since the delay caused by Floor Official review may cause customers to receive an inferior execution or miss the market.

The Exchange believes that ETFs should not be subject to the maximum quote spread rules applicable to options.[13] These rules were adopted on the Amex in 1974 and originally applied to registered option traders. In 1989, the option quote spread rules were formally extended to Amex specialists.[14] During the period between 1974 and 1989, the Commission restricted the trading of listed options on more than one exchange, and the Commission did not completely eliminate these restrictions until December 31, 1994.[15] Currently, all option exchanges have similar maximum quote spread rules.[16]

The Exchange believes that extending maximum quote spread rules to ETFs may have an anti-competitive impact by establishing a regulatory requirement on the Amex that does not exist in the other market centers that trade ETFs. Unlike the situation with listed options where all option exchanges have similar rules regulating bid/ask differentials, the Exchange believes that none of the registered exchanges, ATSs, third market dealers, or Nasdaq that currently trade ETFs establish, or are subject to, maximum quote spread differentials. The Exchange also believes that extending maximum quote spreads rules to ETFs would serve no investor protection purpose since trading in ETFs is characterized by vigorous competition among market centers. If investors are unsatisfied with the quote for an ETF displayed in a particular market center, the Exchange believes that they can trade the security in another market. Competition among market centers, not quote spread regulation, maintains ETF bid/ask differentials at appropriate levels.

The Exchange is proposing to exempt ETFs from the other technical requirements of Rule 170 from which options were exempted in 1989.[17] These sections deal with transactions which: (1) May be subject to the Commission's short sale rule (Commentary .06); and (2) are assigned to investment accounts (Commentary .07). The Exchange believes that eliminating Commentary .06 with respect to ETFs is appropriate because this Commentary simply reminds specialists that they are subject to the Commission's short sale rule. Since the short sale rule frequently does not apply to ETFs due to the Commission's provision of ''no action'' relief, the Commentary creates an ambiguity regarding the applicability of the short sale rule to specialist transactions in ETFs. The Exchange, accordingly, is proposing to eliminate Commentary .06 with respect to ETFs to the extent that the Commission has granted no action relief or has otherwise exempted the securities from the short sale rule. Commentary .07 restricts the ability of specialists to assign securities to an investment account unless the securities were acquired in transactions that meet certain rigorous stabilization tests. Since the prices of ETF trades are determined derivatively, it is impossible for specialists to satisfy the stabilization tests of Commentary .07 and they cannot, consequently, establish investment accounts for these securities. The Exchange, accordingly, is proposing to eliminate Commentary .07 with respect to ETFs.

The Exchange also is proposing to correct erroneous cross references in Rules 1000(a) and 1000A(a) to the definitions of the terms ''derivative products'' and ''security or securities'' in the Exchange Constitution.

2. Statutory Basis

As described above, the proposed rule change is consistent with Section 6(b) of the Act[18] in general and furthers the objectives of Section 6(b) of the Act[19] 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

[9] *See* Securities Exchange Act Release No. 27235 (September 11, 1989), 54 FR 38580 (September 19, 1989).

[10] Article 1, Section 3(d) of the Exchange Constitution defines ''derivative products'' as follows:

The term ''derivative products'' includes, in addition to standardized options, other securities which are issued by The Options Clearing Corporation or another limited purpose entity or trust, and which are based solely on the performance of an index or portfolio of other publicly traded securities. Notwithstanding the foregoing, the term ''derivative products'' shall not include warrants of any type or closed-end management investment companies.

[11] *See e.g.* Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to James F. Duffy, Executive Vice President and General Counsel, American Stock Exchange, dated March 3, 1999 (regarding Nasdaq-100 Trust, Series 1). This letter states in part:

On the basis of your representations and the facts presented, in particular the composite and derivative nature of the Nasdaq-100 Shares, trading would not appear to be susceptible to the practices that Rule 10a–1 is designed to prevent. In particular, the Amex anticipates that the market value of the Nasdaq-100 Shares will rise or fall based on changes in the net asset value of the Trust. Moreover, the short sale rule does not apply to analogous derivative products such as index options and index futures contracts. Accordingly, the Commission hereby grants an exemption to Rule 10a–1 to permit sales of Nasdaq-100 Shares without regard to the 'tick' requirements of Rule 10a–1.

[12] *See* Securities Exchange Act Release No. 46213 (July 16, 2002), 67 FR 48232 (July 23, 2002).

[13] *See* Commentary .01 to Amex Rule 950(n) and Amex Rule 958(c).

[14] The Exchange adopted the maximum quote spread rules applicable to registered options traders in 1975 and formally extended them to options specialists in 1989. See Securities Exchange Act Release No. 27235 (September 11, 1989), 54 FR 38580 (September 19, 1989).

[15] *See* Discussion on the history of restrictions on the multiple listing of options in *In Re: Stock Exchanges Options Trading Antitrust Litigation,* 171 F.Supp. 2d 1974 (April 24, 2001).

[16] *See* Chicago Board Options Exchange, Inc. Rule 8.7, Pacific Stock Exchange, Inc. Rule 6.37, Philadelphia Stock Exchange, Inc. Rule 1014, and International Stock Exchange Rule 803.

[17] *See supra* note 9.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will impose no burden on competition and, in fact, may enhance competition among markets and market makers to the benefit of investors. Modifying the Exchange's stabilization rules will eliminate regulatory restrictions on Amex specialists that are not imposed upon their market maker competitors. Thus, the Exchange believes that the proposed rule change actually will reduce competitive burdens rather than imposing them. The Exchange also believes that the revisions also will facilitate the ability of Amex specialists to provide prompt execution of customer orders. The Exchange notes that these enhancements at the Amex may create new incentives for market makers in other market centers to compete more aggressively with Amex specialists to provide better service, thus benefiting investors generally.

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

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 self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, 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 such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–2002–116 and should be submitted by December 16, 2003.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29414 Filed 11–24–03; 8:45 am]

BILLING CODE 8010–01–P

[20] 17 CFR 200.30(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48798; File No. SR–NASD–2003–150]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish a "Pegged" Order in Nasdaq's SuperMontage System

November 17, 2003.

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 November 7, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association") through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), submitted to the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to establish a new voluntary order type, known as pegged orders, for use within the Nasdaq National Market Execution System ("NNMS" or "SuperMontage"). Nasdaq proposes to implement this new order type on or about December 8, 2003, and will inform market participants of the exact implementation date via a Head Trader Alert on *http://www.nasdaqtrader.com.*

The text of the proposed rule change appears below. New text is italicized.[5]

* * * * *

4700. NASDAQ NATIONAL MARKET EXECUTION SYSTEM (NNMS)

4701. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a)–(jj) No Change.

(kk)–(ll) Reserved.

(mm) The term "Pegged" shall mean, for priced limit orders so designated, that after entry into the NNMS, the price of the order is automatically adjusted by NNMS in response to changes in the Nasdaq inside bid or offer, as appropriate. The NNMS Participant entering a Pegged Order may specify that the price of the order will either equal the inside quote on the same side of the market (a "Regular Pegged Order") or equal a price that deviates from the inside quote on the contra side of the market by $0.01 (i.e., $0.01 less than the inside offer or $0.01 more than the inside bid) (a "Reverse Pegged Order"). The market participant entering a Pegged Order may (but is not required to) specify a cap price, to define a price at which pegging of the order will stop and the order will be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The Commission recently published for notice and public comment proposed rule changes filed by Nasdaq that propose to modify the rules governing the operation of SuperMontage. *See* Securities Exchange Act Release Nos. 48501 (September 17, 2003), 68 FR 56358 (September 30, 2003) (Notice of Filing of SR–NASD–2003–128); 48606 (October 8, 2003), 68 FR 59659 (October 16, 2003) (Notice of Filing of SR–NASD–2003–134); 48671 (October 21, 2003), 68 FR 61531 (October 28, 2003) (Notice of Filing of SR–NASD–2003–135); 48674 (October 21, 2003), 68 FR 61508 (October 28, 2003) (Notice of Filing of SR–NASD–2003–149); 48675 (October 21, 2003), 68 FR 61528 (October 28, 2003) (Notice of Filing of SR–NASD–2003–143). *See also* File No. SR–NASD–2003–165. The text of the proposed rule change is shown as marked against the text of the SuperMontage rules as currently in effect, rather than as they are proposed to be amended. Nasdaq represents that it will file such amendments to pending filings as Commission staff may request to reflect the approval, disapproval, immediate effectiveness, or withdrawal of filings.

permanently converted into an unpegged limit order.

* * * * *

4706. Order Entry Parameters

(a) Non-Directed Orders—

(1) General. The following requirements shall apply to Non-Directed Orders Entered by NNMS Market Participants:

(A) An NNMS Participant may enter into the NNMS a Non-Directed Order in order to access the best bid/best offer as displayed in Nasdaq.

(B) A Non-Directed Order must be a market or limit order, must indicate whether it is a buy, short sale, short-sale exempt, or long sale, and may be designated as an ''Immediate or Cancel'', or as a ''Day'' or a ''Good-till-Cancelled'' order. If a priced order designated as ''Immediate or Cancel'' (''IOC'') is not immediately executable, the unexecuted order (or portion thereof) shall be returned to the sender. If a priced order designated as a ''Day'' order is not immediately executable, the unexecuted order (or portion thereof) shall be retained by NNMS and remain available for potential display/execution until it is cancelled by the entering party, or until 4 p.m. Eastern Time on the day such order was submitted, whichever comes first, whereupon it will be returned to the sender. If the order is designated as ''Good-till-Cancelled'' (''GTC''), the order (or unexecuted portion thereof) will be retained by NNMS and remain available for potential display/execution until cancelled by the entering party, or until 1 year after entry, whichever comes first. Starting at 7:30 a.m., until the 4 p.m. market close, IOC and Day Non-Directed Orders may be entered into NNMS (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. GTC orders may be entered (or previously entered GTC orders cancelled) between the hours 7:30 a.m. to 6:30 p.m. Eastern Time, but such orders entered prior to market open, or GTC orders carried over from previous trading days, will not become available for execution until 9:30 a.m. Eastern Time. Exception: Non-Directed Day (*other than Pegged Orders*) and GTC orders may be executed prior to market open if required under Rule 4710(b)(3)(B).

In addition, an order may be assigned the designations described below. An order may be designated as ''Pegged,'' in which case the order will also automatically be designated as Day. A Pegged Order may not be designated as a Preferenced Order. A Pegged Order (or unexecuted portion thereof) will be retained by NNMS and its price adjusted in response to changes in the Nasdaq inside market. A Pegged Order will be cancelled if there is no displayable Quote/Order to which its price can be pegged. Starting at 7:30 a.m., until the 4 p.m. market close, Pegged Orders may be entered into NNMS (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. The initial price of Pegged Orders entered prior to market open will be established at 9:30 a.m. based on the Nasdaq inside bid or offer at that time.

To maintain the capacity and performance of the NNMS, Nasdaq may at any time suspend the entry of Pegged Orders for all securities or for any security. Pegged Orders that are in the NNMS at the time of such suspension will continue to be available for adjustment and execution.

(C)–(F) No Change.

(2) Entry of Non-Directed Orders by NNMS Order Entry Firms—In addition to the requirements in paragraph (a)(1) of this rule, the following conditions shall apply to Non-Directed Orders entered by NNMS Order-Entry Firms:

(A) All Non-Directed orders shall be designated as Immediate or Cancel, GTC or Day but shall be required to be entered as Non-Attributable if not entered as IOC. *NNMS Order Entry Firms may designate orders as ''Pegged,'' in which case the order will also automatically be designated as Day.* For IOC orders, if after entry into the NNMS of a Non-Directed Order that is marketable, the order (or the unexecuted portion thereof) becomes non-marketable, the system will return the order (or unexecuted portion thereof) to the entering participant.

(B) No change.

(b)–(e) No change.

4707. Entry and Display of Quotes/Orders

(a) Entry of Quotes/Orders—Nasdaq Quoting Market Participants may enter Quotes/Orders into the NNMS, and NNMS Order Entry Firms may enter Non-Attributable *Quotes/Orders* into the NNMS, subject to the following requirements and conditions:

(1) No change.

(2) Upon entry of a Quote/Order into the system, the NNMS shall time-stamp it, which time-stamp shall determine the ranking of the Quote/Order for purposes of processing Non-Directed Orders as described in Rule 4710(b). For each subsequent size increase received for an existing quote at a given price, the system will maintain the original time-stamp for the original quantity of the quote and assign a separate time-stamp to that size increase. *When a Pegged Order is displayed as a Quote/Order, its time-stamp will be updated whenever its price is adjusted.*

(3)–(4) No change.

(b)–(e) No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In order to provide increased functionality to system users, Nasdaq proposes to adopt a new order type, the pegged order, for use in SuperMontage. A pegged order is a limit order, the price of which is automatically adjusted to follow the price movements of the Nasdaq inside market. A ''regular'' pegged order would peg to the same side of the market it is entered on. Thus, the price of a regular pegged buy order would always equal the best inside bid in Nasdaq, and the price of a regular pegged sell order would always equal the best inside offer in Nasdaq. By entering a regular pegged order, a market participant indicates its willingness to provide liquidity at the best inside price set by other market participants.

A ''reverse'' pegged order would peg to the opposite side of the market. Specifically, it would peg at a price that deviates from the opposite side of the market by $0.01.[6] Thus, a reverse pegged buy order would be priced at $0.01 less than the inside offer, and a reverse pegged sell order would be priced at $0.01 more than the inside bid. By entering a reverse pegged order, a market participant indicates its willingness to provide liquidity at a price as close as possible to the opposite

[6] Nasdaq states that requiring the price of a reverse pegged order to deviate from the opposite side of the market would ensure that the price of the reverse pegged order would not lock or cross the Quote/Order to which it is pegged.

side of the market. As a result, in circumstances where the bid/ask spread is greater than $0.01, the entry of a reverse pegged order would establish a new inside price. A pegged order may not be pegged to prices away from the inside market. Like any other order whose price is changed, a pegged order would be given a new time-priority stamp whenever a change to the inside bid/offer results in an adjustment of the price of a pegged order.

Users may voluntarily select a price execution cap beyond which a pegged order would not be executed. Once a price cap is reached, the pegged/reverse pegged order would be permanently converted to an unpegged limit order at the cap price and would be retained by the system for display and potential execution solely at that price or better; the price of a pegged order that is converted into an unpegged limit order would not thereafter be adjusted, even if the inside bid/offer is later in the range where pegging had previously been occurring. If no execution cap price amount is selected, SuperMontage would continue to adjust the price of the pegged order to follow the inside bid or offer to which it is pegged.

Pegged orders may only be entered as DAY orders. Pegged orders may be entered (but not displayed or executed) prior to market open. Because a pegged order reflects a NNMS participant's willingness to provide liquidity, pegged orders entered before market open would be added to the book and become available for interaction with other orders at 9:30 a.m. The price of pegged orders would be established at 9:30 a.m., based on the inside market at the open. Pegged orders may not be preferenced or directed to another market participant.

A regular pegged order may not itself establish the inside bid or offer. Therefore, if all non-pegged displayable interest at the inside is exhausted, the new inside would be established at the next best price level where displayable non-pegged quotes/orders exist, and the price of pegged orders would be adjusted accordingly. If there are no other market participants on the same side of the market, a regular pegged order would be cancelled and sent back to the entering party.

Because the price of a reverse pegged order is based on changes on the opposite side of the market (*e.g.,* a reverse pegged buy order's price is adjusted based on changes in the offer), such an order may remain alone at the inside. If there are no participants on the contra-side of the market, however, a reverse pegged order would be cancelled and sent back to the entering party.

Because pegged orders would not allow a market participant to maintain a price that is away from the inside market, they are consistent with Nasdaq's ''Autoquote Policy'' reflected in NASD IM–4613. Pegged orders would allow all market participants to adjust the prices of orders in a manner similar to the practice of computer generated quoting described in NASD IM–4613(c), which is currently permitted on a case-by-case basis. Because of the potential negative impact that the automatic adjustment of quotes/orders can have on system capacity and performance, however, Nasdaq proposes to specifically retain the right to restrict or prohibit the entry of any type of pegged order entirely, or in a particular issue(s), at any time when SuperMontage is operational or available for the entry of such orders. Pegged or reverse pegged orders that are in the system at the time Nasdaq determines not to accept further such orders would continue to be normally adjusted and executed.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[7] in general and with Section 15A(b)(6) of the Act,[8] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes the proposed rule change would provide market participants with a voluntary tool to use to offer liquidity at the inside market. Nasdaq notes that the Commission has found similar orders offered by at least one other market center to be consistent with the Act.[9]

[7] 15 U.S.C. 78*o*–3.

[8] 15 U.S.C. 78*o*–3(b)(6).

[9] *See* Securities Exchange Act Release No. 47467 (March 7, 2003), 68 FR 12134 (March 13, 2003) (SR–PCX–2002–75). According to Nasdaq, the Pegged Order proposed in this filing is almost identical in function to the Pacfic Exchange Equities, Inc. (''PCXE'') Pegged Order approved by the Commission.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act,[10] and subparagraph (f)(6) of Rule 19b–4,[11] thereunder because it does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. At any time within 60 days of the filing of the 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 the filing will also be available for inspection and copying at the principal office of the Association.

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

All submissions should refer to File No. SR–NASD–2003–150 and should be submitted by December 16, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29412 Filed 11–24–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48809; File No. SR–NASD–2003–167]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Raise ACT Fees for Users of the Query Function During the Trade Comparison Process

November 19, 2003.

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 November 14, 2003, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule as one that establishes or changes a due, fee, or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii) of the Act,[3] which renders the rule effective upon the Commission's receipt of the filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend certain fees on its Automated Confirmation Transaction Service (''ACT'') and implement the new fees on November 17, 2003. The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets:

7000. CHARGES FOR SERVICES AND EQUIPMENT

7010. System Services

(a)–(f) No change

(g) Automated Confirmation Transaction Service

The following charges shall be paid by the participant for use of the Automated Confirmation Transaction Service (ACT):

Transaction Related Charges:	
Reporting of transactions executed through SuperMontage (or any other transaction execution system that makes use of SuperMontage's functionality to report transactions) (''SuperMontage Transactions'').	
Average daily volume of transaction reports for SuperMontage Transactions during the month to which a participant is a party:	Fee per side for transaction reports of SuperMontage Transactions to which such participant is a party:
0 to 9,999	$0.029
10,000 or more	$0.00
Other reports for transactions in Nasdaq National Market and SmallCap Market securities not subject to comparison through ACT.	$0.00
Reporting of all other transactions not subject to comparison through ACT.	$0.029/side
Comparison	$0.0144/side per 100 shares (minimum 400 shares; maximum 7,500 shares)
Late Report—T+N	$0.288/side
Browse/query	$0.288/query [(Each ACT query incurs the $0.288 fee; however, the first accept or decline processed for a transaction is free, to insure that no more than $0.288 is charged per comparison. Subsequent queries for more data on the same security will also be processed free. Any subsequent query on a different security will incur the $0.288 query charge.)]
Terminal fee	$57.00/month (ACT only terminals)
CTCI fee	$575.00/month
WebLink ACT	$300/month (full functionality) or $150/month (up to an average of twenty transactions per day each month) (For the purposes of this service only, a transaction is defined as an original trade entry, either on trade date or as-of transactions per month.)
Risk Management Charges	$0.035/side and $17.25/month per correspondent firm (maximum $10,000/month per correspondent firm)
Corrective Transaction Charge	$0.25/Cancel, Error, Inhibit, Kill, or 'No' portion of No/Was transaction, paid by reporting side; $0.25/Break, Decline transaction, paid by each party[;]
ACT Workstation	$525/logon/month (A firm that uses ACT risk management through one or more NWII terminals when the ACT Workstation is introduced will be eligible to evaluate the ACT Workstation for a free, three-month trial period, provided that the firm continues to pay charges associated with its NWII terminal(s) during that period.)

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

(h)–(s) No change.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ACT is an automated trade reporting and reconciliation service that speeds the post-execution steps of price and volume reporting, comparison, and clearing of trades completed in Nasdaq, the OTC Bulletin Board, and other over-the-counter markets. ACT handles transactions executed through Nasdaq's automated trading systems, as well as transactions negotiated over the telephone and internalized transactions. It also manages post-execution procedures for transactions in exchange-listed securities that are traded in the Nasdaq InterMarket.

When ACT was first implemented over a decade ago, the majority of firms transacted Nasdaq securities via non-automated means, such as over the telephone. The trade comparison process was extremely cumbersome given the lack of a standard, automated means for two trading partners to match the details of a trade, such as the number of shares traded or the price of the security. ACT helped alleviate this problem by providing all NASD members with an automated, centralized, rule-based trade matching system. Once a trade was matched within ACT, it was then forwarded to the National Securities Clearance Corporation (''NSCC'') for clearance and settlement. In the majority of cases, these ACT matches took place via the ACT ''browse/query'' and ''accept/decline'' functions.

In a typical transaction, two parties agree to transact with one another over the telephone. The reporting party, typically the selling market maker, enters its version of the trade details, including the contra party's identity, into the ACT system for 90-second trade reporting. This record is now classified as ''open'' until the contra party takes action to lock-in the transaction. To locate the open trade, the contra party scans its trade records in the specified security via the ACT ''browse/query'' function. Once located, the contra party reviews the trade details to ensure the accuracy of the information (*e.g.*, number of shares and execution price). If the contra party agrees with the trade details entered by the reporting party, it then ''accepts'' the transaction. If the contra party disagrees with the trade details, it ''declines'' the transaction. When most firms traded with one another over the telephone, the majority of ACT reported trades were reported, compared, and locked-in in this manner.

In the above example, the ACT billing process generally has three steps. First, ACT assesses a fee to the contra party that performed the ''browse/query'' action. Second, ACT assesses a fee to both the reporting and contra party for locking-in the transaction via the ''accept/decline'' function. Third, ACT reverses the fee for the contra party's accept/decline action. As a result, each side of the trade pays an equal fee for the trade even though their system usage differed.

ACT usage and pricing have changed dramatically in recent years. Initially, the browse/query and accept/decline process was one of the few options available to firms for reporting and locking-in trades; therefore, it was deemed more equitable to equalize the fees paid by each side of the trade. Since this process constituted a significant proportion of overall ACT usage, it was possible for Nasdaq to implement this process while still adequately covering ACT operating costs.

Today firms have a wide range of options for reporting and locking-in trades, and less than one-half of one percent of all ACT records are locked-in via the browse/query and accept/decline functions. The increase in trading volumes and use of external execution systems such as SuperMontage and electronic communication networks (''ECNs'') allow firms to automatically lock-in participants for trade reporting and clearing, bypassing the manual comparison process in ACT. Firms have also adopted new reporting arrangements whereby one participant automatically locks-in its trading partner by reporting on its behalf. Recent pricing changes have eliminated ACT fees for the majority of these locked-in trades in Nasdaq securities.

Nasdaq is currently in the process of migrating many of its services, including ACT, onto a new, more efficient internal billing platform. The billing process for each ACT service would transfer seamlessly onto this new platform except for the fee reversal described as step three of the process described above. In light of the sharply reduced usage of this functionality, it would be impractical and expensive to duplicate the third step in the new billing system. Doing so would raise the overall costs of the system, which would then have to be passed on to other users. Therefore, Nasdaq has determined that it is more equitable for the small number of users who continue to use this functionality to pay the actual costs associated with each step of the process. As noted above, there are numerous ways for a broker-dealer to report trades in ways that would avoid these charges altogether.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A of the Act [4] in general and with Section 15A(b)(5) of the Act [5] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the NASD operates or controls. The rationale for not charging members for certain system usage in order to equalize the costs between trading contra parties is no longer compelling in light of the myriad of new options members have for locking in trades. Members who elect to continue to use the browse/query and accept/decline functions will pay the incremental cost associated with this type of system usage or can choose to avoid the incremental cost by reporting trades in other ways.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Nasdaq asserts that the proposed rule will become effective on November 14,

[4] 15 U.S.C. 78o–3.

[5] 15 U.S.C. 78o–3(b)(5).

2003, pursuant to Section 19(b)(3)(A)(ii) of the Act[6] and subparagraph (e) of Rule 19b–4 thereunder[7] in that it establishes a due, fee, or other charge imposed by the self-regulatory organization. At any time within 60 days of the filing of the 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 NASD. All submissions should refer to File No. SR–NASD–2003–167 and should be submitted by December 16, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29413 Filed 11–24–03; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78s(b)(3)(A)(ii).

[7] 17 CFR 240.19b–4(e).

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 4543]

Notice of Receipt of Application for Presidential Permit for the Construction of a New International Border Crossing

Notice is hereby given that the Department of State has received an application for a permit authorizing the construction, operation and maintenance of an international toll bridge in the Laredo, Texas area. The application has been filed by the City of Laredo, Texas for a permit for a new crossing of the Rio Grande 9.2 miles downstream from the existing Gateway to the Americas Bridge (International Bridge I).

The Department's jurisdiction with respect to this application is based upon Executive Order 11423, dated August 16, 1968, as amended, and the International Bridge Act of 1972, (Pub. L. 92–343, 86 Stat. 731, approved September 26, 1972).

As required by E.O. 11423, the Department is circulating this application to concerned agencies for comment.

Interested persons may submit their views regarding this application in writing within thirty days from the publication date of this notice to Mr. Dennis M. Linskey, Coordinator, U.S.—Mexico Border Affairs, Room 4258, Department of State, 2201 C St., NW., Washington, DC 20520.

The application and related documents made part of the record to be considered by the Department of State in connection with this application are available for review in the Office of Mexican Affairs during normal business hours throughout the comment period.

Any questions related to this notice may be addressed to Mr. Linskey at the above address or by fax at (202) 647–5752.

Dated: November 17, 2003.

Dennis M. Linskey,

Coordinator U.S.-Mexico Border Affairs, Department of State.

[FR Doc. 03–29436 Filed 11–24–03; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–03–16256]

Agency Information Collection Activities; Request for Comments; Renewed Approval of Three Information Collections

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval to renew the three information collections, which are summarized below under **SUPPLEMENTARY INFORMATION.** We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by January 26, 2004.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FHWA–3–16256 by any of the following methods:

- *Web site*: *http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax*: 1–202–493–2251.
- *Mail*: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery*: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burdens could be minimized, including the use of electronic technology, without reducing the quality of the collected information.

SUPPLEMENTARY INFORMATION:

1. *Title:* Developing and Recording Costs for Utility Adjustments.

OMB Control Number: 2125–0519 (Expiration Date: October 31, 2003).

Abstract: Under 23 U.S.C. 123, the FHWA reimburses the State highway agencies when they have paid the costs of utility facilities' relocations that are required by the construction of Federal-aid highway projects. The FHWA requires the utilities to document the costs for adjusting their facilities. The utilities must have a system for recording labor, materials, supplies and equipment costs incurred when undertaking adjustments to accommodate the highway projects. This record of costs forms the basis for payment by the State highway agency to

the utility and in turn the FHWA reimburses the State for its payment to the utility. The utilities are required to maintain these records of costs for three years after final payment is received.

Respondents: 3,000 utility companies.

Frequency: On average, approximately 3,000 utility companies would have about 3 adjustments of its facilities per year on Federal-aid projects. Approximately, 9,000 reimbursable utility adjustments are made yearly by about 3,000 utility firms.

Estimated Total Annual Burden: The FHWA estimates that this collection imposes a total annual burden on the public of 180,000 hours. The average amount of time required by these firms to calculate the adjustment costs and maintain the required records is 20 hours.

FOR FURTHER INFORMATION CONTACT: Mr. Roger McClellan, (202) 366–6765, Office of Program Administration, Federal Highway Administration, Department of Transportation, 400 7th Street, SW., Washington, DC 20590–0001. Office hours are from 7:30 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

2. *Title:* Developing and Recording Costs for Railroad Adjustments.

OMB Control Number: 2125–0521 (Expiration Date: October 31, 2003).

Abstract: Under 23 U.S.C. 130, the FHWA reimburses the State highway agencies when they have paid for the cost of projects that (1) eliminate hazards at railroad/highway crossings, or (2) adjust railroad facilities to accommodate the construction of highway projects. The FHWA requires the railroad companies to document their costs incurred for adjusting their facilities. The railroad companies must have a system for recording labor, materials, supplies, and equipment costs incurred when undertaking the necessary railroad work. This record of costs forms the basis for payment by the State highway agency to the railroad company, and in turn FHWA reimburses the State for its payment to the railroad company.

Respondents: 115 railroad companies.

Frequency: Nearly 115 railroad companies are involved in an average of 10 railroad/highway projects per year.

Estimated Total Annual Burden: The FHWA estimates that the total annual burden imposed on the public by this collection is 18,400 hours. The average number of hours required to calculate the railroad adjustment costs and maintain the required records is 16 hours.

FOR FURTHER INFORMATION CONTACT: Ms. Debra Williams Chappell, (202) 366–0087, Department of Transportation, Federal Highway Administration, Office of Safety, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., Monday through Friday, except Federal holidays.

3. *Title:* Utility Use and Occupancy Agreements.

OMB Control Number: 2125–0522 (Expiration Date: October 31, 2003).

Abstract: Under 23 U.S.C. 116, the FHWA requires the State and/or local highway authorities to maintain the highway rights-of-way including the control of its use by the utilities. In controlling the utilities, use of the highway rights-of-way the State/local highway authorities are required to document the terms under which the utility is to cross or otherwise occupy the highway rights-of-way. This documentation, consisting of a use and occupancy agreement (permit), must be in writing and must be maintained in the State/local highway authority's files for a three-year retention period.

Respondents: 4, 600.

Frequency: Nearly 4,600 State/local highway authorities are each involved in an average of 15 use and occupancy agreements per year.

Estimated Total Annual Burden: The FHWA estimates that the total annual burden imposed on the public by this collection is 552,000 hours. The estimated amount of time required by the State/local highway authorities to process the permits is 8 hours.

FOR FURTHER INFORMATION CONTACT: Mr. Roger McClellan, (202) 366–6765, Office of Program Administration, Federal Highway Administration, Department of Transportation, 400 7th Street, SW., Washington, DC 20590–0001. Office hours are from 7:30 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued on: November 19, 2003.

James R. Kabel,

Chief, Management Programs and Analysis Division.

[FR Doc. 03–29391 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2003–16318]

Vehicle Weight, Fatality Risk and Crash Compatibility of Model Year 1991–99 Passenger Cars and Light Trucks; Technical Report

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for comments on technical report.

SUMMARY: This notice announces NHTSA's publication of a technical report describing relationships between a vehicle's mass and type and its rate of involvement in fatal crashes. The report's title is Vehicle Weight, Fatality Risk and Crash Compatibility of Model Year 1991–99 Passenger Cars and Light Trucks.

DATES: Comments must be received no later than March 24, 2004.

ADDRESSES:

Report: You may obtain a copy of the report free of charge by sending a self-addressed mailing label to Publications Ordering and Distribution Services (NAD–51), National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. A summary of the report is available on the Internet for viewing on line at *http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/809662.html.* The full report is available on the Internet in PDF format at *http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/pdf/809662.pdf.*

Comments: You may submit comments [identified by DOT DMS Docket Number NHTSA–2003–16318] by any of the following methods:

- *Web site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- *Hand Delivery:* Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

You may call Docket Management at 202–366–9324 and visit the Docket from 10 a.m. to 5 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Charles J. Kahane, Chief, Evaluation Division, NPO–321, Office of Planning, Evaluation and Budget, National Highway Traffic Safety Administration, Room 5208, 400 Seventh Street, SW, Washington, DC 20590. Telephone: 202–366–2560. FAX: 202–366–2559. E-mail: *ckahane@nhtsa.dot.gov.*

For information about NHTSA's evaluations of the effectiveness of existing regulations and programs: Visit the NHTSA Web site at *http://www.nhtsa.dot.gov* and click ''Regulations & Standards'' underneath ''Car Safety'' on the home page; then click ''Regulatory Evaluation'' on the ''Regulations & Standards'' page.

SUPPLEMENTARY INFORMATION: The technical report uses logistic regression analyses to calibrate crash fatality rates per billion miles traveled for model year 1991–99 passenger cars, pickup trucks, SUVs and vans during calendar years 1995–2000—by vehicle weight, vehicle type, driver age and gender, urban/rural, and other vehicle, driver and environmental factors—a cross-sectional analysis of the fatality rates of existing vehicles. The ''crash'' fatality rate for a model includes fatalities to occupants of that model, occupants of the other vehicles that model collides with, and any pedestrians. These analyses suggest that, after controlling for driver age/gender, urban/rural, annual mileage, and other factors:

- The association between vehicle weight and overall crash fatality rates in the heavier MY 1991–99 LTVs (light trucks and vans) was not significant.
- In three other groups of MY 1991–99 vehicles ''the lighter LTVs, the heavier cars, and especially the lighter cars ''fatality rates increased as weights decreased.
- MY 1996–99 pickup trucks and SUVs had, on the average, higher fatality rates than MY 1996–99 passenger cars or minivans of comparable weight.

Logistic regression analyses of fatalities per billion miles in two-vehicle collisions show that MY 1991–99 LTVs were more aggressive than MY 1991–99 cars when they struck other vehicles. The analyses show correlations between occupants' fatality risk in the struck car and the frontal height-of-force and rigidity of the striking LTV.

The technical report supersedes a 1997 NHTSA study on this topic titled *Relationship of Vehicle Weight to Fatality and Injury Risk in Model Year 1985–93 Passenger Cars and Light Trucks* (DOT HS 808 569, *http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/808569.html.*) A request for comments on that notice was published in the **Federal Register** on June 26, 1997 (62 FR 34491).

How Can I Influence NHTSA's Thinking on This Subject?

NHTSA welcomes public review of the technical report and invites reviewers to submit comments about the data and the statistical methods used in the analyses. NHTSA will submit to the Docket a response to the comments and, if appropriate, additional analyses that supplement or revise the technical report.

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the Docket number of this document (NHTSA–2003–16318) in your comments.

Your primary comments must not be more than 15 pages long (49 CFR 553.21). However, you may attach additional documents to your primary comments. There is no limit on the length of the attachments.

Please send two paper copies of your comments to Docket Management, submit them electronically, fax them, or use the Federal eRulemaking Portal. The mailing address is U.S. Department of Transportation Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. If you submit your comments electronically, log onto the Dockets Management System Web site at *http://dms.dot.gov* and click on ''Help & Information'' or ''Help/Info'' to obtain instructions. The fax number is 1–202–493–2251. To use the Federal eRulemaking Portal, go to *http://www.regulations.gov* and follow the online instructions for submitting comments.

We also request, but do not require you to send a copy to Charles J. Kahane, Chief, Evaluation Division, NPO–321, National Highway Traffic Safety Administration, Room 5208, 400 Seventh Street, SW., Washington, DC 20590 (alternatively, FAX to 202–366–2559 or e-mail to *ckahane@nhtsa.dot.gov*). He can check if your comments have been received at the Docket and he can expedite their review by NHTSA.

How Can I Be Sure That My Comments Were Received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, send three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NCC–01, National Highway Traffic Safety Administration, Room 5219, 400 Seventh Street, SW., Washington, DC 20590. Include a cover letter supplying the information specified in our confidential business information regulation (49 CFR Part 512).

In addition, send two copies from which you have deleted the claimed confidential business information to Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590, or submit them electronically.

Will the Agency Consider Late Comments?

In our response, we will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES.** To the extent possible, we will also consider comments that Docket Management receives after that date.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

How Can I Read the Comments Submitted by Other People?

You may read the comments by visiting Docket Management in person at Room PL–401, 400 Seventh Street, SW., Washington, DC from 10 a.m. to 5 p.m., Monday through Friday.

You may also see the comments on the Internet by taking the following steps:

A. Go to the Docket Management System (DMS) Web page of the Department of Transportation (*http://dms.dot.gov*).

B. On that page, click on ''search.''

C. On the next page *http://dms.dot.gov/search/* type in the four-

digit Docket number shown at the beginning of this Notice (16318). Click on ''search.''

D. On the next page, which contains Docket summary information for the Docket you selected, click on the desired comments. You may also download the comments.

Authority: 49 U.S.C. 30111, 30168; delegation of authority at 49 CFR 1.50 and 501.8.

Noble N. Bowie,

Associate Administrator for Planning, Evaluation and Budget.

[FR Doc. 03–29386 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Pipeline Safety: Self-Assessment of Pipeline Operator Public Education Programs

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice; issuance of advisory bulletin.

SUMMARY: RSPA's Office of Pipeline Safety (RSPA/OPS) is issuing this advisory bulletin to owners and operators of hazardous liquid pipelines, gas transmission pipelines, gas distribution pipeline systems and gathering pipeline systems regulated under the Federal pipeline safety regulations at 49 CFR Parts 192 and 195. In an advisory bulletin issued September 5, 2003 (68 FR 52816) RSPA/OPS noted that the Pipeline Safety Improvement Act of 2002 (PSIA) requires each owner or operator of a gas or hazardous liquid pipeline system to implement a continuous public education program on the use of one-call notification systems and other damage prevention activities, the indications of and hazards of an unintended release of product from a pipeline, the public safety steps required after a release, and how to report pipeline product releases. This advisory reminds pipeline operators that they must complete and submit self-assessments of their public education programs to RSPA/OPS for receipt no later than December 17, 2003, to meet the deadline established in the PSIA.

FOR FURTHER INFORMATION CONTACT: Juan Carlos Martinez, (202) 366–1933; or by e-mail, *juan.martinez@rspa.dot.gov.* This document can be viewed at the OPS home page at *http://ops.dot.gov.*

I. Advisory Bulletin (ADB–03–08)

To: Owners and Operators of Hazardous Liquid, Gas Transmission, Gas Distribution, and Gathering Pipeline Systems.

Subject: Self-Assessment of Pipeline Operator Public Education Programs.

Purpose: To remind owners and operators of gas and hazardous liquid pipeline systems of the requirements for effective public education programs and of the requirement to complete and submit self-assessments of those programs to RSPA/OPS no later than December 17, 2003.

Advisory: The Pipeline Safety Improvement Act of 2002 (PSIA) requires that each owner or operator of a gas or hazardous liquid pipeline system must implement a continuous public education program. The PSIA requires that by December 17, 2003, each owner or operator must review its existing public education program for effectiveness and modify the program as necessary by that date.

Although submission of the public education program is not required at this time, RSPA/OPS advises each operator to document their compliance with the PSIA by completing a formal self-assessment of its public education program and by comparing this program against the guidelines established in the recently-issued, industry consensus standard, API RP 1162, *Public Awareness Programs for Pipeline Operators,* and has developed a self-assessment form for that purpose. The self-assessment forms can be completed and submitted online at *http://primis.rspa.dot.gov/edu/rp1162.htm.* Self-assessment forms may also be downloaded from the same Web address and submitted to RSPA/OPS via E-mail, fax, or other delivery method.

Operators must submit their self-assessments to RSPA/OPS for receipt no later than December 17, 2003:

- Completed electronic forms may be submitted to RSPA/OPS as E-mail attachments at: *RP1162SA@rspa.dot.gov.*
- Hard-copy forms can be completed and sent to RSPA/OPS via fax, U.S. mail, or other delivery methods, but must be received by RSPA/OPS no later than December 17, 2003. Delivery of documents should be confirmed. Forms submitted by mail or other delivery methods should be sent to: Attn: Juan Carlos Martinez, Room 7128, U.S. Department of Transportation, Research and Special Programs Administration, Office of Pipeline Safety, 400 7th Street, SW., Washington, DC 20590.

Faxes should be sent to: Juan Carlos Martinez, fax # 202–366–4566. (Operators may call 202–366–1933 for confirmation of fax receipt).

Operators are encouraged to also provide copies of their self-assessments to the appropriate state pipeline safety agencies.

II. Background

The Federal pipeline safety regulations at 49 CFR 192 and 49 CFR 195 require operators of gas and hazardous liquid pipelines to establish continuing education programs to enable customers, the public, appropriate government organizations, and persons engaged in excavation activities to recognize a pipeline emergency for the purpose of reporting to the operator or the appropriate public officials. The regulations also require operators to establish and maintain liaison with appropriate fire, police, and other public officials and to develop and implement written programs to prevent pipeline damage from excavation activities.

The PSIA requires that each owner or operator of a gas or hazardous liquid pipeline system implement a continuous public education program on the use of one-call notification systems prior to excavation and other damage prevention activities, possible hazards associated with unintended releases from the pipeline system, physical indications that such a release may have occurred, what steps should be taken for public safety in the event of a pipeline release, and how to report such an event.

The PSIA requires that by December 17, 2003, each owner or operator of a gas or hazardous liquid pipeline system must review its existing public education program for effectiveness and modify the program as necessary. The completed program must include activities to advise affected municipalities, school districts, businesses, and residents of pipeline system locations. The completed program must be submitted upon request to the Secretary of Transportation or, in the case of an intrastate pipeline system operator, to the appropriate State agency, and shall be periodically reviewed by the Secretary or, in the case of an intrastate pipeline system operator, the appropriate State agency.

The PSIA also provides that the Secretary of Transportation may develop material for use in the program and issue standards prescribing the elements of an effective public education program.

In recognition of the importance of effective public education programs and outstanding recommendations from the

National Transportation Safety Board (NTSB), and anticipated legislative action in this regard, a pipeline industry Task Force has developed a consensus standard establishing guidelines for pipeline operators on development, implementation, and evaluation of public awareness programs for operating pipeline systems, API Recommended Practice (RP) 1162, *Public Awareness Programs for Pipeline Operators.* The Task Force included representatives from gas and hazardous liquid pipeline companies, local gas distribution companies, gathering pipeline system operators, and pipeline industry trade associations. Additional comments were solicited from local public officials, the public, and other interested parties. Representatives from RSPA/OPS and the National Association of Pipeline Safety Representatives (NAPSR) observed and provided comments on the development of the standard.

API RP 1162 was balloted and approved following the guidelines of both the American Petroleum Institute (API) and the American National Standards Institute (ANSI). After revisions to reflect comments, it was published as a national consensus standard in September 2003.

RSPA/OPS considers that ''public education programs,'' as used in the PSIA, and ''public awareness programs,'' as used in API RP 1162, are the same concept. The level of public education and awareness regarding pipeline operations and safety can be improved only through education and communication programs that are demonstrated to be effective. Therefore, RSPA/OPS plans to initiate a new rulemaking, setting minimum requirements for pipeline operators to develop, implement, and manage public education programs. RSPA/OPS will incorporate by reference into the new rule, all or portions of the guidance provided in API RP 1162.

RSPA/OPS has evaluated the PSIA requirements that operators review and modify their public education programs and submit their completed programs upon request to RSPA/OPS or the appropriate state pipeline safety agency. We have determined that the intent of the requirements can be met and pipeline safety can be best served in the short-term by having pipeline operators document their compliance with the PSIA by completing a formal self-assessment of their public education programs and evaluating these programs against the guidelines provided in API RP 1162. Therefore, RSPA/OPS has developed a self-assessment form that will help operators identify gaps in their public education programs and improvements needed to align those programs with the requirements of API RP 1162.

Operators must complete and submit self-assessments of their public education programs to RSPA/OPS no later than December 17, 2003, to meet the deadline established in the PSIA. Operators are encouraged to complete and submit the self-assessment online. Operators are encouraged to also provide copies of their self-assessments to the appropriate state pipeline safety agencies. The self-assessment forms can be found online at *http://primis.rspa.dot.gov/edu/rp1162.htm.*

Alternatively, a Microsoft Word form for electronic completion of the self-assessment form may be downloaded and completed offline. Or, a file for hard-copy printing and completion of the self-assessment may be downloaded and completed offline. Self-assessment forms downloaded and completed offline must be submitted to RSPA/OPS for receipt no later than December 17, 2003.

Operators will be required in the future to submit their public education program plans to the RSPA/OPS for review. Time frames for submission will be determined by the RSPA/OPS and operators will be notified. These plans should identify how the operators will address gaps and make improvements in their public education programs. Operator public education programs will be subject to inspection by RSPA/OPS and the appropriate state pipeline safety agency.

Issued in Washington, DC on November 19, 2003.

James K. O'Steen,

Deputy Associate Administrator for Pipeline Safety.

[FR Doc. 03–29392 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–03–15733; Notice 1]

Pipeline Safety: Request for Waiver; Portland Natural Gas Transmission System

AGENCY: Research and Special Programs Administration (RSPA); U.S. Department of Transportation (DOT).

ACTION: Notice of intent to consider waiver request.

SUMMARY: PNGTS Operating Co., LLC, operator of the Portland Natural Gas Transmission System (PNGTS), requested a waiver of compliance with the regulatory requirements at 49 CFR 192.611 to confirm or revise the maximum allowable operating pressure of its natural gas pipeline after Class location changes occurred in areas associated with two sections of the pipeline totaling 595 feet in length in West Stewartstown, New Hampshire.

DATES: Persons interested in submitting written comments on the waiver request described in this notice must do so by December 26, 2003. Late filed comments will be considered so far as practicable.

ADDRESSES: You may submit written comments by mailing or delivering an original and two copies to the Dockets Facility, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. The Dockets Facility is open from 10 a.m. to 5 p.m., Monday through Friday, except on Federal holidays when the facility is closed. Alternatively, you may submit written comments to the docket electronically at the following web address: *http://dms.dot.gov.*

All written comments should identify the docket and notice numbers stated in the heading of this notice. Anyone who wants confirmation of mailed comments must include a self-addressed stamped postcard. To file written comments electronically, after logging on to *http://dms.dot.gov,* click on ''Comment/Submissions.'' You can also read comments and other material in the docket. General information about the Federal pipeline safety program is available at *http://ops.dot.gov.*

FOR FURTHER INFORMATION CONTACT: James Reynolds by phone at 202–366–2786, by fax at 202–366–4566, by mail at DOT/RSPA, Office of Pipeline Safety, 400 7th Street, SW., Washington, DC 20590, or by e-mail at *james.reynolds@rspa.dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

On March 19, 2003, PNGTS Operating Co., LLC, operator of the Portland Natural Gas Transmission System, submitted a request seeking a waiver of compliance with the regulatory requirements at 49 CFR 192.611 to confirm or revise the maximum allowable operating pressure of its natural gas pipeline after Class location changes occurred in areas associated with two sections of the pipeline totaling 595 feet in length in West Stewartstown, New Hampshire (the ''waiver segments''). In lieu of complying with the § 192.611 requirements, PNGTS proposes to conduct certain alternative risk control activities on the pipeline that exceed the

minimum requirements of Part 192. These activities include performing internal inspections at six-year intervals on the entire 24-inch mainline, annual close-interval cathodic protection surveys on the waiver segments, a direct current voltage gradient survey on the waiver segments, direct assessment and repair of any anomalies identified by the inspections and electrical surveys, and more frequent ground and aerial surveillance patrols and instrumented leak surveys on the pipeline.

The Federal pipeline safety regulations categorize the geographic areas along natural gas pipelines according to the population densities in the vicinity of pipeline segments. There are four classification levels with areas having the lowest population density designated as Class 1, while areas with the highest population density are designated as Class 4. The regulations impose more stringent pipeline design and operation requirements as the Class location increases. Operators are required to periodically monitor these geographic areas and when a Class location changes to a higher Class, operators are required to confirm or revise the maximum pressure at which the pipeline is allowed to operate within a specified period of time. In the absence of a qualifying pressure test, this generally means that the operator must reduce the operating pressure or replace portions of the pipe with higher strength pipe.

The PNGTS system was constructed in 1998 and 1999 and includes a 24-inch diameter section 143.8 miles in length (the ''mainline''). The established maximum allowable operating pressure (MAOP) for the pipeline is 1440 psig. Pursuant to 49 CFR 192.609, PNGTS completed a Class location change study in February 2002. Due to construction activity, several areas along the mainline that were previously categorized as Class 1 locations were re-categorized as Class 3 locations. Based on the specifications of the pipe used in two of these areas, PNGTS determined that the MAOP confirmation criteria referenced in Section 192.611 were not met. The first area is located at Mile Post (MP) 2.55 and consists of 0.343-inch wall thickness, API 5L, Grade X–70 steel pipe (''Waiver Segment 1''). The second area is located at MP 3.30 and consists of pipe of the same material specifications (''Waiver Segment 2'').

Waiver Request

PNGTS requested a waiver of compliance with the requirements at 49 CFR 192.611 to confirm or revise the pipeline's MAOP based on the following reasons:

1. The size of the geographic areas associated with the waiver segments is minimal. The area associated Waiver Segment 1 is only 440 feet in length. The area associated with Waiver Segment 2 is only 155 feet in length.
2. The construction activity that resulted in the Class location change was minimal and is not expected to expand further. The construction consisted of several mobile homes and two multi-tenant structures containing four units each on the perimeter of a tree farm. The multi-tenant units cross the 660-foot Class boundary by distances of only 0.7 to 22.8 feet. In addition, the mobile home park is now at capacity and is unlikely to expand due to the sloping terrain in the area and property ownership constraints.
3. The pipeline was constructed as recently as 1999. Having been in service for only four years, the pipeline is nearly new and in excellent condition. No deficiencies were identified in a baseline close-interval cathodic protection survey conducted in 2000, and no anomalies were identified on or near the waiver segments in a baseline internal inspection conducted in 2002 with both magnetic flux leakage and geometry in-line inspection tools.
4. The pipeline's operating history has been trouble free. No leaks have been identified anywhere on the PNGTS pipeline since it was put into service.
5. The pipeline is equipped with a satellite-linked supervisory control and data acquisition (SCADA) system, including pressure transmitters and mainline valves equipped with remote control actuators enabling PNGTS to identify and promptly mitigate any releases in the vicinity of the waiver segments should they occur.
6. The proposed alternative risk control activities would provide a margin of safety and environmental protection that equals or exceeds that of the measures required under § 192.611 in the absence of a waiver.
7. Granting the waiver would avoid the delivery interruptions and costs associated with excavating and replacing the pipe in the specified areas.
8. The proposed alternative risk control activities would benefit virtually the entire pipeline system, as opposed to only the 595 foot portion associated with the Class location change.

Proposed Alternative Risk Control Activities

PNGTS proposes to perform the following risk control activities to provide a comparable margin of safety in lieu of the requirements to confirm or revise the pipeline's MAOP under § 192.611:

1. The performance of internal inspections on the entire 143.8 miles of 24-inch pipeline in 2008 and subsequent internal inspections at intervals not to exceed six years. The internal inspections would be performed using both magnetic flux leakage and geometry in-line inspection tools capable of detecting metal loss, dent-like deformations, and other integrity threats;
2. The performance of annual close-interval cathodic protection surveys on the Class 3 sections of the pipeline extending from MP 2.56 to MP 2.90 and from MP 3.30 to MP 3.39, as well as an additional 1000 feet of the Class 1 or 2 pipe on both the upstream and downstream ends of these sections;
3. The performance of a direct current voltage gradient survey on the Class 3 sections of the pipeline extending from MP 2.56 to MP 2.90 and from MP 3.30 to MP 3.39, as well as an additional 1000 feet of the Class 1 or 2 pipe on both the upstream and downstream ends of these sections;
4. The performance of direct assessment and appropriate repairs or other remedial measures for all anomalies or other indications of corrosion identified by the internal inspections in Item 1, or the electrical surveys in Items 2 and 3, regardless of the size or depth of the anomaly;
5. The performance of weekly aerial patrols (weather permitting) and quarterly ground road crossing patrols over the entire 143.8 miles of 24-inch pipeline. The ground road crossing patrols would include leak surveys on all road crossings located in the proposed waiver segments and corresponding Class 3 portions of the pipeline using appropriate leak detection equipment;
6. The performance of semiannual leak surveys on the portion of the pipeline extending from MP 0.0 to MP 6.80 using appropriate leak detection equipment.

RSPA is considering granting the requested waiver because of the minimal distance by which the structures cross the Class boundary, the age and condition of the pipeline, and the additional inspection and monitoring activities stipulated above on which the waiver would be conditioned. After RSPA has considered the comments it receives in response to this Notice, it will make a final determination granting or denying the waiver as proposed, or with modifications, and what additional terms and conditions it may be subject to. If the waiver is granted, and RSPA subsequently determines that the effect of the waiver is inconsistent with

pipeline safety, RSPA may revoke the waiver at its sole discretion. This Notice is RSPA's only request for public comment before making its final decision in this matter.

Issued in Washington, DC on November 19, 2003.

Richard D. Huriaux,

Manager, Regulations, Office of Pipeline Safety.

[FR Doc. 03–29393 Filed 11–24–03; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 18, 2003.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW, Washington, DC 20220.

DATES: Written comments should be received on or before December 26, 2003 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1851.

Regulation Project Number: REG–124312–02 Final.

Type of Review: Extension.

Title: Golden Parachute Payments.

Description: These regulations deny a deduction for excess parachute payments. A parachute payment is a payment in the nature of a disqualified individual that is contingent on a change in ownership or control of a corporation. Certain payments, including payments from a small corporation, are exempt from the definition of parachute payment if certain requirements are met (such as shareholder approval and disclosure requirements).

Respondents: Business or other for-profit.

Estimated Number of Respondents: 800.

Estimated Burden Hours Per Respondent: 15 hours.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 12,000 hours.

Clearance Officer: R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW, Washington, DC 20224.

Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Mary A. Able,

Treasury PRA Clearance Officer.

[FR Doc. 03–29396 Filed 11–24–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 18, 2003.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue NW., Washington, DC 20220.

DATES: Written comments should be received on or before December 26, 2003 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0390.

Form Number: IRS Form 5306.

Type of Review: Extension.

Title: Application for Approval of Prototype or Employer Sponsored Individual Retirement Account.

Description: This application is used by employers who want to establish an individual retirement account trust to be used by their employees. The application is also used by persons who want to establish approved prototype individual retirement accounts or annuities. The data collected is used to determine if plans may be approved.

Respondents: Business or other for-profit.

Estimated Number of Respondents/Recordkeeping: 600.

Estimated Burden Hours Respondent/Recordkeeper:

Recordkeeping—11 hr., 43 min.
Learning about the law or the form—35 min.
Preparing and sending the form to the IRS—49 min.

Frequency of Response: On occasion.

Estimated Total Reporting/Recordkeeping Burden: 7,878 hours.

OMB Number: 1545–0790.

Form Number: IRS Form 8082.

Type of Review: Extension.

Title: Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR).

Description: Internal Revenue code (IRC) sections 6222 and 6227 require partners to notify IRS by filing Form 8082 when they (1) treat partnership items inconsistent with the partnership's treatment (6222), and (2) change previously reported partnership items (6227). Sections 6224 and 860F extend this requirement to shareholders of S corporations and residuals of REMICs. Also, section 6241 and 6034A(c) extend this requirement to partners in electing large partnerships and beneficiaries of estates and trusts.

Respondents: Business or other for-profit, Individuals or households.

Estimated Number of Respondents/Recordkeepers: 10,700.

Estimated Burden Hours Respondent/Recordkeeper:

Recordkeeping—4 hr., 18 min.
Learning about the law or the form—1 hr., 23 min.
Preparing and sending the form to the IRS—1 hr., 31 min.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 76,557 hours.

OMB Number: 1545–1034.

Form Number: IRS Form 8582–CR.

Type of Review: Extension.

Title: Passive Activity Credit Limitations.

Description: Under section 469, credits from passive activities, to the extent they do not exceed the tax attributable to net passive income, are not allowed. Form 8582–CR is used to figure the passive activity credit allowed and the amount of credit to be reported on the tax return.

Respondents: Individuals or households, Business or other for-profit.

Estimated Number of Respondents/Recordkeepers: 900,000.

Estimated Burden Hours Respondent/Recordkeeper:

Recordkeeping—2 hr., 4 min.
Learning about the law or the form—8 hr., 7 min.
Preparing the form—4 hr., 38 min.
Copying, assembling, and sending the form to the IRS—1 hr., 9 min.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 7,152,300 hours.

OMB Number: 1545–1096.

Form Number: IRS Form 9117.

Type of Review: Extension.

Title: Excise Tax Program Order Blank for Forms and Publications.

Description: Form 9117 allows taxpayers who must file Form 720 returns a systemic way to order additional tax forms and informational publications.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 15,000.

Estimated Burden Hours Respondent: 2 minutes.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 500 hours.

OMB Number: 1545–1143.

Form Number: IRS Form 706–GS(D–1).

Type of Review: Extension.

Title: Notification of Distribution from a Generation-Skipping Trust.

Description: Form 706–GS(D–1) is used by trustees to notify the IRS and distributees of information needed by distributees to compute the Federal GST tax imposed by Internal Revenue Code (IRC) section 2601. IRS uses the information to enforce this tax and to verify that the tax has been properly computed.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 80,000.

Estimated Burden Hours Respondent/Recordkeepers:

Recordkeeping—1 hr., 33 min.
Learning about the law or the form—1 hr., 46 min.
Preparing the form—42 min.
Copying, assembling, and sending the form to the IRS—20 min.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 348,800 hours.

OMB Number: 1545–1144.

Form Number: IRS Form 706–GS(D).

Type of Review: Extension.

Title: Generation-Skipping Transfer Tax Return for Distributions.

Description: Form 706–GS(D) is used by the distributees to compute and report the Federal GST tax imposed by Internal Revenue Code (IRC) section 2601. IRS uses the information to enforce this tax and to verify that the tax has been properly computed.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 1,000.

Estimated Burden Hours Respondent/Recordkeeper:

Recordkeeping—6 min.
Learning about the law or the form—13 min.
Preparing the form—24 min.
Copying, assembling, and sending the form to the IRS—20 min.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 1,080 hours.

OMB Number: 1545–1440.

Regulation Project Number: INTL–64–93 Final.

Type of Review: Extension.

Title: Conduit Arrangements Regulations.

Description: This document contains regulations relating to when the district director may recharacterize a financing arrangement as a conduit arrangement. Such recharacterization will affect the amount of withholding tax due on financing transactions that are part of the financing arrangement. These regulations will affect withholding agents and foreign investors.

Respondents: Business or other for-profit.

Estimated Number of Recordkeepers: 1,000.

Estimated Burden Hours Respondent: 10 hours.

Estimated Total Recordkeeping Burden: 10,000 hours.

OMB Number: 1545–1447.

Regulation Project Number: CO–46–94 Final.

Type of Review: Extension.

Title: Losses on Small Business Stock.

Description: Records are required by the Service to verify that the taxpayer is entitled to a section 1244 loss. The records will be used to determine whether the stock qualifies as section 1244 stock.

Respondents: Business or other for-profit, Individuals or households.

Estimated Number of Recordkeepers: 10,000.

Estimated Burden Hours Recordkeeper: 12 minutes.

Estimated Total Recordkeeping Burden: 2,000 hours.

OMB Number: 1545–1550.

Notice Number: Notice 97–45.

Type of Review: Extension.

Title: Highly Compensated Employee Definition.

Description: This notice provides guidance on the definition of a highly compensated employee within the meaning of section 414(q) of the Internal Revenue Code as simplified by section 1431 of the Small Business Job Protection Act of 1996, including an employer's option to make a top-paid group election under section 414(q)(1)(B)(ii).

Respondents: Business or other for-profit, Not-for-profit institutions.

Estimated Number of Recordkeepers: 218,683.

Estimated Burden Hours Recordkeeper: 18 minutes.

Estimated Total Recordkeeping Burden: 65,605 hours.

OMB Number: 1545–1551.

Revenue Procedure Numbers: Revenue Procedure 97–36, Revenue Procedure 97–38, Revenue Procedure 897–39, and Revenue Procedure 2002–9.

Type of Review: Extension.

Title: Changes in Methods of Accounting.

Description: The information collected in the four revenue procedures is required in order for the Commission to determine whether the taxpayer properly is requesting to change its method of accounting and the terms and conditions of the change.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions, Farms.

Estimated Number of Respondents/Recordkeepers: 23,545.

Estimated Burden Hours Respondent/Recordkeeper: 9 hours, 27 minutes.

Frequency of Response: On occasion, Annually.

Estimated Total Reporting/Recordkeeping Burden: 222,454 hours.

Clearance Officer: R. Joseph Durbala, (202) 622–3634. Internal Revenue Service, Room 6411, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316. Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 03–29397 Filed 11–24–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network; Privacy Act of 1974; Systems of Records

AGENCY: Financial Crimes Enforcement Network, Treasury.

ACTION: Notice of alterations of three Privacy Act systems of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Financial Crimes Enforcement Network (FinCEN), Department of the Treasury (Treasury), gives notice of proposed alterations to three existing systems of records entitled ''Treasury/DO .200—FinCEN Data Base—Treasury/DO,'' ''Treasury/DO .212—Suspicious Activity Reporting System—Treasury/DO,'' and ''Treasury/DO. 213—Bank

Secrecy Act Reports System—Treasury/DO''. The systems of records were last published in their entirety on February 19, 2002, at 67 FR 7492, 67 FR 7496, and 67 FR 7498, respectively.

DATES: Comments must be received no later than December 26, 2003. The revised systems of records will be effective as of January 5, 2004, unless comments are received that result in a contrary determination and notice is published to that effect.

ADDRESSES: Written comments should be submitted to: Office of Chief Counsel, FinCEN, P.O. Box 39, Vienna, VA 22183–0039, Attention: Revisions to PA Systems of Records—Comments. Comments also may be submitted by electronic mail to the following Internet address: *regcomments@fincen.treas.gov,* with the above caption in the body of the text.

Inspection of comments. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN Reading Room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400.

FOR FURTHER INFORMATION CONTACT: Christine Del Toro, Attorney-Advisor, Office of Chief Counsel, FinCEN, at (703) 905–3590.

SUPPLEMENTARY INFORMATION: The systems of records contain information collected under the authority of the Bank Secrecy Act, the popular name for Titles I and II of Public Law 91–508, as amended, and codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5331. The regulations implementing the authority contained in the Bank Secrecy Act are found at 31 CFR part 103. The authority to administer 31 CFR part 103 has been delegated to FinCEN.

One FinCEN system of records is being revised with the addition of a new routine use to reflect that limited information relating to Money Services Businesses (''MSBs'') that have registered with FinCEN pursuant to 31 CFR 103.41 may be made available to the public. On August 20, 1999, FinCEN published a final rule requiring money services businesses to register with the Department of the Treasury on or before the later of December 31, 2001, and the end of the 180-day period beginning on the day following the date the business is established. *See* 64 FR 45438–45453 and 31 CFR 103.41. Money services businesses that are required to register with FinCEN include money transmitters, issuers, sellers, and redeemers of money orders and traveler's checks, check cashers, and currency dealers and exchangers. *See* § 103.11(uu). To register, MSBs must complete and submit Treasury Department form TD F 90–22.55, ''Registration of Money Services Business.'' Agents of an MSB are not required to register, but are required to be listed on the agent list maintained by the MSB whose products and services the agent offers. *See* 31 CFR 103.41(a)(2).

The Secretary of the Treasury was granted statutory authority to require MSBs to register by section 408 of the Money Laundering Suppression Act of 1994 (''MLSA''), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Public Law 103–325 (September 23, 1994). The Conference Report accompanying passage of the MLSA provides that:

> [t]he Conferees recognize that the contents of both the registration of a money transmitting business and the agent list maintained by the business will include privileged and confidential trade secrets, commercial, and financial information * * *. The Conferees also recognize that some of the data to be contained in the registrations will have legitimate uses outside of law enforcement. It is the Conferees' intent that the Secretary make such information available to the public in a manner which balances the need to protect confidential business information and the need of the public to have access to information about businesses which serve it. Accordingly, the Conferees expect the Secretary to make such information available to the public in as much detail as possible without revealing confidential information. Conference Report 103–652 Aug. 2, 1994 at 193.

Thus, the legislative history of the MLSA indicates that at least part of the information Treasury collects through the MSB registration process was intended by Congress to be made available to the public by Treasury. FinCEN has determined that making certain information about MSB registrants publicly available will be useful to consumers seeking to ensure that the MSBs with which they do business are in compliance with federal regulations, financial institutions charged with implementing anti-money laundering programs, and the law enforcement community.

For the reasons set forth above, the routine uses for the Bank Secrecy Act System of records are being amended to reflect that certain information contained in forms TD F 90–22.55, ''Registration of Money Services Business'' submitted by MSBs registering with FinCEN may be made available to the public in a manner that protects trade secrets, and privileged and confidential commercial or financial information.

In addition, the FinCEN systems of records are being revised to reflect certain changes in the law made by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107–56 (October 26, 2001). Prior to enactment of the USA PATRIOT Act, FinCEN was a Departmental Office of the Department of the Treasury. As a result, the name and number of each of FinCEN's Privacy Act system of records corresponded with the names and numbers given to systems of records maintained by Treasury's Departmental Offices. However, section 361 of the USA Patriot Act created a new section 310 in Subchapter I of chapter 3 of Title 31, United States Code, making FinCEN a Treasury Bureau. See Treasury Order 180–01, dated September 26, 2002. Therefore, the system numbers and names of FinCEN's Privacy Act systems of records are being revised to reflect FinCEN's status as a Treasury Bureau. FinCEN proposes to alter the system numbers and names of its Privacy Act systems of records as follows: ''Treasury/FinCEN .001—FinCEN Data Base—Treasury/FinCEN,'' ''Treasury/FinCEN .002—Suspicious Activity Reporting System—Treasury/FinCEN,'' and ''Treasury/FinCEN .003—Bank Secrecy Act Reports System—Treasury/FinCEN.''

Because information in the systems of records may be retrieved by personal identifier, the Privacy Act of 1974 requires the Treasury to give general notice and seek public comments when making substantive changes to these Systems. The notices were last published in their entirety on February 19, 2002, beginning at 67 FR 7492. Treasury/DO .212 and Treasury/DO .213 were subsequently amended on May 24, 2002, at 67 FR 36669.

The altered system of records report, as required by 5 U.S.C. 552a(r), has been submitted to the Committee on Government Reform in the House of Representatives, the Committee on Governmental Affairs in the Senate, and Office of Management and Budget, pursuant to Appendix I to OMB Circular A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' November 30, 2000.

For the reasons set forth above, FinCEN proposes to alter the FinCEN Data Base, the Suspicious Activity Reporting System, and the Bank Secrecy Act Reports System as follows:

Treasury/DO .200

Description of change: Revise the system number to read: ''Treasury/FinCEN .001.''

SYSTEM NAME:

Description of change: Revise the system name to read: ''FinCEN Data Base—Treasury/FinCEN.''

* * * * *

Treasury/DO .212

Description of change: Revise the system number to read: ''Treasury/FinCEN .002.''

SYSTEM NAME:

Description of change: Revise the system name to read: ''Suspicious Activity Report System (the ''SAR System'')—Treasury/FinCEN.''

* * * * *

Treasury/DO .213

Description of change: Revise the system number to read: ''Treasury/FinCEN .003.''

SYSTEM NAME:

Description of change: Revise the system name to read: ''Bank Secrecy Act Reports System—Treasury/FinCEN.''

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Description of change: Add routine use (10) to read as follows:

(10) ''Disclose to the public information about Money Services Businesses that have registered with FinCEN pursuant to 31 CFR 103.41, other than information that consists of trade secrets, or that is privileged and confidential commercial or financial information.''

* * * * *

Dated: November 18, 2003.

Teresa Mullett Ressel,

Assistant Secretary for Management and Chief Financial Officer.

[FR Doc. 03–29352 Filed 11–24–03; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Publication of the Tier 2 Tax Rates

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice.

SUMMARY: Publication of the tier 2 tax rates for calendar year 2004 as required by section 3241(d) of the Internal Revenue Code (26 U.S.C. 3241). Tier 2 taxes on railroad employees, employers, and employee representatives (a group unique to the railroad industry) fund a private pension benefit of the railroad retirement system.

DATES: The tier 2 tax rates for calendar year 2004 apply to compensation paid in calendar year 2004.

FOR FURTHER INFORMATION CONTACT: Margaret A. Owens, CC:TEGE:EOEG:ET1, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, Telephone Number (202) 622–6040 (not a toll-free number).

Tier 2 Tax Rates: The tier 2 tax rate for 2004 under section 3201(b) on employees is 4.9 percent of compensation. The tier 2 tax rate for 2004 under section 3221(b) on employers is 13.1 percent of compensation. The tier 2 tax rate for 2004 under section 3211(b) on employee representatives is 13.1 percent of compensation.

Dated: November 18, 2003.

Nancy Marks,

Deputy Division Counsel/Deputy Associate Chief Counsel (Tax Exempt and Government Entities).

[FR Doc. 03–29443 Filed 11–24–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Amended notice.

SUMMARY: This is to amend the notice that was published in the **Federal Register** on Monday, November 17, 2003, indicating an Area 4 Taxpayer Advocacy Panel meeting. The meeting is actually an open meeting of the E-Filing Issue Committee.

DATES: The meeting will be held Thursday, December 11, 2003, from 3 to 4 p.m., Eastern Standard Time.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel, E-Filing Issue Committee will be held Thursday, December 11, 2003, from 3 to 4 p.m., Eastern standard time via a telephone conference call. You can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop 1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221. Public comments will also be welcome during the meeting. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for dial-in information.

The agenda will include the following: Various IRS issues.

Dated: November 18, 2003.

Tersheia Carter,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 03–29442 Filed 11–24–03; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Tuesday,
November 25, 2003

Part II

Environmental Protection Agency

40 CFR Parts 148, 261, 268, 271, and 302

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Dyes and/or Pigments Production Wastes; Land Disposal Restrictions for Newly Identified Wastes; CERCLA Hazardous Substance Designation and Reportable Quantities; Designation of Five Chemicals as Appendix VIII Constituents; Addition of Five Chemicals to the Treatment Standards of F039 and the Universal Treatment Standards; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 148, 261, 268, 271, and 302

[RCRA–2003–0001; SWH–FRL–7587–6]

RIN 2050–AD80

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Dyes and/or Pigments Production Wastes; Land Disposal Restrictions for Newly Identified Wastes; CERCLA Hazardous Substance Designation and Reportable Quantities; Designation of Five Chemicals as Appendix VIII Constituents; Addition of Five Chemicals to the Treatment Standards of F039 and the Universal Treatment Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to list nonwastewaters from the production of certain dyes, pigments, and FD&C colorants as hazardous wastes under the Resource Conservation and Recovery Act (RCRA), which directs EPA to determine whether these wastes present a hazard to human health or the environment. EPA is proposing a mass loading-based approach for these wastes. Under this approach, these wastes are hazardous if they contain any of the constituents of concern at annual mass loading levels that meet or exceed regulatory levels. If generators determine that their wastes are below regulatory levels for all constituents of concern, then their wastes are nonhazardous. If their wastes meet or exceed the regulatory levels for any of eight specific constituents of concern, the wastes must be managed as listed hazardous wastes. However, even if the wastes meet or exceed the regulatory levels, the wastes would not be hazardous if two conditions are met: The wastes do not meet or exceed annual mass loadings for toluene-2,4-diamine, and the wastes are disposed in a Subtitle D landfill cell subject to the municipal solid waste landfill design criteria or in a Subtitle C landfill cell subject to applicable design criteria. When mass loadings meet or exceed the specified annual levels, the generator may still manage as nonhazardous all wastes generated up to the loading limit.

This proposal would also add the toxic constituents o-anisidine, p-cresidine, 1,2-phenylenediamine, 1,3-phenylenediamine, and 2,4-dimethylaniline associated with these identified wastes to the list of constituents that serves as the basis for classifying wastes as hazardous. In addition, this proposal would establish treatment standards for the wastes.

If these dyes and/or pigments production wastes are listed as hazardous waste, then they will be subject to stringent management and treatment standards under Subtitle C of RCRA.

Additionally, this action proposes to designate these wastes as hazardous substances subject to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The proposal would not adjust the one pound statutory reportable quantity (RQ) for K181 waste, nor would EPA develop a ''reference RQ'' for the new constituents identified for K181.

Other actions proposed in this notice would add o-anisidine, p-cresidine, 1,3-phenylenediamine, toluene-2,4-diamine, and 2,4-dimethylaniline to the treatment standards applicable to multisource leachate and also to add these chemicals to the Universal Treatment Standards. As a result, a single waste code would continue to be applicable to multisource landfill leachates and residues of characteristic wastes would require treatment when any of these chemicals are present above the proposed land disposal treatment standards.

DATES: EPA will accept public comments on this proposed rule until February 23, 2004. Comments postmarked after this date will be marked ''late'' and may not be considered. Any person may request a public hearing on this proposal by filing a request with Mr. Robert Dellinger, whose address appears below, by December 9, 2003. Consult the sources of information in **FOR FURTHER INFORMATION CONTACT** for the time and location of the hearing, if such hearing is requested.

ADDRESSES: Comments may be submitted by mail to: OSWER Docket, Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. RCRA–2003–0001. Comments may also be submitted electronically, by facsimile, or through hand delivery/courier. Follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section.

If you would like to file a request for a public hearing on this proposal, please submit your request to Mr. Robert Dellinger at: Office of Solid Waste, Hazardous Waste Identification Division (5304W), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (703) 308–7271 or via email at *dellinger.robert@epa.gov*.

See the beginning of the **SUPPLEMENTARY INFORMATION** section for information on how to submit your comments as well as view public comments and supporting materials.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Call Center at (800) 424–9346 or TDD (800) 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call (703) 412–9810 or TDD (703) 412–3323 or review our Web site at *http://www.epa.gov/epaoswer/hazwaste/id/dyes/index.htm*. For information on specific aspects of the rule, contact Ms. Gwen DiPietro of the Office of Solid Waste (5304W), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (E-mail address and telephone number: *dipietro.gwen@epa.gov*, (703) 308–8285). For technical information on the CERCLA aspects of this rule, contact Ms. Lynn Beasley, Office of Emergency Prevention, Preparedness, and Response, Emergency Response Center (5204G), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (E-mail address and telephone number: *beasley.lynn@epa.gov*, (703) 603–9086). For information on the procedures for submitting CBI data, contact Ms. Regina Magbie (5305W), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (E-mail address and telephone number: *magbie.regina@epa.gov*, (703) 308–7909).

SUPPLEMENTARY INFORMATION:

Who Potentially Will Be Affected by This Proposed Rule?

If promulgated as proposed, this regulation could directly impact businesses that generate and manage certain organic dyes and/or pigments production wastes. In addition, manufacturers that do not make dyes or pigments, but that generate wastes containing selected constituents of concern, may be indirectly impacted. This is because we are adding new treatment standards for eight chemicals, and we are adding five new constituents to the list of hazardous constituents on appendix VIII of part 261. Thus, these actions may result in indirect impacts on these manufacturers. In addition, landfill owners/operators who previously accepted these wastes may be indirectly impacted. This action may also affect entities that need to respond

to releases of these wastes as CERCLA hazardous substances. Impacts on potentially affected entities, direct and indirect, are summarized in section IX of this Preamble. The economics background document, ''Economic Assessment for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants,'' presents a comprehensive analysis of all potentially impacted entities. This document is available in the docket established in support of today's proposed rule. A summary of potentially affected businesses is provided in the table below.

Our aim in the table below is to provide a guide for readers regarding entities likely to be directly regulated, or indirectly affected by this action. This action, however, may affect other entities not listed in the table. To determine whether your facility is regulated or affected by this action, you should examine 40 CFR parts 260 and 261 carefully, along with the proposed regulatory language amending RCRA. This language is found at the end of this **Federal Register** notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section entitled **FOR FURTHER INFORMATION CONTACT**.

SUMMARY OF FACILITIES POTENTIALLY AFFECTED BY EPA'S 2003 DYES AND/OR PIGMENTS PRODUCTION WASTE LISTING PROPOSAL

SIC code	NAICS code	Industry sector name	Estimated number of relevant facilities*
Directly Impacted			
2865	325132–1	Synthetic Organic Dyes	37
	325132–4	Synthetic Organic Pigments, Lakes, and Toners.	
Indirectly Impacted			
2800 (except 2865)	325 (except 325132)	Chemical Manufacturing	Less than 50 facilities total**
4953	562212	Solid Waste Landfills and disposal sites, nonhazardous.	
5169	42269	Other Chemicals and Allied Products (wholesale).	

SIC—Standard Industrial Classification.
NAICS—North American Industrial Classification System.
* Note: The figures in this column represent individual facilities, not companies.
** Estimate based on 13 expanded scope facilities plus no more than 37 separate solid waste landfills (562212) potentially receiving wastes of concern.

How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. RCRA–2003–0001. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. The docket for this proposed rulemaking currently contains no Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. If EPA receives such information in comments or finds that it must use such information, it will place it in the official docket, but will not make it available to the public. The official public docket is the collection of materials that is available for public viewing at the OSWER Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0270.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''Federal Register'' listings at *http://www.epa.gov/fedrgstr/,* and you can make comments on this proposed rule at the Federal e-rulemaking portal, *http://www.regulations.gov.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Docket. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the RCRA Docket facility. EPA intends to work toward providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper,

will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, by facsimile, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions provided later in this section. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select ''Information Sources,'' ''Dockets,'' and ''EPA Dockets.'' Once in the system, select ''search,'' and then key in Docket ID No. RCRA–2003–0001. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to *rcra-docket@epa.gov,* Attention Docket ID No. RCRA–2003–0001. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified below. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: OSWER Docket, Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. RCRA–2003–0001.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center, Public Reading Room, Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20004, Attention Docket ID No. RCRA–2003–0001. Such deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays).

4. *By Facsimile.* Fax your comments to: (202) 566–0272, Attention Docket ID. No. RCRA–2003–0001.

How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. Send or deliver information identified as CBI only to the following address: RCRA CBI Document Control Officer, Office of Solid Waste (5305W), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket ID No. RCRA–2003–0001. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at your estimate.
5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

Readable Regulations

Today's proposed hazardous waste listing determination (or ''listing determination'') preamble and regulations are written in ''readable regulations'' format. The authors tried to use active rather than passive voice, plain language, a question-and-answer format, the pronouns ''we'' for EPA and ''you'' for the owner/generator, as well as other techniques, including an acronym list (see below), to make the information in today's proposed rule easier to read and understand. This format is part of our efforts toward regulatory reinvention. We believe that this format will help readers understand the regulations and foster better relationships between EPA and the regulated community.

ACRONYMS

Acronym	Definition
AOC	Areas of Concern
AWQC	Ambient Water Quality Criteria
BDAT	Best Demonstrated Available Technology
BHP	Biodegradation, hydrolysis and photolysis
BRS	Biennial Reporting System
CAA	Clean Air Act
CalEPA	California Environmental Protection Agency
CARBN	Carbon Absorption
CAS	Chemical Abstract Services
CBI	Confidential Business Information
CCL	Compacted Clay Liner
CERCLA	Comprehensive Environmental Response Compensation and Liability Act
CERCLIS	Comprehensive Environmental Response Compensation and Liability Information System
CFR	Code of Federal Regulations
CHOXD	Chemical or Electrolytic Oxidation
CL	Clay Lined
CMBST	Combustion
CMS	Corrective Measures Study
CoC	Constituent of Concern
CPMA	Color Pigments Manufacturers Association
CSF	Cancer Slope Factor
CWA	Clean Water Act
CWT	Centralized Wastewater Treatment Facility (may also be referred to as a wastewater treatment facility, or WWTF)
ED	Environmental Defense (previously the Environmental Defense Fund or EDF)
EO	Executive Order
EP	Extraction Procedure
EPA	Environmental Protection Agency
EPACMTP	EPA's Composite Model for Leachate Migration with Transformation Products
EPCRA	Emergency Planning and Community Right-To-Know Act
ETAD	Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers
EU	European Union
FB	Followed By
FDA	Food and Drug Administration
FD&C	Food, Drug and Cosmetic
FR	**Federal Register**
GC/MS	Gas Chromatography/Mass Spectroscopy
GCL	Geosynthetic Clay Liner
GM	Geomembrane
GRAS	Generally Recognized as Safe
HAP	Hazardous Air Pollutant
HDPE	High Density Polyethylene
HEAST	Health Effects Assessment Summary Table
HELP	Hydrologic Evaluation of Landfill Performance
HPLC/MS or UV	High Performance Liquid Chromatography/Mass Spectroscopy or Ultraviolet Light
HPV	High Production Volume
HQ	Hazard Quotient
HSWA	Hazardous and Solid Waste Amendments
IACM	International Association of Color Manufacturers
ICR	Information Collection Request
IRIS	Integrated Risk Information System
IWAIR	Industrial Waste Air
KG	Kilogram
LDR	Land Disposal Restriction
MACT	Maximum Achievable Control Technology
mg/kg	Milligram per kilogram
mg/L	Milligram per liter
MINTEQ	MINTEQ (model for geochemical equilibria in ground water)
MSDS	Material Safety Data Sheet

ACRONYMS—Continued

Acronym	Definition
MSWLF	Municipal Solid Waste Landfill
MT	Metric Ton
NAICS	North American Industrial Classification System
NAPL	Non-Aqueous Phase Liquid
NCV	National Capacity Variance
NESHAP	National Emission Standards for Hazardous Air Pollutants
NL	No Liner
NPDES	National Pollutant Discharge Elimination System
NPL	National Priority List
NRC	National Response Center
NSPS	New Source Protection Standard
NTTAA	National Technology Transfer and Advancement Act
OCPSF	Organic Chemicals, Plastics, and Synthetic Fibers
OMB	Office of Management and Budget
OSW	Office of Solid Waste
OSWER	Office of Solid Waste and Emergency Response
POTW	Publicly Owned Treatment Works
ppb	Parts Per Billion
ppm	Parts Per Million
PRA	Paperwork Reduction Act
QA	Quality Assurance
QC	Quality Control
RCRA	Resource Conservation and Recovery Act
RFA	Regulatory Flexibility Act
RfC	Reference Concentration
RfD	Reference Dose
RFI	RCRA Facility Investigation
RFSA	Regulatory Flexibility Screening Analysis
RODS	Record of Decision System
RQ	Reportable Quantity
SBA	Small Business Administration
SBREFA	Small Business Regulatory Enforcement Fairness Act
SIC	Standard Industry Code
SL	Synthetic Liner
SOCMI	Synthetic Organic Chemical Manufacturing Industry
SOP	Standard Operating Procedure
SRI	Stanford Research Institute
SW–846	Test Methods for Evaluating Solid Wastes
SWMU	Solid Waste Management Unit
TCLP	Toxicity Characteristic Leaching Procedure
TRI	Toxic Release Inventory
TSCA	Toxic Substances Control Act
TSDF	Treatment, Storage and Disposal Facility
TSS	Total Suspended Solids
UMRA	Unfunded Mandates Reform Act
USC	United States Code
UTS	Universal Treatment Standard
VOC	Volatile Organic Compound
WETOX	Wet Air Oxidation
WMU	Waste Management Unit
WWT	Wastewater Treatment

Contents of This Proposed Rule

I. Overview
A. What Impact May This Proposed Rule Have?
B. What Are the Statutory Authorities for This Proposed Rule?
II. Background
A. How Does EPA Define a Hazardous Waste?
B. How Does EPA Regulate RCRA Hazardous Wastes?
C. How Does EPA Regulate Solid Wastes That Are Not RCRA Hazardous Wastes?
D. Overview of the Hazardous Waste Listing Determination Process for Dyes and/or Pigments Production Wastes
1. Previous Proposals
2. Consent Decree Schedule for This Proposal
3. Effect on Proposals of Legal Actions Pertaining to Confidential Business Information
E. Existing Regulations That Apply to This Industry
F. What Industries and Wastes Are Covered in This Proposed Rule?
1. Scope of Industry Classifications
2. Scope of Waste Classifications
G. Description of the Dyes and/or Pigments Production Industries
H. What Publicly Available Information Did EPA Collect and Use?
III. Approach Used in This Proposed Listing
A. Summary of Today's Action
B. Why Is a Mass Loadings-Based Approach Being Used for This Listing?
C. What Wastes Are Generated by This Industry?
D. How Are These Wastes Currently Managed?
E. What Waste Management Scenarios Did We Select for Risk Assessment Modeling?
1. Plausible Waste Management Selection Criteria and Modeling Considerations
2. Selection of Waste Management Scenarios for Risk Assessment Modeling of Dyes and/or Pigments Nonwastewaters
3. Selection of Waste Management Scenarios for Risk Assessment Modeling

of Dyes and/or Pigments Production Wastewaters
F. What Factors Did EPA Incorporate Into Its Quantitative Risk Assessment?
G. Overview of the Risk Assessment
1. How Did EPA Chose Potential Constituents of Concern?
2. What Was EPA's Approach to Conducting Human Health Risk Assessment?
3. What Was EPA's Approach to Conducting the Ecological Risk Assessment?
4. What Is the Uncertainty in the Risk Results?
5. How Did EPA Use Damage Case Information?
IV. Proposed Listing Determinations
A. What Are the Proposed Regulations for Dyes and/or Pigments Production Nonwastewaters?
1. Landfill Scenarios Underlying Listing Loading Limits
2. Conditional Exemption for Certain Landfilled Wastes
3. Selecting K181 Constituents and Mass Loading Limits
4. Assessment of Biodegradation
5. Lead as a Potential K181 Constituent
6. Waste Analysis Concerns
7. Proposed Additions to Appendices VII and VIII of Part 261
8. Co-Generation With Out-of-Scope Wastes
B. How Does K181 Impact Wastes That Are Not Landfilled, Combusted, or Previously Listed?
1. What Is the Status of Wastes That Are Not Landfilled?
2. What Is the Status of Wastes Destined for Combustion That Trigger the K181 Listing Levels?
3. Applicability to Wastes That Are Already Hazardous
C. Why Are We Proposing Not To List Wastewaters?
1. Air Emissions From Tanks and Surface Impoundments
2. Groundwater Releases From Surface Impoundments
D. Scope of the Listings and the Effect on Treatment Residuals
E. What Is the Status of Previously Disposed Wastes and Landfill Leachate From Previously Disposed Wastes?
V. Proposed Requirements for K181 Determinations
A. How Do I Demonstrate That My Wastes Are Nonhazardous?
1. Categorical Determination
2. No K181 Constituents of Concern
3. Low Quantity Versus High Quantity Wastes With K181 Constituents
4. Section (d)(2) Demonstrations for Waste Quantities Less Than 1,000 MT/yr
5. Section (d)(3) Demonstrations for Waste Quantities Greater Than 1,000 MT/yr
6. EPA and State Oversight
B. How Do I Document Compliance With the Landfill Condition?
C. How Would I Manage My Wastes During the Period Between Generation and Hazardous Waste Determination?
D. Implementation Examples
E. What Are the Consequences of Failing To Meet Recordkeeping Requirements or Listing Conditions?
VI. Proposed Treatment Standards Under RCRA's Land Disposal Restrictions
A. What Are EPA's Land Disposal Restrictions (LDRs)?
B. How Does EPA Develop LDR Treatment Standards?
C. What Treatment Standards Are We Proposing?
D. What Changes to Existing Treatment Requirements Are Proposed?
E. Other LDR-Related Provisions
F. Is There Treatment and Management Capacity Available for These Proposed Newly Identified Wastes?
1. What Is a Capacity Determination?
2. What Are the Capacity Analysis Results?
VII. State Authority and Compliance
A. How Are States Authorized Under RCRA?
B. How Would This Rule Affect State Authorization?
C. Who Would Need to Notify EPA That They Have a Hazardous Waste?
D. What Would Generators and Transporters Have to Do?
E. Which Facilities Would Be Subject to Permitting?
1. Facilities Newly Subject to RCRA Permit Requirements
2. Existing Interim Status Facilities
3. Permitted Facilities
4. Units
5. Closure
VIII. CERCLA Designation and Reportable Quantities
A. What Is the Relationship Between RCRA and CERCLA?
B. How Does EPA Determine Reportable Quantities?
C. EPA Will Assign An RQ of One-Pound for The Waste
D. How Does a Mass Loading Limit Hazardous Waste Listing Approach Relate to My Reporting Obligations Under CERCLA? When Would I Need To Report a Release of These Wastes Under CERCLA?
E. How Would I Report a Release?
F. What Is the Statutory Authority for This Program?
G. How Can I Influence EPA's Thinking on Regulating K181 Under CERCLA?
IX. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
1. Background
2. Need for the Proposed Rule
3. Consideration of Non-Regulatory Alternatives
4. Evaluation of Regulatory Options
5. Assessment of Costs, Economic Impacts, and Benefits
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 12898: Environmental Justice
I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act

I. Overview

A. What Impact May This Proposed Rule Have?

We are proposing to list nonwastewaters from the production of certain dyes and/or pigments as hazardous wastes under Subtitle C of RCRA. If you are a dye, pigment or FD&C colorant manufacturer and you generate nonwastewaters described in this proposed rule, then you would need to determine if your wastes meet the new hazardous waste code, K181, if finalized. Your waste would become a listed hazardous waste if it contains annual mass loadings (kilograms/year, abbreviated as kg/yr) of any of the K181 constituents of concern at a level equal to or greater than the hazardous loading identified for that constituent (*see* Table IV–1), unless you meet both of the following conditions: (1) Your wastes do not contain annual mass loadings of the constituent for which we are proposing a second, higher tier listing limit (*see* Table IV–2), and (2) you manage your wastes in a Subtitle D landfill cell subject to the design criteria in § 258.40 or in a Subtitle C landfill cell subject to § 264.301 or § 265.301. When mass loadings meet or exceed the specified annual levels, you may still manage as nonhazardous all wastes generated up to the loading limit. If you determine that your nonwastewaters are hazardous under this listing, then the wastes must be stored, treated and disposed in a manner consistent with the RCRA Subtitle C hazardous waste regulations at 40 CFR parts 260–272. If you were not previously a hazardous waste generator, and you determine that you generate this newly-listed hazardous waste, then you must notify the EPA or your authorized state, according to section 3010 of RCRA, that you generate hazardous waste.

If you believe that your wastes do not exceed the K181 listing levels, or that you meet the conditions for exclusion from the listing, you can document your findings on an annual basis, and manage your wastes as nonhazardous. If your annual generation of nonwastewaters potentially subject to the K181 listing exceeds 1,000 metric tons and you wish to demonstrate that your wastes do not exceed the K181 listing levels, you must conduct sampling and analysis of the affected wastes, calculate the constituent-specific mass-loadings, and keep certain records of these wastes on-site. On the other hand, if your annual generation of nonwastewaters potentially subject to the K181 listing is

less than 1,000 metric tons and you wish to demonstrated that your wastes do not exceed the K181 listing levels, you can use your knowledge of your wastes to calculate your wastes' mass loadings. Following the initial determination that your wastes are nonhazardous under this listing, you would have a continuing obligation to make such a determination at least on an annual basis. After three consecutive annual demonstrations that your wastes are not subject to K181, you would be able to make subsequent determinations based on your knowledge of the wastes, rather than by conducing waste analysis.

We are proposing not to list wastewaters from the production of dyes and/or pigments.

Section II provides background on the Listing Program, past proposed listing determinations for these wastes, relevant litigation, the scope of this effort, an overview of this industry and the general types of data that we used. Section III describes our approach to conducting this listing determination. Section IV presents our basis for concluding that nonwastewaters should be listed as K181 and that wastewaters do not warrant listing. Section V describes the proposed process for demonstrating that your wastes are not K181.

B. What Are the Statutory Authorities for This Proposed Rule?

Except as specified below, these regulations are being proposed under the authority of sections 2002(a), 3001(b), 3001(e)(2), 3004(d)–(m), and 3007(a) of the Solid Waste Disposal Act, 42 U.S.C. 6912(a), 6921(b) and (e)(2), 6924(d)–(m), and 6927(a), as amended, most importantly by the Hazardous and Solid Waste Amendments of 1984 (HSWA). These statutes commonly are referred to as the Resource Conservation and Recovery Act (RCRA), and are codified at Volume 42 of the United States Code (U.S.C.), sections 6901 to 6992(k) (42 U.S.C. 6901–6992(k)).

Section 102(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9602(a) is the authority under which EPA is proposing amendments to 40 CFR part 302.

II. Background

A. How Does EPA Define a Hazardous Waste?

EPA's regulations establish two ways of identifying solid wastes as hazardous under RCRA. A waste may be considered hazardous if it exhibits certain hazardous properties (''characteristics'') or if it is included on a specific list of wastes EPA has determined are hazardous (''listing'' a waste as hazardous) because we found them to pose substantial present or potential hazards to human health or the environment. EPA's regulations in the Code of Federal Regulations (40 CFR) define four hazardous waste characteristic properties: ignitability, corrosivity, reactivity, or toxicity (*see* 40 CFR 261.21–261.24). As a generator, you must determine whether or not a waste exhibits any of these characteristics by testing the waste, or by using your knowledge of the process that produced the waste (*see* § 262.11(c)). While you are not required to sample your waste, you will be subject to enforcement actions if you are found to be improperly managing materials that are characteristic hazardous waste.

EPA may also conduct a more specific assessment of a waste or category of wastes and ''list'' them if they meet criteria set out in 40 CFR 261.11. As described in § 261.11, we may list a waste as hazardous if it:

—Exhibits any of the characteristics noted above, *i.e.*, ignitability, corrosivity, reactivity, or toxicity (§ 261.11(a)(1));

—Is ''acutely'' hazardous, *i.e.*, if it is fatal to humans at low doses, or in the absence of human data, it has been shown in animal studies to meet certain criteria, or otherwise capable of causing or significantly contributing to an increase in serious illness (§ 261.11(a)(2)); or

—Is capable of posing a substantial present or potential hazard to human health or the environment when improperly managed (§ 261.11(a)(3)).

Under the third criterion, at 40 CFR 261.11(a)(3), we may decide to list a waste as hazardous if it contains hazardous constituents identified in 40 CFR part 261, appendix VIII, and if, after considering the factors noted in this section of the regulations, we ''conclude that the waste is capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.'' We place a chemical on the list of hazardous constituents on Appendix VIII only if scientific studies have shown a chemical has toxic effects on humans or other life forms. When listing a waste, we also add the hazardous constituents that serve as the basis for listing the waste to 40 CFR part 261, appendix VII.

The regulations at 40 CFR 261.31 through 261.33 contain the various hazardous wastes the Agency has listed to date. Section 261.31 lists wastes generated from non-specific sources, known as ''F-wastes,'' and contains wastes that are usually generated by various industries or types of facilities, such as ''wastewater treatment sludges from electroplating operations'' (*see* code F006). Section 261.32 lists hazardous wastes generated from specific industry sources, known as ''K-wastes,'' such as ''Spent potliners from primary aluminum production'' (*see* code K088). Section 261.33 contains lists of commercial chemical products and other materials, known as ''P-wastes'' or ''U-wastes,'' that become hazardous wastes when they are discarded or intended to be discarded.

Today's proposed regulations would list certain dyes and/or pigments production wastes as a K-waste code under § 261.32. We are also proposing to add constituents that serve as the basis for the proposed listings to appendix VII of part 261, as well as to add certain constituents to appendix VIII of part 261 that are not already included.

''Derived-From'' and ''Mixture'' Rules

Residuals from the treatment, storage, or disposal of most listed hazardous wastes are also classified as hazardous wastes based on the ''derived-from'' rule (40 CFR 261.3(c)(2)(i)). For example, ash or other residuals generated from the treatment of a listed waste generally carries the original hazardous waste code and is subject to the hazardous waste regulations. Also, the ''mixture'' rule (40 CFR 261.3(a)(2)(iii) and (iv)) provides that, with certain limited exceptions, any mixture of a listed hazardous waste and a solid waste is itself a RCRA hazardous waste.

B. How Does EPA Regulate RCRA Hazardous Wastes?

If a waste exhibits a hazardous characteristic or is listed as a hazardous waste then it is subject to federal requirements under RCRA. These regulations affect persons who generate, transport, treat, store or dispose of such waste. Facilities that must meet hazardous waste management requirements, including the need to obtain permits to operate, commonly are referred to as ''Subtitle C'' facilities. Subtitle C is Congress' original statutory designation for that part of RCRA that directs EPA to issue regulations for hazardous wastes as may be necessary to protect human health or the environment. EPA standards and procedural regulations implementing Subtitle C are found generally at 40 CFR parts 260 through 273.

All RCRA hazardous wastes are also hazardous substances under the

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as defined in section 101(14)(C) of the CERCLA statute. This applies to wastes listed in §§ 261.31 through 261.33, as well as any wastes that exhibit a RCRA characteristic. Table 302.4 at 40 CFR 302.4 lists CERCLA hazardous substances along with their reportable quantities (RQs). Anyone spilling or releasing a substance at or above the RQ must report the release to the National Response Center, as required in CERCLA section 103. In addition, section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA) requires facilities to report the release of a CERCLA hazardous substance at or above its RQ to State and local authorities. Today's rule proposes to establish RQs for the newly listed wastes.

C. How Does EPA Regulate Solid Wastes That Are Not RCRA Hazardous Wastes?

If your waste is a solid waste, but is not, or is determined not to be a listed and/or characteristic hazardous waste, then you may manage them at Subtitle D facilities. These facilities are approved by state and local governments and generally impose less stringent requirements on management of wastes. Subtitle D is the statutory designation for that part of RCRA that deals with disposal of nonhazardous solid waste. EPA regulations affecting Subtitle D facilities are found at 40 CFR parts 240 thru 247, and 255 thru 258. Regulations for Subtitle D landfills that accept municipal waste (''municipal solid waste landfills'') are in 40 CFR part 258.

D. Overview of the Hazardous Waste Listing Determination Process for Dyes and/or Pigments Production Wastes

1. Previous Proposals

Under the Resource Conservation and Recovery Act (RCRA) of 1976, as an amendment to the Solid Waste Disposal Act of 1965, Congress directed EPA to establish a framework for RCRA's Subtitle C hazardous waste program. Congress also required EPA to propose and write timely rules identifying wastes as hazardous under Subtitle C.

In the early 1980's, the EPA's Office of Solid Waste began an investigation of the wastes generated by the dyes and/or pigments production industries. Then in 1984, Congress passed the Hazardous and Solid Waste Amendments (HSWA) to RCRA to significantly expand the scope of RCRA, requiring EPA, in part, to make listing determinations for a number of wastes including those from the manufacture of dyes and pigments (RCRA section 3001(e)(2)). The Agency has made two listing determination proposals with regard to organic dyes and pigments manufacture, one in 1994 and another in 1999, according to the deadlines set forth in a consent decree entered between EPA and Environmental Defense (ED; formerly Environmental Defense Fund, or EDF). The consent decree is described further in II.C.2.

On December 22, 1994, the Agency proposed its first listing determinations for wastes from the production of organic dyes and pigments (59 FR 66071). Specifically, the Agency proposed to list five wastes, not to list six other wastes, and to defer action on an additional three wastes. On July 23, 1999, the Agency proposed concentration-based listings for two of the three deferred wastes from the 1994 proposed rule (64 FR 40192). EPA redacted underlying data from both proposals due to a court injunction that placed restrictions on the Agency's release of underlying data with unresolved confidentiality claims. (The court injunction is discussed further in II.C.3.) EPA has not taken final action on either of these proposals.

Today's proposed rule completely supercedes the '94 and '99 proposals. We have transferred over to the new docket those non-CBI materials that we are using as a basis for the new proposal.

2. Consent Decree Schedule for This Proposal

As noted above, HSWA established deadlines for completion of a number of listing determinations, including for dyes and pigments production wastes (*see* RCRA section 3001(e)(2)). Due to competing demands for Agency resources and shifting priorities, these deadlines were not met. As a result, in 1989, ED filed a lawsuit to enforce the statutory deadlines for listing decisions in RCRA section 3001(e)(2). (*Environmental Defense* v. *Whitman*, D.D.C. Civ. No. 89–0598.) To resolve most of the issues in the case, in 1991 ED and EPA entered into a consent decree which has been amended several times to revise the deadlines for EPA action. Paragraph 1.h.(i) (as amended in December 2002) of the consent decree addresses the organic dyes and pigments production industries:

> EPA shall promulgate final listing determinations for azo/benzidine, anthraquinone, and triarylmethane dye and pigment production wastes on or before February 16, 2005 * * * These listing determinations shall be proposed for public comment on or before November 10, 2003.

Furthermore, paragraph 6.e. (as amended) stipulates that:

> On or before November 10, 2003, EPA's Administrator shall sign a notice of proposed rulemaking proposing land disposal restrictions for dye and pigment wastes proposed for listing under paragraph 1.h.(i). EPA shall promulgate a final rule establishing land disposal restrictions for dye and pigment wastes listed under paragraph 1.h.(i) on the same date that it promulgates a final listing determination for such wastes.

Today's proposal satisfies EPA's duty under paragraphs 1.h and 6.e of the ED consent decree to propose listing determinations and land disposal restrictions for the specified organic dyes and/or pigments production wastes.

3. Effect on Proposals of Legal Actions Pertaining to Confidential Business Information

In late 1994, just prior to EPA's issuance of the first listing proposal for dyes and/or pigments production wastes, EPA was sued by a number of pigment manufacturers who successfully sought an injunction prohibiting EPA from releasing the companies' information that they had submitted to EPA and claimed as Confidential Business Information (CBI). (*Magruder Color Co.* v. *EPA,* Civ. No. 94–5768 (D.N.J.) The U.S. District Court in New Jersey enjoined EPA from disclosing any of the claimed CBI at issue in the litigation. As a result, EPA redacted underlying data from both its 1994 and 1999 proposed dye and pigment listing determinations. Members of the public (including ED) informed EPA that they could not adequately comment on the proposals without access to the redacted data.

EPA had intended to litigate the *Magruder* case and publish a notice of data availability releasing any information that the Court determined not to be CBI. However, litigation proved extremely time-consuming. Consequently, in 2002 EPA decided to try a new strategy—issuing a completely new proposal that did not rely on data subject to the injunction in *Magruder*. EPA also reached a settlement with *Magruder* plaintiffs that stayed the litigation during this new rulemaking and permitted EPA to disclose certain specified masked and aggregated waste sampling data. The Stipulation and Consent Order entered by the District Court on June 30, 2003 is available in the docket for today's proposal.

Today's proposal has been developed independently of the first and second proposals. It does use some data developed for the 1994 proposal. First, it uses RCRA § 3007 questionnaire

responses submitted by dyes and/or pigments manufacturers that were not plaintiffs in *Magruder* and that we have determined are not CBI. We also use the masked and aggregated data from EPA's record sampling and analysis of dye and pigment wastes disclosed pursuant to the settlement described above. Finally, we use some data submitted in public comments that are not claimed as CBI. We are not using, however, any of the analyses or background documents prepared for the two previous proposals. We have conducted new analyses, prepared new background documents, and reached new conclusions. Today's proposal completely supersedes the 1994 and 1999 proposals. EPA does not intend to respond to comments submitted on those proposals. Thus, if you believe that any comments submitted on those proposals remains germane to today's proposal, you should submit them (or relevant portions) again during this comment period.

E. Existing Regulations That Apply to This Industry

RCRA authorizes EPA to evaluate industry waste management practices and, if necessary, regulate how wastes are handled to ensure that present or potential hazards are not posed to human health and the environment. In addition to RCRA, the Clean Water Act (CWA) and Clean Air Act (CAA) provide EPA with the statutory authority to evaluate industry practices and, if necessary, regulate industry releases of pollutants to environmental media such as water and air.

Currently, there are no hazardous waste listings under RCRA specifically directed at organic dyes and/or pigments production wastes. Organic dyes and/or pigments production waste streams may, however, carry hazardous waste listing and/or characteristic codes if they are generated from the use of certain common organic solvents (spent solvent wastes F001 through F005) or if they exhibit a hazardous waste characteristic (ignitability-D001, corrosivity-D002, reactivity-D003, toxicity-D004-D043). In addition, a variety of intermediates used in dyes and pigments production are listed hazardous waste when disposed as discarded commercial chemical products under § 261.33. EPA is not soliciting comment on these existing hazardous waste listings and does not intend to respond to such comments if received. As explained in section IV.B.3, EPA is proposing to exclude from today's proposed listing dyes and/or pigments production wastes that are subject to these existing listings or hazardous waste characteristics.

Regulatory requirements under the CWA (40 CFR part 414) specify effluent guidelines for wastewaters discharged from the organic chemical industry, including certain dyes and/or pigments production wastes that are discharged to navigable waters. These guidelines are implemented through national pollutant discharge elimination system (NPDES) permits. These regulations apply to dyes and/or pigments production wastes that originate from the manufacture of cyclic crudes and intermediates, dyes, and organic pigments classified under SIC 2865 (among various organic chemicals, plastics, and synthetic fibers (OCPSF) products). In addition, manufacturers who discharge wastewaters generated from dyes and/or pigments production to a publicly owned treatment works (POTW) may be required to comply with general pretreatment requirements (40 CFR part 403) as established by the POTW. Finally, some dyes and/or pigments manufacturers send their wastewaters to privately-owned centralized wastewater treatment facilities (CWTs) that are operated under NPDES permits. The Agency promulgated effluent guidelines for these facilities at 40 CFR part 437.

Under the CAA, there are existing regulatory requirements for the organic chemical industry that may apply to dyes and/or pigments production facilities, such as:

- 40 CFR part 60—several subparts on standards of performance for VOC emissions for new stationary sources.
- 40 CFR part 61—national emission standards for hazardous air pollutants on equipment leaks from fugitive emission sources, benzene operations, etc.
- 40 CFR part 63—several subparts on national emission standards for hazardous air pollutants (NESHAP) for the synthetic organic chemical manufacturing industry (SOCMI).
- 40 CFR part 68—chemical accident prevention provisions.
- 40 CFR part 82—protection of stratospheric ozone.

For example, 40 CFR part 60 subpart Kb provides standards of performance for volatile organic liquid storage vessels; subpart III provides standards of performance for VOC emissions from the SOCMI air oxidation unit processes; and subpart RRR provides standards of performance for VOC emissions from the SOCMI reactor processes. The NESHAP in part 63 subpart F applies to chemical manufacturing processing units; the NESHAP in part 63 subpart G applies to process vents, storage vessels, transfer operations, and wastewater; the NESHAP in part 63 subpart H covers equipment leaks; the NESHAP in part 63 subpart I applies to certain processes subject to the negotiated regulation for equipment leaks; and the NESHAP in part 63 subpart Q applies to industrial cooling towers.

There is also a proposed new source performance standard (NSPS) for volatile organic compound emissions for wastewaters from the synthetic organic chemical manufacturing industry (SOCMI) (*see* 59 FR 46780, September 12, 1994; and 63 FR, 68087; and December 9, 1998, amendments to the proposed rule based on public comments and changes to other SOCMI rules). This SOCMI Wastewater NSPS proposal will most likely be promulgated and published in the **Federal Register** in late 2003 or early 2004. Furthermore, the Agency proposed on April 4, 2002, Subpart FFFF NESHAP, to reduce hazardous air pollutants from the miscellaneous organic chemical manufacturing and the miscellaneous coating manufacturing categories (67 FR 16154). This proposal would apply to the production of a variety of SIC 28/NAICS 325 organic chemicals including organic dyes and pigments.

In addition, the Agency has promulgated performance standards and emission guidelines for new and existing commercial and industrial solid waste incineration units burning nonhazardous wastes (see 65 FR 75337; December 1, 2002). The Agency also has recently proposed a NESHAP for industrial/commercial/institutional boilers and process heaters identified as major sources of hazardous air pollutants (HAP) emissions (see 63 FR 1659; January 13, 2003).

There are also air emission regulations for steam generating boilers under 40 CFR Part 60 Subparts D, Da, Dc and Db that provide New Source Performance Standards (NSPS) limiting emissions from boilers built after certain dates. Moreover, the Agency has published an amendment for standards of performance for industrial-commercial-institutional steam generating units located at chemical manufacturing plants and petroleum refineries burning high-nitrogen byproduct/wastes (66 FR 49830; October 1, 2001).

F. What Industries and Wastes Are Covered in This Proposed Rule?

1. Scope of Industry Classifications

EPA based many of its decisions concerning the scope of the industries and wastes covered in this proposal on the ED v. Browner consent decree. Paragraph 1.h.(i) of the consent decree stipulates that:

EPA shall promulgate final listing determinations for azo/benzidine, anthraquinone, and triarylmethane dye and pigment production wastes * * * The azo/benzidine listing determination shall include the following azo/benzidine dye and pigments classes: azo, monoazo, diazo, triazo, polyazo, azoic, benzidine, and pyrazolone. The anthraquinone listing determination shall include the following anthraquinone dye and pigment classes: anthraquinone and perylene. The triarylmethane listing determination shall include the following triarylmethane dye and pigment classes: triarylmethane and triphenylmethane.

Today's proposal applies only to certain organic dye and/or pigment production industries. The end-user markets for dyes and pigments, which include textiles, paper, leather, inks, paints, coatings, plastics, fibers, lacquers, varnishes, cosmetics, food items, and other low volume markets, are not within the scope of our listing determination. Similarly, we are not addressing wastes from the post-production formulation and packaging of dyes and/or pigments. Consistent with both HSWA Amendments of 1984 and the consent decree, EPA is only making proposed determinations on wastes from the production of the organic dyes and/or pigments at issue.

Facilities impacted by today's proposal manufacture a range of products. Some are exclusive dye manufacturers, while others produce exclusively pigments. Others produce both pigments and dyes, and many of these facilities produce other products that are not dyes or pigments. While the various trade associations have asserted over time that wastes from dye manufacture differs from wastes from pigment manufacture, we are not differentiating between the two types of products for the purposes of this proposal. Dyes and pigments commonly use similar raw materials, and pigments are often made by insolubilizing dyes. The mass loadings-based approach proposed today will only impact those facilities that generate wastes with significant levels of the K181 constituents, irrespective of whether they are associated with dyes, pigments or both processes. As a result, this notice uses the terminology ''dyes and/or pigments'' to refer to all of the facilities or processes potentially impacted by this proposal.

Products produced by the organic dyes and/or pigments industries that are included within the scope of this proposed rule are referred to as ''dyes,'' ''pigments'' or ''FD&C colorants.'' The consent decree covers three major chemical classes of organic dyes and pigments: azo/benzidine, anthraquinone, and triarylmethane. This includes entities who manufacture azo, monoazo, diazo, triazo, polyazo, azoic, benzidine, and pyrazolone categories of the azo/benzidine class; anthraquinones and perylenes; and triarylmethane and triphenylmethane categories of the triarylmethane class.

Commenters on the previous proposed listing determinations for these wastes raised several questions about the range of products that would be associated with any listed wastes from the production of dyes and/or pigments. For the purposes of clarity, we are addressing those particular concerns in today's proposal. One commenter [1] stated that wastes from the manufacture of polymeric colorants should not be included in the proposed listings. The commenter noted that polymeric colorants are not classified as dyes or pigments by various authoritative sources and are not considered dyes or pigments by industry or end-users. Specifically, the commenter noted that (1) no polymeric colorant is listed in the worldwide dyes registry administered by the United Kingdom-based Royal Society of Dyers and Colourists, *i.e.*, the Colour Index; and (2) polymeric colorants do not appear to qualify as a conventional dye or pigment under the guidelines provided in Kirk-Othmer Encyclopedia of Chemical Technology (Fourth Edition). The commenter described polymeric colorants as polymers with much higher molecular weights (approximately 3,500) than either dyes or pigments (less than 500). The commenter also noted that in prior rulemakings (*e.g.*, carbamate rulemaking [2] and polymer exemption provisions under the Toxic Substances Control Act (TSCA)),[3] EPA recognized the reduced toxicity associated with higher molecular weight molecules. The commenter further noted that producers of such products claim that the manufacturing process and end uses of polymeric colorants are different than dyes or pigments in that polymeric colorants must be non-staining. The dyes manufacturers' trade association, ETAD, noted in their comments that they do not classify polymeric colorants as dyes.[4] We agree that polymeric colorants do not fall within the classes of products of interest to today's proposal. Wastes from production of polymeric colorants, therefore, are not within the scope of today's proposed listing determination.

Several commenters [5] stated that perylene and perinone pigments are misclassified as anthraquinones. They argue that although the Colour Index classifies perylenes and perinones as being subclasses of anthraquinone, these pigment classes are not structurally related to anthraquinones and are not derived from anthraquinone-based raw materials, and therefore, should be classified separately. While there may be a question as to whether perylenes should be classified as anthraquinones, we are proposing to retain wastes from the production of perylene products within the scope of today's proposed listing determination. The consent decree specifically requires us to assess perylene products, and therefore we must make listing determinations that cover any corresponding wastes, regardless of whether or not perylenes are properly classified as anthraquinones.

Regarding perinone pigments, while the Colour Index groups perinones under the broader classification of ''Anthraquinones and Related Colouring Matters,'' we are persuaded by the commenters' arguments that these products are sufficiently dissimilar from anthraquinones. Perinones do not have the quinone-type structure that is distinctive of anthraquinones, but rather perinones are derivatives of naphthalene-1,4,5,8-tetracarboxylic acid.[6] Therefore, we are not proposing that perinones be covered by today's proposed listing determination.

Commenters also stated that quinacridone pigments are not within the anthraquinone pigment category since they are quinonoid in type and carry Colour Index numbers outside of the anthraquinone category. We agree that these products are sufficiently dissimilar from anthraquinones. Quinacridones are classified as acridines, which have a nitrogen in the fused ring system.[7] Therefore, we are not proposing to include their wastes

[1] *See* Milliken comments on 1994 and 1999 proposals, available in the docket for today's proposal.

[2] 60 FR 7824, 7830 (February 9, 1995).

[3] 40 CFR 723.250.

[4] See ETAD's comments on 1994 proposal, available in the docket for today's proposal.

[5] See comments on the 1994 proposal submitted by CDR, Bayer, and CPMA, and on the 1999 proposal submitted by CPMA, available in the docket for today's proposal.

[6] For example, see the perinone pigment: C.I. Pigment Orange 43; in this case the pigment has only one carbon bound to an oxygen in a carbonyl group (instead of two in the typical anthraquinone) and this carbon is bonded to a nitrogen in an amide linkage (instead of a carbon in an anthraquinone).

[7] For example, see the quinacridone pigment: C.I. Pigment Red 202; this pigment has only one carbonyl group (instead of two in the typical anthraquinone) and instead of another carbonyl moiety the molecule has a nitrogen in the typical acridine ring structure.

within the scope of today's proposed listing determination.

Additional information on polymeric colorants, perylenes, perinones, and quinacridones is presented in the ''Background Document for Identification and Listing of Wastes from the Production of Organic Dyes and Pigments'' (hereafter referred to as the Listing Background Document) and in the referenced comments which are available in the public docket for today's proposal.

2. Scope of Waste Classifications

Paragraph 1.h.(ii) of the consent decree describes the dyes and/or pigments production wastes that must be addressed by our listing determination:

> Listing determinations under paragraph 1(h) of this Decree shall include the following wastes, where EPA finds such wastes are generated: spent catalysts, reactor still overhead, vacuum system condensate, process waters, spent adsorbent, equipment cleaning sludge, product mother liquor, product standardization filter cake, dust collector fines, recovery still bottoms, treated wastewater effluent, and wastewater treatment sludge.

In this proposal, we have grouped all of the wastes for these industries that are identified in the consent decree into two major categories of process wastes: Wastewaters and nonwastewaters. Some manufacturers may commingle nonprocess wastes (*i.e.*, cafeteria and office refuse, sanitary wastes) with wastewaters or nonwastewaters from dyes and/or pigment production. We consider these nonprocess wastes to be outside the scope of the consent decree and we have not evaluated them. However, if they are commingled with the process nonwastewaters that we propose to list, they will be regulated as K181 hazardous wastes under the RCRA mixture rule.

G. Description of the Dyes and/or Pigments Production Industries

Organic dye and/or pigment manufacturers are typically concentrated near large metropolitan areas, with the majority of facilities located on the East Coast and in the Midwest. We estimate that there are 37 dyes and/or pigments production facilities operating in the United States by about 29 different companies (a few larger companies operate several facilities).[8] Of this universe, we estimate that about 15 of these companies meet the Small Business Administration definition of a small business (total company employment of fewer than 750 people at the corporate level).

Kirk-Othmer defines dyes as intensely colored or fluorescent organic substances which impart color to a substrate by selective absorption of light.[9] When applied, dyes penetrate the substrate in a soluble form, after which they may or may not become insoluble. The structure of dyes is temporarily altered during the application process and colors are imparted only by selective absorption.

Dyes are used to color fabrics, leather, paper, ink, lacquers, varnishes, plastics, cosmetics, and some food items. Several thousand individual dyes of various colors and types are manufactured. This large number is attributable to the many different types of materials to which dyes are applied and the different conditions of service for which dyes are required.[10]

Synthetic dyes are derived in whole or in part from cyclic intermediates. Approximately two-thirds of the dyes consumed in the United States are used by the textiles industry to dye fabrics, and about one-sixth are used for coloring paper, while the remainder are used primarily in the production of organic pigments and in the dyeing of leather and plastics.[11]

Commercial dyes are sold in several physical forms including granular, powders, liquid solutions, and pastes. The dyes contain color at concentrations ranging from approximately 1 to more than 98 percent.[12]

Organic dyes are classified in several ways, including their chemical structure or class, general dye chemistry, and application process. Chemical structure classifications include azos, triarylmethanes, diphenylmethanes, anthraquinones, stilbenes, methines, polymethines, xanthenes, phthalocyanines, sulfurs and so on. Kirk-Othmer describes the common application process classes of dyestuffs to include acid dyes, mordant dyes, metal complex dyes, direct dyes, fiber-reactive dyes, basic dyes, vat dyes, sulfur dyes, disperse dyes, ingrain dyes/azoic dyes, and other dyes. Using general dye chemistry, textile dyes typically are grouped into the following categories: acid dyes, direct (substantive dyes), azoic dyes, disperse dyes, sulfur dyes, fiber reactive dyes, basic dyes, oxidation dyes, mordant (chrome) dyes, developed dyes, vat dyes, pigments, optical/fluorescent brighteners, and solvent dyes.[13] The trade association representing the dye industry is the Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers (ETAD).

The Color Pigment Manufacturers' Association (CPMA), which primarily represents the pigments industry, defines pigments as ''colored, black, white, or fluorescent particulate organic or inorganic solids, which usually are insoluble in, and essentially physically and chemically unaffected by, the vehicle or substrate in which they are incorporated.'' [14] According to the CPMA, the primary difference between pigments and dyes is that pigments are insoluble in the substrate during the application process, while dyes are soluble in the substrate. Pigments retain a crystalline or particulate structure and impart color by selective absorption or by scattering of light.

The approximate percentage of synthetic organic pigments by use during 1991–1995 was as follows: inks (60%), paints and coatings (25%), plastics (10%), and other (5%). Pigments are used primarily in printing inks. There are fewer pigments produced than dyes, however, pigment batches generally are larger in size. U.S. production of organic pigments increased by 5 percent during 1997–99, from 75,500 tons to 79,500 tons. Production is estimated to increase at an average annual rate of 2.7 percent through 2005.[15]

Organic pigments are derived in whole or in part from benzenoid chemicals and colors and are described as being toners or lakes. Toners and lakes essentially are the same in final form, but differ in their preparation method.

[8] ''Economic Assessment for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants,'' U.S. EPA. November, 2003.

[9] ''Dyes and Dye Intermediates.'' Kirk-Othmer Encyclopedia of Chemical Technology, Fourth Edition. Volume 8. New York: John Wiley & Sons, Inc, 1993.

[10] ''Chemical Economic Handbook Marketing Research Report—Dyes,'' SRI International, 2000.

[11] ''Synthetic Organic Chemicals United States Production and Sales, 1991,'' USITC Publication 2607, February 1993.

[12] ''Chemical Economic Handbook Marketing Research Report—Dyes,'' SRI International, 2000.

[13] S. V. Kulkarni, C. D. Blackwell, A. L. Blackard, C. W. Stackhouse, and M. W. Alexander, U.S. Environmental Protection Agency, Air and Energy Engineering Research Laboratory, ''Project Summary Textile Dyes and Dyeing Equipment: Classification, Properties, and Environmental Aspects,'' EPA/600/S2–85/010, April 1985.

[14] See, for example, CPMA comments on the Testing of Certain High Production Volume Chemical; Data Collection and Development on High Production Volume (''HPV'') Chemicals Proposed Rule and Notice 65 FR 81658, December 26, 2000, Docket Control No. OPPTS–42213A, *http://www.thecre.com/watchlist/20010423_cpma.html#start.*

[15] Data and estimates taken from Will, Raymond and Akihiro Kishi. SRI International, The Chemical Economics Handbook, 2001. *CEH Marketing Research Report—Pigments* (pages 3 and 5).

FD&C colorants are dyes and pigments that have been certified or provisionally certified by the Food and Drug Administration (FDA) for use in food items, drugs, and/or cosmetics. The International Association of Color Manufacturers (IACM) represents certain FD&C colorant manufacturing facilities. Typically, FD&C colorants are azo, anthraquinone, or triarylmethane dyes with azo representing the largest category. These products are similar or identical to larger-volume dye products not used in food, drugs, and cosmetics.

The dyes and/or pigments industries typically operate successive batch processes producing varying dyes and/or pigments products. These batch operations generate a wide variety of solid wastes periodically. Wastes are often commingled from multiple processes prior to management, and include secondary wastes generated from the treatment of commingled waste (*e.g.*, facilities commingle wastewaters prior to managing them in tanks or impoundments, and generate commingled wastewater treatment sludges). Some wastes may also be process-specific wastes that are generated from a specific process and may be managed independently of other wastes (*e.g.*, spent filter aids).[16], [17]

For more detailed information, see the Listing Background Document available in the public docket for today's proposed rule.

H. What Publicly Available Information Did EPA Collect and Use?

In light of the constraints imposed by the *Magruder* injunction on survey and analytical data with unresolved CBI claims, we identified a variety of publicly available sources of information for today's listing determinations. We used these data (as described elsewhere in this proposal and in the docket materials available in the public docket for today's proposal) for several purposes: (1) To support a general assessment of the dyes and/or pigments industries' waste generation and management practices; (2) to develop a list of potential constituents of concern; (3) to identify plausible waste management scenarios that are the basis for our risk assessment and listing determination; and (4) to project potential impacts associated with the proposal.

The more important data sources we used include the following:

—Non-CBI RCRA § 3007 questionnaire information and data, collected during the 1992 Agency survey of wastes generated in the dyes and/or pigments industries, and supplemented, corrected, and updated (for the year 1997) by the surveyed facilities. Surveys submitted by the twelve plaintiffs in *Magruder* remain unavailable. The available surveys are (1) surveys submitted by non-plaintiffs who made no CBI claims; (2) surveys submitted by non-plaintiffs who made CBI claims, but later withdrew them; and (3) surveys submitted by non-plaintiffs who made CBI claims, which EPA denied under the procedures set out in 40 CFR part 2.

—EPA's analytical data from sampling and analysis of the wastes of concern, developed in the early 1990s and used to support the 1994 and 1999 proposed listing determinations, as masked and aggregated per Table 1 of the June 2003 settlement agreement with the *Magruder* plaintiffs.

—Split sample analytical data submitted by the Color Pigments Manufacturing Association (CPMA), in a letter dated April 20, 1994 from J. Lawrence Robinson of CPMA to Ed Abrams of EPA.

—The Toxics Release Inventory (TRI) for Reporting Year 2000.

—The European Union (EU)'s directive for a community ban on azocolourants (76/769/EEC, Annex I, point 43), relating to restrictions on the marketing and use of certain dangerous substances and preparations (azocolourants).

—Public comments without CBI claims submitted on the 1994 and 1999 proposed listing determinations.

—Colour Index 2.0, Intermediates Database, Third Edition, July 1999.

—Kirk-Othmer Encyclopedia of Chemical Technology, Fourth Edition, 2001.

—The Stanford Research Institute (SRI)'s 2000 Directory of Chemical Producers.

—Information provided by trade associations (CPMA and ETAD) in 2002–2003 regarding the status of dye, pigment and FD&C facilities potentially generating the wastes of concern.

—Information provided by trade associations (CPMA and ETAD) in 2002–2003 regarding onsite waste management units for dyes and/or pigments manufacturers potentially generating the wastes of concern.

—Dyes and/or pigments manufacturers' websites.

III. Approach Used in This Proposed Listing

A. Summary of Today's Action

In hazardous waste listings promulgated by EPA, we typically describe the scope of the listing in terms of the waste material and the industry or process generating the waste. However, in today's rule, we are proposing to use a newly developed ''mass loadings-based'' approach for listing dyes and/or pigments production wastes. In a mass loadings-based listing, a waste would be hazardous once a determination is made that it contains any of the constituents of concern at or above specified mass-based levels of concern.

In this proposed rule, we identify constituents of concern likely to be present in nonwastewaters which may pose a risk above specified mass loading levels. Using risk assessment tools developed to support our hazardous waste identification program, we assessed the potential risks associated with the constituents of concern in plausible waste management scenarios. From this analysis, we developed ''listing loading limits'' for each of the constituents of concern.

If you generate any dyes and/or pigments production nonwastewaters addressed by this proposed rule, you would be required either to determine whether or not your waste is hazardous or assume that it is hazardous as generated under today's proposed K181 listing. (Note, we are proposing that if wastes are otherwise hazardous due to an existing listing in §§ 261.31–33 or the hazardous waste characteristics in §§ 261.21–24, the listing under K181 would not apply.) We are proposing a three-step determination process. The first step is a categorical determination where you would determine whether your waste falls within the categories of wastes covered by the listing (*e.g.*, nonwastewaters generated from the production of dyes and/or pigments that fall within the product classes of azo, triarylmethane, perylene or anthraquinone) and whether any of the regulated constituents could be in your waste. If you determine under this first step that your waste meets the categorical description of K181 and that your waste may contain any K181 constituent, you would then in the second step determine whether your waste meets the numerical standards for K181 (*e.g.*, compare the mass loading of the regulated constituents in your waste to the numerical standards). Your waste

[16] ''Dyes and Dye Intermediates.'' Kirk-Othmer Encyclopedia of Chemical Technology, Fourth Edition. Volume 8. New York: John Wiley & Sons, Inc. 1993.

[17] ''Pollution Prevention Guidance Manual for the Dye Manufacturing Industry.'' U.S. Environmental Protection Agency and the Ecological and Toxicological Association of the Dyestuffs Manufacturing Industry. 1990.

would be a listed hazardous waste if it contains any of the constituents of concern at a mass loading equal to or greater than the annual hazardous mass limit identified for that constituent. Under the proposed approach, all waste handlers may manage as nonhazardous all wastes generated up to the loading limit, even if the waste subsequently exceeds one or more annual mass loading limits. The detailed descriptions of the steps you would be required to follow to demonstrate that your waste does not exceed the K181 listing limits is presented in section V. Finally, in the third step, you would be able to determine whether your waste is eligible for a conditional exemption from the K181 listing. You would need to demonstrate that your waste does not exceed a higher loading limit for one constituent and that it is being disposed of a landfill subject to design standards set out in § 258.40, § 264.301, or § 265.301.

B. Why Is a Mass Loadings-Based Approach Being Used for This Listing?

We have previously proposed two concentration-based listing determinations that were similar to today's proposal of a mass loadings-based listing. These proposals (the 1999 dyes and pigments listing proposal and the 2001 paint listing proposal) identified concentrations that would have served as listing levels for the constituents of concern for those wastes. Both proposals dealt with industries that generate highly variable wastes. We believed these proposals added a valuable level of flexibility to the listings, by clarifying the levels at which the wastes of concern began to pose risk that warranted hazardous waste control. These levels would have served as both pollution prevention goals, whereby facilities could reengineer their processes to minimize specific risks, and built-in delisting levels, allowing generators to exit the Subtitle C system without invoking the rulemaking process required by the current Delisting Program.

As we assessed this approach, we concluded that a mass loadings-based approach to listing dyes and/or pigments production wastes as hazardous has all of the advantages of a concentration-based listing. For example, a mass loadings-based approach allows generators to evaluate the variable wastes they generate individually for hazard, so only wastes that are hazardous are listed. As a result, there should be less burden on dyes and/or pigments manufacturers than would be imposed by a traditional listing that would bring entire wastes into the hazardous waste system, regardless of the amount of constituents found in wastes generated by individual generators. Also, a mass loadings-based listing approach may provide an incentive for hazardous waste generators to modify their manufacturing processes. For example, if a manufacturer has a listed hazardous waste based on constituent-specific mass loading levels established by EPA, the generator knows that if the wastes' mass loading levels are reduced below the regulatory level due to raw material substitution or process change, the waste would not be regulated as a listed hazardous waste. Therefore, the generator may decide to substitute raw materials in order to generate a nonhazardous waste. This approach encourages waste minimization and reduced use of toxic constituents, goals of both RCRA and the Pollution Prevention Act of 1990 (42 U.S.C. 13101 *et seq.*, Pub. L. 101–508, November 5, 1990).

Section 1003 of RCRA states that one goal of the statute is to promote protection of human health and the environment and to conserve valuable material and energy resources by ''minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling, and reuse and treatment.'' Section 1003 further provides that it is a national policy of the United States that, whenever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible.

The Pollution Prevention Act of 1990 provides a hierarchy of approaches. Pollution should be prevented or reduced; wastes that cannot be prevented should be recycled or reused in an environmentally safe manner; wastes that cannot be prevented/reduced or recycled should be treated; and disposal or release into the environment should be chosen only as a last resort. If EPA provides a mass loadings-based target in the listing, generators would have regulatory and economic incentives to meet the reduced levels.

The mass loading approach also offers two additional advantages. It will improve environmental protection by capturing large volume, dilute wastes that would not be regulated under a concentration-based approach. Also, since it requires less data from individual facilities, it allows us to move forward on the last of the HSWA-mandated listings without complete resolution of the *Magruder* CBI litigation.

While this approach represents a new way of assessing wastes, we believe that the underlying concepts of assessing the mass of constituents of concern are similar to other EPA programs, including reporting that may be required for major sources under the CAA, for facilities subject to the TRI, and for facilities subject to NPDES permits. Many facilities potentially impacted by this listing will already be assessing constituent masses under these types of programs.

EPA solicits public comment on all aspects of this mass-loading-based approach to making a listing determination, including the impact of such an approach compared to approaches used in the past (*e.g.*, concentration-based approach) and its usefulness as a means of encouraging pollution prevention.

C. What Wastes Are Generated by This Industry?

As explained earlier in Section II.G, we estimate that currently there are 37 active dyes and/or pigments facilities operated by 29 companies (excluding those no longer making in-scope dyes and/or pigments products and those due to be closed) based on the information provided by the trade associations (CPMA, ETAD and IACM) in 2002–2003.

Based on the non-CBI portions of the 1992 RCRA § 3007 survey data (as supplemented and updated) submitted by entities who were not plaintiffs in the *Magruder* litigation, organic dyes and/or pigments manufacturers mainly generate the following types of waste: Wastewaters (including process washes, equipment rinse waters, and other waste liquors), spent solvents, still bottoms, wastewater treatment sludge and other solid materials (such as emission control dust and fines, off-specification products, spent filter aids/cloths, process sludge and filter cake.)

We estimate that the 37 dyes and/or pigments production facilities generate up to 22 million metric tons of wastewaters and 69,000 metric tons of nonwastewaters per year.[18] Our estimates of wastewater generation rates were based on rates reported in NPDES permits for those facilities that discharge directly to surface water. For facilities that discharge their wastewaters indirectly through POTWs, we estimated their wastewater generation rates using data compiled by

[18] *See* ''Economic Assessment for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants' in the public docket for today's proposed rule for a description of our waste quantity estimation.

the Office of Water in support of the OCPSF effluent guidelines development process. We estimated nonwastewater generation rates by applying engineering estimates of wastewater treatment sludge generation rates. Wherever possible, we used facility-specific generation rates, including those provided in non-CBI public comments and non-CBI portions of § 3007 surveys. Note that our estimates of nonwastewater generation rates do not include estimates of waste solids other than wastewater treatment sludges (*e.g.*, filter solids, off-specification products, *etc.*). Our review of the non-CBI § 3007 data show that these waste quantities are often significantly smaller than wastewater treatment sludge quantities generated at the same facilities. At the same time, our estimated nonwastewater quantities are likely to be somewhat overstated due to our use of conservative assumptions about the amount of sludge generated during wastewater treatment. Consequently, we believe that our estimates of wastewater treatment sludge volumes are large enough to encompass volumes of the other types of solids generated by these facilities.

D. How Are These Wastes Currently Managed?

We used the following sources to characterize the management of those wastes covered by this listing determination:

- Non-CBI portions of RCRA § 3007 surveys submitted by facilities that are not plaintiffs in the *Magruder* litigation.
- Non-CBI public comments on the 1994 and 1995 proposed listing determinations for this industry.
- State agencies.
- TRI.
- Industry trade associations.
- Facility Web sites.

The non-CBI surveys (available in the docket for today's rule) provided limited historical data about the waste management practices performed by the surveyed facilities, including: Wastewater treatment in tanks, wastewater treatment and/or storage in surface impoundments, discharge of wastewaters to a POTW or under NPDES, solvent recovery, combustion of waste solids/liquids onsite or offsite, fuel blending in industrial furnaces, and disposal of nonwastewaters in nonhazardous landfills onsite or offsite, and disposal of nonwastewaters in hazardous offsite landfills.

We explored a number of more recent publicly available data sources to update the non-CBI survey information on the waste management practices at the operating dyes and/or pigments production facilities and to understand current management practices at facilities whose survey data were unavailable due to the *Magruder* injunction. We reviewed non-CBI information from public commenters on the December 22, 1994 and July 23, 1999 proposed rules. The commenters claimed that all the onsite land disposal units of concern (nonhazardous waste landfills and surface impoundments) described in the 1992 RCRA § 3007 survey were equipped with protective liners, or had been replaced with tanks, or were closed or undergoing closure. (These comments have been placed in the docket for today's proposal.)

In 2002 we contacted nine State agencies to learn about the existing status of onsite land disposal units located at potential dyes and/or pigments production facilities in those States.[19] None of the State contacts identified any facilities with active onsite land disposal units, with the exception of a single facility slated for closure that was described as operating surface impoundments equipped with double high density polyethylene (HDPE) liners.

Furthermore, we reviewed the most recent available TRI data (reporting year 2000) for onsite and offsite chemical releases of interest at the dyes and/or pigments production facilities. As summarized in the Listing Background Document, the TRI data describes a variety of management practices, including: discharge to POTW or surface water; thermal treatment in offsite incinerators, cement kilns, energy recovery facilities, or fuel blenders; disposal in onsite landfills; disposal in offsite landfills; and shipment to waste brokers or treatment facilities.

We also met with the three primary trade associations (CPMA, ETAD, and IACM) in December of 2002. The trade associations reviewed our compilation of available information regarding onsite waste management practices at known dyes and/or pigments production facilities. (*See* meeting summaries available in the public docket for today's proposed rule.) Both CPMA and ETAD collected additional information, and provided input on the status of those identified onsite waste management practices (copies available in the public docket for today's proposed rule). ETAD indicated that the only active onsite landfill was at a facility that treats waste by incineration prior to disposal. This is consistent with TRI reporting data, which show that the only constituents of concern that were disposed of in the onsite landfill were metals (presumably the organic constituents were effectively destroyed). Furthermore, ETAD confirmed that the production of dyes at this facility was a very small fraction of the onsite production processes. Thus, we believe that the use of this one onsite landfill was not representative of management practices for the waste we are evaluating. Based on all of this information, we concluded that all wastes of concern going to landfills are disposed of in offsite landfills. As discussed further in the following sections, we ultimately concluded that all of the landfilled wastes are placed in municipal solid waste landfills.

Consistent with their comments on the 1994 and 1999 proposals, the trade associations asserted that there are currently no active unlined surface impoundments at operating dyes and/or pigments production facilities that receive untreated in-scope wastes, since the previously identified unlined or clay-lined onsite impoundments had been closed. The trade associations were also able to confirm that one production facility treats wastewater in an impoundment with double composite liners (including synthetic materials) and a leachate collection system, and that one other facility with a double-lined impoundment was scheduled to close.

In a subsequent review of some facility websites, we discovered that one facility operates onsite surface impoundments. According to the State regulating authority contacted, these impoundments are clay-lined and are used to store wastewater after treatment and prior to NPDES discharge. This facility is discussed in more detail in section IV.C.

E. What Waste Management Scenarios Did We Select for Risk Assessment Modeling?

This section summarizes our findings and conclusions concerning current dyes and/or pigments production practices for nonhazardous waste management; the plausible waste management scenarios that we chose to model for the risk assessment; and why we did not model certain management practices.

We chose to model three waste management scenarios based upon our review of the current waste handling practices reported in the publicly available data and the plausibility that these scenarios represent actual practices that are used or could be used for disposal of dyes and/or pigments production wastes. The scenarios that

[19] *See* "On-Site Waste Management Determination," dated May 20, 2003 in the public docket for details.

we chose are nonwastewaters disposed in nonhazardous municipal solid waste landfills; wastewaters stored and treated in on-site tanks prior to discharge to a POTW or under a NPDES permit; and wastewaters managed in onsite surface impoundments prior to discharge to a POTW or under a NPDES permit. The general criteria for selection of plausible waste management scenarios and the rationale for choosing each of these scenarios are described in this section.

1. Plausible Waste Management Selection Criteria and Modeling Considerations

Our regulations at § 261.11(a)(3)(vii) require us to consider the risk associated with ''the plausible types of improper management to which the waste could be subjected'' because exposures to wastes (and therefore the risks involved) will vary by waste management practice. The choice of which ''plausible management scenario'' (or scenarios) to use in a listing determination depends on a combination of factors which are discussed in general terms in our policy statement on hazardous waste listing determinations contained in the first proposed Dyes and Pigments Listing Determination (59 FR 66072, December 22, 1994). We have applied this policy in all subsequent listings and believe it is appropriate to continue to apply it here.

Our approach to selecting waste management scenarios to model for risk analysis is to examine current industry management practices; assess whether or not other practices are available to the industry; and to decide what practices the industry would reasonably be expected to use. There are common waste management practices, such as landfilling, which we generally presume are plausible for solid wastes and which we will evaluate for potential risk. There are other practices which are less common, such as land treatment, which we consider plausible only where the disposal methods have been reported to be practiced. Where a practice is actually reported in use, that practice is generally considered ''plausible'' and may be considered for potential risk. In some situations, potential trends in waste management for a specific industry suggest we will need to project ''plausible'' management even if it is not currently in use in order to be protective of potential changes in management and therefore in potential risk. We then evaluate which of these current or projected management practices for each waste are likely to pose significant risk based on an assessment of exposure pathways of concern associated with those practices.

2. Selection of Waste Management Scenarios for Risk Assessment Modeling of Dyes and/or Pigments Nonwastewaters

The majority of nonwastewaters are landfilled. Based on information available as we started our risk analyses, we decided to model disposal of nonwastewaters in both offsite municipal solid waste landfills and a small number of onsite and offsite nonhazardous industrial waste landfills. After we began these analyses, ETAD submitted additional information indicating that our initial information regarding an onsite landfill was not relevant, as the facility operating that landfill treats waste by incineration prior to disposal. In addition, we obtained information from the State of Illinois regarding the offsite landfill that we had initially identified as an industrial landfill, clarifying that this landfill in fact accepts municipal wastes. Consequently, we decided that disposal in an industrial landfill is not a plausible management practice for these wastes, and we are basing our proposed listing decision solely on our assessment of disposal in MSWLFs. Upon receipt of this information, we modified our subsequent modeling runs to reflect a landfill distribution that was solely made up of MSWLFs.

The primary difference between modeling industrial nonhazardous landfills and municipal landfills is that industrial nonhazardous landfills are slightly smaller than municipal landfills so the quantities of dyes and/or pigments production waste modeled in an industrial landfill would be a relatively larger proportion of the total waste quantities going into the unit. Given the linear nature of our modeling for the organic loading limits, we do not believe that the model results would differ significantly if the landfill size distribution reflected industrial landfills. The preliminary runs that we conducted on a distribution of industrial and municipal landfills reflected our preliminary (and incorrect) characterization of some of the currently used landfills as industrial nonhazardous landfills. These preliminary results were very similar to the results for MSWLFs only (that serve as the basis for today's proposal).

We modeled three liner scenarios: unlined, clay-lined, and synthetic-lined landfills. The risk assessment in section III.G.2.d.i contains more details about our risk modeling for landfills and the three liner scenarios. In past listings, EPA has not included the effect of liners in the modeling of releases from landfills. Previously, we generally assumed that liners may fail over the long term, and therefore we modeled landfills as if they were unlined. We have been reluctant to take liners into account due to the uncertainties in the long term efficacy of liners and because we lacked data that we could use to project infiltration rates from a lined unit.[20]

More recently, EPA has modeled reduced infiltration rates for lined landfills to support the Guide for Industrial Waste Management. The Industrial Waste Evaluation Model (IWEM) incorporated models to evaluate the groundwater protection afforded by various liner systems.[21] For modeling composite liners, the IWEM used empirical data for infiltration rates collected from lined landfills. As part of the effort to characterize and develop distributions for the infiltration rates through liners, EPA collected information for nonhazardous waste management unit liner systems (*i.e.*, the rates of leachate infiltration through liners).[22] EPA is today proposing to use data collected in this effort to construct distributions of infiltration rates for modeling of Subtitle D MSWLFs.

We believe it is appropriate to consider liners in today's listing determination for several reasons. First, we have no indication that these wastes are (or are likely to be) landfilled in cells without liners. In comments on the earlier listing proposals for dye and pigment wastes, industry groups (ETAD and CPMA) stated that industry does not use unlined landfills; ETAD went further and identified the landfills being used by their members and described the liner systems in place at these landfills. Second, CERCLA liability concerns create strong incentives against the operation of such units by landfill owners and against the placement of these wastes in such units by waste generators. Third, our data show that the industry uses municipal solid waste landfills. These units have been subject to the Part 258 standards

[20] For example, we argued this most recently in the chlorinated alphatics listing, where we concluded that uncertainties regarding the long-term effectiveness of landfill liners were sufficient to support a decision to list. We emphasized, however, that this decision was specific to a waste containing high concentration of mercury, a highly toxic, very persistent constituent. 65 FR 67101 (Nov. 8, 2000).

[21] *Industrial Waste Management Evaluation Model (IWEM) Technical Background Document.* EPA530–R–02–012, U.S. EPA, August 2002. *See also http://www.epa.gov/epaoswer/non-hw/industd/iwem_tbd.htm.*

[22] ''Characterization of Infiltration Rate Data to Support Groundwater Modeling Efforts,'' Draft Final TetraTech, Inc. September 28, 2001.

since the regulations were promulgated in 1991. Fourth, we previously have considered the attenuative properties of liners in prior listing determinations for surface impoundments (*e.g.*, *see* the proposal for listing paint manufacturing wastes at 66 FR 10108, February 13, 2001), as well as in the Guide for Industrial Waste Management. Finally, we now have data describing infiltration rates through various liner systems, allowing us to build distributions reflective of real landfills. For these reasons, we believe it is now appropriate to assess the impact of liners on the attenuation of toxicants in waste management units, where such liners are widely used for the disposal of the wastes of interest. We request comments on this approach.

Available data suggests that a relatively small portion of the nonwastewaters from dyes and/or pigments production are combusted and, consequently, that combustion is a plausible management method. We chose not to model combustion. In past listing determinations where we have attempted to assess risks from incineration, we found that the potential risks from the release of constituents through incineration would be at least several orders of magnitude below potential air risks from releases from tanks or impoundments (*see* listing determination for solvent wastes at 63 FR 64371, November 19, 1998). Further, it is difficult to model what goes into combustion units in relation to the residual constituents that are released from the combustion unit either in ash or air.[23] We believe the existing and proposed air regulation can effectively regulate these combustion units, as described in section II.E.

Furthermore, we did not model management in Subtitle C landfills. Subtitle C modeling is unnecessary, since we modeled a less protective MSWLF scenario. Finally, we also did not model management scenarios that involved recycling. We had no information to lead us to believe that such practices involved land placement. As explained below, we modeled air releases from wastes in tanks and found no risks warranting listing. We think secondary materials stored in tanks prior to recycling would pose similarly low risks.

3. Selection of Waste Management Scenarios for Risk Assessment Modeling of Dyes and/or Pigments Production Wastewaters

As delineated in section III.D, the publicly available data showed a number of management scenarios of interest for wastewaters from production of dyes and/or pigments: management in tanks or surface impoundments prior to discharge to a POTW or under an NPDES permit; incineration; and fuel blending in industrial furnaces.

We modeled two scenarios: (1) Onsite treatment of wastewater in tanks, and (2) onsite management of wastewaters in clay-lined and synthetic-lined surface impoundments. As described in the previous section, currently operating organic dyes and/or pigments production facilities manage their wastes in these types of units. We also modeled unlined surface impoundments, although we did not use these results as the basis for our listing determination. We believe unlined impoundments are unlikely to be utilized for untreated wastewater, not only because our data do not indicate that such units are currently in use, but also because storage or treatment in an impoundment without any kind of liner seems unlikely.

For surface impoundments, EPA has recently relied on the effectiveness of liners in deciding not to list wastewaters from paint manufacturing.[24] Although we did not try to model liner performance for paint wastewaters, we assumed that composite liners provide significant protection during the relatively short operational life of an impoundment (30 to 50 years). As noted in the final determination for paint manufacturing wastes, we believe that the level of protection afforded by a liner system would be significant (67 FR 16267). Furthermore, if leaks occurred during its operating life, the unit can be drained and repaired. Since we do not have data on infiltration rates for lined surface impoundments, we used calculated infiltration rates. This is the same approach used for the IWEM guidance, referenced above for lined landfills; see the Risk Background Document for today's proposal for more discussion.

We believe it is appropriate to consider liners in modeling surface impoundments in today's listing determination for reasons similar to those noted for landfills in the above section. Specifically, our data indicate that the untreated wastewaters in scope are not (and are not likely to be) managed in impoundments without liners. Industry groups (ETAD and CPMA) have confirmed that there are no active unlined surface impoundments at operating dyes and/or pigments production facilities that receive untreated in-scope wastes. We believe it is less likely that unlined landfills would be in operation in the future, given liability concerns. Also, we are using an approach similar to that we used for describing infiltration rates through various liner systems for the IWEM guidance. We request comments on this approach.

We did not assess discharges of wastewaters by dye and/or pigment facilities under NPDES permits or discharges to POTWs. The discharges to surface waters are regulated under the Clean Water Act by means of NPDES permits or national pretreatment standards. Many of these discharges are excluded from RCRA hazardous waste regulation. *See* 40 CFR 261.4(a)(1) and (2). We also chose not to model combustion of wastewaters in incinerators, cement kilns or industrial furnaces. In the previous section on nonwastewaters, we explain the Agency's rationale for not modeling combustion or fuel blending. That rationale applies equally to wastewaters.

F. What Factors Did EPA Incorporate Into Its Quantitative Risk Assessment?

In making listing determinations, the Agency considers the listing criteria set out in 40 CFR 261.11. The criteria provided in 40 CFR 261.11(a)(3) include eleven factors for determining ''substantial present or potential hazard to human health and the environment.'' Nine of these factors, as described generally below, are incorporated into EPA's risk assessment for the wastes of concern:

- Toxicity (§ 261.11(a)(3)(i)) is considered in developing the health benchmarks used in the risk assessment modeling.
- Constituent concentrations (§ 261.11(a)(3)(ii)) and the quantities of waste generated (§ 261.11(a) (3)(viii)) are combined in the calculation of mass loading levels that pose a hazard.
- Potential to migrate, persistence, degradation, and bioaccumulation of the hazardous constituents and any degradation products (§§ 261(a)(3)(iii), 261.11(a)(3)(iv), 261.11(a)(3)(v), and 261.11(a)(3)(vi)) are all considered in the design of the fate and transport models used to determine the concentrations of the contaminants to which individuals are exposed.

[23] While other products of incomplete combustion may present possible risks, it is difficult for us to assess this potential for the chemicals of concern.

[24] *See* the proposed rule at 66 FR 10108 (Feb. 13, 2001) and the final rule at 67 FR 16267 (Apr. 4, 2002).

As discussed in the previous section, we considered two factors, plausible mismanagement and other regulatory actions ((§§ 261.11(a)(3)(vii) and 261.11(a)(3)(x)) in establishing the waste management scenario(s) modeled in the risk assessment.

One of the remaining factors of the eleven listed in 261.11(a)(3) is consideration of damage cases (§ 261.11(a)(3)(ix)); this is discussed in section G.5 below. The final factor allows EPA to consider other factors as appropriate (§ 261.11(a)(3)(xi)).

EPA conducted analyses of the risks posed by the wastes evaluated for this listing to determine the mass loadings of constituents that, if found in dyes and/or pigments production wastes, would meet the criteria for listing set forth in § 261.11(a)(3). Section G discusses the human health risk analyses and ecological risk screening analyses EPA conducted to support our proposed listing determinations for dyes and/or pigments production wastes. We consider the risk analyses in developing our listing decisions for each of the wastes.

G. Overview of the Risk Assessment

We conducted a risk assessment to calculate the mass loadings of individual constituents that can be present in waste and remain below a specified level of risk to both humans and the environment.

To establish these listing levels, we: (1) Selected constituents of potential concern in wastes from dyes and/or pigments production, (2) evaluated plausible waste management scenarios (as described previously in section III.E), (3) calculated exposure concentrations by modeling the release and transport of the constituents from the waste management unit to the point of exposure, and (4) calculated waste constituent loadings that are likely to pose unacceptable risk. In addition, we conducted a screening level ecological risk assessment to ensure that the loading limits were protective of the environment.

The following sections explain the selection of the constituents that we evaluated in the risk assessment and present an overview of the analysis we used to calculate risk-based listing levels for nonwastewaters and wastewaters from dyes and/or pigments production. Details of the risk assessment are provided in the Risk Assessment Background Document, which is in the docket for today's rule.

1. How Did EPA Chose Potential Constituents of Concern?

Our overall goal in choosing potential constituents of concern was to identify a list of chemicals that could reasonably be expected to be associated with wastes from the production of azo, triarylmethane, perylene or anthraquinone dyes or pigments and that could be derived entirely from sources that were not restricted by the *Magruder* injunction.

We first created a primary list of all of the chemicals identified in a series of non-CBI data sources, and then removed from that list those compounds not expected to have toxicity benchmarks and those chemicals not expected to be directly linked with the manufacture of the dyes and pigments of concern. This process ultimately resulted in the identification of 35 constituents of concern (CoC) (*see* Table III–1 below) that we further assessed via risk assessment. The details of this analysis are described in ''Background Document: Development of Constituents of Concern for Dyes and Pigments Listing Determination,'' available in the docket for today's proposal.

TABLE III–1.—DYES AND PIGMENTS CONSTITUENTS OF CONCERN

Chemical compound	Synonyms	CAS
Aminoanthraquinone	2-Aminoanthraquinone	117–79–3
Aniline	Benzenamine; aminobenzene	62–53–3
o-Anisidine	2-Methoxyaniline, 2-methoxybenzenamine	90–04–0
Azobenzene	Diphenyldiazene, diphenyl diimide	103–33–3
Barium		7440–39–3
Benzaldehyde		100–52–7
Benzidine		92–87–5
4–4'-bis(dimethylamino) benzophenone		90–94–8
4-Chloroaniline	p-Chloroaniline	106–47–8
Copper		7440–50–8
p-Cresidine	2-Methoxy-5-methylbenzenamine, 3-amino-4-methoxytoluene	120–71–8
p-Cresol	4-Methylphenol	106–44–5
1,2-Dichlorobenzene	o-Dichlorobenzene	95–50–1
3,3'-Dichlorobenzidine	3,3'-Dichlorobiphenyl-4,4'-ylenediamine	91–94–1
3,3'-Dimethoxybenzidine	Dianisidine	119–90–4
2,4-Dimethylaniline	2,4-Xylidine	95–68–1
N,N-Dimethylaniline	N,N-Dimethylbenzenamine	121–69–7
3,3-'Dimethylbenzidine	4,4'-bi-o-Toluidine, diaminoditolyl	119–93–7
Diphenylamine	N-Phenylbenzeneamine	122–39–4
Formaldehyde		50–00–0
Lead		7439–92–1
Methanol		67–56–1
4,4'-Methylenedianiline	p-p'-Diaminodiphenyl methane; 4,4'-methylene-bis[benzenamine]	101–77–9
Naphthalene		91–20–3
5-Nitro-o-anisidine	2-methoxy-5-nitroaniline	99–59–2
5-Nitro-o-toluidine	2-methyl-5-nitroaniline; 2-amino-4-nitrotoluene	99–55–8
Phenol		108–95–2
1,2-Phenylenediamine	o-phenylenediamine, 2-aminoaniline	95–54–5
1,3-Phenylenediamine	3-Aminoaniline, m-phenylenediamine	108–45–2
1,4-Phenylenediamine	4-aminoaniline; p-Phenylenediamine	106–50–3
Sodium nitrite		7632–00–0
Toluene-2,4-diamine	4-m-tolylenediamine, 2,4-diaminotoluene, 4-methyl-m- phenylenediamine	95–80–7
o-Toluidine	2-toluidine; 2-aminotoluene	95–53–4
p-Toluidine	4-toluidine; 4-aminotoluene	106–49–0

TABLE III–1.—DYES AND PIGMENTS CONSTITUENTS OF CONCERN—Continued

Chemical compound	Synonyms	CAS
Zinc		7440–66–6

Our primary data sources (described in section II.H of this notice and in the public docket for today's rule) used to develop the CoC lists include:

- Sampling and analytical data collected by EPA (as summarized in Table 1 of the *Magruder* consent order) and split sample analytical data compiled and provided by CPMA. These data characterized wastes generated from dyes and/or pigments production.
- Non-CBI RCRA § 3007 survey data characterizing wastes from dyes and/or pigments production.
- A list of 22 aromatic amines associated with azo dyes regulated by the European Union.
- Intermediates associated with dye and pigment products reported to be manufactured in the U.S. in the ''Colour Index,'' Third Edition.
- Public comments on the prior 1994 and 1999 proposed listing determinations for dyes and pigment wastes.
- TRI releases reported by known manufacturers of dyes and/or pigments impacted by this proposal.

We found data linking each of the 35 CoCs listed above to dyes and/or pigments manufacture from at least two (and generally from at least four) of these data sources, and often found additional corroborating data from other more general encyclopedia and chemical dictionaries. In addition, we found toxicity benchmark data for each of these CoCs, allowing us to conduct risk assessment modeling of these compounds. As an example, we identified 4-chloroaniline as a CoC because (1) it was detected in our and CPMA's analytical data; (2) it was confirmed as present in dyes and/or pigments wastes in public comments; (3) it was reported to be released by known dyes and/or pigments manufacturers in the TRI; (4) it is regulated by the European Union as an aromatic amine linked to azo dyes; and (5) we identified toxicity benchmarks that allowed us to conduct risk assessment modeling of this compound.

2. What Was EPA's Approach to Conducting Human Health Risk Assessment?

The risk analysis for the dyes and/or pigments production wastes estimates the mass loadings of individual constituents that can be present in each waste and still provide a specified level of protection to human health and the environment. The risk assessment evaluates waste management scenarios that may occur nationwide. We selected a national analysis that captures variability in meteorological and hydrogeological conditions for this listing determination because facilities that manage the wastes of interest are found in many areas of the country.

For this listing determination, we defined the target level of protection for human health to be an incremental lifetime cancer risk of no greater than one in 100,000 (10^{-5}) for carcinogenic chemicals and a hazard quotient of 1.0 for noncarcinogenic chemicals. The hazard quotient is the ratio of an individual's chronic daily dose of a constituent to the reference dose for that constituent, where the reference dose is an estimate of the daily dose that is likely to be without appreciable risk of deleterious effects over a lifetime.

To determine the allowable mass loadings for constituents of concern, we used a probabilistic analysis to calculate the exposure to nearby residents from disposal of those constituents in the types of waste management units used by the dyes and pigments industries. We then set the allowable loading level such that the exposure to each constituent would not exceed the target level of protection for 90 percent of the nearby residents (adults and children). Thus, the allowable mass loadings meet a target cancer risk level of 10^{-5} or hazard quotient of one for 90 percent of the receptor scenarios we evaluated. We calculated estimates of exposure in the upper end of the distribution (*i.e.*, at or above the 90th percentile), while avoiding estimates that are beyond the true distribution. EPA guidance for risk characterizations states that ''the 'high end' of the risk distribution (generally the area of concern for risk managers) is conceptually above the 90th percentile of the actual (either measured or estimated) distribution. This conceptual range is not meant to precisely define the limits of this descriptor, but should be used by the assessor as a target range for characterizing 'high-end risk.' '' [25] Therefore, a high-end estimate that falls within the range (at or above the 90th percentile but still realistically on the distribution) is a reasonable input to a decision.

We believe that the 90th percentile levels from our probabilistic analysis are appropriate to set the levels for this mass loadings-based listing. The dyes and/or pigments production waste that remains nonhazardous at the proposed levels would pose risks below that indicated by the benchmark risk level at the 90th percentile. We also used the 90th percentile risk levels in two prior proposed concentration-based listings. See the proposed rules for wastes from paint manufacturing (66 FR 10060, February 13, 2001) and two dyes and/or pigments wastes (64 FR 40192, July 23, 1999).[26]

A probabilistic analysis calculates distributions of results (in this case a protective mass loading for each constituent) by allowing some of the parameters used in the analysis to have more than one value. The model is run numerous times (for this analysis we generally ran the model 10,000 times), each time with different values selected from the distributions of input parameters. A parameter is any one of a number of inputs or variables (such as distance between the waste management unit and the receptor) required for the fate and transport and exposure models and equations that EPA uses to assess risk. In the probabilistic analysis, we vary sensitive parameters for which distributions of data are available.

Parameters varied for this analysis include waste management unit size, parameters related to the location of the waste management unit such as climate and hydrogeologic data, location of the receptor, and exposure factors (*e.g.*, drinking water ingestion rates). In some cases, to maintain the inherent correlation between parameters, we treat multiple parameters as a single parameter for the purpose of conducting the analysis. We do this to prevent inadvertently combining parameters in our analysis in ways that are unrealistic. For example, we treat environmental setting (location) parameters such as climate, depth to groundwater, and

[25] ''Guidance on Risk Characterization for Risk Managers and Risk Assessors,'' by then Deputy Administrator F. Henry Habicht, 1992.

[26] For traditional listing decisions, we have considered a range of probabilistic results at or above the 90th percentile, *e.g.*, see the proposed listings for wastes from the production of chlorinated aliphatics (64 FR 46476, August 25, 1999) and inorganic chemicals (65 FR 55684 September 14, 2000).

aquifer type as a single set of parameters. We believe that, for example, allowing the climate from one location to be paired with the depth to groundwater from another location could result in a scenario that would not represent reality.

We set some of the parameters in the probabilistic analysis as constant values because (1) there are insufficient data to develop a probability distribution function, and (2) from previous listing determinations, the analysis has been shown to be insensitive to the value of the parameter.

a. What Waste Management and Release Scenarios Were Modeled?

We evaluated three waste management units that represent plausible management scenarios that are likely destinations for dyes and/or pigments production waste. The modeled units were nonhazardous landfills, surface impoundments, and wastewater treatment tanks. Section III.E describes in detail why these waste management units were selected for evaluation in the risk assessment. The waste management scenarios for each of these units were created using publicly available information reported and provided by industry on the management of their dyes and/or pigments production wastes. In addition, we used information on the national distributions of waste management unit characteristics (*e.g.*, size and waste capacity) collected with surveys conducted for other rulemakings to establish the characteristics of the waste management units.

As noted in section III.E.2, we originally believed that facilities managed dyes and/or pigments wastes in onsite or offsite nonhazardous landfills that are not MSWLFs, *i.e.*, Subtitle D ''industrial landfills.'' Thus, our initial modeling of landfill scenarios used a distribution of landfills that included a small fraction of industrial units (91 percent MSWLFs and 9 percent industrial landfills). Further review of the available information showed that we did not have any evidence that industrial landfills were currently in use for these wastes. Therefore, subsequent risk analyses used a landfill distribution made up of MSWLFs only. As previously discussed, the differences between the industrial and MSW landfill scenarios were relatively minor; this change did not have a significant impact on the risk results. Also, in the initial analyses, we inadvertently used a landfill life of forty years, while for subsequent modeling we corrected this to a thirty-year life. We have used a thirty-year life in recent listings, and we believe a thirty-year life is more appropriate for MSWLFs.[27] Comparisons of some modeling runs using the different landfill lives and distributions showed that these were not significant factors.

We have developed distributions for each type of waste management unit that characterizes the units' capacities and dimensions (*e.g.*, area and depth). These dimensions and operating characteristics are important determinants of the extent to which a contaminant may be released from the unit. We assume specific operational lifetimes (between 30–50 years) for each type of waste management unit, as well as different lengths of time during which constituents are assumed to be released from these units.

We determined that releases from all of the waste management units (tanks, landfills, and surface impoundments) can occur through release of vapor emissions to the air. We evaluated air releases for organic constituents that had a toxicity benchmark for the inhalation exposure route. Seventeen of the 30 organic constituents assessed did not have adequate benchmarks for such analysis. We did not assess the metals for vapor emissions because they do not volatilize. We assumed that particulate emissions to the air from solids disposed in landfills would be minimal because municipal landfills are typically required to have daily cover (*see* regulations for daily cover at § 258.21). Therefore, we did not consider particulate emissions for either organic or metal constituents in this assessment.

For landfill and surface impoundment scenarios, we determined that releases could also occur through leaching of waste contaminants into the subsurface to both groundwater and surface water. The Agency assumed that landfills and surface impoundments followed standard construction and operational requirements such that runoff and water erosion did not occur. We assumed that tanks were sufficiently impermeable that they were highly unlikely to release any significant amount of waste to the subsurface.

b. What Exposure Scenarios did EPA Evaluate?

We assumed that exposure from vapor emissions would be through inhalation of ambient air, while exposure to contaminants in groundwater would be through drinking and through inhalation of volatile contaminants released during showering. We did not add the risks from vapor releases and from groundwater contamination because vapor releases reach nearby residents in a matter of hours, while releases to groundwater take many years to migrate to nearby wells. For adults, we did add risks from both drinking and showering with contaminated groundwater. We assumed small children took baths instead of showers, so we did not model the risk of inhaling volatile chemicals while showering with groundwater for them. Previous analyses have indicated that exposure to chemicals volatilized from groundwater during household uses other than showering are very low compared to exposures in the bathroom during and immediately after showering. Therefore, we did not model exposure from other household uses of groundwater.

As noted above, particulate emissions to the air from solids disposed in landfills would be minimal because municipal landfills are required to have daily cover. In addition, releases from landfills or surface impoundments through volatilization are unlikely to lead to significant deposition and food chain uptake because this release pathway would only be significant for constituents that are more volatile than those of concern for dyes and/or pigments production wastes.

c. How did EPA Quantify Each Receptor's Exposure to Contaminants?

The amount of contaminant ingested or inhaled by a receptor is a function of the concentration of the contaminant in the water or air and various exposure factors, such as how much drinking water the receptor consumes each day (the intake rate), how much air the receptor breathes, the number of years the receptor is exposed (the exposure duration), and how often the receptor is exposed (the exposure frequency). Another important exposure factor affecting risk is the body weight of the receptor, since most toxicity measures are expressed as dose per unit of body weight. Our primary source of exposure factors is the ''Exposure Factors Handbook'' published by EPA in August 1997.

The one situation where we do not calculate dose to determine risk is the case when we use the reference concentrations (RfCs) to assess health impacts. RfCs are expressed as ambient air concentrations which are protective of human health; as such, they already have the appropriate exposure factors (inhalation rate, body weight) included in their derivation.

Children are an important sub-population to consider in a risk assessment because, compared to adults, children drink more water and breathe more air per unit of body weight.

[27] ''Calculation of Municipal Landfill Active Life.'' U.S. EPA. November 10, 2003.

Therefore, their dose per unit of body weight at any particular time is higher than an adult's. To evaluate childhood exposure for this analysis, we evaluated a child whose exposure begins at a random age between one and six years old. We then aged the child for the number of years defined by the randomly selected exposure duration. As children mature, their physical characteristics and behavior patterns change. To capture these changes in the analysis, we divided the life of a resident who moved into the home as a child into several cohorts: cohort 1 (ages 1–5), cohort 2 (ages 6 to 11), cohort 3 (ages 12 to 19), and cohort 4 (ages 20 to 70). Each cohort has a discrete distribution of exposure parameters that are used to calculate exposure to an individual, so our analysis updated the exposure factors as the child aged from one cohort to another.

d. How Did EPA Predict the Release and Transport of Constituents From a Waste Management Unit to Receptor Locations?

We conducted contaminant fate and transport modeling to determine what the concentrations of contaminants will be in the air or groundwater that the receptor comes into contact with. These concentrations are called ''exposure point concentrations.'' There are a number of computer-based models and sets of equations that we use to predict exposure point concentrations. In the following sections, we briefly discuss these models and equations and their application in the risk analyses.

(i) Predicting Release of Constituents. *Landfill Partitioning Model.* The landfill model is designed to simulate the gradual filling of an active landfill and the long-term releases from the active and closed landfill cells. We also used this model in the February 13, 2001 proposed listing determination for paint production wastes (66 FR 10060). The design assumes that the landfill is composed of a series of vertical cells of equal volume that are filled sequentially. We assumed that each cell requires one year to be filled. The formulation of the landfill model is based on the assumption that the contaminant mass in the landfill cells might be linearly partitioned into the aqueous, vapor, and solid phases. The partitioning coefficients are based on those reported in literature, and are listed in the Risk Assessment Background Document. The model simulates the active lifetime of the landfill (30 years) and continues simulating releases until less than 1 percent of the peak mass is left or for a total of 200 years, whichever occurs first.

We assumed three different liner scenarios, unlined landfills where the underlying substrate is native soil (represented by a national distribution of soil types), landfills with compacted clay liners, and landfills with composite liners. For the unlined and clay-lined scenarios, we used EPA databases of landfill infiltration rates and regional recharge rates (calculated using the Hydrologic Evaluation of Landfill Performance (HELP) water-balance model). For the composite liner scenario, we used empirical distributions of infiltration rates.

The empirical infiltration rates were compiled from measured leak detection system flow rates for composite lined landfill cells.[28] There are several broad categories of liner types now in use. A typical composite liner is made up of a geosynthetic liner (GM) and a clay liner of some kind underneath. The clay liner is often a compacted clay liner (CCL). A CCL is composed of natural mineral materials, a bentonite-soil blend, and other materials placed and compacted in layers to build up a thick liner system (typically at least two feet thick). Another clay-based liner is a geosynthetic clay liner (GCL). A GCL is a relatively thin layer of processed clay (typically bentonite) either bonded to a geomembrane or fixed between two layers of geotextile. GCLs were developed relatively recently and are typically used with a GM in a composite liner.

In the composite liner scenario (annotated as SL) we modeled, we used a distribution of composite liners used at MSWLFs, including GM/GCLs, geomembrane/compacted clay liners (GM/CCLs), and a few examples of other combinations of liners. In developing this distribution, we excluded infiltration data from nonmunicipal landfills (Subtitle C landfills and landfills that accepted specialized wastes, such as ash) because our data indicate that all landfills reported to be used by dyes and/or pigments manufacturers are municipal solid waste landfills, and because we believe it is not appropriate to include data from units that accept very different waste (*e.g.,* hazardous wastes) and have different design requirements. In addition, we tried to use infiltration data that represented infiltration through a composite liner, *i.e.,* a combination of synthetic and clay liner that is consistent with the design requirements in § 258.40. For this reason, we excluded infiltration data that only represented infiltration through a single liner, such as the geomembrane liner by itself. Our evaluation of the results for these different liner assumptions is given in section IV.A.

We also modeled a select group of landfills that used geomembrane/geosynthetic clay liners (GM/GCL). The GM/GCL data set, unlike our composite liner data set, excluded all data from liner systems that included compacted clay liner (CCL). The CCL infiltration rates may include significant amounts of water expelled from the CCL as waste is placed in the landfill (''consolidation water'').[29] The consolidation water is difficult to account for and therefore may cause our infiltration rate data to be somewhat overstated. However, we believe that the contribution from consolidation water is not likely to be significant at the higher infiltration rates that are most important to the modeling results (*i.e.,* the 90th percentile probabilistic results are likely to be weighted toward the high end portion of the distribution of infiltration rates where any impact from consolidation water should be minimal). While the modeling results for the composite liner may be slightly higher due to this factor, we do not believe this materially affects the results. We also believe that the larger composite liner data set provides a better distribution of infiltration rates. The data used for the GM/GCL modeling were fairly limited in number and represented only a relatively small subset of the landfill units with data. Therefore, we relied on the composite modeling results (the SL scenario) for setting the listing limits proposed in this notice. The GM/GCL scenario results are provided in the Risk Assessment Background Document in the docket for today's proposal.

As usual for listing landfill modeling, we also assumed that there are adequate controls of runoff and erosion from the unit, preventing releases to groundwater or air from these routes. We assumed that the cover at closure is a soil cover that still permits volatilization. We also assumed that landfills would release leachate to the subsurface.

Based on the design assumptions above, we simulated the annual release of chemical mass by leaching to the unsaturated zone beneath the landfill and volatilization to the air. Within the landfill, we simulated losses of mass through anaerobic biodegradation (*i.e.,* degradation processes that occur in an oxygen-free environment). Hydrolysis

[28] ''Characterization of Infiltration Rate Data to Support Groundwater Modeling Efforts,'' Draft Final. TetraTech, Inc. September 28, 2001.

[29] ''Characterization of Infiltration Rate Data to Support Groundwater Modeling Efforts,'' Draft Final. Tetra Tech, Inc. September 28, 2001.

was not a significant factor for any of the constituents of concern. We used the highest 9-year average leachate concentration predicted by the partitioning model as input into EPA's Composite Model for Leachate Migration with Transformation Products (discussed in section ii below).

In modeling biodegradation, we used anaerobic degradation rates that were available in our primary reference.[30] This reference did not provide biodegradation rates for seven constituents of concern: aniline, azobenzene, benzaldehyde, 4-chloroaniline, 2,4-dimethylaniline, 1,2-phenylenediamine, and o-toluidine. For these chemicals, we selected conservative surrogates for assigning biodegradation rates. In selecting surrogates, we considered likely degradation pathways, potential interim products, and chemical structure. We used surrogates that were similar in structure and had similar or identical functional groups; in some cases, the surrogates were closely related isomers with the same chemical formula (*e.g.,* we used the rate for 1,4-phenylenediamine for 1,2-phenylenediamine). The use of surrogates is discussed in more detail in the Risk Assessment Background Document. We solicit comment on the use of surrogates for estimating biodegradation rates. We believe that using appropriate surrogates is preferable to assigning a default value of zero for the biodegradation rate. However, we also modeled these seven constituents by assuming a zero degradation rate for comparison. The mass loading limits resulting from modeling landfill releases without the surrogate biodegradation rates for these constituents are shown in Table IV–4 in section IV.A.4.

The partitioning model incorporates other assumptions intended to improve the efficiency of the model. These assumptions are described in detail in the Risk Assessment Background Document. The assumptions included the lack of lateral transport between cells, simulation of only a single cell and then aggregation of results based on the time each cell is filled, and the assumption that waste is added at a constant concentration and at a constant rate.

We do not believe that the wastes evaluated for the landfill scenario will contain or form nonaqueous phase liquids (NAPLs). NAPLs would be a problem only for wastes containing high concentrations of liquid organic material. Regulations for municipal landfills restrict the placement of any bulk or containerized liquids in a MSWLF unit (§ 258.28). Further, we have no information to indicate that such wastes would be destined for disposal in landfills. For example, the TRI releases reported for the constituents of concern do not suggest large quantities of organics are disposed in landfills. We expect wastes with high organic content to undergo thermal treatment, such as energy recovery. Therefore we did not model NAPL migration.

Surface Impoundment Partitioning Model. The surface impoundment model simulates the disposal of liquid wastes in a surface impoundment and the releases of chemicals during the lifetime of the unit. We also used this model in the September 14, 2000 proposed listing determination for inorganic chemical manufacturing wastes (65 FR 55684) and the February 13, 2001 proposed listing determination for paint production wastes (66 FR 10060). The entire time series of leachate concentrations are then used as input into EPA's Composite Model for Leachate Migration with Transformation Products (*see* section ii) which estimates the movement of the plume through the saturated and unsaturated zone over a 10,000 year time period. The time series of emissions for both vapors and particulates are also utilized along with air dispersion modeling results to estimate ambient air concentrations. We assume that the impoundments are properly designed and operated such that runoff and erosion do not occur. We assume that the unit is not covered. The model assumes that the waste in the impoundment consists of two phases: Aqueous liquid and sediment. The model simulates the changes at the bottom of the impoundment over time as settled solids fill pore space in native soils and act to reduce chemical transport to underlying soils and groundwater. In addition, the model allows for a fraction of each surface impoundment to be aerated, which enhances biodegradation and increases volatilization of some chemicals. The surface impoundment is assumed to operate 50 years and then undergoes clean closure (that is, all the waste is removed from the unit).

We modeled three liner systems for the surface impoundments: No liner, clay liner, and composite liner. The infiltration rates for unlined and clay-lined units were calculated internally by the groundwater model we used (EPACMTP). For the composite-lined surface impoundment, we calculated infiltration rates assuming a distribution of leak densities assembled from a survey of composite-lined units.[31] This approach is described in the Risk Assessment Background Document.

Based on the design assumptions, the surface impoundment module simulates annual release of leachate to the unsaturated zone and volatile emissions to the air. The model does not account for redeposition of volatiles into the unit from precipitation. The model accounts for various biological, chemical, and physical processes in the liquid phase, including hydrolysis, volatilization, sorption, settlement, resuspension, growth and decay of solids, and activated biodegradation (degradation which is dependent on the amount of biomass present). For the solid phase, the model accounts for anaerobic biodegradation in the sediments and has the ability to account for hydrolysis, although the hydrolysis rates for the constituents of concern were all zero. As noted above for the landfill partition model, we lacked biodegradation rates for seven constituents. As described previously, we used surrogates to estimate aerobic and anaerobic biodegradation rates for these constituents.

Tank Emissions Model. The tank model simulates time-varying releases of constituents to the atmosphere. The treatment tank is divided into two primary compartments: A liquid compartment and a sediment compartment. Mass balances are performed on these primary compartments at time intervals small enough that the hydraulic retention time in the liquid compartment is not significantly impacted by the solids settling and accumulation. In the liquid compartment, there is flow both in and out of the waste management unit (WMU). Solids generation occurs in the liquid compartment due to biological growth; solids destruction occurs in the sediment compartment due to sludge digestion. Using a well-mixed assumption, the suspended solids concentration within the WMU is assumed to be constant throughout the tank. However, some stratification of sediment is expected across the length and depth of the WMU so that the effective total suspended solids (TSS) concentration within the tank is assumed to be a function of the WMU's TSS removal efficiency rather than equal to the effluent TSS concentration. The liquid (dissolved) phase

[30] Howard, P.H., R.S. Boethling, W.F. Jarvis, W.M. Meyland, E.M. Michalenko, and H.T. Printup (ed.). 1991. *Handbook of Environmental Degradation Rates.* Lewis Publishers.

[31] ''Characterization of Infiltration Rate Data to Support Groundwater Modeling Efforts,'' Draft Final. Tetra Tech, Inc. September 28, 2001.

contaminant concentration within the tank, however, is assumed to be equal to the effluent dissolved phase concentration (*i.e.,* liquid is well mixed). The time series of emissions for vapors is utilized along with air dispersion modeling results to estimate ambient air concentrations.

Biological treatment occurs in treatment tanks due to both aerobic and anaerobic biodegradation. As noted above for the landfill partition model, we lacked biodegradation rates for seven constituents. Thus, as described previously, we used surrogates to estimate aerobic and anaerobic biodegradation rates for these constituents.

(ii) Predicting Transport of Constituents. *Air Dispersion Model* The air dispersion model uses information on meteorology (*e.g.,* wind speed, wind direction, temperature) to estimate the movement of constituents associated with contaminant releases through the atmosphere and the constituent concentrations in the air at the locations of potential receptors. The air concentrations for this analysis are based on the air dispersion factors from the Industrial Waste Air (IWAIR) model. These dispersion factors were calculated based on national distributions of location, waste management unit surface areas, and distance to receptors. As noted above, releases through volatilization are unlikely to lead to significant deposition and food chain uptake, and thus, deposition was not considered.

The calculated air concentrations were then averaged over the exposure duration. For the exposure duration, we used a time period centered around the occurrence of the peak concentration. These average concentrations were used to determine the receptor's exposure and risk.

Groundwater Model We used the EPA Composite Model for Leachate Migration with Transformation Products (EPACMTP) to model the subsurface fate and transport of contaminants that leach from the waste management units (landfills and surface impoundments) and migrate to a residential drinking water well. We assume that the soil and aquifer are uniform porous media and that flow and transport is described by Darcy's law and the advection-dispersion equation, respectively.

EPACMTP accounts for the following processes affecting contaminant fate and transport: Advection, hydrodynamic dispersion, equilibrium sorption by the soil and aquifer solids (both in the unsaturated and saturated zones), and contaminant hydrolysis. EPACMTP does not account for preferential pathways such as fractures, macropores, or facilitated transport (*i.e.,* any chemical process that has the potential to speed the transport of a pollutant beyond what is expected), which may increase the migration of constituents. Conversely, while the model has the capability of modeling biodegradation in groundwater, we do not have any appropriate coefficients to apply in the subsurface, so we do not account for the potential decrease in constituent migration.

The groundwater pathway consists of two components: Flow and transport in the vadose zone (the unsaturated zone directly below the unit), and flow and transport in the saturated zone. The primary transport mechanisms are downward movement along with infiltrating water flow in the unsaturated zone and movement along with ambient groundwater flow in the saturated zone. The advective movement in the unsaturated zone is one-dimensional, while the saturated zone module accounts for three-dimensional flow and transport. The model also considers mixing due to hydrodynamic dispersion in both the unsaturated and saturated zones.

In the unsaturated zone, flow is gravity-driven and prevails in the vertically downward direction. Therefore, the flow is modeled in the unsaturated zone as one-dimensional in the vertical direction. It is also assumed that transverse dispersion (both mechanical dispersion and molecular diffusion) is negligible in the unsaturated zone. This assumption is based on the fact that lateral migration due to transverse dispersion is negligible compared with the horizontal dimensions of the WMUs. In addition, this assumption is environmentally protective because it allows the leading front of the constituent plume to arrive at the water table with greater peak concentration.

In the saturated zone, the movement of constituents is primarily driven by ambient groundwater flow, which in turn is controlled by a regional hydraulic gradient and hydraulic conductivity in the aquifer formation. The model does take into account the effects of infiltration from the waste source as well as regional recharge into the aquifer. The effect of infiltration from the waste source is to increase the horizontal and vertical spreading of the plume, while the effect of regional recharge outside of the waste source is to cause a downward dip in the movement of the plume as it moves in the down gradient groundwater flow direction.

In addition to advective movement along with groundwater flow, the model simulates mixing of contaminants with groundwater due to hydrodynamic dispersion, which acts in the longitudinal, (*i.e.,* along the groundwater flow direction), as well as in horizontal and vertical transverse directions. The rate of movement of contaminants is strongly affected by chemical-specific sorption reactions in both the unsaturated and saturated zone.

e. What Are the Human Health Toxicities of the Constituents of Concern?

To characterize the risk from human exposures to the constituents of concern, toxicity information on each constituent of concern was integrated with the results of exposure assessment. Chronic human health benchmarks were used in this risk assessment to evaluate potential noncancer and cancer risks. We use reference doses (RfDs) and reference concentrations (RfCs) to evaluate noncancer health impacts from oral and inhalation exposures, respectively. Oral cancer slope factors (CSFs), inhalation unit risk factors, and inhalation CSFs are used to evaluate risk for carcinogens. The benchmarks are chemical-specific and do not vary between receptors (*i.e.,* residents, farmers, recreational fishers) or age groups. We used several sources to obtain human health benchmarks.

Health benchmarks for this risk assessment were obtained primarily from the most recent Integrated Risk Information System (IRIS) and from provisional benchmarks approved by EPA's Office of Research and Development. Other sources included EPA's most recent Health Effects Assessment Summary Tables (HEAST), Agency for Toxic Substances and Disease Registry minimal risk levels, California Environmental Protection Agency (CalEPA) chronic inhalation reference exposure levels, and CalEPA cancer potency factors. For lead, we used EPA's drinking water action level for lead of 0.015 mg/L for the groundwater pathway. We also used a drinking water action level for the groundwater pathway analysis for copper since an ingestion benchmark was not available.

Section 7 of the Risk Assessment Background Document contains the toxicological information used in our analysis. The studies used as the basis for each of these benchmarks have been reviewed, along with reference to the complete studies, and are presented in section 7 of the Risk Assessment Background Document.

f. What Are the Risk Assessment Results for Nonwastewaters?

We developed mass loading limits for nonwastewaters managed in a landfill. We calculated risk-based mass loading limits for the air and groundwater pathways. Table III–2 shows the loading limits derived from probabilistic analysis for the landfill groundwater pathway for several liner scenarios: No liner (NL), a compacted clay liner (CL), and a range of composite synthetic/clay liner (SL).

Reviewers should note that inputs used in the modeling to support today's proposal may change, and minor modifications to the model itself may be made as a result of ongoing internal quality assurance/quality control reviews and public comments. As a consequence, the proposed constituent levels may change as well. Reviewers should bear in mind that levels that increase or decrease sufficiently could result in adding or deleting constituents from the listing, based on whether the risk-based levels are likely to occur in dyes and/or pigments production wastes.

We propose to eliminate constituents from further consideration for nonwastewaters if the calculated allowable loading exceeds 10,000 kg/yr. Our basis for this is that mass loading limits for nonwastewaters in excess of 10,000 kg/yr are implausible, because such a loading would require waste concentrations that are unlikely to occur. For example, using our estimated average annual quantity of wastewater treatment sludge (1,894 metric tons/year (MT/yr)),[32] a loading of 10,000 kg/yr would correspond to a waste concentration above 5,000 ppm. Such a high concentration is highly unlikely in typical nonwastewaters, as shown by the available analytical data for dye and/or pigment wastes.[33] The results in Table III–2 only show the results for the constituents that yielded loadings that were below the 10,000 kg/yr level (>1.0E+04). The modeling for the groundwater pathway yielded loading limits less than 10,000 kg/yr for 12 out of the 35 constituents of concern for the unlined landfill scenario. Modeling of compacted clay lined landfills yielded eight loading limits less than 10,000 kg/yr; while modeling the range of composite liners which we call the ''SL'' scenario yielded only one such loading limit. (*See* the Risk Assessment Background Document for the full modeling results).

In contrast, the results for the air pathway for all landfill scenarios did not show any levels of concern, *i.e.*, the loading limits were all above 10,000 kg/yr. Details for this analysis can be found in the Risk Assessment Background Document.

TABLE III–2.—MASS LOADING LIMITS FOR POSSIBLE CONSTITUENTS OF CONCERN IN LANDFILLS: GROUNDWATER PATHWAY

Chemical	CAS No.	Mass loading (kg/yr)		
		NL	CL	SL
Toluene-2,4-diamine	95–80–7	0.34	0.99	140
2,4-Dimethylaniline (2,4-xylidine)	95–68–1	21	100	>1.0E+04
4-Chloroaniline	106–47–8	630	4,800	>1.0E+04
o-Anisidine	90–04–0	30	110	>1.0E+04
Benzidine	92–87–5	120	>1.0E+04	>1.0E+04
p-Cresidine	120–71–8	120	660	>1.0E+04
1,2-Phenylenediamine	95–54–5	160	710	>1.0E+04
1,3-Phenylenediamine	108–45–2	300	1,200	>1.0E+04
Lead	7439–92–1	1,300	4,900	>1.0E+04
Aniline	62–53–3	1,900	9,300	>1.0E+04
N,N-Dimethylaniline	121–69–7	2,500	>1.0E+04	>1.0E+04
1,4-Phenylenediamine	106–50–3	6,500	>1.0E+04	>1.0E+04

NL = limits for unlined landfill scenario.
CL = limits for clay-lined landfill scenario.
SL = limits for composite liner landfill scenario.

In addition to the results shown in Table III–2, we also conducted a screening analysis for sodium nitrite; the resulting loading limits were calculated to be 493 kg/yr, 740 kg/yr, and 19,720 kg/yr for the unlined, clay-lined, and composite-lined (SL) landfill scenarios.[34] Nitrite exists in the environment in a complex equilibrium with other forms of nitrogen, including less toxic nitrate, ammonia, and nitrogen gas. Equilibrium is affected by a variety of factors, and nitrite levels would be driven by the complex nitrogen cycle and the landfill and subsurface conditions. While we know nitrite is converted to nitrate and nitrogen under various conditions, our models were not able to quantify these processes. Also, we assumed that nitrite migrates with no significant adsorption (K_d=0). Therefore, we view the modeling results for sodium nitrite as a conservative screening analysis, because we used a variety of simplifying assumptions.

Only two facilities reported any TRI releases of sodium nitrite through offsite disposal (which we assume are releases of nonwastewaters), with the larger release being 363 kg (the other was 2 kg). This larger release is still below the very conservative loadings from our screening analyses for the three landfill scenarios. Furthermore, given the solubility of sodium nitrite, it seems unlikely that it could be present in any wastewater treatment sludges in significant amounts, but would preferentially partition to the wastewater. This is supported by the TRI data, which show that nearly all of

[32] *See* the Economic Analysis Background Document for a full description of our estimation of waste quantities.

[33] *See* the summary of analytical data in the Listing Background Document. Exceptions include high organic wastes, such as still bottoms, however these are relatively rare and are reportedly treated by combustion (*i.e.*, are not sent to a landfill). See, for example, Attachment C to the comments from BASF on the 1994 proposal, available in the docket for today's rule.

[34] Note that the Risk Background Document presents the loading limits for sodium nitrite in terms of ''nitrogen,'' rather than the complete sodium nitrite molecule (NaO_2). This occurs because the toxicity benchmark for sodium nitrite is given in terms of ''nitrogen.'' The TRI data are given for total mass of sodium nitrite. Therefore, for comparison to the TRI data, the loading limits are converted to the molecular formula for sodium nitrite; this requires multiplying the loadings given in terms of ''nitrogen'' by a factor of 4.93.

the sodium nitrite released by dyes and/or pigments facilities was in wastewaters sent to POTWs or discharged under NPDES permits to surface water. Because our screening assessment is likely to be very conservative, and because it is unlikely that any nonwastewaters from dyes and/or pigments production contain sodium nitrite at levels exceeding the screening analysis results, we believe that it is not necessary to set a nonwastewater loading limit for this chemical.

g. What Are the Risk Assessment Results for Wastewaters?

We developed mass loading limits for wastewaters managed in tanks and in surface impoundments. For surface impoundments, we calculated risk-based mass loading limits for both the air and groundwater pathways. For tanks, because of their relative impermeability, we calculated limits based only on the air pathway.

We assumed that allowable loadings in excess of 100,000 kg/yr were implausible. In developing this assumption, we used this plausibility threshold to calculate a theoretical wastewater concentration. At 100,000 kg/yr, we estimate that typical wastewater constituents concentrations would be 163 ppm.[35] To test the validity of this assumption, we looked at the available analytical data for wastewaters, as summarized in the masked and aggregated results presented in the Listing Background Document. We found only one constituent of concern—aniline—with wastewater concentrations above 163 ppm.[36] Thus, the sampling data generally support our assumption that constituents of concern will not be found in wastewaters in amounts exceeding 100,000 kg/yr.

As discussed in sections III.D, III.E, and IV.C, we believe that the mostplausible impoundment scenario for these industries is management of wastewaters in synthetic-lined impoundments. For the groundwater ingestion pathway of the synthetic-lined impoundment scenario, none of the modeled wastewater constituent loadings are less than 100,000 kg/yr. As a result, we conclude that our assessment of the synthetic-lined surface impoundment scenario did not identify any constituents that present a concern for the groundwater ingestion pathway. For specific results, see the Risk Assessment Background Document.

For both tanks and/or surface impoundments, the loading limits for the air pathway for 10 of the 17 constituents modeled were below 100,000 kg/yr. These constituents are shown in Table III–3. The air pathway results did not vary significantly for surface impoundments under the various liner scenarios. We show the results for the synthetic-lined impoundments below. Our evaluation of these results are presented in section IV.C. The Risk Assessment Background Document presents additional results for the unlined and clay-line surface impoundment scenarios.

TABLE III–3. MASS LOADING LIMITS FOR POSSIBLE CONSTITUENTS OF CONCERN IN TANKS AND SURFACE IMPOUNDMENTS DUE TO AIR EMISSIONS [1]

Chemical	CAS No.	Mass loading (kg/yr)	
		Tank	Surface impoundment
Aniline	62–53–3	2,700	1,500
Naphthalene	91–20–3	2,200	2,200
Azobenzene	103–33–3	3,700	2,400
o-Toluidine	95–53–4	2,600	2,400
o-Anisidine	90–04–0	9,500	2,900
p-Cresidine	120–71–8	50,000	13,000
Formaldehyde	50–00–0	>1.0E+05	14,000
Toluene-2,4-diamine	95–80–7	>1.0E+05	51,000
1,2-Dichlorobenzene	95–50–1	71,000	63,000
Benzidine	92–87–5	>1.0E+05	89,000

[1] Levels represent the 90th percentile minimum loading limit derived from probabilistic analysis for the air pathway for tanks and synthetic-lined surface impoundments.

We also conducted a screening analysis for sodium nitrite, which resulted in loading limits of 19,277 kg/yr for the unlined impoundment and 48,807 kg/yr for the clay-lined impoundment; the loading limit for the synthetic-lined impoundment scenario was well above the 100,000 kg/yr level. As discussed for the landfill scenario, nitrite exists in the environment in equilibrium with other forms of nitrogen. As noted previously, the modeling results for sodium nitrite represent a conservative screening analysis that incorporated a variety of simplifying assumptions. In this case, we also believe that nitrite is likely to be converted to nitrate in the aerobic environment of a surface impoundment.[37]

The only TRI release of sodium nitrite to wastewater comparable to these screening levels was one quantity of 20,586 kg/yr (released to a POTW, not an impoundment). This release is barely above the very conservative loading from our screening analysis for an unlined impoundment (19,277 kg/yr), but well below the loading limit for the clay-lined scenario (48,807 kg/yr). Furthermore, the loading limit for the synthetic-lined impoundment (which is the most plausible management practice) is well above the level of concern. Because our screening assessment is likely to be very conservative, and because wastewaters from dyes and/or pigments production are unlikely to contain sodium nitrite at levels exceeding the screening analysis results, we believe that it is not

[35] Assuming an average wastewater quantity of 615,000 metric tons/yr, *see* ''Economic Assessment for the Proposed Loadings-Based Listing of Non-Wastewaters From the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants'' in the docket for today's proposal.

[36] A second chemical, acetone, also exceeded 163 ppm in some samples. Acetone, however, is not a constituent of concern in this rulemaking because it is typically used as a solvent (rather than an intermediate) and as such is already subject to regulation as a hazardous waste under F003.

[37] Note that the toxicity benchmark for nitrate (Rfc) in IRIS indicates that nitrate is 16-fold less toxic than nitrite.

necessary to set a wastewater loading limit for this chemical.

3. What Was EPA's Approach to Conducting the Ecological Risk Assessment?

We conducted a screening analysis to estimate whether there might be significant impacts from these constituents on ecological receptors. This analysis was limited to evaluating the impact of contaminated groundwater discharging into surface waters and potentially affecting aquatic life and consumers of aquatic life. We did not assess potential impacts from vapor emissions to air because we did not have inhalation health benchmarks for ecological receptors.

The evaluation of potential impacts on surface waters consisted of modeling the increase in constituent concentrations in surface waters due to the discharge of groundwater contaminated by dyes and/or pigments production wastes into those waters. We used EPA's Ambient Water Quality Criteria (AWQC) to calculate allowable loadings of the potential constituents of concern (Table III–1) for this pathway. For all constituents, the allowable loadings calculated using the AWQC were above the loadings derived using human health toxicity benchmarks. This means that the loading limits calculated to protect human health are also protective for aquatic life. Therefore, we did not find any significant impact from these constituents in this ecological screening analysis.

4. What Is the Uncertainty in the Risk Results?

Liner Infiltration Rates

The infiltration rates used in calculating releases from lined landfills were significant sources of uncertainty in our modeling results. In modeling releases from landfills with liners, we had to rely on limited data for infiltration rates through various liner systems. To account for the expected variability in infiltration rates, we incorporated distributions of rates for composite liners with synthetic components (our SL scenario). The data available were limited both in terms of the number of lined units from which we collected data, and also in terms of the length of time the liner systems were in place. Most of the landfills from which infiltration data was obtained had initial waste placement between 10 and 15 years ago (between 1987 and 1992). Liner systems may suffer increased releases from a variety of causes, such as liner failure due to improper installation, faulty materials, or long-term degradation of the liner system. These factors would tend to increase infiltration rates.

Our concern about the representativeness of the length of time the infiltration data represents is somewhat balanced by our assumption that biodegradation occurs in MSWLFs. We accounted for biodegradation for all organic constituents of concern. The half-lives we used for the organic constituents are relatively short. We estimate that the mass loading of these constituents would biodegrade over the landfill life to low levels. The slowest degradation rate we evaluated is 9.6E–04 per day, which corresponds to a half-life of 2 years. After 10 years of degradation at this rate, 97 percent of the constituent mass would have degraded (ignoring for this example the competing processes of leaching and volatilization). Therefore, almost all of what is placed into the landfill during the first 20 years of operation (as well as most of what is landfilled during the last 10 years) would be degraded by the time the landfill is closed. We think, therefore, that our data on infiltration rates reasonably represents liner performance for this limited period of time.

In addition, there are other factors that we did not account for in our modeling that would tend to decrease releases of constituents of concern from landfills with composite liners. Our modeling did not account for the effect of a leachate collection system, which would tend to decrease leachate release; this is a required element in the design of a composite MSWLF liner (§ 248.40(b)). Nor did we consider that a final cover would tend to decrease infiltration rates after the unit is closed. The closure regulations for a MSWLF unit (§ 258.60) include a requirement for a low permeability final cover, but our data set did not include many closed units. Note that these final covers are often constructed using geomembrane liners, which are generally more impermeable to surface infiltration than earthen or clay liners. While a cover may also degrade over time, post-closure regulations (§ 258.61) require the owner to maintain the integrity of the cover for 30 years (the post-closure period may be extended, if deemed necessary). In addition, while not required under the part 258 regulations, many landfill units are equipped with additional liners, *i.e.*, units may have a double composite liner system. This is apparent from the units from which the infiltration data were collected (the units had a secondary liner in place, thus allowing the infiltration from the top liner to be measured). Also, information submitted by an industry group in comments on the 1999 proposed listing for dyes and/or pigments wastes indicates that over half of the landfills receiving the wastes in question reported having some kind of double liner in place.[38]

Other Sources of Uncertainty

This section discusses other major areas of risk assessment uncertainty: scenario uncertainty, model uncertainty, and parameter uncertainty.

Scenario uncertainty results from the assumptions we make regarding how receptors become exposed to contaminants. This uncertainty occurs because of the difficulty and general impracticality of making actual studies of all activities involved in the management of a waste and the human activities that occur around the waste management unit.

This risk assessment, like other recent listing risk assessments (*e.g.*, *see* the proposal for paint manufacturing wastes at 66 FR 10060; February 13, 2001) does not consider the additive risk from exposure to multiple constituents. Chemical mixtures can display both synergistic and antagonist behavior with regard to risk. In general, however, the overall risks of a mixture are very likely to be greater than that of exposure to a single chemical. Therefore not adding exposures across the chemicals is an area of uncertainty that leads to an underestimate of total risk.

We did not calculate the additive effects from co-disposal of dyes and/or pigments nonwastewaters since the available information from TRI on the mass loading and co-management of particular constituents of concern in dyes and/or pigments production wastes indicated that such co-disposal by multiple generators in landfills was not a significant occurrence.

Also, certain contaminants from these industries may also be present in the environment as a result of both natural processes and anthropogenic activities. Under these circumstances, receptors potentially receive a ''background'' exposure that adds to the exposure resulting from release of contaminants from the waste. For a national analysis like this assessment, the inclusion of background concentrations as part of the analysis is difficult because of the lack of data on national background concentrations for each constituent and the potential high variability of background concentrations.

[38] *See* comments by Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers, Attachment A, October 21, 1999, placed in the docket for today's proposal.

Model uncertainty is associated with all models used in all phases of a risk assessment, because models and their mathematical expressions are simplifications of reality that are used to approximate real-world conditions and processes, and their relationships. Models do not include all parameters or equations necessary to express reality because of the inherent complexity of the natural environment and the lack of sufficient data to describe it. Even though the models used in the risk analyses are used widely and have been accepted for numerous applications, they each retain significant sources of uncertainty.

For example, in modeling the fate and transport of chemicals in groundwater, we did not assess complex hydrogeology such as karst or highly fractured aquifers. In general, fractured flow in groundwater can channel the contaminant plume, thus allowing it to move faster and more concentrated than in nonfractured flow environments. As a result, our modeling may underestimate the concentrations in the groundwater.

Also, there is considerable uncertainty in predicting the movement of contaminants over long periods of time. We assess the risk to receptors for the groundwater pathway over a time period of 10,000 years. There are likely to be significant changes in environmental conditions over time, yet the modeling methodology maintains constant assumptions over this 10,000 year period.

Parameter uncertainty occurs when (1) there is a lack of data about the parameters used in the equations, (2) the data that are available are not representative of the particular instance being modeled, or (3) parameter values cannot be measured precisely and/or accurately because of limitations in measurement technology.

The age of several of the databases used in this analysis to characterize the waste management units or the location of the receptors leads to uncertainty in the analysis. These databases contain information collected by the EPA in several surveys during the mid-to late 1980's. While these databases represent the best available information the Agency has, there may have been significant changes in waste management units or residential locations over the last 15–20 years. The uncertainty associated with these data may lead to an over or under estimate of risk.

For organic chemicals, single values for parameters such as partitioning coefficients and biodegradation rates were obtained from public literature sources, yet there is general agreement that these types of values may be highly variable under different environmental conditions. We recognize that biodegradation rates are dependent on a variety of environmental conditions, thus where more than one rate was found, we chose the lowest one. We selected anaerobic degradation rates reported as the most appropriate for constituents within landfills. Depending on the site specific conditions, the degradation rates may underestimate or overestimate the amount of degradation that would occur in a landfill. Note that we did not, however, attempt to account for biodegradation in the subsurface, because we believe this degradation is more variable and difficult to predict. For metals, EPA used the MINTEQ model to estimate the variation in partitioning of metals as a function of subsurface chemistry. However, this model is still undergoing review, which indicates an additional source of uncertainty.

Limited data were available on the physical and chemical characteristics of dyes and/or pigments production waste. To address this, assumptions on the waste characteristics are based on general knowledge of dyes and pigments and other similar industrial wastes. In this analysis, EPA assumes that the dyes and/or pigments production wastes have the same general characteristics (*e.g.*, fraction of organic carbon, pH, particle size) as other wastes.

We typically use regional databases to obtain the parameter values necessary to model contaminant fate and transport. Because the data that we used are not specific to the facilities at which the actual wastes are managed, the data represent our estimates of the generic site conditions. For an analysis where waste management locations are so variable, we believe this type of approach is reasonable and is the best method to address the fate and transport of constituents. Nevertheless, the use of these databases in lieu of site-specific data may result in either overestimates or underestimates of risk.

Sources of uncertainty in toxicological benchmarks include one or more of the following: extrapolation from laboratory animal data to humans, variability of response within the human population, extrapolation of responses at high experimental doses under controlled conditions to low doses under highly variable environmental conditions, and adequacy of the database (number of studies available, toxic endpoints evaluated, exposure routes evaluated, sample sizes, length of study, *etc.*). Toxicological benchmarks are designed to be conservative (that potentially overestimates risk) because of the uncertainties and challenges associated with condensing toxicity data into a single quantitative expression. Uncertainty factors are applied to address limitations of the available toxicological data and are necessary to ensure that the RfD or RfC is protective of individuals in the general population. The use of uncertainty factors is based on long-standing scientific practice. Uncertainty factors, when combined, commonly range from 10 to 1000 depending on the nature and quality of the underlying data. The RfD/RfC methodology is expected to have an uncertainty spanning perhaps an order of magnitude.

Toxicological effects in children are also an area of uncertainty. Cancer slope factors and reference doses for children are based on comparing childhood exposure, for which we have age-specific data, with adult toxicity measures, where adequate age-specific dose-response data is lacking. This mismatch results in a large amount of uncertainty in the estimation of hazard quotients for children and the concern that we may be underestimating the potential impacts on children.

5. How Did EPA Use Damage Case Information?

We considered whether any damage cases exist that indicate impacts on human health or the environment from improper management of the wastes of concern, as required under the listing regulations (§ 261.11(a)(3)(ix)). Damage incidents might also provide some information on the potential of the waste constituents to migrate, persist, or degrade in the environment. We compiled damage incidents involving dyes and/or pigments production wastes for a previous proposal,[39] and we updated this report for today's proposal.[40] We found and reported eleven incidents in the August 1994 damage case report that appeared to involve some kind of contamination from the mismanagement of dye and/or pigment production wastes. Our updated analysis did not produce any other cases with useful information.

The available information on potential problems related to apparent mismanagement of dye and/or pigment wastes at manufacturing sites. The

[39] *See* the report prepared for the 1994 proposed rule, ''Resource Damage Incidents for Dye and Pigment Industry,'' August 1994, in the docket for today's rule.

[40] *See* the updated report, ''Damage Incident Analysis for the for Identification and Listing of Wastes from the Production of Organic Dyes and Pigments,'' July 2003, in the docket for today's rule.

information of most potential utility came from the Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS), which contains information on potential and actual Superfund sites, and EPA Region or State files. We found further information on the Superfund Record of Decision System (RODS), which documents remediation actions at sites on the National Priority List (NPL).

We examined eleven cases closely, because these sites appear to involve sites where dyes and/or pigments production occurred. However, comments from a number of companies and trade associations on the 1994 proposal argued that most of these cases did not support the proposed listings in the 1994 rule. Commenters argued that the damage cases did not reflect current management practices, nor did the cases confirm risks were posed by the wastes proposed for listing. Upon further review, we agree that the damage cases have limited utility for determining current plausible mismanagement scenarios. The majority of damage cases (especially Superfund sites) were from sites that operated prior to implementation of the current RCRA regulations for hazardous wastes (*e.g.*, characteristically hazardous waste) or nonhazardous wastes (*e.g.*, current regulations for municipal landfills in part 258), and generally reflect management practices that no longer occur (such as disposal of untreated waste in unlined surface impoundments and indiscriminate disposal of wastes on the ground). Also, most of the facilities with damage cases have closed or ceased production of the in-scope dyes and pigments. Therefore, we believe these past damage incidents do not represent current waste management practices used by the dyes and/or pigments production industry.

In most cases, the available damage incident data do not attribute contamination to the specific dyes and/or pigments production wastes at issue in today's proposed rule. Contamination may be caused by other unrelated processes or activities onsite. Even where historical problems can be traced to dye or pigment materials, they are not very useful in assessing the potential risks for dyes and/or pigments production as they are currently generated or managed. The damage cases provide some anecdotal information to suggest that some dyes and/or pigments production wastes may yield environmental contamination when managed in the ways that lead to the damage cases. Some damage incidents also provide information indicating the potential for the migration, mobility, and persistence of constituents in dyes and/or pigments production wastes. For example, the information on the chemicals contaminating the groundwater or other media at the damage sites show contamination from some of the constituents of concern in today's rule (aniline, 4-chloroaniline, 1,2-dichlorobenzene). This provides some support that these constituents may migrate to the groundwater and may present risks if the contaminated groundwater is consumed. However, this information does not assist in determining the mass loadings at which dyes and/or pigments production wastes could pose a hazard.

In general, because the wastes in the damage cases may include wastes not in the scope of today's rule, and because the cases reflect management scenarios that we do not believe are currently common or plausible, it is difficult to use them to reach conclusions as to whether the wastes under evaluation in today's proposal may pose significant risks. Certainly, it is inappropriate to use damage cases to ascertain at what mass loadings the dyes and/or pigments production wastes under evaluation may pose such risks. Thus, while the damage cases support the concept that some dyes and/or pigments production wastes may sometimes pose risks, EPA is relying upon its quantitative risk assessment in formulating today's proposal.

IV. Proposed Listing Determinations

A. What Are the Proposed Regulations for Dyes and/or Pigments Production Nonwastewaters?

We are proposing to list nonwastewaters from the production of dyes and/or pigments. Such wastes would become a listed hazardous waste if they are generated during the production of any of the specified classes of dyes and/or pigments products and if, at the point of generation, they contain any of the K181 constituents of concern at a mass loading equal to or greater than the annual mass loading limit identified for that constituent. All wastes generated during a calendar year up to the mass loading limits are outside the scope of the listing, even if the wastes subsequently meet or exceed the limits. Such wastes would be excluded from the listing from their point of generation, and would not be subject to any RCRA Subtitle C management requirements for generation, storage, transport, treatment, or disposal (including the land disposal restrictions).

We are also proposing a conditional exemption for nonwastewaters listed in K181 with specific constituent loadings below a higher limit at the point of generation, so long as the wastes are disposed of in a Subtitle D or Subtitle C landfill cell subject to specified design standards. We are proposing the following listing description for these wastes:

> *K181:* Nonwastewaters from the production of dyes and/or pigments (including nonwastewaters commingled at the point of generation with nonwastewaters from other processes) that, at the point of generation, contain mass loadings of any of the constituents identified in paragraph (c)(1) of this section that are equal to or greater than the corresponding paragraph (c)(1) levels, as determined on a calendar year basis. These wastes would not be hazardous if: (i) The nonwastewaters do not contain annual mass loadings of the constituent identified in paragraph (c)(2) of this section at or above the corresponding paragraph (c)(2) level; and (ii) the nonwastewaters are disposed in a Subtitle D landfill cell subject to the design criteria in § 258.40 or in a Subtitle C landfill cell subject to either § 264.301 or § 265.301. For the purposes of this listing, dyes and/or pigments production is defined in paragraph (b)(1) of this section. Paragraph (d) of this section describes the process for demonstrating that a facility's nonwastewaters are not K181. This listing does not apply to wastes that are otherwise identified as hazardous under §§ 261.21–24 and 261.31–33 at the point of generation. Also, the listing does not apply to wastes generated before any annual mass loading limit is met.

We also specify the procedures and recordkeeping requirements that generators would use to demonstrate whether or not they exceed the loading limits and, if applicable, whether they meet the landfill design requirements. These implementation provisions are discussed in section V of today's proposal.

We are proposing that the constituents and the mass loadings in the listing (which would be specified in paragraph (c)(1) of § 261.32) would be those shown in Table IV–1. For the conditional exemption, we are proposing the constituent and mass loading limit shown in Table IV–2 (to be set out in § 261.32(c)(2)). These constituents and listing levels are based on the risk modeling for nonwastewaters disposed of in nonhazardous waste landfills summarized in section III.G.

TABLE IV–1.—PROPOSED SECTION 261.32(C)(1) MASS LOADING LIMITS FOR K181 NONWASTEWATERS

Constituent	Chemical abstracts No.	Mass levels (kg/yr)
Aniline	62–53–3	9,300
o-Anisidine	90–04–0	110
4-Chloroaniline	106–47–8	4,800
p-Cresidine	120–71–8	660
2,4-Dimethylaniline	95–68–1	100
1,2-Phenylenediamine	95–54–5	710
1,3-Phenylenediamine	108–45–2	1,200
Toluene-2,4-diamine	95–80–7	0.99

TABLE IV–2.—PROPOSED SECTION 261.32(C)(2) MASS-LOADING LIMIT FOR CONDITIONAL EXEMPTION TO K181 FOR NONWASTEWATERS DISPOSED OF IN LANDFILL CELLS SUBJECT TO DESIGN REQUIREMENTS

Constituent	Chemical abstracts No.	Mass levels (kg/yr)
Toluene-2,4-diamine	95–80–7	140

1. Landfill Scenarios Underlying Listing Loading Limits

Table III–2 sets out the loading limits we calculated for several landfill liner scenarios representing decreasing infiltration rates: No liner (NL), clay liner (CL), and a composite synthetic/clay liner (SL). These results reflect a broad spectrum of potential Subtitle D landfills that might receive nonwastewaters. However, we based the listing levels on the two scenarios we believe are most applicable. We are proposing to use the modeling results for a clay-lined landfill (CL scenario) as the basic loading levels for dyes and/or pigments production nonwastewaters in Table IV–1. As discussed in section 2 below, we are proposing to use the results for the composite liner modeling (SL scenario) as the basis for a conditional exemption from the listing to set the loading limit in Table IV–2 that would apply to wastes that are managed in landfills that are equipped with a minimum of a composite liner system.

We found that management in an offsite municipal solid waste landfill was a plausible management practice for nonwastewaters (*see* section III.F.2). The regulations governing municipal landfills require a composite liner design (or a strict performance standard; *see* 40 CFR 258.40), but this requirement does not apply to existing units (existing units are municipal landfill cells that accepted waste as of the dates specified in § 258.1(e), generally October 9, 1993). Most key parts of the MSWLF regulations codified in 40 CFR part 258 apply to existing units. Some of these regulations (notably the groundwater monitoring and corrective measures regulations at § 258.50 through § 258.58) probably have encouraged facilities to close unlined units because of the long-term liability of adverse groundwater impact.[41] We believe that it is likely that a landfill currently receiving these industrial wastes would have at least a clay liner.[42] In fact, an industry association presented detailed information in comments on the 1999 proposed listing for dye and pigment wastes that showed that landfills receiving these wastes are reported to have liners.[43] Therefore, we are proposing that the mass loading limits from the clay-lined results shown in Table IV–1 define the hazardous mass loadings for these dye and/or pigment wastes (in § 261.32(c)(1)). Nevertheless, because there may be unlined MSWLFs that might be used for these wastes, we are soliciting comment on whether the listing (and levels in § 261.32(c)(1)) should be conditioned on the wastes being placed in a landfill with a minimum of a clay liner. We may consider this option, for example, if we receive data that shows dye and pigment wastes are being disposed of in unlined landfills.

2. Conditional Exemption for Certain Landfilled Wastes

We are also proposing that wastes that otherwise meet the K181 listing description could be managed as nonhazardous so long as both of the following conditions are met: (1) The nonwastewaters do not contain an annual mass loading of toluene-2,4-diamine that is equal to or greater than 140 kg/yr, and (2) the nonwastewaters are disposed in a Subtitle D landfill cell subject to the design criteria in § 258.40 or in a Subtitle C landfill cell subject to the design criteria in § 264.301 or § 265.301. We are proposing this exemption because our modeling indicates that management in landfills that comply with or exceed these design standards should not pose a risk to human health and the environment (so long as the waste does not exceed the § 261.32(c)(2) listing levels for toluene-2,4-diamine).

As previously discussed in IV.A.1, the § 261.32(c)(1) listing levels reflect our risk assessment modeling results for a clay-lined landfill. Wastes with mass loadings above the § 261.32(c)(1) listing levels pose risk to human health when placed in a landfill that is only lined with clay because of the modeled mobility of the K181 constituents through a clay liner into the subsurface and subsequent movement through an aquifer used for domestic consumption. Many landfills, however, have been designed with more protective liner systems than a simple clay liner. The § 258.40 landfill liner requirements provide significantly more protection against contaminant migration into

[41] See ''Waste Age,'' Volume 30, p. 64; July 1999. Also, the number of MSWLFs operating has decreased from 7,683 in 1986 to 3,581 in 1995 and to about 2,300 in 2000; See EPA's updated lists of MSWLFs (EPA530–R–96–006) and at *http://www.epa.gov/epaoswer/non-hw/muncpl/longdesc/4-8longdesc.htm.*

[42] While our data indicate that dyes and/or pigments manufacturers do not appear to currently use nonmunicipal (*i.e.*, ''industrial'') Subtitle D landfills, we believe that this type of landfill is also likely to be lined. Commercial offsite landfills are subject to considerable regulations by States, including liner requirements. See the report by ASTSWMO, ''Non-Municipal, Subtitle D Waste Survey,'' March 1996 and EPA's report ''List of Industrial Waste Landfills and Construction and Demolition Waste Landfills,'' September 30, 1994 (PB195–208914, 530–R–95–019), *http://www.epa.gov/epaoswer/hazwaste/sqg/list/lfillpdf.pdf.*

[43] See comments by Ecological and Toxicological Association of Dyes and Organic Pigments Manufacturers, Attachment A, October 21, 1999, placed in the docket for today's proposal.

groundwater. We believe that the SL modeling results closely match the § 258.40 requirement, because the infiltration data used for the SL scenario were derived from municipal landfills with composite liners (*i.e.*, a combination of a geomembrane liner and a clay liner of some sort). This modeling, reflected in the § 261.32(c)(2) listing levels, demonstrates that the majority of the constituents that warrant establishment of listing levels based on a clay-lined landfill scenario (*i.e.*, the § 261.32(c)(1) levels) are effectively controlled in a landfill with a composite clay and synthetic liner similar to the liner required under § 258.40. Our modeling of the composite liner scenario indicates that only one constituent, toluene-2,4-diamine, poses risk that warrants further control due to possible infiltration through a composite liner system.

Based on our risk assessment results that indicate that the majority of the assessed constituents can be safely managed in § 258.40 compliant landfills, we have proposed to exempt those wastes that would otherwise meet the K181 standards when those wastes are managed in landfills subject to the § 258.40 standards, so long as the wastes do not contain mass loadings in excess of the § 261.32(c)(2) standard of 140 kg/yr we are proposing for toluene-2,4-diamine.

Hazardous waste regulations require double composite liners that are even more protective than part 258 composite liners. Some generators of dyes and/or pigments nonwastewaters may choose to dispose of their wastes in hazardous waste landfills. Wastes which contain mass loadings below the § 261.32(c)(2) standard would not pose threats if placed in landfill cells subject to the hazardous waste landfill requirements. Accordingly, we are also proposing to exempt wastes that would otherwise meet the K181 listing if they do not exceed the § 261.32(c)(2) mass level and if they are placed in landfill cells subject to 40 CFR 264.301 or § 265.301. We request comment on this exemption.

3. Selecting K181 Constituents and Mass Loading Limits

As described in section III, we developed risk-based mass loading limits for the set of constituents shown in Table III–1. In general, we relied on the modeling results to guide us in deciding which constituents would be appropriate in defining these dyes and/or pigments production nonwastewaters as listed hazardous wastes. We dropped constituents from further concern if the calculated allowable mass loadings exceeded 10,000 kg/yr, because these constituents are unlikely to occur in these wastes above this level. That is, mass loadings of this magnitude are so high in comparison with expected waste generation rates, that the resultant theoretical concentrations are well in excess of the concentrations we expect to be present in these wastes and thus can be considered implausible. Thus, using this concept of a theoretical waste concentration to screen the constituents listed in Table III–1, we narrowed the list of constituents by eliminating those with calculated allowable mass loadings above 10,000 kg/yr.

Table IV–3 summarizes various information sources we have identified that link these chemicals to the production of dyes or pigments of concern. We believe this information supports our proposal to propose listing levels for these constituents in K181. Additional details are presented in the Listing Background Document and in ''Background Document: Development of Constituents of Concern for Dyes and Pigments Listing Determination,'' both of which are available in the docket for today's proposal. We solicit comment on the proposed list of constituents and their levels in Tables IV–1 and IV–2. We seek comment and supporting information as to whether any constituents should be added to or dropped from the list of constituents of concern for dyes and/or pigments nonwastewaters and the basis for such action. More specifically, we seek any information that may assist us in deciding whether any of the constituents in Table IV–1 are unlikely to be present at the levels of concern, and thus whether we should drop them from the listing.

TABLE IV–3.—OVERVIEW OF DATA SOURCES LINKING K181 CONSTITUENTS TO DYES AND/OR PIGMENTS PRODUCTION

Constituent	CAS No.	Analytical data	Colour index	TRI	EU Ban	§ 3007 survey	Manufacturer web sites
Aniline	62–53–3	X	X	X		X	X
o-Anisidine	90–04–0	X	X	X	X		X
4-Chloroaniline	106–47–8	X		X	X		
p-Cresidine	120–71–8		X	X	X		X
2,4-Dimethylaniline	95–68–1	X				X	X
1,2-Phenylenediamine	95–54–5	X	X	X			X
1,3-Phenylenediamine	108–45–2		X	X		X	X
Toluene-2,4-diamine	95–80–7		X	X	X		X

We also specifically seek comment on the constituent in Table IV–2 that is at issue for wastes disposed of in a landfill subject to § 258.40, § 264.301 or § 265.301 design requirements. TRI releases for toluene-2,4-diamine were reported by two dyes and/or pigments production facilities. One facility reported an annual release of less than 500 lbs., or 227 kg (*i.e.*, as reported in a Form A for the TRI). The second facility reported the transfer of 396 kg of mixed toluenediamine isomers to a broker for disposal; we could not determine whether this waste was treated prior to disposal. The TRI data therefore indicates that one or two facilities may be disposing of toluene-2,4-diamine in the modeled management practice at levels on the same order of magnitude as the proposed listing levels. In addition to the TRI data, the Colour Index and two facilities' Web site indicate that four companies manufacture products that may be derived from toluene-2,4-diamine. Note that we do not have any analytical data for this constituent in dye and pigment wastes, because we did not analyze wastes for this chemical. After evaluating all available information, including information on the potential presence of toluene-2,4-diamine at the proposed levels in nonwastewaters and the current use of this constituent in dyes and/or pigments production, we will determine whether toluene-2,4-diamine should be included in § 261.32(c)(2).

4. Assessment of Biodegradation

As described in section III.G.2.d.i, we accounted for the biodegradation of the constituents of concern in our landfill modeling. In modeling biodegradation, we used anaerobic degradation rates

that were available in the primary reference;[44] when rates were not available for seven chemicals of concern, we used conservative surrogates derived from the same reference. The loading limits for nonwastewaters in Tables IV–1 and IV–2 were derived using this approach. We also completed modeling for these seven constituents using a default degradation rate of zero.

Table IV–4 presents the mass loading limits for nonwastewaters that would result from using zero degradation rates for the seven constituents. Under this approach, three additional constituents would be added to the § 261.32(c)(1) list (benzaldehyde, azobenzene, and p-toluidine) and five additional constituents would be added to the § 261.32(c)(2) list (2,4-dimethylaniline, 4-chloroaniline, 1,2-phenylenediamine, aniline, and p-toluidine). We believe that using appropriate surrogates is preferable to assigning a default value of zero for the biodegradation rate. However, we request comment on whether the risk assessment results derived from the default rate of zero should be used as the basis for setting listing levels for some or all of these constituents.

TABLE IV–4.—ALTERNATE MASS LOADING LIMITS CALCULATED WITHOUT DEGRADATION

Constituent	Chemical abstracts no.	§ 261.32(c)(1) Mass levels (kg/yr)	§ 261.32(c)(2) Mass levels (kg/yr)
2,4-Dimethylaniline	95–68–1	3.7	160
4-Chloroaniline	106–47–8	89	3,400
1,2-Phenylenediamine	95–54–5	5.7	180
Benzaldehyde	100–52–7	1,500	([1])
Azobenzene	103–33–3	6,800	([1])
Aniline	62–53–3	110	4,300
p-Toluidine	106–49–0	11	400

[1] Not applicable: Calculated degradation rates exceed 10,000 kg/yr, no listing level proposed.

We specifically seek comment on the five constituents that would be added to the conditional exclusion in § 261.32(c)(2) if this alternate approach of using zero biodegradation rates were adopted. We recognize that some information we have in the record suggests that mass loadings in these wastes may not reach the Table IV–4 levels for some constituents.

For example, we have historical analytical data for dyes and/or pigments nonwastewaters for 2,4-dimethylaniline, 4-chloroaniline, p-toluidine, 1,2-phenylenediamine, and aniline (see the Listing Background Document). 2,4-Dimethylaniline was detected only in wastewater (two samples, maximum of 1.19 ppm). 4-Chloroaniline was found in five waste samples, but at fairly low concentrations (maximum of 13 ppm). p-Toluidine (also known as 4-methylaniline) was detected at high levels in one sample of nonwastewater (presumably a still bottom or spent solvent), and it was also possibly detected as a co-eluting component of 2/3/4-aminotoluene (maximum of 10.4 ppm). 1,2-Phenylenediamine (also know as 2-aminoaniline) was possibly detected at a maximum of 7.17 ppm as a co-eluting component of 2,4-aminoaniline and 2-methoxyaniline. However, the analytical data for 1,2-phenylenediamine is difficult to interpret because this chemical could not be separated from the other closely related isomers by the method used, and also because further evaluation of data from other wastes indicated that the recovery of 1,2-phenylenediamine from some matrices is difficult (*see* section IV.A.5 for a discussion on waste analysis problems). Aniline was found in numerous waste samples, including wastewater sludges and other nonwastewaters; some samples had high aniline concentrations. Data from comments suggests that the higher concentrations may be associated with special wastes (*e.g.*, still bottoms), but this cannot be confirmed from the available analytical data. In any case, aniline appears to be fairly prevalent in dye and/or pigment wastes. For these five constituents, the detected concentrations are generally below the theoretical waste concentrations we calculated using an estimated average waste quantity (*e.g.*, the loading 160 kg/yr for 2,4-dimethylaniline contained in the average estimated waste quantity of 1,894 kg/yr would give a theoretical concentration of 84 ppm). Exceptions include one detection for p-toluidine and at least three samples for aniline.

We also considered TRI data from known dyes and/or pigments manufacturers reported for these constituents. The TRI data for 4-chloroaniline show that total reported releases of 212 kg were far below the § 261.32(c)(2) mass loading limits. 2,4-Dimethylaniline and p-toluidine are not on the TRI list of chemicals. The only TRI release for 1,2-phenylenediamine was the filing of a form A by one facility, indicating a release of less than 500 lbs., or 227 kg/yr. Five facilities reported releases of aniline (two others also filed form A); three of these reported total aniline releases that exceed the § 261.32(c)(2) mass loading limit.

In addition, some facilities appear to manufacture dyes and/or pigments products that are derived from these constituents. For example, company Web sites and the Colour Index link four facilities with products derived from 2,4-dimethylaniline. Also, while we were not able to find specific links between current dyes and/or pigments production facilities for products derived from 4-chloroaniline, we believe that this constituent's presence in multiple waste samples suggests it may be in use, or perhaps occurs as a by-product. The Colour Index and company websites also link several dyes and/pigments production facilities with products derived from 1,2-phenylenediamine and p-toluidine. Aniline is a common raw material for dyes and pigments; this constituent is linked to at least eight companies. Thus, if we decide to adopt this alternate approach to assessing degradation rates for these constituents, we will evaluate information submitted by commenters on the potential presence of these constituents at the proposed levels in nonwastewaters and the current use of these constituents in dyes and/or pigments production. After considering all available information, we will determine whether we should set

[44] Howard, P.H., R.S. Boethling, W.F. Jarvis, W.M. Meylan, E.M. Michalenko, and H.T. Printup (ed.). 1991. *Handbook of Environmental Degradation Rates*. Lewis Publishers.

exemption loading limits for these chemicals.

We also solicit comment on retaining benzaldehyde as a K181 constituent in the § 261.32(c)(1) list, if we were to adopt this alternate approach to assessing biodegradation. Benzaldehyde is a naturally occurring chemical that is found in many foods, and is widely used in flavors and fragrances;[45] it is on FDA's list of generally recognized as safe (GRAS) substances (21 CFR 172.515). While our primary degradation reference did not report a degradation rate for benzaldehyde, we are aware that benzaldehyde is fairly reactive and will degrade to benzoic acid, which is 40-times less toxic (*see* IRIS database). When we used a conservative surrogate degradation rate for benzaldehyde, the modeling results showed this constituent would not present a problem (*i.e.*, the results were well above 10,000 kg/yr.). We request information on the degradation rate for this chemical. We also request information on the frequency of benzaldehyde use in dyes and/or pigments production, as well as information on the likelihood that nonwastewaters will contain loadings of benzaldehyde at or above our proposed loading limits. If we adopt this alternate way of assessing biodegradation, information indicating that benzaldehyde is rarely used or unlikely to exceed the proposed loading limit may lead us to delete this chemical from the listing.

5. Lead as a Potential K181 Constituent

We are proposing not to set K181 standards for the metal, lead, despite modeling results for the clay-lined landfill scenario (4,900 kg/yr) that are below our screening threshold of 10,000 kg/yr. We do not believe it is appropriate to set lead standards for K181 for a number of reasons. First, we think it is unlikely that lead is used extensively in current dyes and/or pigments production. While historical information indicates that lead has been used in this industry (*e.g.*, as an oxidizing agent), we believe that environmental regulations (such as the Toxicity Characteristic) and increased general concerns about the use of lead in consumer products may have contributed to declines in the use of lead in this industry. Our analysis of the TRI data shows very limited reporting of lead releases by the 35 dyes and/or pigments manufacturers that report to the TRI. In fact, only two facilities report lead releases: Eastman Chemical (Kingsport, TN) and Harshaw Chemical/Engelhard Corporation (Louisville, KY). As previously discussed, Eastman is a very large chemical manufacturer, with an extensive product list (over 1,200 plastics/polymers, fibers and other chemicals). Dye production accounts for an extremely small portion of their operations. We do not believe their waste is representative of dye and/or pigment wastes in general, or that it is likely that their reported lead releases are associated with their very limited dye product line. Harshaw Chemical is a major manufacturer of inorganic pigments, and currently generates a significant quantity of characteristic lead wastes (D008) as well as listed wastes from the production of inorganic pigments containing lead (K002 and K003).[46] Therefore, we believe that the lead releases reported by Harshaw in the TRI are highly likely to be associated with their inorganic pigment production (rather than their organic pigment processes). The TRI data is consistent with this interpretation. Harshaw reported in the 2000 TRI that all of the lead sent offsite for disposal underwent stabilization/solidification; nearly all of this (except for 45 kg) was sent to a Subtitle C facility. No other dyes and/or pigment manufacturers reported any releases of lead in 2000.

Second, we evaluated the available analytical data for these wastes for lead. Our analytical results showed two samples contained lead, with a maximum concentration of 16.8 mg/kg. By assuming that this is a typical concentration in these industries' wastes (despite the TRI data that indicates that it is rarely reported in releases from these industries), we calculated the necessary waste quantity that would need to be generated in order to exceed the modeled threshold level of 4,900 kg/yr. The resultant calculated theoretical minimum waste quantity of 274,000 metric tons is significantly greater than the total quantity of nonwastewaters that we estimate that all of the potentially impacted facilities generate in total (47,000 metric tons). This analysis indicates that, even if any other dye and/or pigment manufacturers do generate lead-bearing wastes, they are unlikely to contain lead at mass loading levels above the modeled threshold level.

Finally, we also note that lead is currently regulated as D008, a characteristic hazardous waste when TCLP levels exceed 5.0 mg/L. The TC levels serve as a safety net for lead-bearing wastes, if any, that might be generated by facilities manufacturing the relevant dyes and pigments. We are soliciting comments, however, on whether we should include a threshold loading limit for lead in the K181 listing.

6. Waste Analysis Concerns

Some problems have surfaced in past chemical analysis of dyes and/or pigments production wastes for some of the potential constituents of concern in Table IV–1. In a few cases, our analysis could not distinguish between co-eluting compounds when we used the typical EPA methods (*e.g.*, method 8270 in SW–846). However, significant improvements have been made in instrument sensitivity and chromatographic column performance in the approximately ten years since EPA conducted its prior analyses. In general, we believe that following methods in SW–846 should be adequate for the constituents in Table IV–1: method 8270 (GC/MS), method 8315 (HPLC), and method 8321 (HPLC/MS or HPLC/UV).[47] Therefore, we believe that these constituents may now be readily measured by the majority of laboratories equipped to perform such analyses.[48]

The most problematic constituent appears to be 1,2-phenylenediamine (also known as o-phenylenediamine). We originally promulgated numerical treatment standards for 1,2-phenylenediamine in a prior rulemaking (64 FR 15583, April 8, 1996). However, we subsequently withdrew the standard because of poor method performance (*see* 63 FR 47409, September 4, 1998). The methods used at the time did not provide adequate recovery of the chemical from samples at the 5.6 mg/kg level. We solicit comment on options to deal with this potential problem (short of dropping the constituent, which is also an option) and other analytical issues. For example, we could allow generators to use knowledge of their waste in lieu of testing for these constituents (regardless of waste quantities generated—see section V for differing testing requirements for smaller and larger waste quantities). Alternatively, we could allow the generator to show compliance with the

[45] See the "Flavor And Fragrance High Production Volume Consortia—The Aromatic Consortium Test Plan For Benzyl Derivatives," December, 2001 submitted to EPA's High Production Volume Challenge Program *(http://www.epa.gov/chemrtk/benzylde/c13450tc.htm).*

[46] See 1999 data from the facility in EPA's Biennial Reporting System (BRS) for hazardous waste.

[47] See the discussion on page 3–25 and elsewhere in the background document "Best Demonstrated Available Technology (BDAT) Background Document For Dye and Pigment Production Wastes", which is in the docket for today's rule.

[48] See the Economic Analysis Background Document for our cost estimates. See also *http://www.speclab.com/price.htm.*

mass loading limits based on good-faith analytical efforts that demonstrate that the constituent could not exceed the mass loading limit by an order of magnitude (factor of ten), similar to the allowance specified for meeting the land disposal treatment standards for combustion residues (*see* § 268.40(d)(3)).

7. Proposed Additions to Appendices VII and VIII of Part 261

As required under § 261.30(b), we are proposing to add the constituents that are the basis for the listings to Appendix VII of Part 261. Thus, we are proposing to add the constituents that are listed in Table IV–1 to Appendix VII as the basis for listing K181. In addition, a number of constituents in Table IV–1 are not currently listed in Appendix VIII to Part 261 as ''hazardous constituents.'' EPA places constituents on Appendix VIII if scientific studies show the chemicals have toxic, carcinogenic, mutagenic, or teratogenic effects on humans or other life forms (*see* § 261.11(a)(3)). The Risk Assessment Background Document contains the detailed toxicological data for all constituents we evaluated, including the chemicals we are proposing to add to Appendix VIII: o-anisidine, p-cresidine, 2,4-dimethylaniline, 1,2-phenylenediamine, and 1,3-phenylenediamine. We recognize that Appendix VIII already contains the chemical name ''phenylenediamine'' with a CAS number of 25265–76–3. This Appendix VIII listing represents a mixture of isomers (*i.e.*, benzenediamines with the presence of two amino-groups in unspecified locations on the benzene ring). We are proposing to add the specific isomers (1,2-phenylenediamine and 1,3-phenylenediamine) to clarify that these are listed on Appendix VIII, even though we believe that the existing listing for the mixed isomers would cover the specific isomers in question. If in response to comments we decide to add any additional constituents from Table III–2 to the loading limits in § 261.32(c)(1) or (c)(2), then we would also add these constituents to Appendix VII and VIII, if necessary. For example, under the alternative approach in section IV.A.4 using zero degradation rates, we would also add benzaldehyde, azobenzene and p-toluidine to Appendix VII of Part 261, and benzaldehyde and azobenzene would be additional constituents added to appendix VIII of part 261.

8. Co-Generation With Out-of-Scope Wastes

A number of U.S. manufacturers of dyes and/or pigments produce products other than those dyes and pigments classes described above in II.F.1. For example, some manufacturers might also produce sulphur or phthalocyanine dyes, dye intermediates, or other completely unrelated products (*e.g.*, surfactants). These facilities are likely to commingle their wastewaters from most or all of their processes for treatment prior to discharge. The resultant wastewater treatment sludges contain constituents from all of the mingled wastewaters.

We are proposing that, to the extent that a facility commingles wastewaters from the dye or pigment processes of interest in today's rule with other ''out-of-scope'' wastewaters, the resultant sludge would be entirely subject to the K181 listing if the commingled waste contained sufficient mass loadings of the K181 constituents of concern to trigger the K181 listing. This means, for example, that the entire mass of toluene-2,4-diamine in a facility's wastewater treatment sludge, would be compared to the K181 listing level for toluene-2,4-diamine, irrespective of whether some of that mass originated in processes other than the manufacture of azo, anthraquinone, perylene or anthraquinone dyes or pigments. Note that other process wastes that are commingled when generated (*e.g.*, dusts and fines) would also be covered by the K181 listing, if the commingled wastes contain some wastes that are in the scope of the listing.

We believe it is appropriate to propose that the scope of the listing cover mass contributions from other processes for several reasons. First, the toxicity and risk associated with the constituents of concern does not change as a function of the type of manufacturing process that is the source of that constituent in a commingled waste. For example, aniline in a facility's wastewater treatment sludge that comes from the dye production process poses the same risk as an equivalent amount of aniline in that same sludge as a result of treating commingled aniline-bearing wastewaters from manufacturing photographic chemicals. Second, while the ED consent decree serves as a strong guide to the Agency in determining the scope of our listing determination (by establishing priorities and timeframes for the completion of specific listings), the consent decree in no way prohibits the Agency from proposing listings with broader or different scope. As an example, in the listing determination for inorganic chemical manufacturing wastes, we listed K178 (solids from manufacturing and manufacturing-site storage of ferric chloride from acids formed during the production of titanium dioxide using the chloride-ilmenite process); see November 20, 2001 (66 FR 58258). The K178 listing addressed wastes not directly related to the wastes specified in the consent decree (*i.e.*, titanium dioxide production wastes (except for chloride process waste solids)). Finally, we believe that the proposed approach also is the most straightforward way of structuring this type of mass-based listing. The regulatory presentation in the CFR, as well as the implementation and enforcement of the listing, are simpler under the proposed approach.

Facilities impacted by this portion of the listing description (*e.g.*, those whose wastewater treatment solids contain the K181 regulated constituents from non-dyes and/or pigments processes) would have the option of segregating their wastewaters prior to commingling with wastewaters from the dyes and/or pigments processes covered by K181. Segregated solids that have no contribution of K181 constituents from the dyes and/or pigments processes of concern would not be subject to K181. We believe, however, that a more desirable environmental outcome (and perhaps technically more feasible) would be achieved if those facilities used the K181 listing levels as goals for their pollution prevention programs, and if they adopted process modifications designed to reduce overall loadings of the K181 constituents.

We request comments on this aspect of the proposed scope of the K181 listing. We also request comment on an alternative approach which would allow facilities to count only those mass loadings associated with azo/triarylmethane/perylene/anthraquinone dyes and/or pigments manufacture when assessing whether their wastes exceed the K181 listing levels. For example, a facility may have specific chemical analytical data for its wastewater prior to commingling that might be used to demonstrate that the vast majority of a constituent of concern is not derived from wastes that are in the scope of K181. Using such data, the facility could demonstrate using a mass-loading calculation that the mass of the constituent resulting from the in-scope process is well below the mass loading limits specified in K181.

B. How Does K181 Impact Wastes That Are Not Landfilled, Combusted, or Previously Listed?

1. What Is the Status of Wastes That Are Not Landfilled?

We are setting the § 261.32(c)(1) listing levels as the baseline levels that establish when nonwastewaters from the production of dyes and/or pigments pose sufficient risk to warrant listing as hazardous waste. Although these levels are derived from a landfill management scenario, we are proposing, consistent with our past practice, that these levels apply to all nonwastewaters within the scope of the listing definition, irrespective of how the waste may be managed. As a specific example of what this means, we are not setting separate ''entry/exit'' levels for wastes that might be combusted. We are assuming that wastes with constituent amounts below the listing levels do not pose risks in a combustion scenario, so the landfill-based listing limits provide sufficient protection. This is consistent with our general approach to unconditional hazardous waste listings. If we find that waste does not pose risks in a landfill or surface impoundment scenario, we do not list the waste, although we have not assessed the risks posed by combustion.

This approach is also similar to the proposed concentration-based listing determination for paint production wastes, where we also proposed threshold levels that were not based on any modeling of combustion practices. As we noted in that proposal, in past listing determinations where we attempted to assess risks from combustion, we found that the potential risks from the release of constituents through combustion would be at least several orders of magnitude below potential air risks from tanks or impoundments (*see* 63 FR 64371, November 19, 1998). We also noted that it is difficult to assess what goes into combustion units in relation to the residual constituents that might persist in ash or be released to the air, such as products of incomplete combustion.

Our assessment of the tank management scenario for wastewaters from the production of dyes and/or pigments indicates that the lowest allowable mass loadings associated with air releases from tanks for the constituents of concern is in the range of 2,000–3,000 kg/yr. Based on the analysis conducted in previous determinations (*e.g.*, 63 FR 64371, November 19, 1998), a comparable assessment of air releases from the combustion scenario would establish allowable mass loading levels several orders of magnitude higher, well in excess of the proposed § 261.32(c)(1) listing levels.

2. What Is the Status of Wastes Destined for Combustion That Trigger the K181 Listing Levels?

We are proposing that nonwastewaters exceeding the listing loading levels will be K181 listed wastes even if they are combusted. This is consistent with our general approach to listing, in which we model land disposal units and, if we find risks of concern, promulgate a listing that includes wastes sent to combustion. We have taken this approach because we anticipate difficulties developing modeling that could adequately capture the various complex aspects of this combustion, including destruction efficiency, formation of toxic products of incomplete combustion, partitioning of uncombusted toxicants among air, scrubber water and ash, and transport.[49]

However, we are soliciting comment on the option of exempting K181 nonwastewaters sent to combustion facilities. Without risk assessment results to rely on, we have qualitatively assessed the data we have gathered regarding current combustion management practices for dyes and/or pigments nonwastewaters. The TRI is our primary source of information. It shows that ten facilities send nonwastewaters offsite for thermal treatment and two facilities combust wastes onsite. All ten of the offsite treatment facilities are RCRA TSDFs. However, we cannot determine for certain whether the wastes of concern to this proposal are in fact being combusted in Subtitle C combustors, or in co-located Subtitle D combustors.

The two facilities that conduct onsite thermal treatment are Eastman (Kingsport, TN) and BASF (Huntington, WV). Eastman apparently operates both hazardous and nonhazardous waste combustion.[50] BASF operates a nonhazardous waste unit used to treat still bottoms and related wastes from an aniline/triarylmethane process.[51] While this boiler is not permitted for managing hazardous wastes, it is covered by a State permit that sets low release limits for aniline (40 kg/yr).[52] As part of BASF's 1995 comments on our initial proposed listing determination for these wastes, they submitted a risk assessment for this unit demonstrating low risk potential.

The available information regarding current combustion indicates that the majority, and perhaps all, of the wastes that are combusted are managed either in Subtitle C units, or units with air permits that specifically address key K181 constituents potentially present in those wastes. We solicit comments on whether this is sufficient information to support an exemption from K181 for wastes that are managed in combustion units that are permitted under Subtitle C, or that have other relevant CAA permits.

3. Applicability to Wastes That Are Already Hazardous

We are also proposing that wastes that are subject to another hazardous waste listing under § 261.31–33 or a hazardous waste characteristic under § 261.21–24 would not be subject to listing under K181. Generators would not count the mass of any constituent of concern in these wastes toward the loading limits in the K181 listing.

This avoids complications that would arise in implementing the loadings-based listing. For example, consider an azo dye producer who generates a sludge meeting the F004 listing due to solvent use during production. This F004 sludge could also be captured by the narrative description in the K181 listing, as it would be a nonwastewater from the production of azo dyes. If the facility also generates another separate wastewater treatment sludge from the production of azo dyes, the facility would need to assess the total mass of a constituent of concern for all wastes potentially subject to the K181 listing. Thus, the facility would have to add the mass of any constituents of concern in the F004 waste to the mass of the constituents present in the treatment sludge. It is possible that the additional mass from the F004 waste would cause the total mass of some constituent in the treatment sludge to meet or exceed the listing levels in § 261.32(c)(1) or (c)(2). However, the F004 waste is already hazardous and subject to full Subtitle C control. Regulating the treatment sludge based on the additional mass in the

[49] While we attempted to model combustion of these wastes in the 1994 proposed listing determination for dyes and pigment wastes, commenters argued strenuously that our modeling was overly conservative, and presented stack testing for aniline showing much higher destruction efficiency for aniline than we had assumed, and risk assessment results showing very low risk (*see* ''Comments on the 1994 Proposed Rule for Dye and Pigment Wastes,'' originally submitted by BASF Corporation, December 15, 1995, in the docket for today's proposal).

[50] See Listing Background Document.

[51] See the docket for today's proposal for ''Comments on the 1994 Proposed Rule for Dye and Pigment Wastes,'' originally submitted by BASF Corporation, December 15, 1995 (Attachment C), for a more complete description of this unit.

[52] See BASF's air permit in the docket for today's proposal.

listed waste appears inappropriate, given that the F004 waste could not be disposed with the treatment sludge as non hazardous waste. Therefore, we are proposing that wastes that are already classified as hazardous wastes would not be subject to listing as K181.

If the above example is modified, such that the F004 waste is generated in commingled form with the wastewater treatment sludge (*e.g.*, from commingled wastewaters), then the waste would be F004, regardless of the mass levels present in the K181 constituents of concern. EPA has not evaluated all of the hazardous constituents reasonably expected to be present in F004 wastes and set levels at which it is safe to dispose of them in nonhazardous waste landfills with or without composite liners. In this case, therefore, our proposed approach would mean that the F004 wastes would remain hazardous, but the waste would not be subject to the K181 listing.

C. Why Are We Proposing Not To List Wastewaters?

As described previously in section III.E.3, we evaluated the potential management of wastewaters from dyes and/or pigments production in two scenarios: Tanks and lined surface impoundments. After consideration of the risk assessment modeling results, the plausibility of each management scenario, and the level of environmental protection provided by existing and upcoming air regulations, we are proposing not to list wastewaters from dyes and/or pigments production. Our logic supporting this determination is presented below.

1. Air Emissions From Tanks and Surface Impoundments

We assessed air emissions from both tanks and surface impoundments, as previously described, and calculated mass loadings for those CoCs with inhalation toxicity benchmarks. Because the modeled mass loading results for these scenarios were very similar, we are presenting a combined analysis of these results here.

As discussed previously in section III.G.2.g, we assumed that calculated allowable loadings in excess of 100,000 kg/yr were implausible and therefore screened out those constituents for which our modeling gave a calculated allowable loading in excess of 100,000 kg/yr.

Ten constituents had calculated allowable loadings less than 100,000 kg/yr. Table IV–5 presents these CoCs, the modeled allowable loading results for tanks and surface impoundments (synthetic lined), theoretical concentrations (using the estimated average wastewater quantity), a summary of available analytical data, and total onsite and offsite releases reported in the TRI by the dyes and/or pigments production industries.

TABLE IV–5.—ANALYSIS OF AIR PATHWAY LOADING RESULTS

Constituent of concern	Calculated allowable loading for tanks/surface impoundments (kg/yr)	Theoretical wastewater concentration for tanks/surface impoundments (ppm)	Available analytical data for wastewaters (ppm)	TRI: D&P industry total on- and off-site releases (kg/yr, RY2000)
Naphthalene	2,200/2,200	3.6/3.6	0.011–0.1	1,294
o-Toluidine	2,600/2,400	4.2/3.9	0.044–0.16	234
Aniline	2,700/1,500	4.4/2.4	0.66–120	237,100
Azobenzene	3,700/2,400	5.2/3.9	0.093–0.104	(3)
o-Anisidine	9,500/2,900	15.5/4.7	0.76	0
p-Cresidine	50,000/13,000	81.3/21.1	(1)	5,680
Formaldehyde	>100,000/14,000	>160/22.8	0.064–0.819	10,962
Toluene-2,4-diamine	>100,000/51,000	>160/82.9	(2)	817
1,2-Dichlorobenzene	71,000/63,000	115/102	0.004–0.059	31,490
Benzidene	>100,000/89,000	>160/145	0.0055–0.023	0

[1] Not reported
[2] Not analyzed.
[3] Not a TRI constituent.

With the exception of aniline (discussed further below), we believe that it is highly unlikely that these constituents would be present at levels above the calculated allowable mass loadings in any facility's wastewaters. Our assessment of the TRI releases reported by the dyes/pigments industries indicates that the total releases from the entire industry are less than the calculated allowable mass loading limits predicted by our risk assessment modeling that would be applied on a facility-specific basis (except for aniline). For example, total reported releases of naphthalene by dye and/or pigments manufacturers were 1,294 kg/yr, which is less than the calculated allowable loading level of 2,200 kg/yr. This comparison greatly overestimates potential wastewater levels because total TRI releases include releases from all facilities to air and land, as well as water.

The available analytical data support the TRI analysis, showing that (with the exception of aniline), these constituents are unlikely to be present in dyes and/or pigments wastewaters at concentrations high enough to result in mass loadings above the calculated allowable levels. The theoretical concentrations presented in the table above assume an average wastewater quantity of 615,000 MT/yr. The majority of the facilities in this industry are expected to generate lower wastewater quantities (*i.e.*, the median wastewater quantity is 119,000 MT/yr), and thus the theoretical concentration of these constituents in these wastewaters at the calculated allowable levels would be even higher, and thus more implausible.

Aniline, however, may in fact be present in dyes and/or pigments industry wastewaters at levels exceeding the calculated allowable loading of 2,700 kg/yr. Of the four dyes and/or pigments manufacturers reporting aniline releases in the TRI, two report releases of aniline-bearing wastewaters to POTWs in excess of 2,700 kg/yr, and are presumably managing these wastewaters in tanks prior to discharge. One of these two facilities (BASF/Huntington, WV) is operating under a state air permit that limits the actual aniline air emissions from wastewater treatment to levels well below the potential wastewater loading limit for aniline (permit available in docket for today's rulemaking). The

second facility (Sun Chemical/ Muskegon, MI) treats its wastewaters via powdered activated carbon and biological treatment prior to discharge to a POTW.[53] The treatment unit in use has been subject to State air permits in the past. The facility recently obtained a wavier from permitting requirements for the treatment unit based on analysis showing that emissions (including aniline) are very low.[54]

Existing federal air regulations that pertain to facilities manufacturing dyes and pigments are summarized in section II.E. Aniline is regulated as a ''hazardous air pollutant'' (HAP) under the Clean Air Act. In general, the existing and upcoming regulations on air releases will limit the actual releases of many organic chemicals from dyes and/or pigments wastes. Based on our evaluation of the information available, we believe that air releases of aniline at dyes and/or pigments facilities are adequately controlled and such releases do not present significant risks.

We note that we could not make a TRI comparison for azobenzene because it is not a TRI constituent. Azobenzene is a degradation product associated with certain specialized dye and/or pigment production (*e.g.*, aniline-based triarylmethane products), rather than an actual intermediate. We do not believe that azobenzene would be present in wastewaters above the mass loading limits, but expect it to be present at low levels in very few wastes. The historical analytical data support this conclusion.

As described previously in section III.G.2.d.i, we assessed the biodegradation of certain constituents by assigning them rates from structurally similar constituents. We also, as an alternative, assessed these chemicals using a default degradation rate of zero. In the wastewater analysis, the constituents affected were aniline and azobenzene. The alternate calculated allowable loadings determined for aniline were 2,000 kg/yr and 980 kg/yr for the tank and surface impoundment scenarios, respectively. The alternate values for azobenzene were 3,200 kg/yr and 1,700 kg/yr for the tank and surface impoundment scenarios, respectively.

We solicit comments on our proposed decision not to list wastewaters and set mass loading-based regulatory levels derived from the air emission pathways from tanks and/or surface impoundments. We also request comments on an alternative approach that would list wastewaters from the production of dyes and/or pigments, establishing loading limits in a manner similar to that being proposed today for K181. We might adopt this alternative if, for example, we received data and information that these wastewaters are more likely to exceed the calculated mass loading limits than our current data indicates, or our modeling was insufficiently conservative, or that existing air regulations are not effectively controlling risks from aniline.

2. Groundwater Releases From Surface Impoundments

The dyes/pigments industries are known to operate a small number of surface impoundments (*see* section III.E.3). As a result, we modeled the management of wastewaters in unlined, clay-lined, and synthetic-lined surface impoundments for the groundwater pathway. We believe that the synthetic-lined impoundment is the most plausible management scenario for these wastes. Our analysis (*see* section III.G.2.g) indicates that releases to groundwater from impoundments with synthetic liners are unlikely to pose risk because the calculated allowable mass loadings all exceeded 100,000 kg/yr, an implausible loading in these wastewaters. While clay-lined impoundments are in use at one dye manufacturing site, we have not selected this scenario as plausible because these impoundments are not used to manage untreated wastes (*see* following discussion). We also determined that the unlined scenario for surface impoundments is not plausible for these wastes (*see* section III.D.2).

Our risk modeling of the clay-lined impoundment scenario indicates that the potential listing loading levels are below 100,000 kg/yr for 31 of the 35 constituents of concern (*see* the Risk Assessment Background Document for these results). We considered whether the one facility known to be operating clay-lined impoundments (Lobeco, located in Lobeco, SC) is likely to be managing wastewaters with constituents at levels of concern.

Lobeco indicated that their wastewater treatment system consists of neutralization, aeration with activated sludge, and holding ponds.[55] Staff from South Carolina's Department of Health and Environmental Control described four in-ground units at this site: An equalization unit and a digestion unit, both concrete-lined (with secondary clay liners), and two clay-lined holding basins. The holding basins receive wastewater treated in the concrete lined units prior to discharge to surface waters under an NPDES permit. 1999 TRI data for this facility shows that they had low levels of two constituents of potential concern in the influent to their wastewater treatment facility: Formaldehyde (<1 part per billion or ppb) and naphthalene (1 ppb–1 ppm). The facility reported that the only chemical reported to be discharged to surface water was ammonia. Consequently, we conclude that the treatment in the upstream units removed the naphthalene and formaldehyde before wastewaters reached the clay-lined holding basins.

The facility's NPDES monitoring data shows that only one of the constituents of concern for this listing for which the facility conducted analysis was detected in their effluent; copper was found at 0.3–0.9 pounds/day (50–150 kg/yr), well below the copper calculated allowable loading limit of 5,600 kg/yr for clay-lined impoundments. Since we believe the water in the clay-lined holding basins closely resembles the effluent, we do not believe that these particular impoundments are likely to manage wastewaters that would contain constituents of concern at levels above the calculated allowable mass loading limits.

We request comment on our proposal not to list wastewaters from dyes and/ or pigments production and not to set loading levels derived from the groundwater pathway for clay-lined surface impoundments. We also request comments on an alternative approach that would list wastewaters from the production of dyes and/or pigments that are managed in clay-lined surface impoundments, establishing mass loading limits in a manner similar to that being proposed today for K181. This alternative approach would not list as hazardous those wastewaters that are managed in synthetic-lined impoundments or in tanks. We would consider this alternative further if we receive data and information that, for example, would indicate that there are additional clay-lined surface impoundments in use by the industry or our assessment of the risks posed by wastewaters is insufficiently conservative.

D. Scope of the Listings and the Effect on Treatment Residuals

Today's proposal would result in a new hazardous waste listing that differs from previously promulgated listed hazardous wastes in that it includes

[53] Contact between Dr. Robert Kayser, OSW and John Fagiolo, Remedial Project Manager, EPA, June 24, 2003.

[54] Contact between Dr. Robert Kayser, OSW and Tracey McDonald, Air Quality Division, Michigan Department of Environmental Quality, June 24, 2003 in the docket for today's rule.

[55] *http://www.lobecoproducts.com/environment.html.*

constituent-specific mass loading limits to define the scope of the listing. The primary purpose of this ''mass loadings-based listing'' is to establish levels at the point of generation of a waste, at or above which that waste is considered to be a listed hazardous waste (*i.e.*, ''entrance'' levels). Wastes that are generated with constituent masses below these levels (on an annual basis) would not be subject to these listings.

Residuals from the treatment, storage, or disposal of listed hazardous wastes are usually classified as hazardous wastes based on the ''derived-from'' rule (*see* 40 CFR 261.3(c)(2)(i)).[56] We are not proposing to use the mass loading-based levels as ''exit'' levels for residues from treatment of dyes and/or pigments production nonwastewaters (K181). Thus, we are not proposing any exemption to the mixture rule for the K181 wastes.

In the listing determination for paint manufacturing waste solids, we proposed that the concentration-based listing levels would also serve as ''exit'' levels. That is, we proposed that waste solids that were treated to below the listing limits could exit the hazardous waste system and would become nonhazardous waste (66 FR 10110). We considered proposing to use the mass loading limits as exit levels for dye and pigment wastes, but we decided not to do this for several reasons. Most important, the mass-based loading is different from a concentration-based listing, because the proposed mass-based approach already builds in an exemption for wastes with constituent masses below the loading limit. Thus, the proposed approach allows a facility to handle as nonhazardous any wastes containing constituents of concern up to the loading limit. In contrast, a concentration-based listing would require all wastes that meet the listing level to be handled as hazardous.

In addition, an exemption for treatment residuals would be complex to implement. For example, a facility could generate an initial portion of waste up to the mass loading limit and handle that portion as nonhazardous. With an exemption for treatment residuals, the facility could then treat additional wastes and claim the residuals are below the loading limits. However, given that the facility already generated and disposed of wastes that contained the permissible mass loading limits, it would be inappropriate to classify the treatment residuals as nonhazardous.

Difficulties would also arise in any exemption for treatment residuals, if such treatment were to occur offsite. The offsite facility would have to demonstrate that the conditions set out in the proposed regulations were met and document that the waste is nonhazardous (*i.e.*, according to the proposed listing regulations in subparagraphs (c), (d) and (e)). An offsite treatment facility may not have the knowledge to track the cumulative loadings from the generator to ensure that the conditions for becoming nonhazardous are met. Furthermore, the treatment facility would likely be accepting a variety of hazardous wastes from numerous generators. Thus, even if this facility was able to comply with the conditions for determining the treated waste is not K181, the treatment residuals could still carry other hazardous waste codes under the mixture rule (see 40 CFR 261.3(a)(2)(iv)), as well as the derived-from rule. Thus, any implementation scheme for offsite treatment facilities appears problematic.

Finally, the treatment of any waste that is classified as K181 at the point of generation would have to comply with hazardous waste regulations. For example, if the waste was incinerated, the combustion unit would have to be permitted under Subtitle C. Therefore, the benefits of possibly classifying the treatment residuals as nonhazardous do not appear to be significant, compared to the cost of constructing and permitting a hazardous waste treatment unit (which, if we limited any exemption to onsite treatment, would have to be located onsite).

We seek comment on the need for any exemption for treatment residuals, and how such an exemption could be structured. If we were to adopt such an exemption, we would add an exemption to the derived-from rule (*e.g.*, in § 261.3(c)(2)(ii)), which would require the generator to show that the treated waste no longer meets the listing levels of K181 (using the determination process proposed in § 261.32(d)), and that the residuals meet the requirements specified in part 268. As described above, we believe that any exemption from the derived-from rule would be most applicable to generators who treat their waste onsite, because the generator would have the information needed to track the cumulative mass of the various constituents in the treated waste.

E. What Is the Status of Previously Disposed Wastes and Landfill Leachate From Previously Disposed Wastes?

The Agency has been clear in the past that hazardous waste listings normally apply to wastes disposed of prior to the effective date of a listing, even if the landfill ceases disposal of the waste when the waste becomes hazardous. (*See* 53 FR 31147, August 17, 1988.) We also have a well-established interpretation that listings apply to leachate derived from the disposal of listed hazardous wastes, including leachate derived from wastes meeting the listing descriptions that were disposed before the effective date of a listing. Leachate derived from the treatment, storage, or disposal of listed hazardous wastes is classified as a hazardous waste by virtue of the ''derived-from'' rule in 40 CFR 261.3(c)(2). We are not reopening nor taking comment on any of these issues with this proposed rulemaking.

As set out in detail in the August 1988 notice, this does not mean that landfills simply holding wastes that are listed now as hazardous become subject to Subtitle C regulation. However, previously disposed wastes now meeting a listing description that are actively managed,[57] including actively managed residues such as leachate that are derived from such wastes, become subject to Subtitle C regulation. (*See* 53 FR at 31149, August 17, 1988.) In most circumstances, active management of leachate is exempt from Subtitle C regulation. Specifically, management of leachate in wastewater treatment tanks prior to discharge under the CWA is exempt from RCRA regulation (40 CFR 264.1(g)(6)). Discharge to a POTW via the sewer system, where leachate mixes with domestic sewage, is also excluded from RCRA jurisdiction (*see* RCRA section 1004(27) and 40 CFR 261.4(a)(1)). Similarly, discharge to navigable waters is excluded from RCRA jurisdiction (*see* RCRA section 1004(27) and 40 CFR 261.4(a)(2)).

[56] Also, the ''mixture'' rule (*see* 40 CFR 261.3(a)(2)(iii) and (iv)) provides that, with certain limited exceptions, any mixture of a listed hazardous waste and a solid waste is itself a RCRA hazardous waste.

[57] The Agency often uses the term ''active management'' as a catch-all term to describe the types of activities that may trigger RCRA Subtitle C permitting requirements. In general, those activities are hazardous waste treatment, storage, and disposal, all of which are defined in 40 CFR 260.10. It is important to note, however, that EPA interprets the disposal that triggers RCRA Subtitle C permitting requirements to be the types of disposal as described in the definition of ''disposal facility'' in 40 CFR 260.10, and not the broader, more general definition of ''disposal'' in that section and in RCRA section 1004(3). *See, e.g.*, 53 FR 31149 (August 17, 1988). Instead, the latter, broader definition is used to determine the applicability of certain statutory provision, such as RCRA section 7003, 7002(a)(1)(B), 3013, and 3007. *See, e.g.*, 55 FR 8759 (March 8, 1990).

It is possible that nonwastewaters within the proposed scope of K181 (and the relevant mass loading limits) may have been disposed in landfills. However, the proposed listing for K181 waste is a mass loading-based listing, and it would be difficult to know whether the previously disposed wastes that meet the narrative description of K181 did, in fact, have constituent mass loadings that would be at or above the K181 regulatory levels. We don't anticipate that records documenting the mass of proposed constituents of concern in these wastes exist for previously disposed wastes.

Typically, the status of the previously disposed waste is not an issue, unless the waste is actively managed in some way. One way this question might arise is if the derived-from leachate is actively managed; we discuss this question below. This issue would arise more directly, however, if the waste previously disposed were to be excavated for further management, perhaps as part of a corrective action or other remediation effort. In this case, we believe it would be most practical to evaluate the managed waste as if it were newly generated. That is, a facility engaged in excavation of wastes that are potentially K181 would use the procedures in the proposed listing to determine if the constituents of concern meet or exceed the relevant mass loading limits. If the mass loadings are met or exceeded, then the actively managed waste would be K181. As noted, except in cases where the origin of the waste and its constituents are well documented, we believe classifying a previously disposed waste as K181 will be difficult, at best.

If actively managed landfill leachate and gas condensate derived from the newly-listed wastes proposed for listing in today's notice could be classified as K181, we would be concerned about the potential disruption in current leachate management that could occur, and the possibility of redundant regulation.[58] This issue was raised to the Agency in the context of the petroleum refinery waste listings (*see* 63 FR 42173, August 6, 1998). A commenter expressed concern that, because some of the commenter's nonhazardous waste landfills received newly-listed petroleum wastes prior to the effective date of the listing decision, the leachate that is collected and managed from these landfills would be classified as hazardous. The commenter argued that this could lead to vastly increased treatment and disposal costs without necessarily any environmental benefit. After examining and seeking comment on this issue, we published a final rule that temporarily defers regulation of landfill leachate and gas condensate derived from certain listed petroleum refining wastes (K169–K172) that were disposed before, but not after, the new listings became effective, provided certain conditions are met. (*See* 64 FR 6806, February 11, 1999.) We proposed deferrals for similar wastes derived from landfills in the 1999 proposal for the dye and pigment industries (64 FR 40192, July 23, 1999), the inorganic chemical manufacturing industries (65 FR 55684, September 14, 2000), the chlorinated aliphatics industry (65 FR 67068, November 8, 2000) and the paint and coatings industry (66 FR 10060, February 13, 2001). We also promulgated a final listing determination for the inorganic chemical manufacturing industries that retains the deferral (66 FR 58258, November 20, 2001).

At the time this issue was brought to the Agency's attention in the context of the petroleum refinery waste listings, EPA's Office of Water had recently proposed national effluent limitations guidelines and pretreatment standards for wastewater discharges—most notably, leachate—from certain types of landfills. (*See* 63 FR 6426, February 6, 1998). In support of this proposal, EPA conducted a study of the volume and chemical composition of wastewaters generated by both subtitle C (hazardous waste) and Subtitle D (nonhazardous waste) landfills, including treatment technologies and management practices currently in use. Most pertinent to finalizing the temporary deferral for the petroleum refining wastes, EPA did not propose pretreatment standards for subtitle D landfill wastewaters sent to POTWs because the Agency's information indicated that such standards were not required. EPA subsequently finalized its decision that pretreatment standards were not necessary (*see* 65 FR 3008, January 19, 2000).

The conditions included in the temporary deferral we published on February 11, 1999 are that the leachate is subject to regulation under the Clean Water Act, and the leachate cannot be stored in surface impoundments after a period of two years. *See* 40 CFR 261.4(b)(15). We believe that it was appropriate to temporarily defer the application of the new waste codes to such leachate in order to avoid disruption of ongoing leachate management activities, while the Agency decides if any further integration is needed of the RCRA and CWA regulations consistent with RCRA section 1006(b)(1). We believe that it is still appropriate to defer regulation and avoid leachate management activities, and to permit the Agency to decide whether any further integration of the two programs is needed. As such, we would be concerned about forcing pretreatment of leachate even though pretreatment is neither required by the CWA, nor needed. Therefore, we are proposing to temporarily defer the regulation of landfill leachate and gas condensate derived from management of K181 waste that we are proposing for listing in today's rule, with the same conditions as described in 40 CFR 261.4(b)(15) for petroleum wastes. We request comment on this proposed conditional deferral.

V. Proposed Requirements for K181 Determinations

We are proposing that listing determinations for K181 would be self-implementing. This means that you (the waste generator) would be responsible for determining whether or not your wastes are K181 listed hazardous wastes at the point of generation based on the proposed procedures we describe below. First, you must determine whether your nonwastewaters are included within the categorical K181 text (*i.e.,* nonwastewaters from the production of azo, triarylmethane, perylene and anthraquinone dyes or pigments). If so, then you would need to determine if your nonwastewaters could contain any of the K181 constituents of concern (CoCs). If your wastes at the point of generation could not contain any of the CoCs, we are proposing that your wastes are not subject to K181.

If your dyes and/or pigments production nonwastewaters might contain any of the K181 CoCs and you wish to demonstrate that the mass loadings of these constituents in your waste are below the regulatory levels, you would use one of two demonstration methodologies, depending on the annual quantity of waste you generate. If you generate or expect to generate 1,000 metric tons or less of these wastes in a calendar year, then you would have the option of testing your wastes or using your knowledge of the wastes to demonstrate that they are nonhazardous. If you expect to generate more than 1,000 metric tons/year of these wastes in a calendar year, then you would have to test the wastes annually to demonstrate that they are nonhazardous. Our reasons

[58] We do not believe that the mass loading limits in the proposed K181 listing would be useful in determining if the leachate was K181 waste. This is because the mass loading limits in K181 were derived for nonwastewaters, not landfill leachate, which are wastewaters.

for proposing this two-tiered approach and requiring annual testing of larger quantity wastes are discussed in section V.A.3 below.

If you determine that part or all of your dyes and/or pigments production nonwastewaters are nonhazardous, we are proposing to require, under the authority of sections 2002 and 3007 of RCRA, that you keep certain records of your determination at the generating site (onsite). You must make a new demonstration each calendar year. Your wastes, however, would be hazardous if your onsite records and/or testing conducted by EPA or an authorized state demonstrate the presence of one or more CoCs at or above the listing mass loading levels. Your wastes would also be hazardous if the landfill disposal conditions were applicable, but were not satisfied.

Note that the proposed approach would mean that even if your mass loadings meet or exceed the specified mass loading levels on an annual basis, you may still manage as nonhazardous all wastes generated up to the mass loading limit. In other words, we are proposing that the K181 listing would apply to only the portion of wastes that meet or exceed the mass loadings. This is illustrated by the following example. Using the proposed mass loading for toluene-2,4-diamine in Table IV–1 (0.99 kg/yr.), if a facility generates 200 kg/yr, the amount up to just below the mass loading limit in § 261.32(c)(1) (*i.e.,* 0.99 kg/yr.) would be nonhazardous, and the facility would only be required to handle the waste containing the rest of the mass of toluene-2,4-diamine as hazardous waste. Furthermore, if the generator sends this waste to a landfill that meets the design requirements under § 258.40, then the generator may dispose up to just below the mass loading limit in § 261.32(c)(2) (*i.e.,* 140 kg/yr) as nonhazardous and handle the remaining portion above this limit as hazardous. This approach has some advantages. First, this is consistent with the results of the risk analysis, which indicates that quantities up to the loading limit could be safely managed as nonhazardous. Second, this would simplify the facility's concern with how to manage wastes generated during the year, if the facility is not certain how close the waste will come to meeting the loading limit for the entire year. Thus, if the facility has sufficient knowledge to know that the cumulative total for intermediate batches of the waste will not meet the loading limit, the facility can safely handle and dispose of this portion of the waste as nonhazardous. If or when the waste reaches the loading limit, then the facility simply handles all subsequent waste as hazardous.

However, for wastes which meet or exceed the mass loading threshold, another alternative would be for the loading limit to apply to all of a generator's waste, including the waste generated before the mass loading limit is met or exceeded. Under this option, a generator would need a high level of certainty that wastes generated for the calendar year would not meet or exceed the mass loading limits in § 261.32(c)(1), or if the waste is sent to a landfill meeting the § 258.40 design criteria, the waste would have to be below the limits in § 261.32(c)(2). This approach would be more consistent with past listings, in which wastes with similar characteristics would be managed the same, rather than allowing a portion of the waste to be managed as nonhazardous. This approach would provide added incentive to a generator to manage potentially hazardous wastes properly and perhaps to reduce mass loadings through pollution prevention actions. However, this approach may result in serious problems for a generator who, in good faith, underestimates the mass loadings for a calendar year. If the generator manages the waste as nonhazardous, and then discovers that wastes generated later in the year cause the total waste to meet or exceed mass loading limits, then the generator would be in violation for improperly managing hazardous waste. Furthermore, if a Subtitle D landfill accepted the initial waste batches as nonhazardous, then when the generator reaches or exceeds the mass loading for that calendar year, then all of the waste from that generator in that calendar year would be hazardous waste subject to the K181 listing. The landfill owner would have placed hazardous waste in units that do not meet the requirements of Subtitle C. We solicit comment on this alternative approach.

The following discussion covers how we are proposing that you could demonstrate that your waste doesn't contain any CoCs at levels of concern (section III.A), and how you could demonstrate that your waste could be placed in a landfill that meets or exceeds the design criteria in § 258.40 as nonhazardous (section III.B). Section C describes the proposed status of your wastes prior to completion of your nonhazardous determination. Section D provides examples illustrating how the listing determination for K181 might work. Section E describes compliance and enforcement implications for the determinations.

A. How Do I Demonstrate That My Wastes Are Nonhazardous?

We are proposing that you could determine that your wastes are not listed as K181 because they don't contain CoCs at levels in excess of the listing levels in a number of ways.

1. Categorical Determination

You could determine that your wastes do not fall within the categorical K181 text included in the proposed regulations for this action under § 261.32(a). For example, if you do not produce any azo, triarylmethane, perylene, or anthraquinone products (as described in proposed § 261.32(b)), your nonwastewaters would not fall within the scope of the listing. Any wastes that are already hazardous due to the characteristics (§§ 261.21–261.24) or are otherwise listed (§§ 261.31–261.33) do not also fall within the scope of the listing. Wastewaters are not within the scope of the listing.

2. No K181 Constituents of Concern

We are proposing at § 261.32(d)(1) that you can use your knowledge of your wastes to demonstrate that your wastes do not contain any of the K181 CoCs identified in § 261.32(c)(1). You would have to compare the CoCs identified in § 261.32(c)(1) for K181 to constituents expected in your wastes. You could use process knowledge (*e.g.,* knowledge of the constituents in your wastes based on existing sampling and analysis data and/or information about raw materials used, production processes used, and reaction and degradation products formed) to make these initial determinations. If you determine that your potential K181 wastes at the point of generation do not contain any of the CoCs for K181 listed in § 262.32(c)(1), then you can determine your wastes to be nonhazardous. We are proposing that you keep documentation onsite for three years supporting your determinations that wastes are nonhazardous based on your knowledge that they do not contain any of the CoCs. We discuss enforcement of this and other recordkeeping provisions below in section E.

3. Low Quantity Versus High Quantity Wastes With K181 Constituents

If you generate less than 1,000 MT/yr of nonwastewaters that meet the K181 categorical description, you are eligible for determining that your wastes do not exceed the § 261.32(c)(1) or (c)(2) listing levels using the procedures proposed in § 261.32(d)(2). These procedures are based on your knowledge of your wastes, and do not require that you

conduct waste analysis to support your demonstration. The procedures that apply to generators of quantities less than 1,000 MT/yr of waste are described further in section 4 below. If you generate more than 1,000 MT/yr, you would have to use the more extensive procedures proposed in §261.32(d)(3) to demonstrate that your wastes are not hazardous, as described further in section 5, below.

To support either a § 261.32(d)(2) or § 261.32(d)(3) demonstration, you will need to keep track of how much potential K181 waste you generate from January 1 to December 31 of each year. For the year that this listing becomes effective, the demonstration would cover the period of time between the effective date and December 31 of that year. We are proposing a calendar year basis for these demonstrations to ease implementation of the rule, ensuring that industry and regulators have a common, clear understanding of the time period covered by such demonstrations.

In the proposed categorical K181 text, these wastes are defined as nonwastewaters from the production of dyes and/or pigments (including nonwastewaters commingled at the point of generation with nonwastewaters from other processes) that are not otherwise already listed or captured by the hazardous waste characteristics. To the extent that your nonwastewaters from other processes are segregated from wastes that fall within the scope of K181, they would not be included in your K181 waste quantity determination. Similarly, your dyes and/or pigments production wastes that are listed as hazardous for listings other than K181, or that are characteristically hazardous would not be included in your K181 waste quantity determination. However, if you generate a commingled waste (such as wastewater treatment sludge or other wastes) that contains waste contributions from both K181 and non-K181 sources (that are not otherwise hazardous), the entire commingled waste volume would be included in your K181 waste quantity determination, until and unless you were to segregate these sources. See discussion above in section IV.A.7 on commingled wastes.

The rationale for the selection of 1,000 metric tons per year (MT/yr) cutoff for the two tiers is included in the docket for today's rule.[59] In general, the 1,000 MT/yr cutoff for nonwastewaters (above which testing is required) is intended to ensure that the largest quantities of nonwastewaters generated by the dyes and/or pigments production facilities are tested and, at the same time, to minimize the burden on small generators. We believe that larger quantities of wastes have the potential for posing greater environmental risk than smaller quantities of wastes if a nonhazardous determination based on knowledge turns out to be inaccurate. Therefore, we believe it is reasonable to require larger quantity waste generators to test their wastes to make their determination, while smaller quantity waste generators are given the option to either test their wastes or use knowledge of their wastes annually to make a determination. We request comment on the appropriateness of giving smaller quantity waste generators the option of using knowledge of their wastes in making such a demonstration. We will consider requiring smaller quantity waste generators to test their wastes, like the larger quantity waste generators, if significant and defensible arguments are presented by commenters to support these requirements as necessary and appropriate. We will also consider adjusting the 1,000 Mt/yr cut off higher or lower, if we receive more precise information on waste quantities.

We request comment on an alternative to the two-tiered implementation approach discussed above. The alternative implementation approach would allow any generator to rely on either process knowledge or testing to evaluate the concentrations of CoCs in their nonwastewaters, irrespective of the annual quantity generated. This implementation approach would be similar to the existing program for determining whether a waste exhibits a hazardous characteristic (*see* 40 CFR 261.24 and 262.11). Although we prefer the two-tiered approach being proposed in today's rule, we will give careful consideration to any arguments presented or relevant waste analysis data submitted in response to today's proposal (*e.g.,* data showing that only a small portion of the wastes in the industry exceed the listing mass levels) to decide whether an alternative approach is warranted.

4. Section 261.32(d)(2) Demonstrations for Waste Quantities Less Than 1,000 MT/yr

If you generate less than 1,000 MT/yr of wastes potentially subject to K181, you can use knowledge to demonstrate that your waste does not contain mass loadings above either set of K181 listing levels. The following discussion describes our proposed approach to this type of demonstration.

Estimate Waste Quantity: You must estimate how much waste you expect to generate in the next calendar year (*e.g.,* based on past annual waste generation data and/or current knowledge about future generation). You must include all wastes that meet the categorical K181 listing description to determine the total waste quantity for the dyes and/or pigments production nonwastewaters.

If you initially estimated that your waste generation would be less than 1,000 MT/yr and, at any time within the year you exceed 1,000 MT/yr, you would then no longer be eligible for making a § 261.32(d)(2) demonstration, and would need to comply with § 261.32(d)(3) to demonstrate that the remainder of the waste that you generate in that calendar year is not hazardous. This means that if you had not already been testing your wastes to demonstrate that they are not hazardous, you would then have to test your wastes for the remainder of the year.

Track Waste Generation: You must track the actual quantity of dyes and/or pigments production nonwastewaters generated during each calendar year. Again, you must include all wastes that meet the listing description for K181 to determine the total waste quantity for the dyes and/or pigments production nonwastewaters.

Estimate Waste Mass Loadings Using Knowledge: Under a § 261.32(d)(2) determination, we are proposing that you could use knowledge of your wastes (*e.g.,* knowledge of the constituents in your wastes based on existing sampling and analysis data and/or information about raw materials used, production processes used, and reaction and degradation products formed) to estimate waste concentrations for the constituents of concern in your waste, and to then calculate estimated mass loading levels for the CoCs. You should calculate the cumulative mass loadings of the CoCs in your waste over the course of the year, taking into consideration known variations in constituent concentration over the course of the year. You should estimate the mass loadings of the CoCs associated with each shipment of wastes during the year. So long as your cumulative estimated mass loading levels during the year remain below the regulatory levels, you can manage your waste as nonhazardous. Note that a new determination would have to be made in subsequent calendar years, with the possible changes noted below under *Subsequent Annual Determinations.*

Recordkeeping: If you make a knowledge-based determination that

[59] See Appendix J in the Listing Background Document for ''Determination of Tiered Waste Analysis Requirements for Dyes and/or Pigments Production Nonwastewaters.''

levels of the CoCs in your wastes are below the regulatory levels, then we are proposing that you keep the following records onsite for three years to support your § 261.32(d)(2) nonhazardous determination:

- The actual quantity of dyes and/or pigments nonwastewaters generated.
- The process knowledge information that was used.
- The calculations performed to determine mass and annual running total mass levels for each CoC in the waste during the year based on process knowledge information that was used to support a nonhazardous determination.

We discuss the consequences of failing to keep records below in section E.

5. Section 261.32(d)(3) Demonstrations for Waste Quantities Greater Than 1,000 MT/yr

If the annual volume of your potential K181 nonwastewaters is greater than 1,000 MT/yr and you wish to demonstrate that your wastes do not exceed any of the relevant mass-based loading thresholds, we are proposing that you must test your wastes. You may not use knowledge of the wastes to determine the levels of the CoCs in your wastes. For those wastes that you must test, we are proposing that you use the following procedures:

- Determine which K181 constituents are reasonably expected to be present in your waste.
- Develop a waste sampling and analysis plan (SAP) (if you do not already have one that is appropriate) to collect and analyze representative samples of your wastes for those constituents.
- Collect and analyze an appropriate number of representative samples of your wastes in accordance with your waste SAP.
- Record the actual quantity of wastes that is represented by your sampling and analysis results.
- Calculate CoC-specific mass loadings (multiply the CoC concentration by waste quantity).
- Determine whether the annual running total mass (year-to-date mass loadings) for CoCs, including mass totals from earlier in the year, are below the K181 listing mass levels.
- Keep your records onsite for three years.
- Conduct your determination each calendar year to verify that the wastes remain nonhazardous.

Each of these steps is described further below.

Identify Target Constituents: Using knowledge of your wastes, you would need to identify which of the K181 constituents are potentially present in your wastes (proposed § 261.32(d)(3)(i)). If you can use your knowledge to demonstrate that any of the § 261.32(c)(1) or (c)(2) constituents would not or could not be present in your waste, you would not be required to conduct any waste analysis for those constituents. Your ''knowledge'' might include previous waste analyses (conducted for a different purpose), information about raw materials used at your facility, production processes in use, and reaction or degradation products potentially formed in your process or waste handling.

Waste Sampling and Analysis Plan: You must develop a sampling and analysis plan to characterize the levels of the K181 constituents that may be present in your wastes. Your SAP must consider any expected temporal or spatial fluctuations in CoC concentrations. Your sample design must be described in the SAP. The sample design and the sensitivity of the analytical methods used must be sufficient to determine whether the mass levels of the CoCs in your wastes (based on the quantity of wastes you generate annually and concentrations of the CoCs in your wastes) are above or below the mass loading-based levels for these constituents.

Conduct Sampling and Analysis: Following your SAP, you then would collect the appropriate number of samples, and conduct the planned waste analysis. Note that we are not proposing a required number of samples that you would need to collect annually to obtain representative data for your wastes. When you determine the appropriate number of samples to be collected, you must consider facts such as the variability of the wastes you generate during the course of the year.

We are not proposing mandated use of grab or composite sampling to obtain samples that are representative of your wastes. However, it would be your responsibility to ensure that your sampling and analysis is unbiased, precise, and representative of your wastes and to provide documentation of this representativeness in your SAP.

Similarly, we are not mandating the use of specific analytical methods, so long as you can demonstrate that the selected methods have the appropriate sensitivity, bias, and precision to determine the presence or absence of the constituents of concern at or below K181 mass loading levels. Specifically, we are not proposing to require the use of SW–846[60] methods to comply with these requirements. However, you would be required to document the: (1) Detailed standard operating procedures (SOPs) for the sampling and analysis protocols that you used; (2) sensitivity and bias of the measurement process; (3) precision of the analytical results for each batch of waste tested; and (4) analytical results.

We would consider the analytical results adequate to support your demonstration if you show, using spiked samples for the CoCs, that those constituents can be measured at concentrations corresponding to the regulatory levels in your wastes, within the analytical method performance limits (*e.g.,* sensitivity, bias, and precision). You might establish this target concentration for your spiked sample analysis by dividing the K181 listing level by your projected annual waste quantity. To determine the performance limits for a method, we recommend following quality control (QC) guidance provided in Chapters One and Two of SW–846. Your method performance data should be retained onsite with your analytical results as described below.

Calculate Mass Loadings: We are proposing that you must record your analytical results (§ 261.32(d)(3)(iv)), record the quantity of your wastes associated with those results (§ 261.32(d)(3)(v)), and calculate the corresponding constituent-specific mass loadings (product of constituent concentration and waste quantity) (§ 261.32(d)(3)(vi)).

Following sampling and analysis, you must calculate the mass of each constituent of concern in your wastes and keep a running total of the mass of each CoC throughout the year. In addition, you should also calculate mass loading levels for the CoCs in your waste and keep a running total of the mass of each CoC prior to disposal of any quantity of your waste during the year. The mass of a CoC depends on both the quantity of waste and the concentration of the constituent in the waste. For example, 1,000 metric tons (1 million kilograms) of waste that contains a constituent at a concentration of 1 mg/kg will have 1 million milligrams (or 1 kilogram) of that constituent. During the year, the dyes and/or pigments nonwastewaters that are generated may contain different concentrations of a constituent. In this case, the mass of a constituent in a fixed quantity of waste will also go up or

[60] EPA Publication SW–846, ''Test Methods for Evaluating Solid Waste, Physical/Chemical Methods.''

down based on the concentrations of the constituent in the wastes being generated. A running total for the mass of a constituent will be the sum total of all mass calculations for the constituent in all quantities of nonwastewaters that have been generated from beginning of the year to present. At the end of the year, if the annual running total mass of a CoC is less than its listing mass level, it will be possible to demonstrate that a final annual mass of a CoC in the waste is below its listing mass level.

To determine the mass of a CoC, we are proposing that you use the maximum detected concentration or, if multiple samples have been collected, you may use either the maximum or a concentration based on the 95th percentile upper confidence limit on the mean, for each CoC and multiply it with the total waste quantity which it characterizes. However, we request comment on whether you should be allowed to average the concentrations of constituents detected in multiple waste samples. Alternatively, we request comment on whether use of another confidence limit of the mean (*e.g.,* 90th or 80th percentile) would be more appropriate for concentrations of constituents detected in multiple samples.

If your tested wastes are representative of the wastes that will be generated during part or the rest of the year (or you can reliably determine that these wastes exhibited the maximum concentrations for the constituents of concern), then you could use these concentrations for each CoC to calculate the additional mass of each CoC in your waste based on additional waste that you generate for part or rest of the year.

Compare Loadings to K181 Listing Limits: You would need to track the cumulative mass loading of CoCs in your waste over the course of each year. As long as the cumulative mass for each CoC in your waste remains below the respective K181 levels during the course of the year (and you meet the landfill disposal condition, if applicable), then your corresponding waste quantity generated to that point in time would be nonhazardous. You would, however, continue to be responsible for maintaining records that support a nonhazardous determination. However, if the cumulative mass for any of the constituents of concern equals or exceed its listing mass level during the course of the year, then at that point your waste would be listed hazardous waste and subject to all applicable RCRA Subtitle C hazardous waste requirements. Waste generated in the same year prior to that point would remain nonhazardous waste. It would not become subject to the K181 listing. Earlier in section V. we solicited comment on an alternative approach that would have the listing determination applying to all wastes generated in any year that the listing levels are exceeded.

Keep Records Onsite: Under § 261.32(d)(3)(viii), we are proposing that you keep the following records onsite for three years to support a nonhazardous determination based on testing:

- The sampling and analysis plan used for collecting and analyzing samples representative of your wastes, including detailed sampling methods used to account for spatial and temporal variability of the wastes, and sample preparative, cleanup (if necessary) and determinative methods.
- The sampling and analysis data (including QA/QC data) and knowledge (if used to determine that one or more constituents of concern are not present in the wastes) that support a nonhazardous determination.
- The actual quantity of dyes and pigments nonwastewaters generated.
- The calculations performed to determine mass and annual running total mass levels for each CoC in the waste during the year that support a nonhazardous determination.
- If the annual testing requirements for your wastes were suspended based on three consecutive years of nonhazardous determinations (*see* Subsequent Annual Determinations in the following section), then you need to keep the process knowledge information used to support a nonhazardous determination. If testing is re-instituted (following suspension of testing requirements) because of a significant process change (as discussed further below), then describe this process change.

We request comment on the adequacy of the above recordkeeping requirements to support a nonhazardous determination. See section E below for a discussion of the consequences of failing to meet these recordkeeping requirements.

Subsequent Annual Determinations: We are proposing that you continue to perform waste analysis annually after you have determined your wastes to be nonhazardous for the purpose of verifying that your wastes remain nonhazardous.

We are proposing that subsequent waste analysis requirements could change under the following circumstances:

(i) After completing annual testing requirements for your wastes under § 261.32(d)(3), if the annual running total mass levels for the CoCs during any three consecutive years based on sampling and analysis results for the CoCs in your wastes are determined to be nonhazardous, then the annual testing requirements for your wastes would be suspended and you could use knowledge of your wastes annually to support a nonhazardous determination.

(ii) After suspension of the annual testing requirements for your wastes, if dyes and/or pigments production or waste treatment processes generating these wastes are significantly altered (*i.e.*, if it could result in significantly higher levels of the CoCs for K181 in your wastes and greatly increase the potential for your wastes to become hazardous), then the annual testing requirements for your wastes would be reinstituted. In order to again suspend the annual testing requirements for your wastes, the requirement under step (i) above would have to be met.

We request comment on whether the annual testing requirement should be continued beyond three years, if the generator determines all of its dyes and/or pigments production wastes to be nonhazardous for three consecutive years. Following suspension of annual testing requirements, the generator would still be liable if testing by EPA or an authorized state finds the waste to be hazardous.

6. EPA and State Oversight

Regardless of which approach you choose to determine whether your waste contains constituents in amounts lower than the § 261.32(c)(1) or (c)(2) listing levels, EPA and authorized States may make their own determinations for enforcement and oversight purposes. EPA and authorized States may sample your waste and calculate the mass of any constituent of concern. If EPA concluded that your waste met or exceeded the applicable mass limits, it could bring an enforcement action under section 3008 of RCRA for violations of hazardous waste requirements if you have not managed the waste in compliance with applicable Subtitle C requirements. Authorized States could use enforcement authorities under State law.

B. How Do I Document Compliance With the Landfill Condition?

You may determine through a § 261.32(d)(2) or (3) determination that your wastes in fact contain K181 constituents at levels in excess of the § 261.32(c)(1) listing levels. If your demonstration shows, however, that the level in your wastes of the § 261.32(c)(2) constituent is below their corresponding § 261.32(c)(2) listing level, you may manage your wastes as nonhazardous if

you dispose of them in a landfill cell subject to Part 258 or Subtitle C design standards.

As noted above in section IV, § 258.40 applies to new MSWLFs or new cells at existing MSWLFs. It requires use of a composite liner and leachate collection system or an equivalent design approved by the Director of an approved state program or by EPA. The composite liner must include a synthetic layer. The infiltration rates we modeled for landfills with synthetic liners were based on data from landfills with composite liners very similar to the design required under § 258.40. Consequently, we are proposing to allow disposal of dyes and/or pigments production nonwastewaters meeting the § 261.32(c)(2) mass limits in a municipal landfill cell that is subject to the § 258.40 design requirements.

We are specifying that the cell must be subject to these requirements because we believe that some operating landfills still use older cells that are not required to meet the design requirements. Our risk assessment shows that placing dyes and/or pigments nonwastewaters with constituent masses up to the § 261.32(c)(2) level in unlined landfills would not adequately protect human health and the environment.

EPA has found that 49 states have adequate permitting programs to implement the Part 258 regulations for MSWLFs. Permit programs must ensure that all MSWLFs in the state comply with the § 258.40 design standards. (*See* 40 CFR 239.6 (e).) No dyes and/or pigments production facility is located in the state that lacks EPA approval. Consequently, we think that all landfill cells subject to the Part 258 design standards are complying with those standards. We request comment, however, on whether we should also require a more specific demonstration that the landfill cell is in compliance with the design standards—and, if so, what it should consist of, and who would be responsible. One possibility would be to require the use of a cell subject to § 258.40 at a MSWLF that has a permit issued under a state program that EPA found to be adequate under 40 CFR part 239.

Some generators of dyes and/or pigments production wastes may choose to send nonwastewaters meeting the § 261.32(c)(2) limits wastes to hazardous waste landfills. New landfill units and lateral expansions of existing hazardous waste landfills are required to have ''double'composite liners including synthetic components. See 40 CFR 264.301 and 265.301. Available data suggest that these liner systems have even lower infiltration rates than the liners required under part 258. We are proposing to give generators the option of sending wastes with constituents up to the § 261.32(c)(2) levels to landfill cells subject to these stricter hazardous waste liner requirements.

We request comment on whether a third class of appropriate landfill should be included, namely, industrial solid waste landfill cells that have liner systems that meet the § 258.40 or Subtitle C standards. We request comment on what an appropriate demonstration might consist of, and who should be responsible for making the demonstration.

We are proposing to require you to keep records showing that you used a qualifying landfill cell. We are not proposing any specific requirements. Rather, we are proposing a more flexible performance standard similar to the documentation requirement in 40 CFR 261.2(f) for claims that materials are not solid wastes. One of the simplest ways to demonstrate fulfillment of the landfill disposal condition may be to provide, upon request by a compliance or enforcement official, a copy of a signed contract with either a municipal landfill subject to the relevant Part 258 requirements or a hazardous waste landfill subject to Subtitle C requirements. The contract would need to show that the landfill operator would use only cells subject to the applicable Part 258 or Subtitle C design requirements. In cases where such a contract does not exist, the following alternative types of documentation may be adequate: signed nonhazardous waste manifests, shipping papers, or invoices showing that wastes were placed in municipal landfills cells subject to the applicable Part 258 or Subtitle C design requirements.

We would regard a showing that all of your recent or ongoing shipments of potential K181 wastes have been sent to appropriate landfill cells as sufficient evidence of intent to continue to use appropriate landfill cells for any wastes that you are storing onsite prior to shipment.

As explained in more detail in section E below, if your potential K181 waste is not disposed of in a qualifying landfill cell, or you cannot demonstrate that it was, your waste is subject to the K181 listing from the time that it was generated, and EPA or an authorized state may take enforcement action against any person who failed to meet applicable Subtitle C requirements while they managed it.

C. How Would I Manage My Wastes During the Period Between Generation and Hazardous Waste Determination?

If you generate wastes that are included within the categorical K181 text, you may not presume that your wastes are not subject to the listing until you make a determination which shows that your wastes are nonhazardous. From the time you generate the wastes to the time you make a determination on your wastes, you are responsible for storing your wastes properly. If your wastes are determined to be hazardous and you did not comply with applicable Subtitle C requirements prior to the determination, then you could be subject to an enforcement action.

D. Implementation Examples

To assist you and the regulating authorities alike in understanding the proposed implementation procedures for K181, we present below some scenarios describing how different types of dyes and/or pigments production facilities would determine whether or not their nonwastewaters would be subject to the proposed K181 listing. These examples cover those circumstances where facilities assess whether they can use knowledge or must use sampling and analysis to determine that their wastes are not subject to regulation as K181. Note that these examples are not meant to describe all situations.

Example 1: Using knowledge to show waste contains no K181 constituents (§ 261.32(d)(1)).

Facility A manufactures a limited number of azo dyes, as well as a variety of dye product classes not addressed by the K181 listing scope. The facility reviews the raw materials used in the production of its azo dyes and determines that none of the K181 constituents are used in their azo dye production. In addition, the facility assesses their azo product line and determines that none of the K181 constituents would be present in their nonwastewaters as a result of reaction byproducts, or degradation of their products or raw materials, or as a result of being present in their raw materials as impurities. The facility documents its findings as per proposed § 261.32(d)(1), and manages their wastes as nonhazardous.

Example 2: Quantities Less Than 1,000 MT/yr: Using knowledge to show wastes do not exceed § 261.32(c)(1) listing levels (§ 261.32(d)(2)).

Facility B manufactures disazo and triarylmethane pigments. The facility routinely uses several K181

constituents, aniline and p-cresidine, as pigment raw materials. Its production processes generate mother liquor, process filtrates, equipment washouts, spent filter aids and various solid residues. All wastewaters are discharged to a local POTW for treatment. Nonwastewaters, approximately 20 metric tons per month (totaling 240 metric tons per year), are accumulated in dumpsters prior to disposal.

The facility believes that its nonwastewaters will not exceed the § 261.32(c)(1) listing levels. As less than 1,000 metric tons of total nonwastewaters are generated each calendar year, the facility can use knowledge of its processes and wastes to estimate its waste constituent levels under proposed § 261.32(d)(2). Based on its assessment of the raw materials used in the production lines, the facility calculates that its pigment production processes use no more than 1,800 kg/year of aniline and 150 kg/year of p-cresidine per calendar year; and no other K181 chemicals are used as input materials. In addition, the facility does not use aniline or p-cresidine for any other purposes onsite. Based on its assessment of its process chemistry and review of raw material purity information, the facility concludes that none of the other K181 chemicals are expected to be present in its nonwastewaters.

The facility thus determines that its pigment production nonwastewaters do not meet the definition of K181 because the wastes would not contain more than the listing levels of 9,300 kg/year and 660 kg/year of aniline and p-cresidine, respectively, and no other K181 constituents are expected in the wastes. The facility documents its findings as per (d)(2), and manages the waste as nonhazardous.

Example 3: Quantities Less Than 1,000 MT/yr: Using knowledge to show wastes do exceed § 261.32(c)(1), but do not exceed § 261.32(c)(2) listing levels, and thus can be landfilled as nonhazardous in landfill subject to § 258.40 or Subtitle C design standards (§ 261.32(d)(2)).

Facility C manufactures a variety of azo and anthraquinone dye products using many ingredients that include 1,3-phenylenediamine, 4-chloroaniline, and toluene-2,4-diamine. The spent process liquors, equipment rinses and other wastewaters resulting from the production are piped to storage tanks, mixed there, and then treated chemically and biologically in several treatment tanks. The treated wastewater is discharged to an adjacent river under an NPDES permit. The facility's records show that the treatment tanks generate wastewater treatment sludge at the average rate of 60 metric tons a month. In addition, approximately 15 metric tons/month of spent filter aids and other process nonwastewaters result from the production processes. The facility commingles its nonwastewaters in storage bins, and ships them offsite for final disposal in a landfill.

The facility determines in the beginning of the calendar year that the combined quantity of the wastewater treatment sludge and other nonwastewaters in question is projected to be less than 1,000 metric tons for the year, and thus should be subject to the low volume K181 listing determination procedure under § 261.32(d)(2). Also, based on its well-documented knowledge of product manufacturing, waste generation and treatment, and wastewater analyses for NPDES discharge, the facility calculates using mass balance that the commingled nonwastewaters could not contain more than 100, 1,000, and 80 kg per year of 1,3-phenylenediamine, 4-chloroaniline, and toluene-2,4-diamine, respectively, using worst-case assumptions. The facility then compares these estimated loadings to the § 261.32(c)(1) listing limits and finds that their projected levels of 1,3-phenylenediamine and 4-chloroaniline are well below the listing limits; while the level of toluene-2,4-diamine exceeds the listing limit of 0.99 kg/year specified in § 261.32(c)(1). The facility now compares the projected level of toluene-2,4-diamine to the level in § 261.32(c)(2) of 140 kg/yr, and concludes that the nonwastewaters are not projected to trigger the § 261.32(c)(2) listing level. Therefore, the facility determines that its nonwastewaters can be managed as nonhazardous when disposed of in a municipal landfill cell subject to the design criteria in § 258.40 or the Subtitle C landfill design criteria.

The facility documents its findings as per § 261.32(d)(2), and manages the waste as nonhazardous in an appropriate landfill. The facility retains documentation regarding the landfill used to manage the waste as per § 261.32(d)(4).

Example 4: Quantities Greater Than 1,000 MT/yr: Using waste analysis to show wastes do exceed § 261.32(c)(1), but do not exceed § 261.32(c)(2) listing levels, and thus can be landfilled as nonhazardous in landfill that meets or exceeds § 258.40 (§ 261.32(d)(3)).

Facility C, described in the previous example, projects in January of the subsequent year, that it will still be able to successfully make a § 261.32(d)(2) demonstration that its wastes are not K181, and continues to dispose of its nonwastewaters at a permitted municipal landfill subject to § 258.40. By October of that year, however, the facility determines that it has generated 1,000 metric tons of nonwastewater due to increased dye production. In addition, the facility estimates that another 200 metric tons would be generated by the end of December. To continue to demonstrate that its wastes are not K181, the facility now is subject to § 261.32(d)(3). Accordingly, the facility develops a waste sampling and analysis plan under § 261.32(d)(3), and then collects and tests representative waste samples for the remainder of the year to demonstrate that the nonwastewaters are still nonhazardous. The analytical results show the maximum concentrations of 29.2, 583, and 41.7 mg/kg for 1,3-phenylenediamine, 4-chloroaniline, and toluene-2,4-diamine, respectively, and contain no other K181 constituents. With these maximum constituent concentrations and the revised waste quantity of 1,200 metric tons, the facility calculates that the nonwastewaters contain no more than 35 kg,[61] 700 kg, and 50 kg of 1,3-phenylenediamine, 4-chloroaniline, and toluene-2,4-diamine for the entire year, which are below the worst case constituent quantities initially estimated under the prior year's § 261.32(d)(2) demonstration. With this confirmation, the facility continues to ship the nonwastewaters generated in November and December to the appropriate municipal landfill. The facility documents its findings as per § 261.32(d)(3). The facility retains documentation regarding the landfill used to manage the waste as per § 261.32(d)(4).

For the next two years, the facility continues to generate more than 1,000 metric tons of nonwastewater each year, and thus continues to sample and analyze its wastes to demonstrate that they do not meet the K181 listing description. At the conclusion of the third year, the facility can revert to a knowledge-based § 261.32(d)(2) demonstration, so long as it doesn't modify its process in a way that might result in higher loadings in excess of the listing limits of any of the K181 constituents in its nonwastewaters.

Example 5: Quantities Greater Than 1,000 MT/yr: Using waste analysis to show wastes exceed § 261.32(c)(2) listing levels, requiring full Subtitle C compliance, pollution prevention subsequently reduces loadings below § 261.32(c)(2) levels.

Facility D produces a variety of dyes and pigments, some of which do not fall

[61] Example calculation: 29.2 mg/kg × (1,200 metric tons × 1,000 kg/metric ton) = 35,000,000 mg = 35 kg

under the K181 listing description, using a number of the chemicals listed under § 261.32(c)(1). The site is equipped with a centralized wastewater treatment (WWT) system that treats all of the wastewaters resulting from the plant's overall operations, discharging the treated wastewater to a surface body under an NPDES permit and generating 800 metric tons of sludge filter cake each calendar year. Moreover, the facility generates numerous batches of nonwastewaters, totaling 400 metric tons/year, from the multiple manufacturing process lines, such as filtration sludges, used filter aids/cloths, dust and fines, and unusable off-specification products. The facility manages these process nonwastewaters along with the WWT sludge.

Due to the combined nonwastewater quantity (800 metric tons of WWT sludge plus 400 metric tons of process solids) in excess of 1,000 metric tons/year, the facility must follow the § 261.32(d)(3) determination process, including sampling and analysis for the constituents expected to be present in the wastes, to demonstrate that the nonwastewaters do not meet the K181 listing criteria.

The facility determines through waste analysis that its nonwastewaters contain more than 500 kg/yr of toluene-2,4-diamine, which exceeds the § 261.32(c)(2) listing levels. The facility believes that much of the 500 kg/yr loading is attributable to production processes not covered by the K181 scope. Due to the commingled nature of the WWT sludge, however, the entire quantity of the sludge (as well as the other nonwastewaters linked to K181 processes) is subject to the K181 listing. This waste must therefore be managed as a hazardous waste, and must meet the corresponding BDAT standards for K181 before being disposed.

The facility conducts an audit of its production processes, and determines that it can reduce the levels of toluene-2,4-diamine in its nonwastewaters through a variety of pollution prevention techniques. After implementing the most cost-effective of these techniques, the facility successfully reduces its toluene-2,4-diamine loadings to below the § 261.32(c)(2) listing levels, and subsequently manages its waste in a municipal landfill subject to the design criteria in § 258.40. The facility documents its findings as per § 261.32(d)(3), and manages the waste as nonhazardous. The facility retains documentation regarding the landfill used to manage the waste as per § 261.32(d)(4).

Example 6: Quantities Greater Than 1,000 MT/yr: Using waste analysis to show wastes do exceed § 261.32(c)(1), but do not exceed § 261.32(c)(2) listing levels (§ 261.32(d)(3)), scope determination for F003 waste, incremental management of wastes generated prior to exceeding § 261.32(c)(1) levels.

Facility E generates 500 MT/yr of process nonwastewaters from a dye production process that uses solvents. The waste is already classified as F003 and therefore is not subject to the K181 listing, even though it contains toluene-2,4-diamine. The facility also generates wastewater treatment sludge at a rate of 10,000 MT/yr. The facility, using existing analytical data, calculates that the wastewater treatment sludge contains 10 kg/yr of toluene-2,4-diamine.

The wastewater treatment sludge is classified as K181 because it exceeds the § 261.32(c)(1) listing level of 0.99 kg/yr of toluene-2,4-diamine. The loading, however, does not exceed the § 261.32(c)(2) listing level of 140 kg/yr, so the wastes would be eligible for exclusion from K181 if the facility manages the wastes in landfills subject to the § 258.40 or Subtitle C landfill design standards.

The facility also generates discrete batches of waste every four to six weeks. By analyzing each batch and determining the toluene-2,4-diamine mass in each batch, the facility is able to ascertain at which point in time the cumulative mass loading in their waste approaches and exceeds the § 261.32(c)(1) listing level of 0.99 kg/yr. Until that time, the wastes are not classified as K181.

E. What Are the Consequences of Failing To Meet Recordkeeping Requirements or Listing Conditions?

In paragraphs (d)(1), (d)(2), (d)(3) and (d)(4) of § 261.32 of the proposed rule, we are proposing to require generators of dyes and/or pigments nonwastewaters from the listed product classes to keep records under the authority of sections 2002 and 3007 of RCRA. We are proposing that these provisions will be RCRA requirements and not conditions which must be fulfilled to prevent the waste from being classified as listed waste K181. Failure to comply with the proposed recordkeeping requirements could result in an enforcement action by EPA under section 3008 of RCRA or by an authorized State under similar State authorities. This section of the statute authorizes the imposition of civil penalties in an amount up to $27,500 for each day of noncompliance. Authorized states could also bring action under comparable state enforcement authorities.

We are proposing to make both sets of annual mass loading limits and the lined landfill requirements applying to wastes meeting the § 261.32(c)(2) limits conditions of the listing. Dyes and/or pigments nonwastewaters would become K181 wastes if anyone failed to fulfill these conditions. EPA or authorized states could bring enforcement actions for violations of hazardous waste requirements against anyone who has not managed the waste in compliance with applicable Subtitle C requirements.

Finally, we note that citizens may file suits under section 7002 of RCRA to enforce the recordkeeping requirements or other Subtitle C hazardous waste requirements if a condition is violated. Moreover, citizens can take action under section 7002 of RCRA, and EPA can take action under section 7003, if the management of dyes and/or pigments nonwastewaters may pose an imminent and substantial endangerment to human health or the environment.

A generator claiming that it is not subject to the listing would have to maintain sufficient documentation to demonstrate that it has not exceeded the relevant annual mass loading limits, and that it has sent its waste to a landfill subject to § 258.40 or Subtitle C design standards (if it claims it is subject to the conditional exemption for waste going to a lined landfill). EPA believes that basic documentation is integrally related to the substantive conditions of this proposal, since it would be difficult for a regulating agency (or even the generator) to know whether a given shipment of waste is hazardous absent records establishing the mass of constituents generated year-to-date. EPA requests comment on whether the proposed approach is sufficient to ensure enforceability of the proposed substantive conditions, or whether some or all of the proposed record-keeping requirements should be converted to conditions. EPA may make all or some of these requirements conditions in the final rule, or establish a general condition that the generator maintain sufficient records to demonstrate that it is remains outside the scope of the listing.

VI. Proposed Treatment Standards Under RCRA's Land Disposal Restrictions

A. What Are EPA's Land Disposal Restrictions (LDRs)?

Congress has specified that land disposal of hazardous waste is prohibited, unless the waste meets

treatment standards established by EPA before the waste is disposed, or is disposed in units from which there will be no migration of hazardous constituents for as long as the waste remains hazardous. RCRA sections 3004 (d), (e), (f), and (g). (These interrelated provisions are often referred to as Land Disposal Restrictions, or LDRs.) Treatment standards must substantially diminish the toxicity or mobility of hazardous waste or constituents thereof, so that short- and long-term threats to human health and the environment are minimized. RCRA section 3004(m). EPA is required to promulgate land disposal prohibitions and treatment standards for waste identified or listed as hazardous after November 1984 within six months of a final rule identifying or listing such waste. We are proposing prohibitions and treatment standards for all of the wastes which we are today proposing to list as hazardous. We are further proposing that the date of the prohibition and treatment standard be on the same date that the listing becomes effective.

B. How Does EPA Develop LDR Treatment Standards?

In an effort to make treatment standards as uniform as possible, while adhering to the fundamental requirement that the standards must minimize threats to human health and the environment, EPA developed the so-called Universal Treatment Standards (UTS) (codified at 40 CFR 268.48). Under the UTS, whenever technically and legally possible, the Agency adopts the same technology-based numerical limit for a hazardous constituent regardless of the type of hazardous waste in which the constituent is present. See 63 FR 28560 (May 26, 1998); 59 FR 47982 (September 19, 1994). The UTS, in turn, reflect the performance of Best Demonstrated Available Treatment (BDAT) Technologies of the constituents in question.

EPA is also authorized in section 3004 (m) to establish methods of treatment as a treatment standard. Doing so involves specifying an actual method by which the waste must be treated (unless a variance or determination of equivalency is obtained). Given this constraint, EPA prefers to establish numerical treatment standards, which leaves the option of using any method of treatment (other than impermissible dilution) to achieve the treatment standard.

C. What Treatment Standards Are We Proposing?

We find that there is significant structural similarity among many of the constituents of concern, including those for which we have not previously set technology-specific standards. The constituents of concern either have been demonstrated to be treated effectively by the BDAT technology to below the analytic detection limit, or are similar enough to these constituents that it can be reasonably determined that they would not be more difficult to treat via combustion or other destructive procedures. Hence, we expect that all constituents of concern for these wastes can be treated with equal effectiveness (*i.e.*, destroyed or removed so as to be no longer detectable) by similar methods of treatment. The obvious most effective treatment for nonwastewater forms of these wastes is combustion. For wastewaters derived from K181, a treatment train of wet air oxidation (WETOX) or chemical oxidation (CHOXD) followed by carbon adsorption (CARBN), or application of combustion (CMBST) is the BDAT for the constituents of concern for which treatment standards have not previously been developed.

We also assessed the potential of developing numerical standards for those constituents with current technology-based treatment standards and those constituents of concern in K181 that lack current treatment requirements. Numerical treatment standards have been promulgated for only nine of the organic constituents of concern. Commenters to the July 23, 1999 listing proposal (64 FR 40192) suggested that EPA establish numerical standards, because they allow any treatment, other than impermissible dilution, to be used to comply with the land disposal restrictions. We find that there is adequate documentation in existing SW–846 methods 8270, 8315, and 8325 to calculate numerical standards for all but benzaldehyde; 1,3-phenylenediamine; 1,2-phenylenediamine; and 2,4-dimethylaniline. For these constituents, with the exception of 1,2-phenylenediamine, we propose to transfer the numerical standards of similar constituents as the universal treatment standards.

For 1,2-phenylenediamine, we have found during past method performance evaluations that it can be difficult to achieve reliable recovery from aqueous matrixes and precise measurements. Therefore, for this constituent we propose that wastewaters be treated by CMBST; or CHOXD followed by BIODG or CARBN; or BIODG followed by CARBN, and all nonwastewaters would be treated by CMBST. If data adequate for the development of a numerical standard is presented in comments, the Agency may promulgate a numerical standard as an alternative, or as the treatment requirement.

If these numerical standards are shown in comments not to be achievable or otherwise appropriate, we could adopt methods of treatment as the exclusive treatment standard. Under this technology only approach, all nonwastewaters identified as K181 would be treated by CMBST, and all derived from wastewaters would be treated by either WETOX or CHOXD, followed by CARBN or CMBST.

The proposed treatment standards are presented in the following table.

TABLE VI–1.—PROPOSED TREATMENT STANDARDS FOR CONSTITUENTS IN K181

Constituents of concern	CAS No.	Wastewater (mg/L)	Nonwastewater (mg/kg)
Aniline	65–53–3	0.81*	14*
o-Anisidine (2-methoxyaniline)	90–04–0	0.010	0.66
Azobenzene**	103–33–3	0.010	0.66
Benzaldehyde**	100–52–7	0.065	4.3
4-Chloroaniline	106–47–8	0.46*	16*
p-Cresidine	120–71–8	0.010	0.66
2,4-Dimethylaniline (2,4-xylidine)	95–68–1	0.010	0.66
1,2-Phenylenediamine	95–54–5	CMBST; or CHOXD fb (BIODG or CARBN); or BIODG fb CARBN.	CMBST
1,3-Phenylenediamine	108–45–2	0.010	0.66
p-Toluidine **	106–49–0	0.010	0.66

TABLE VI–1.—PROPOSED TREATMENT STANDARDS FOR CONSTITUENTS IN K181—Continued

Constituents of concern	CAS No.	Wastewater (mg/L)	Nonwastewater (mg/kg)
Toluene-2,4-diamine	95–80–7	0.020	1.30

* Existing Universal Treatment Standard. No change is proposed.
** Treatment standards would be proposed for this constituent if zero biodegradation is assumed. See section IV.A.4.

D. What Changes to Existing Treatment Requirements Are Proposed?

We also propose to add the constituents in K181 with numerical treatment standards to the Universal Treatment Standards (UTS) listed at 40 CFR 268.48. This action would potentially add five chemicals with the standards in Table VI–1 to the UTS if biodegradation rates are assigned for all constituents based upon structural similarity, namely: o-anisidine, p-cresidine, 2,4-dimethylaniline, 1,3-phenylenediamine, and toluene-2,4-diamine. If biodegradation rates are assumed to be zero for constituents that do not have a reported value, then there are three additional constituents that may require promulgation of universal treatment standards. The three are azobenzene, benzaldehyde, and p-toluidine. As a result, characteristic wastes that also contain these constituents will require additional treatment before disposal, if constituent concentrations exceed the proposed levels.

We propose to amend the constituents of concern in F039 as necessary to include the constituents identified in K181 not already specified in F039 (the same constituents named above for the UTS). F039 applies to landfill leachates generated from multiple listed wastes in lieu of the original waste codes. F039 wastes are subject to numerical treatment standards equivalent to the universal treatment standards listed at 40 CFR 268.48. Without this change in existing regulations, F039 landfill leachates may not receive proper treatment for the constituents of K181.

The proposed treatment standards reflect the performance of best treatment technologies, and are not based on the listing levels of concern derived from the risk assessment for dyes and/or pigments wastes. In that risk assessment, our analysis focused on the plausible management practices for only the dyes and pigments industries. As a result, our models did not attempt to assess all possible pathways, because the plausible management practice (disposal in a municipal Subtitle D landfill) provides a certain level of control over some potential release pathways. In addition, our assessment of potential releases modeled engineered barriers, in the form of various types of liner systems.

It is not appropriate to use the mass loading levels derived from these risk assessments as levels at which threats to human health and to the environment are minimized. The risk analysis does not address all of the long-term uncertainties associated with land disposal of these wastes. (*See* section 3004 (g)(5) and 55 FR 6640, 6642 (February 26, 1990).) Nor is it permissible to consider artificial liner systems, or other engineered barriers, in assessing whether threats posed by land disposal of a hazardous waste have been minimized. *API* v. *EPA,* 906 F. 2d 726, 735–36 (threats to human health and the environment must be minimized *before* land disposal occurs); cf. S. Rep. 284, 98th Cong. 1st Sess. at 15 (''Artificial barriers cannot provide the assurances necessary to meet the standard,'' referring to the parallel no-migration standard for determining if a method of land disposal is protective without the need for pretreating the waste before land disposal occurs).

Because there remain significant uncertainties as to what levels of hazardous constituents in these wastes would minimize threats to human health and to the environment posed by these wastes' land disposal, we are choosing to develop treatment standards for these wastes based on performance of the Best Demonstrated Available Technology for these wastes. *HWTC III,* 886 F. 2d at 361–363 (accepting this approach). For the same reason, we are finding that these technology-based treatment standards are not more stringent than the risk-based levels at which we could find that threats to human health and to the environment are minimized.

E. Other LDR-Related Provisions

EPA has adopted special LDR treatment standards for debris contaminated by hazardous waste. See § 268.45. EPA is proposing that these provisions would also apply to hazardous debris cross-contaminated with K181. Debris contaminated with K181 would be required to be treated prior to land disposal, using specific technologies from one or more of the following families of debris treatment technologies: extraction, destruction, or immobilization. If such debris is treated by immobilization, it remains a hazardous waste and must be managed in a hazardous waste facility. Residuals generated from the treatment of debris contaminated with K181 would remain subject to the treatment standards proposed today. (*See* 57 FR 37277, August 18, 1992, for additional information on the applicability, scope, and content of the hazardous debris provisions.)

Lastly, because land disposal also includes placement in injection wells (40 CFR 268.2(c)) application of the land disposal restrictions to K181 requires the modification of injection well requirements found in 40 CFR part 148. We propose that K181 be prohibited from underground injection. (*See* 40 CFR part 148.) Therefore, K181 wastes may not be underground injected unless they have been treated in compliance with the LDR treatment standards or are injected into a Class 1 well from which it has been determined that there will be no migration of hazardous constituents for as long as the wastes remain hazardous.

F. Is There Treatment and Management Capacity Available for These Proposed Newly Identified Wastes?

1. What Is a Capacity Determination?

When EPA develops new hazardous waste LDR regulations, we must determine whether adequate alternative treatment capacity exists nationally to manage the waste and meet the new treatment standards. The LDRs are effective when promulgated unless EPA grants a national capacity variance from the otherwise-applicable date and establishes a different date (not to exceed two years beyond the statutory deadline) based on ''. . . the earliest date on which adequate alternative treatment, recovery, or disposal capacity which protects human health and the environment will be available'' (RCRA section 3004(h)(2)).

Our capacity analysis methodology focuses on the amount of waste currently disposed on the land, which will require alternative or additional treatment as a result of the LDRs. The quantities of wastes that are not subject to LDRs, such as discharges regulated

under NPDES, discharges to a POTW, or treatment in a RCRA exempt tank, are not included in the quantities requiring additional treatment as a result of the LDRs. Also, land disposed wastes that do not require alternative or additional treatment (*i.e.*, those that are currently treated to meet standards) are excluded from the required capacity estimates. Land disposed wastes requiring alternative or additional treatment or recovery capacity that is available onsite or within the same company also are excluded from the required commercial capacity estimates. The resulting estimates of required commercial capacity are then compared to estimates of available commercial capacity. If adequate commercial capacity exists, the waste is restricted from further land disposal. If adequate capacity does not exist, EPA has the authority to grant a national capacity variance.

In making the estimates described above, the volume of waste requiring treatment depends on the current waste management practices employed by the waste generators before this proposed regulation is finalized and becomes effective. We collected data on waste management practices for the affected facilities from publicly available sources during the development of this proposed rule. However, we realize that as the regulatory process proceeds, generators of these wastes may decide to minimize or recycle their wastes or otherwise alter their management practices. Thus, EPA will monitor changes and update data on current management practices as these changes will affect the volume of wastes ultimately requiring commercial treatment or recovery capacity.

The commercial hazardous waste treatment industry can change rapidly. For example, national commercial treatment capacity changes as new facilities come on-line or old facilities go off-line and as new units and new technologies are added at existing facilities. The available capacity at commercial facilities also changes as facilities change their commercial status (*e.g.*, changing from a fully commercial to a limited commercial or ''captive''—company owned—facility). Thus, EPA also continues to update and monitor changes in available commercial treatment capacity.

We request available data on the industry-wide total annual generation volumes of wastes affected by this proposed rule, including K181 in wastewater and nonwastewater forms, soil or debris contaminated with these wastes, the current and planned management practices for the wastes, and waste mixtures. We also request data on the current treatment or recovery capacity capable of treating these wastes, facility and unit permit status related to treatment of the proposed wastes and any plans that facilities may have to expand or reduce existing capacity, or construct new capacity. Of particular interest to us is available information related to factors that may limit the availability of treatment technologies.

2. What Are the Capacity Analysis Results?

This preamble only provides a brief summary of the capacity analysis performed to support this proposed regulation. For additional and more detailed information, please refer to the ''Background Document for Capacity Analysis for Land Disposal Restrictions: Newly Identified Dye and Pigment Process Wastes (Proposed Rule), November 2003'' (''Capacity Background Document''), available in the RCRA docket established for today's proposed rule.

For this capacity analysis, we examined data on waste characteristics and management practices gathered for the purpose of the dyes and pigments hazardous waste listing determination based on the publicly available information. The data sources are described in detail in section II.H of this preamble.

If K181-derived wastewaters are generated, there is adequate wastewater treatment capacity existing for these wastes. As discussed in section IV.C above, EPA is proposing to treat the wastewater form of K181 by wet air oxidation or chemical oxidation followed by carbon adsorption or applying combustion for the constituents of concern. There is adequate wastewater treatment capacity available should the need for treatment of the wastewater form of the waste arise. The wastewater treatment capacity is detailed in the Capacity Background Document. Therefore, we are proposing not to grant a national capacity variance from LDR treatment standards for the wastewater form of K181. We are proposing that LDRs become effective when the listing determination becomes effective. In addition, we are not listing wastewaters generated at these facilities, so there is no need for additional treatment of wastewater from the production of dyes and/or pigments (other than K181-derived wastewaters).

As described in section IV.C above, EPA is proposing to establish numerical treatment standards or a method of treatment as the treatment standards for the constituents of concern of the newly proposed waste. We expect that the constituents of concern in the nonwastewater form of the newly proposed waste are amenable to the treatment by combustion or other destructive technologies. EPA estimates, at most, 69,000 metric tons of nonwastewater forms of K181 that may require alternative commercial treatment and be managed offsite at a commercial hazardous waste treatment facility. Furthermore, EPA anticipates that much less than 69,000 metric tons of the wastes may require combustion capacity because not all of these wastes are expected to exceed the mass loading limits, and of those wastes that do exceed the loading limits, they may be managed in a Subtitle C combustion unit or may meet the proposed conditional exemption for nonwastewaters that are managed in landfills that meet or exceeds the design criteria in § 258.40 or in a Subtitle C landfill cell subject to either § 264.301 or § 265.301. We estimate that the commercially available sludge and solid combustion capacity is approximately 0.6 million tons per year and therefore sufficient to treat the newly proposed waste which might newly require treatment. We also expect that adequate landfill capacity exists for managing the residuals from treating this waste. Therefore, we are proposing to not grant a national capacity variance from the LDR treatment standards for the nonwastewater form of K181. We are proposing that the LDRs become effective when the listing determination becomes effective.

As discussed in section VI.D, we are also proposing to add the constituents of concern in K181 with numerical standards to the constituent lists for F039 and universal treatment standards (UTS). EPA does not anticipate that waste volumes subject to the treatment standards for F039 or characteristic wastes would increase because of the addition of these organic constituents to F039 and the UTS lists. Based on available data, waste generators already appear to be required to comply with the treatment requirements for other organic constituents in F039 and characteristic wastes. Therefore, additional treatment due to the addition of the constituents to the F039 and UTS lists may not be required. We also do not anticipate laboratory analytical problems as a result of this addition. However, we solicit comments regarding additional treatment needed, as well as the ability and capacity of laboratories to analyze wastes for these contaminants.

For soil and debris contaminated with these wastes, we believe that the vast

majority of contaminated soil and debris, if any, will be managed onsite and therefore would not require substantial commercial treatment capacity. Therefore, we are proposing to not grant a national capacity variance for hazardous soil and debris contaminated with the newly listed waste covered under this proposal. Based on the public information used, there are no data showing mixed radioactive wastes or underground injected wastes associated with the proposed listing. As a result, we are also proposing to not grant a national capacity variance for mixed radioactive waste (*i.e.*, radioactive wastes mixed with K181) or waste being injected underground.

The ultimate volume of waste estimated to require alternative or additional commercial treatment may change if the final listing determination changes; should this occur, we will revise the capacity analysis accordingly. The actual quantity of waste requiring commercial treatment may be smaller due to facility closures and changes in product formulations which may not be subject to LDR treatment standards. We recognize the batch process nature of this industry and the speed at which facilities may change product formulations. We solicit any updated or additional information pertinent to the national capacity variance determinations for all forms of the newly proposed waste. We also request comment on current and future management practices and the volumes managed for these wastes.

VII. State Authority and Compliance

A. How Are States Authorized Under RCRA?

Under section 3006 of RCRA, EPA may authorize qualified states to administer their own hazardous waste programs in lieu of the federal program within the state. Following authorization, EPA retains enforcement authority under sections 3008, 3013, and 7003 of RCRA, although authorized states have primary enforcement responsibility. The standards and requirements for state authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that state. The Federal requirements no longer applied in the authorized state, and EPA could not issue permits for any facilities in that state, since only the state was authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new federal requirements did not take effect in an authorized state until the state adopted the federal requirements as state law.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. EPA is directed by the statute to implement these requirements and prohibitions in authorized states, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so.

Authorized states are required to modify their programs only when EPA enacts Federal requirements that are more stringent or broader in scope than existing Federal requirements. RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (see also 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous federal regulations.

B. How Would This Rule Affect State Authorization?

We are proposing today's rule pursuant to HSWA authority. The listing of the new K-waste is promulgated pursuant to RCRA section 3001(e)(2), a HSWA provision. Therefore, we are adding this rule to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and take effect in all States, regardless of their authorization status. The land disposal restrictions for these wastes are promulgated pursuant to RCRA section 3004(g) and (m), also HSWA provisions. Table 2 in 40 CFR 271.1(j) is modified to indicate that these requirements are self-implementing.

States may apply for final authorization for the HSWA provisions in 40 CFR 271.1(j), as discussed below. Until the States receive authorization for these more stringent HSWA provisions, EPA would implement them. The procedures and schedule for final authorization of State program modifications are described in 40 CFR 271.21.

Section 271.21(e)(2) of EPA's State authorization regulations (40 CFR part 271) requires that States with final authorization modify their programs to reflect Federal program changes and submit the modifications to EPA for approval. The deadline by which the States would need to modify their programs to adopt this proposed regulation is determined by the date of promulgation of a final rule in accordance with § 271.21(e)(2). Once EPA approves the modification, the State requirements would become RCRA Subtitle C requirements.

States with authorized RCRA programs already may have regulations similar to those in this proposed rule. These State regulations have not been assessed against the Federal regulations proposed today to determine whether they meet the tests for authorization. Thus, even after promulgation of final rules, a State would not be authorized to implement these regulations as RCRA requirements until State program modifications are submitted to EPA and approved, pursuant to 40 CFR 271.21. Of course, States with existing regulations that are more stringent than or broader in scope than current Federal regulations may continue to administer and enforce their regulations as a matter of State law. In implementing the HSWA requirements, EPA will work with the States under agreements to avoid duplication of effort.

C. Who Would Need To Notify EPA That They Have a Hazardous Waste?

Under RCRA section 3010, the Administrator may require all persons who handle hazardous wastes to notify EPA of their hazardous waste management activities within 90 days after the wastes are identified or listed as hazardous. This requirement may be applied even to those generators, transporters, and treatment, storage, and disposal facilities (TSDFs) that have previously notified EPA with respect to the management of other hazardous wastes. The Agency is proposing to waive this notification requirement for persons who handle wastes that are covered by today's listings and have already (1) notified EPA that they manage other hazardous wastes, and (2) received an EPA identification number. However, any person who generates, transports, treats, stores, or disposes of these wastes and has not previously received an EPA identification number would need to obtain an identification number pursuant to 40 CFR 262.12 to generate, transport, treat, store, or

dispose of these hazardous wastes within 90 days after the effective date.

Note that under this proposal, nonwastewaters would not become newly listed K181 waste if the constituent mass loadings do not meet the levels in § 261.32(c)(1); the wastes would also not be listed if the constituent mass loadings are below the less stringent levels in § 261.32(c)(2) and if the nonwastewaters are disposed in a landfill that meets or exceeds the design criteria in § 258.40 or in a Subtitle C landfill cell subject to either § 264.301 or § 265.301. Persons who generate only wastes that meet these conditions need not notify EPA or obtain an identification number.

D. What Would Generators and Transporters Have To Do?

Once a final rule is promulgated, persons that generate the newly listed hazardous wastes may be required to obtain an EPA identification number if they do not already have one (as discussed above). In order to be able to generate or transport these wastes after the effective date of this rule, generators of the wastes listed today would be subject to the generator requirements set forth in 40 CFR part 262. These requirements include standards for hazardous waste determination (40 CFR 262.11), compliance with the manifest (40 CFR 262.20 to 262.23), pretransport procedures (40 CFR 262.30 to 262.34), generator accumulation (40 CFR 262.34), record keeping and reporting (40 CFR 262.40 to 262.44), and import/export procedures (40 CFR 262.50 to 262.60). The generator accumulation provisions of 40 CFR 262.34 allow generators to accumulate hazardous wastes without obtaining interim status or a permit in units that are container storage units, tank systems, or containment buildings. These existing regulations also place a limit on the maximum amount of time that wastes can be accumulated in these units. If, however, the wastes covered in today's proposed rule are managed in units that are not tank systems, containers, or containment buildings, then these units would be subject to the permitting requirements of 40 CFR parts 264 and 265, and the generator is required to obtain interim status and seek a permit (or modify interim status or a permit, as appropriate).

Also, current regulations require that persons who transport newly identified hazardous wastes to obtain an EPA identification number as described above; such transporters will be subject to the transporter requirements set forth in 40 CFR part 263.

E. Which Facilities Would Be Subject to Permitting?

1. Facilities Newly Subject to RCRA Permit Requirements

Facilities that treat, store, or dispose of wastes that are subject to RCRA regulation for the first time by this proposed rule (that is, facilities that have not previously received a permit pursuant to section 3005 of RCRA and are not currently operating pursuant to interim status), could be eligible for interim status (see section 3005(e)(1)(A)(ii) of RCRA). To obtain interim status based on treatment, storage, or disposal of such newly identified wastes, eligible facilities would be required to comply with 40 CFR 270.70(a) and 270.10(e) by providing notice under section 3010 and submitting a Part A permit application no later than 6 months after date of publication in the **Federal Register** of the final rule. Such facilities would be subject to regulation under 40 CFR part 265 pending final administrative disposition of the permit application (*e.g.*, until a permit is issued).

In addition, under section 3005(e)(3) and 40 CFR 270.73(d), not later than 6 months after date of publication of the final rule, land disposal facilities newly qualifying for interim status under section 3005(e)(1)(A)(ii) would also need to submit a Part B permit application and certify that the facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements. If the facility fails to submit these certifications and a permit application, then interim status would terminate on that date.

2. Existing Interim Status Facilities

Pursuant to 40 CFR 270.72(a)(1), all existing hazardous waste management facilities (as defined in 40 CFR 270.2) that treat, store, or dispose of the newly listed hazardous wastes and are currently operating pursuant to interim status under section 3005(e) of RCRA, would need to file an amended Part A permit application with EPA no later than six months after the date of publication of a final rule. By doing this, the facility could continue managing the newly listed wastes pending final disposition of the permit application. If the facility fails to file an amended Part A application by that date, the facility would not receive interim status for management of the newly listed hazardous wastes and may not manage those wastes until the facility receives either a permit or a change in interim status allowing such activity (40 CFR 270.1(b); 270.10(g)).

3. Permitted Facilities

Facilities that already have RCRA permits would need to request permit modifications if they want to continue managing the newly listed wastes (*see* 40 CFR 270.42(g)). This provision states that a permittee may continue managing the newly listed wastes by following certain requirements, including submitting a Class 1 permit modification request by the date on which the waste or unit becomes subject to the new regulatory requirements (*i.e.*, the effective date of a final rule), complying with the applicable standards of 40 CFR parts 265 and 266 and submitting a Class 2 or 3 permit modification request within 180 days of the effective date. Generally, a Class 2 modification is appropriate if the newly listed wastes will be managed in existing permitted units or in newly regulated tanks, container units or containment buildings and will not require additional or different management practices than those authorized in the permit.

A Class 2 modification requires the facility owner to provide public notice of the modification request, a 60-day public comment period, and an informal meeting between the owner and the public within the 60-day period. The Class 2 process includes a ''default provision,'' which provides that if the Agency does not reach a decision within 120 days, the modification is automatically authorized for 180 days. If the Agency does not reach a decision by the end of that period, the modification is authorized for the life of the permit (*see* 40 CFR 270.42(b)).

A Class 3 modification is generally appropriate if management of the newly listed wastes requires additional or different management practices than those authorized in the permit or if newly regulated land-based units are involved. The initial public notification and public meeting requirements are the same as for Class 2 modifications. However, after the end of the 60-day public comment period, the Agency will grant or deny the permit modification request according to the more extensive procedures of 40 CFR part 124. There is no default provision for Class 3 modifications (*see* 40 CFR 270.42(c)).

Under 40 CFR 270.42(g)(1)(v), for newly regulated land disposal units, permitted facilities must certify that the facility is in compliance with all applicable 40 CFR part 265 groundwater monitoring and financial responsibility requirements no later than 6 months after the date of publication of a final rule. If the facility fails to submit these certifications, authority to manage the

newly listed wastes under 40 CFR 270.42(g) will terminate on that date.

For states which have not yet picked up the permit modification tables of 40 CFR 270.42, ''major'' and ''minor'' permit modifications should be applied as appropriate to the permit modification request.

4. Units

Units in which the newly listed hazardous wastes are generated or managed would be subject to all applicable requirements of 40 CFR part 264 for permitted facilities or 40 CFR part 265 for interim status facilities, unless the unit is excluded from such permitting by other provisions, such as the wastewater treatment tank exclusions (40 CFR 264.1(g)(6) and 265.1(c)(10)) and the product storage tank exclusion (40 CFR 261.4(c)). Examples of units to which these exclusions could never apply include landfills, waste piles, incinerators, and any other miscellaneous units in which these wastes may be generated or managed. However, as noted above, under this proposal nonwastewaters would not become newly listed K181 waste if the constituent loadings do not meet the levels in § 261.32(c)(1); the wastes would also not be listed if the constituent mass loadings are below the levels in § 261.32(c)(2) and if the nonwastewaters are disposed in a landfill that meets or exceeds the design criteria in § 258.40 or in a Subtitle C landfill cell subject either to § 264.301 or § 265.301.

5. Closure

All units in which the newly listed hazardous wastes are treated, stored, or disposed after the effective date of this regulation that are not excluded from the requirements of 40 CFR parts 264 and 265 would be subject to both the general closure and post-closure requirements of subpart G of 40 CFR parts 264 and 265 and the unit-specific closure requirements set forth in the applicable unit technical standards subpart of 40 CFR part 264 or 265 (*e.g.,* Subpart N for landfill units). In addition, EPA promulgated a final rule that allows, under limited circumstances, regulated landfills or surface impoundments to cease managing hazardous waste, but to delay Subtitle C closure to allow the unit to continue to manage nonhazardous waste for a period of time prior to closure of the unit (*see* 54 FR 33376, August 14, 1989). Units for which closure is delayed continue to be subject to all applicable 40 CFR parts 264 and 265 requirements. Dates and procedures for submittal of necessary demonstrations, permit applications, and revised applications are detailed in 40 CFR 264.113(c) through (e) and 265.113(c) through (e).

VIII. CERCLA Designation and Reportable Quantities

A. What Is the Relationship Between RCRA and CERCLA?

CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980) defines the term ''hazardous substance'' to include RCRA listed and characteristic hazardous wastes. When EPA adds a hazardous waste under RCRA, the Agency also will add the waste to its list of CERCLA hazardous substances. EPA establishes a reportable quantity, or RQ, for each CERCLA hazardous substance. EPA provides a list of the CERCLA hazardous substances along with their RQs in Table 302.4 at 40 CFR 302.4. If you are the person in charge of a vessel or facility that releases a CERCLA hazardous substance in an amount that equals or exceeds its RQ, then you must report that release to the National Response Center (NRC) pursuant to CERCLA section 103. You also may have to notify State and local authorities.

B. How Does EPA Determine Reportable Quantities?

Under CERCLA, all new hazardous substances automatically have a statutory one-pound RQ. EPA adjusts the RQ of a newly added hazardous substance based on an evaluation of its intrinsic physical, chemical, and toxic properties. These intrinsic properties called ''primary criteria'' are aquatic toxicity, mammalian toxicity (oral, dermal, and inhalation), ignitability, reactivity, chronic toxicity, and potential carcinogenicity. EPA evaluates the data for a hazardous substance for each primary criterion. To adjust the RQs, EPA ranks each criterion on a scale that corresponds to an RQ value of 1, 10, 100, 1,000, or 5,000 pounds. For each criterion, EPA establishes a tentative RQ. A hazardous substance may receive several tentative RQ values based on its particular intrinsic properties. The lowest of the tentative RQs becomes the ''primary criteria RQ'' for that substance.

After the primary criteria RQs are assigned, EPA further evaluates substances for their susceptibility to certain degradative processes. These are secondary adjustment criteria. The natural degradative processes are biodegradation, hydrolysis, and photolysis (BHP). If a hazardous substance, when released into the environment, degrades rapidly to a less hazardous form by one or more of the BHP processes, EPA generally raises its RQ (as determined by the primary RQ adjustment criteria) by one level. Conversely, if a hazardous substance degrades to a more hazardous product after its release, EPA assigns an RQ to the original substance equal to the RQ for the more hazardous substance.

The standard methodology used to adjust the RQs for RCRA hazardous waste streams differs from the methodology applied to individual hazardous substances. The procedure for assigning RQs to RCRA waste streams is based on the results of an analysis of the hazardous constituents of the waste streams. The constituents of each RCRA hazardous waste stream are identified in 40 CFR part 261, Appendix VII. EPA first determines an RQ for each hazardous constituent within the waste stream using the methodology described above. The lowest RQ value of these constituents becomes the adjusted RQ for the waste stream. When there are hazardous constituents of a RCRA waste stream that are not CERCLA hazardous substances, the Agency develops an RQ, called a ''reference RQ,'' for these constituents in order to assign an appropriate RQ to the waste stream (see 48 FR 23565, May 25, 1983). In other words, the Agency derives the RQ for waste streams based on the lowest RQ of all the hazardous constituents, regardless of whether they are CERCLA hazardous substances.

C. EPA Will Assign an RQ of One-Pound for the Waste

In today's proposed rule, EPA will assign a one-pound RQ to the K181 waste. The RQ for each constituent contained in the proposed waste is presented in the table below.

TABLE VIII–1.—RQS FOR CONSTITUENTS IDENTIFIED IN K181 WASTE

Constituents in K181 waste stream	Constituent RQ (kg) (40 CFR 302.4)
Aniline	5000 (2270)
o-Anisidine	100 (45.4)
4-Chloroaniline	1000 (454)
p-Cresidine	*1 (0.454)
2,4-Dimethylaniline	*1 (0.454)
Toluene-2,4-diamine	10 (4.54)
1,2-Phenylenediamine	*1 (0.454)
1,3-Phenylenediamine	*1 (0.454)

*RQ of 1 pound assigned to this constituent because we have not yet developed a ''waste constituent RQ'' for this substance.

We are not adjusting the RQ for K181 at this time because we have not yet developed a ''waste constituent RQ'' for

the following constituents of concern in this waste: p-cresidine; 2,4-dimethylaniline; 1,2-phenylenediamine; and 1,3-phenylenediamine.

D. How Does a Mass Loading Limit Hazardous Waste Listing Approach Relate to My Reporting Obligations Under CERCLA? When Would I Need To Report a Release of These Wastes Under CERCLA?

Today's proposed hazardous waste listings are based on the mass loadings of the hazardous constituents in the wastes. An RQ of one-pound is assigned for the waste based on the lowest RQ of the hazardous constituents in the waste. Notification is required under CERCLA when a waste meeting the listing description and threshold for that hazardous waste is released into the environment in a quantity that equals or exceeds the RQ for the waste.

For CERCLA reporting purposes, the Clean Water Act mixture rule (40 CFR 302.6) may be adapted to apply to releases of this waste when the quantity (or mass limit) of all of the K181 hazardous constituents in the waste are known and the waste meets the K181 listing description (*i.e.,* any of the K181 mass loading levels are met or exceeded). In such a case, notification is required where an amount of waste is released that contains an RQ or more of any hazardous substance contained in the waste. When the quantity (or mass limit) of one or more of the K181 hazardous constituents is not known, notification is required when the quantity of K181 waste released equals or exceeds the RQ for the waste stream.

E. How Would I Report a Release?

To report a release of proposed K181 (or any other CERCLA hazardous substance) that equals or exceeds its RQ, you must immediately notify the National Response Center (NRC) as soon as you have knowledge of that release. The toll-free telephone number of the NRC is 1–800–424–8802; in the Washington, DC, metropolitan area, the number is (202) 267–2675.

You may also need to notify State and local authorities. The Emergency Planning and Community Right-to-Know Act (EPCRA) requires that owners and operators of certain facilities report releases of CERCLA hazardous substances and EPCRA extremely hazardous substances (see list in 40 CFR Part 355, Appendix A) to State and local authorities. After the release of an RQ or more of any of those substances, you must report immediately to the community emergency coordinator of the local emergency planning committee for any area likely to be affected by the release, and to the State emergency response commission of any State likely to be affected by the release.

F. What Is the Statutory Authority for This Program?

Section 101(14) of CERCLA defines the term hazardous substance by referring to substances listed under several other environmental statutes, as well as those substances that EPA designates as hazardous under CERCLA section 102(a). In particular, CERCLA section 101(14)(C) defines the term hazardous substance to include ''any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act.'' CERCLA section 102(a) gives EPA authority to establish RQs for CERCLA hazardous substances. CERCLA section 103(a) requires any person in charge of a vessel or facility that releases a CERCLA hazardous substance in an amount equal to or greater than its RQ to report the release immediately to the federal government. EPCRA section 304 requires owners or operators of certain facilities to report releases of CERCLA hazardous substances and EPCRA extremely hazardous substances to State and local authorities.

G. How Can I Influence EPA's Thinking on Regulating K181 Under CERCLA?

In developing this proposal, EPA tried to address the concerns of all our stakeholders. Your comments will help us to improve this proposal. We invite you to provide your views on this proposal and how it may affect you. We also are interested in receiving any comments that you have on the information provided in Table VIII–1, including the hazardous constituents identified for proposed K181.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)) the Agency must determine whether a regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a ''significant regulatory action'' under point number four above. This rule, as proposed may raise novel legal or policy issues due to the unique mass loading-based approach used in development of the risk assessment. As such, this action was submitted to OMB for review. Any substantive changes to this Preamble, the regulatory language, or supporting documentation made in response to OMB review are documented in the public record.

Under the terms of Executive Order 12866, we have determined that the annual economic effects of this proposed rule are less than $100 million. Furthermore, this proposed rule is not expected to 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. The annualized benefits associated with today's rule have not been monetized but are believe to be less than $100 million.

The information presented in this Section is derived from the following document: ''Economic Assessment for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants Economic Assessment,'' November 2003. This document is available in the docket established for today's action. EPA seeks public comment on all aspects of this document, including both the magnitude and timing of the costs and benefits.

1. Background

This proposal presents a mass loadings-based listing approach. Historically, the Agency's listing program has captured entire categories of wastes posing unacceptable risks to human health and the environment. Today's approach proposes listing only those wastes from any single facility that contain specific constituents in quantities above acceptable risk levels. This is a new and unique hazardous

waste listings approach for the Office of Solid Waste.

We have prepared two economic support documents for this proposed action. These are: ''Economic Assessment for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants,'' and, ''Regulatory Flexibility Screening Analysis for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants.'' The Economic Assessment focuses primarily on compliance costs to the regulated community, industry economic impacts, and a qualitative benefits discussion. Also covered are findings related to children's health, unfunded mandates, regulatory takings, federalism, tribalism, energy effects, and environmental justice. The Regulatory Flexibility Screening Analysis (RFSA) examines impacts to small entities that may result from this action, as proposed. A summary of findings from this Economic Assessment and the RFSA is presented below. The complete Economic Assessment and RFSA documents are available for public review and comment. These documents are located in the RCRA docket established for this action.

2. Need for the Proposed Rule

The Agency has determined that selected constituents found in certain wastes generated by organic dye, pigment, and food, drug, and cosmetic (FD&C) colorant manufacturers may pose unacceptable risks to human health and the environment when improperly disposed in quantities above specified mass loading levels. We believe that the market and other private sector institutions have failed to adequately address pollution issues associated with these wastes.

In most cases of environmentally related market failure, private industry costs of production do not fully reflect the pollution costs to human health and the environment. This may occur when individuals not responsible for the pollution bear the costs in human health and ecological damages. Environmental economists refer to this situation as a negative environmental externality. If negatively impacted individuals are economically, politically, and/or culturally weaker than the polluter, insufficient incentives are likely to exist for polluters to incur the additional costs necessary for implementation of appropriate pollution control measures. Furthermore, weaker parties harmed by the pollution are not likely to obtain compensation from the polluter due to the high transaction costs, property rights limitations, and the difficulty these citizens may have in establishing a causal relationship between the damage incurred and activity at the polluting facility.

In addition to market failures, we believe that existing State programs designed to protect human health and the environment from unacceptable risks associated with these wastes have resulted in inconsistent protections. Individual State programs often result in a patchwork of inconsistent programs that fail to ensure uniform nationwide protection. Furthermore, variability among State programs covering the management of many wastes tends to reward manufacturers in some states while penalizing manufacturers in other states.

Finally, today's rule implements mandates specifically and explicitly set forth by the U.S. Congress without the exercise of any policy discretion by EPA. This action is proposed under the authority of sections 3001 (b)(1), and 3001(e)(2) of the Hazardous and Solid Waste Amendments (HSWA) of 1984. These sections direct EPA to make a hazardous waste listing determination for wastes from the production of ''dyes and pigments.''

We believe this proposed rule is necessary, as required under RCRA, in order to sufficiently minimize risk to human health and the environment. We further believe that federal government intervention is necessary as the most efficient means to correct for market failures resulting from pollution caused by these wastes. The proposed rule will effectively internalize much of the costs associated with the existing negative externalities. Furthermore, while the Agency is sensitive to Federalism issues, we believe this proposal will help ensure consistent nationwide protection of human health and the environment from potentially inadequate disposal of these wastes, while, at the same time, establishing a more level economic playing field for all affected manufacturers.

3. Consideration of Non-Regulatory Alternatives

Executive Order 12866 recognizes and emphasizes the need for comprehensive, high quality analytical support for all economically significant regulatory actions (as defined under Section 3(f)(1) of EO 12866). While not economically significant, we have completed an Economic Assessment for this proposed action, as discussed above. We have also considered non-regulatory alternatives to this proposed rule. Section 1(b)(3) of the Executive Order instructs Executive Branch Agencies to consider and assess available alternatives to direct regulation prior to making a determination for regulation. This regulatory determination assessment should be considered, ''to the extent permitted by law, and where applicable.'' The ultimate purpose of the regulatory determination assessment is to ensure that the most efficient tool, regulation, or other type of action is applied in meeting the targeted statutory objective(s).

We are currently subject to both a statutory mandate and a Consent Decree requiring a listing determination for specific dye, pigment, and FD&C production wastes. Because of this legal action, we are not at liberty to address this pollution problem through non-regulatory approaches (unless of course, we determine that these dyes and/or pigments wastes do not warrant listing as hazardous wastes). However, in the spirit of the Executive Order, we have contemplated reasonably feasible non-regulatory alternatives.

Reasonably feasible alternatives to regulation may include diverse tools such as market-based incentives, education program(s), voluntary waste minimization/pollution prevention programs, and targeted negotiated agreements. A non-regulatory approach, such as educational outreach programs would be largely ineffective because the people who are made aware of the potential health risks (*e.g.*, those people living near landfills where these wastes are disposed) have limited ability to reduce exposure without incurring significant costs. While we believe that our mass loadings-based approach may stimulate affected manufacturers to improve waste minimization activities, we recognize that various waste minimization and pollution prevention procedures are currently in place. These procedures, however, may be further stimulated in response to our mass loadings-based approach, thereby helping to reduce the toxic loadings from the wastes of concern. Other programs such as market-based incentives or negotiated agreements would be overly difficult, costly, and cumbersome to implement and monitor due to the quantities of waste involved and generation patterns of these wastes. However, we are open to stakeholder comments on non-regulatory alternatives that, when applied in conjunction with a regulatory option, may help ensure cost-efficient protection of human health and the environment.

4. Evaluation of Regulatory Options

We considered the proposed regulatory approach and two primary regulatory options for management of the waste streams examined in this assessment. These were: the proposed mass loadings-based approach (combined with a contingent management approach), a no list status quo option, and the standard listing or traditional approach. The no-list option would result in manufacturers not incurring any incremental management and/or administrative costs under RCRA. This option, however, may result in affected facilities facing future human health and environmental liabilities for groundwater or other damages. In addition, those exposed to the targeted contaminants above the loading levels of concern may continue to suffer adverse health and welfare impacts. The traditional listing option would require that all manufacturers generating any waste meeting a categorical listing description comply with RCRA Subtitle C requirements. Under this option, the entire quantity of the waste of concern would be defined as hazardous, regardless of any mass loadings-based determination. Most of the affected manufacturers would incur waste management and administrative procedure costs incremental to current baseline practices. Our mass loadings-based (with contingent management) approach, as proposed, requires affected manufacturers to determine whether or not their wastes contain the regulated constituents, and, if such constituents are generated in quantities of concern. Wastes with constituent levels exceeding the primary set of thresholds proposed for these wastes may be exempted from the listing if they show that their wastes do not contain constituent loadings above the § 261.32(c)(2) listing levels and their wastes will be disposed of in a landfill subject to the design requirements in 40 CFR 258.40 or in a Subtitle C landfill cell subject to either § 264.301 or § 265.301. Only the incremental quantity above the annual mass loadings limit is affected. The affected manufacturer is not expected to incur any incremental costs if the waste does not contain constituents of concern or meet the applicable mass loading threshold. Furthermore, even if the wastes exceed the threshold mass loadings, the contingent management aspect of the proposed listing allows wastes to be handled as nonhazardous, provided the waste is disposed in a landfill that meets or exceeds the § 258.40 design standards or in a Subtitle C landfill cell subject to either § 264.301 or § 265.301, and if the conditional mass loading limit is not met for toluene-2,4-diamine.

Five out of the eight constituents of concern do not have UTS levels or LDR standards. The establishment of UTS levels and LDR standards for these constituents may result in sampling/analysis and treatment costs to industries beyond the manufacturers generating K181. We have examined these potential cost impacts under two scenarios: no listing—status quo, and UTS/LDR standards for these constituents.

Finally, today's action, as proposed, may also impact Subtitle D landfills who have previously received the newly listed dye, pigment, perylene and FD&C wastes. Leachate collected from landfills that previously received these wastes may be considered hazardous if such waste is determined to have met the hazardous waste definition at the time of disposal, and the leachate generated from these landfills contains the K181 constituents. We considered two regulatory options for these landfills: the no-list option, and, a Clean Water Act temporary deferral option (Agency preferred).

5. Assessment of Costs, Economic Impacts, and Benefits

Today's proposed action is projected to result in incremental compliance costs to selected organic dye, pigment, and FD&C manufacturers subject to the requirements of this rule. In most cases, these manufacturers may face no more than increased analytical and waste disposal costs. Non dyes and/or pigments manufacturers may be impacted by today's action if they generate wastes containing constituents that receive new LDR standards and are newly added to Appendix VIII. There may also be cost impacts to Subtitle D landfill operators if they would need to install tanks and/or piping systems in order to take advantage of the proposed temporary deferral under the Clean Water Act.

a. Introduction and Scope of This Section

The value of any regulatory action is traditionally measured by the net change in social welfare that it generates. The Economic Assessment conducted in support of today's proposed rule examines both costs and qualitative benefits in an effort to assess the overall net change in social welfare. The primary focus of the Economic Assessment document is on compliance costs and economic impacts. In this section, we summarize our analytical methodology and findings for the dyes and pigments production industries. We also briefly review our findings relative to impacts on other industries and potential impacts on landfill operators. General benefits anticipated from the rule, as proposed, are examined in a qualitative format. The information presented here is derived from the Economic Assessment. This document is available in the docket established for today's action. Interested readers are encouraged to read and comment on the data, methodology, findings, and limitations presented in this document.

b. Industry Profile

This proposed listing action affects the Synthetic Organic Dye and Pigment Manufacturing industries. These industries are identified under the Standard Identification Classification (SIC) as 2865, and under the North American Industrial Classification System (NAICS) as 325132. Our review of publically available data, combined with comments from the dyes and/or pigments industry associations has identified a total of 37 facilities that may be subject to the proposed listing. Of this total, twenty are pigment producers, eighteen are dye producers, and six produce FD&C products. Six of the facilities produce both dyes and pigments and one facility produces all three. The 37 facilities are operated by 29 different companies, fifteen of which are defined as ''small businesses'' under the Small Business Administration size standards.

The World market value for all organic dyes and pigments is estimated at $14 billion for 2003, with the U.S. market representing about 20 to 24 percent of this total. The U.S. market for all organic dyes and/or pigments products generating wastes of concern represents approximately 60 to 65 percent of the total market. The U.S. market for organic dyes and pigments is forecast to grow by about 3 percent per year through 2005.

Increased imports, pricing pressures, and rising costs are forcing some U.S. based organic dyes and/or pigments manufacturers to discontinue or modify production. Other manufacturers appear to be switching from onsite manufacturers to importers and/or formulators. Mergers and consolidations have been the general trend over the past ten years for many U.S. based manufacturers. However, recent years have also seen an increase in the number of small, low-cost entrepreneurial manufacturers, finishers and formulators who have been able to carve out market shares which were once held by the major companies. U.S. owned dye companies supply

approximately 25 percent of the total U.S. dye market, while European-owned manufacturers hold the remaining 75 percent. Pigment production ownership is similarly structured.

c. Analytical Methodology

Our first step in the development of the cost and economic impacts analysis was the preparation of an industry profile (briefly discussed above). This profile established the potentially regulated universe, market structure, gross revenues, and estimated value of affected production. We then established baseline conditions for the producers of concern. This included an assessment of waste quantities generated, management practices, and unit costs. Compliance management practices and unit costs were developed next. Compliance costs include implementation costs (waste sampling, and analysis, plus recordkeeping and reporting, if any), transport costs, and compliant treatment and/or disposal costs, as appropriate. Baseline costs less total costs of rule compliance were calculated to determine incremental costs of compliance and economic impacts. All data were derived from publically available government and industry sources. No confidential business information (CBI) was used in the preparation of this analysis.

d. Affected Waste Quantities

This rule proposes a mass loadings-based listing for selected organic dye, pigment, and FD&C production nonwastewaters, to be identified as K181, if they meet or exceed either of two mass-based constituent thresholds. Non-wastewater quantities were estimated for the 37 facilities potentially subject to the rule requirements. Wastewater quantities were first estimated in order to derive wastewater treatment sludge quantities. Annual wastewater generation was estimated for the 37 facilities based on several sources. Facility specific information was available for eight direct dischargers and five indirect dischargers. Wastewater flow rates were estimated for the remaining 24 indirect dischargers based on estimated dyes and/or pigments production and wastewater flow data derived from a 1987 U.S. EPA Office of Water guidance document.[62]

[62] U.S. EPA. October 1987. ''Development Document for Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Organic Chemicals and the Plastics and Synthetic Fibers Point Source Category Volume I.'' Industrial Technology Division, Office of Water Regulations and Standards.

We developed a log normal distribution of wastewater quantities from the statistics available in the above referenced document. A log-normal distribution is widely used under the following conditions: values are positively skewed with most of the values near the lower limit, the variable can increase without limits, but cannot fall below zero; and where the coefficient of variability (the ratio of the standard deviation to the mean) is greater than 30 percent. The wastewater flow statistics met these criteria. The coefficient of variability for the wastewater flow data was 453 percent.We used a commercially available software program to develop a distribution curve for the wastewater data. This program used a Monte Carlo technique to create a distribution of outcomes over thousands of iterations (50,000 in this case). From the distribution created by this program, the wastewater quantities were determined for every fifth percentile. Based on the production revenue data obtained for each facility, a corresponding production revenue percentile was assigned to each of the indirect dischargers. It was assumed that the production revenue directly correlated with the quantity of wastewater generated. For example, if a facility's product production revenue was at the 90th percentile level, it will generate wastewater at the 90th percentile level as well.

Annual wastewater treatment sludge generation rates were estimated for the 37 facilities based on two sources. Facility specific information was available for one facility who reported using a reverse osmosis wastewater treatment system. The wastewater treatment sludge generation rate for one other facility who reported using reverse osmosis, was estimated based on the calculated generation ratio. Wastewater treatment sludge generation rates for the remaining 35 facilities were based on total suspended solids (TSS) data from the 1987 Effluent Guidelines report. The total quantity of potentially impacted solid waste generated annually from the 37 facilities is estimated to range from 44,000 to 69,000 metric tons.

Other non-liquid wastes, in addition to wastewater treatment sludges, are expected to be impacted by this rule. These include: spent catalysts, spent adsorbent, equipment cleaning sludge, product standardization filter cake, and dust collector filter fines. The quantity of solids generated by these waste streams are assumed to be very minor. Furthermore, some of these wastes may be included in the wastewater treatment sludge estimates. No publicly available information regarding the actual generation rates of these wastes within the dyes and/or pigments industry was found.

e. Baseline Waste Management Procedures and Unit Costs

Baseline waste management methods were derived through a review of industry and trade group comments, the 1999 TRI Report, and general public sources (including internet sources).

Baseline management practices for the wastes of concern include sludge dewatering for handling and disposal purposes (based on economic feasibility), then disposal in an unregulated clay-lined or unlined landfill, Subtitle D landfill, or a Subtitle C landfill (bulk or super sack). Three facilities with available site-specific information pertaining to sludge management methods have been identified. Two of these facilities report offsite Subtitle D landfill, while one reported onsite Subtitle C incineration followed by onsite Subtitle C landfill. The remaining facilities are assumed to manage sludge offsite in unregulated clay-lined landfills. This assumption will result in an overestimation of compliance costs if facilities are currently disposing of their wastes in composite lined landfills meeting Part 258 requirements.

Costs for landfill disposal were developed from the Remedial Action Cost Engineering and Requirements (RACER) cost estimating software, and the March 2000 Remediation Market Report Published by Chartwell. Costs in RACER are based on the 2002 Environmental Cost Handling Options and Solutions (ECHOS) cost database. The RACER disposal cost for hazardous and nonhazardous wastes is presented as a 30 city average of major cities across the United States. Chartwell reports the average costs of Subtitle D commercial landfill by state. For the purposes of this analysis, the state averages were averaged for a national average cost of disposal. All costs were inflated to 2003 dollars for this estimate using the Consumer Price Index. Disposal of solid waste in unregulated unlined landfills was estimated using the Subtitle D landfill disposal unit cost. Fifty percent of the Subtitle D landfill cost was used as a proxy for unregulated clay-lined landfill disposal costs. Unit costs are as follows: Subtitle D Landfill—$42.60/ton, Unregulated clay-lined landfill—$21.30/ton.

Costs for commercial incineration were developed from RACER and the Hazardous Waste Resource Center's ''January 2002 Incinerator and Landfill

Cost Data'' survey[63] (HWRC). The HWRC data present the results of a survey of the Environmental Technology Council (ETC). All costs were inflated to 2003 dollars for this estimate using the Consumer Price Index. Incineration costs for shipment quantities less than ten tons were estimated using jumbo sack disposal costs and 55-gallon drum disposal costs for dry sludges/solids and pumpable sludges, respectively. Costs for small quantities of non-pumpable sludge was estimated using a 30 percent markup over the bulk incineration unit cost to account for additional handling costs. The markup for small quantities was approximated using the unit cost increase between jumbo sack and bulk Subtitle C landfill (approximately 37 percent).

Onsite incineration (rotary kiln) costs were estimated from several workbook methodologies.[64] [65] Costs were inflated to 2003 dollars using the Chemical Engineering Plant Cost Index for capital costs and the Consumer Price Index for O&M costs.

Incineration cost estimates are as follows: Onsite Rotary Kiln Incineration of non-pumpable sludge: 147.2 * (tons) + $927,503, Offsite Bulk Incineration of non-pumpable Sludges: $560.14\ton, Offsite Bulk Incineration of pumpable Sludge: $1,033.2/ton, Offsite Small Quantity Incineration of non-pumpable Sludges: $728.2/ton, and Offsite Bulk Incineration of pumpable sludge (drummed): $1,947.5/ton.

f. Compliance Waste Management Procedures and Unit Costs

Compliance with the proposed rule may include one or more of the following incremental cost elements: alternative waste management procedures, additional waste sampling and analysis requirements, alternative waste transport procedures and patterns, manifest requirements, RCRA Part B permit requirements, administrative requirements, and corrective action requirements. Compliance with the waste management procedures for affected sludge quantities may be disposal in a composite lined Part 258 or equivalent Subtitle D landfill, or hazardous waste incineration, depending upon option analyzed. Unit costs for these procedures are identified above.

The annual cost for sampling and analysis of non-aqueous waste streams is estimated to range from $10,509 to $10,858.[66] This estimate includes costs for sample collection, development of procedure, feasibility studies, five annual samples of each analysis for mass loading determination, and 15 samples for characterization of the wastes. Feasibility studies, procedure development, and characterization are annualized over five years at a 7 percent rate for borrowing capital (0.24389). A feasibility study is assumed for all CoCs without a prescribed method in the EPA document SW–846 at an estimated cost of $1,559. Four of the eight CoCs do not have standard methods listed in SW–846. Procedure development is required for these CoCs. Procedure development consists of performing the analysis multiple times (to develop calibration curves, identify spike and dilution rates, *etc.*). Three laboratories are assumed to develop methods and procedures for analysis of constituents without methods and procedures already established. Costs incurred by the laboratories are divided across all 37 generating facilities.

Hazardous waste shipments are tracked through the use of a hazardous waste manifest which accompanies each waste shipment. Manifesting costs were obtained from the ''Hazardous Waste Manifest Cost Benefit Analysis,'' prepared by the Logistics Management Institute in October 2000. Costs were inflated to 2003 dollars using the Consumer Price Index. An average cost of $122 (2003 dollars) per manifest was assumed to be incurred by any generator shipping hazardous waste. The transporter and generator costs were combined to estimate a total manifesting cost per shipment of $239. Costs for shipping papers for nonhazardous wastes are also estimated. These include, costs to prepare, carry, and retain shipping papers. These costs were derived from the ''Hazardous Waste Manifest Cost Benefit Analysis.'' Total costs are estimated at $90.40 per shipment for the transporter and generator, combined. This covers costs to prepare, carry and retain all nonhazardous shipping papers. Cost for disposal of wastes in unregulated or Subtitle D landfills include costs for shipping papers. All other methods of offsite disposal include costs for hazardous waste manifest.

Hazardous waste transportation costs (excluding manifesting costs) were estimated based on van trailer (small quantity) and roll-off bin (bulk) trucking unit costs reported in RACER. Costs are based on distance and maximum truck load size of 18 tons.[67] A minimum of four loads per year is assumed based on the maximum accumulation period of 90 days. Otherwise, the number of loads per year is calculated by dividing the total annual generation quantity by the assumed maximum truck load size of 18 tons. For small businesses, a truck load size of 5 tons was assumed. The ECHOS minimum shipment fee of $730 was used to determine transportation unit costs below 200 miles for hazardous waste. The distances presented in the EPA report: ''Evaluation of Cost and Economic Impacts of F006 Recycling Rulemaking Options'' from December 2001 for landfill disposal of electroplating wastes (based on a sample of 75 facilities) were utilized as a proxy for the transportation distances for sludge disposal. Nonhazardous waste transportation costs (excluding manifesting costs) also were estimated based on bulk hazardous waste transportation costs reported in RACER. Costs are based on distance and a maximum load size of 18 tons. Due to the relatively close transportation distances estimated for Subtitle D landfills, a unit cost of $2.21 per mile ($0.12 per ton-mile) was used. The transportation cost is estimated to be less than the hazardous transportation unit cost due to the regularly scheduled, full 18-ton, bulk nonhazardous waste shipments. For nonhazardous waste and post rule product recovery, no minimum number of loads is assumed. The number of shipments per year is calculated by dividing the total annual generation quantity by the assumed maximum truck load size of 18 tons.

The weighted average hazardous waste transportation unit cost to a Subtitle C landfill was estimated at $3.81/mile with a weighted average distance of 338 miles. The average hazardous waste transportation unit cost to an incineration facility was estimated at $3.26/mile, with an average distance of 577 miles. The assumed average nonhazardous waste transportation unit cost to a Subtitle D landfill was $2.21/mile and an average distance of 50 miles.

Cost for administrative duties were derived using hour estimates for each administrative task based on ''best

[63] Hazardous Waste Resource Center *http://www.etc.org/costsurvey6.cfm.*

[64] Vogel, Gregory A., MITRE Corporation, ''The Estimation of Hazardous Waste Incineration Costs,'' sponsored by U.S. EPA, January, 1983.

[65] K. Lim, R. DeRosier, R. Larkin, and R. McCormick, Acurex Corporation, Energy & Environmental Division, ''Retrofit Cost Relationships for Hazardous Waste Incineration,'' prepared for the U.S. EPA, Office of Research and Development, Industrial Environmental Research Laboratory, Incineration Research Branch, January, 1984.

[66] *See* ''Economic Assessment for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants.''

[67] RACER indicates a maximum truck load size of 18 tons.

engineering judgement'' and are described further in the economic analysis background document.

Costs for the RCRA Part B Permit were estimated using ''Estimated Costs for the Economic Benefits of RCRA Noncompliance'' dated September 1997. General facility requirements and incinerator requirements were included for the construction and operation of an onsite sludge rotary kiln. Under the traditional listing option, we estimate that between four and eight of the 37 facilities would seek a RCRA permit to operate an onsite incinerator, because it is more economical than managing the waste in an offsite commercial incinerator. A cost of $51,924 for the general facility requirements and $26,495 for the incinerator requirements was determined. Permit costs were annualized over 10 years at a 7 percent rate for borrowing capital (0.14238).

Incremental corrective action costs associated with unpermitted facilities include the cost to conduct a RCRA Facility Investigation (RFI), a Corrective Measures Study (CMS), and remediate solid waste management units (SWMUs) and areas of concern (AOCs). Depending upon the option analyzed, some of the unpermitted facilities may be brought into the RCRA program if they seek a RCRA Part B permit for incinerators. RCRA corrective action is typically triggered by facilities seeking a RCRA permit. As noted above, under the traditional listing option, we estimate that between four and eight of the 37 facilities will seek a RCRA permit to operate an onsite incinerator because it is more economical than managing it in an offsite commercial incinerator. These facilities may incur corrective action costs. Potential corrective action costs were not estimated for this analysis.

g. Costs and Economic Impacts on the Affected Industries

Our analysis for this proposed rulemaking evaluated the Agency's preferred approach for management of the wastes of concern, and two primary regulatory options. The Agency's preferred approach is a mass loadings-based (with contingent management) rulemaking. The two options are a no-list—no action determination, and the standard or traditional listing approach. Beyond the time and effort required to read and understand the final rule, the no-list option would result in affected manufacturers incurring no incremental waste management and/or administrative costs. The Agency preferred mass loadings-based approach, and the traditional listing option are discussed below.

Incremental compliance costs for the proposed mass loadings-based approach with contingent management were found to range from $0.6 to $4.3 million per year, depending upon total waste quantity managed, nonconditional mass loading levels, and the number of affected facilities. These findings generally assume baseline waste management in an unregulated clay-lined landfill and compliance management in a Subtitle D landfill meeting § 258.40 standards.[68] Actual baseline nonwastewater management may be in lined municipal landfills meeting § 258 .40 standards for most or all potentially impacted facilities. If this is the case, incremental costs and any associated benefits under the Agency preferred approach would be less than estimated. See Section 4.4.1 and Table 4–7 in the Economic Assessment background document for a complete discussion. The high-end estimate assumes, in part, Subtitle C incineration for all nonwastewaters generated at facilities identified as using toluene-2,4-diamine. Under this scenario, the conditional mass loading level for toluene-2,4-diamine is assumed to be exceeded at these facilities. Additional sampling and analysis, transport, and administrative costs are included, where appropriate. Corporate level economic impacts under this approach were found to be less than 3 percent of total gross annual revenues for but one of the affected companies.

Incremental compliance costs for the standard, or traditional listing option are estimated to range from $9.4 to $15.9 million per year, depending upon the total quantity of waste impacted.[69] This estimate also includes additional sampling and analysis, transport, administrative, RCRA Part B, and corrective action costs, where appropriate. Corporate level economic impacts under this option were found to be less than 3 percent of total gross annual revenues for 93 percent of all affected companies.

h. Impacts on Other Industries

This regulation may result in impacts to other industries. Specifically, two categories may be impacted: Municipal and industrial solid waste landfill operators who previously accepted the wastes of concern, and, non dyes and/or pigments generators of hazardous waste containing one or more of the five Constituents of Concern that are not currently on Appendix VIII or have LDR requirements.

Landfills: A common disposal practice for currently nonhazardous dye, pigment, and FD&C waste is offsite disposal in municipal solid waste landfills. The leachate derived from this waste has traditionally been collected and recirculated, treated, and/or disposed. Because of the proposed listing, collected leachate from landfills (*i.e.,* cells) that have accepted these wastes may be hazardous under the Derived-from Rule (*see* Section IV.E). Also, when the leachate from these two wastes mixes with leachate from other wastes, the entire leachate quantity from the affected landfill (or cell) may be considered hazardous under the Mixture Rule. By changing the regulatory status of the proposed wastes, the collected leachate from the disposal of these wastes may be covered under Subtitle C of RCRA. Municipal Solid Waste (MSW) and other landfills that have previously accepted and generated leachate from these wastes (received in quantities above mass loadings levels of concern) may face increased leachate management costs. This would be an indirect impact of the rule, as proposed.

The EPA report, ''Characterization of Municipal Solid Waste in the United States: 1997 Update,'' EPA 530–R–98–007, May 1998, estimates there were approximately 2,400 MSW landfills in the contiguous U.S. for 1996. Based on the total number of potentially affected dye, pigment, and FD&C facilities, and their locations, it is likely that no more than fifty MSW landfills received wastes of concern (in any quantity). Leachate quantities generated by each of these landfills are dependent upon the geographic location, area, leachate collection system design, and operation of the landfill.

We are proposing a Clean Water Act temporary deferral for potentially affected landfills under today's action. This temporary deferral would exempt the landfill leachate from RCRA Subtitle C regulation if it is managed pursuant to certain conditions. After two years, impacted facilities would no longer be allowed to manage the exempt leachate in surface impoundments as nonhazardous. Under this approach, selected landfills may choose to modify their facilities, or implement expanded personnel training programs and/or alternative operation and maintenance procedures. Costs associated with these activities have not been quantified but are likely to be negligible.

[68] Baseline nonwastewater management in an unregulated clay lined landfill was assumed where facility-specific informaiton was restricted or not available.

[69] **Note:** An extreme high-end scenario was examined where all facilities were required to burn all waste under full Subtitle C requirments. Total annualized costs under this scenario were estimated at $26 million. This scenario was examined for high-end bounding purposes only and is not considered to be a feasible regulatory option.

Non Dyes and/or Pigments Waste Generators: Five of the eight constituents of concern [70] are not currently on Appendix VIII. These are: o-anisidine, p-cresidine, 2,4-dimethylaniline, 1,2-phenylenediamine, and 1,3-phenylenediamine. The proposed listing would also add five chemicals with the standards in Table VI–1 to the UTS, namely: o-anisidine, p-cresidine, 2,4-dimethylaniline, 1,3-phenylenediamine, and toluene-2,4-diamine. The proposed rule will result in the addition of these constituents to Appendix VIII and establishment of the additional UTS standards. This would be a direct impact of the rule potentially affecting an expanded universe of facilities.

We examined the TRI database, Material Safety Data Sheets (MSDS), Chemchannels.com [71] and Biennial Report System (BRS) data in an effort to identify other facilities that may be generating hazardous wastes containing any of the constituents of concern.

Based on available data, we identified 13 non dye and/or pigment facilities that may be impacted by the expanded scope of this proposed rule. The constituents of concern appear to be contained in other hazardous organic nonwastewaters and currently managed by either energy recovery or incineration. This is the common management procedure for these wastes. This procedure is assumed to continue after the rule is promulgated given that it will comply with the LDR requirements. Incremental costs to impacted expanded scope facilities are expected to be limited to additional sampling and analysis requirements necessary to fully characterize the wastes. We estimate that the additional sampling and analysis costs would average $2,183.50 per facility, per year. The total cost for all 13 facilities is estimated to be no more than $28,400 per year.

Remediation of Hazardous Waste Sites: Adding constituents to Appendix VIII, by itself, is not expected to have a significant impact on remediation of hazardous waste sites. The RCRA regulations in 40 CFR Part 264 establish management standards for hazardous waste treatment, storage and disposal facilities. Subpart F of 264 sets standards for addressing releases from solid waste management units. Appendix VIII is identified in section 264.93 of Subpart F as the list from which facility-specific groundwater protection standards are developed as part of a compliance monitoring program under 264.99. These groundwater protection standards are comprised of the Appendix VIII constituents that are ''reasonably expected to be in or derived from waste contained in a regulated unit.'' The addition of these substances to Appendix VIII, therefore, would only potentially affect those facilities in compliance monitoring that (1) would reasonably be expected to use or make these chemicals, or (2) manage these wastes. Throughout the remainder of this Subpart, the Agency directs permit writers to Appendix IX, a list specifically designed to be used in monitoring groundwater. We are not proposing to add any constituents to Appendix IX.

We have addressed the potential impact on the first category of facilities (*i.e.,* those that would reasonably be expected to use or make these chemicals, beyond the Dye and Pigment industries we evaluated) explicitly in our expanded scope analysis. For the second category of facilities, those that manage hazardous wastes that might contain the constituents being added to Appendix VIII, we believe these costs to be negligible. Our analysis indicates that these compounds are not widely used in commerce, and thus be unlikely to trigger the 264.93 standard of ''reasonably expected to be in or derived from waste contained in a regulated unit'' standard. Adding chemicals to Appendix VIII may also result in the remediation of these constituents at Superfund sites. However, for the same reasons noted above, we believe that the addition of these constituents to Appendix VIII will have a very limited impact (if any) on Superfund cleanups.

i. Lead as a Potential K181 Constituent

We have considered whether a K181 lead standard may significantly change our assessment of the costs and economic impacts estimated for the Agency Preferred Approach. Our preliminary assessment indicates that there would be no substantive impacts. Three facilities were found to generate wastes that may contain toluene-2,4-diamine. These three facilities were assumed to generate this constituent above nonconditional loading levels under our ''high'' analytical scenario for the Agency Preferred Approach. If we add lead as a K181 constituent, any of these facilities with lead in their wastes would need to stabilize post incineration residuals to comply with land disposal restrictions. Assuming all waste is incinerated, the maximum aggregate incremental costs associated with stabilization, if required, are likely to be insignificant for these facilities on an individual basis. Aggregate cost impacts for all three facilities would be no more than $340,000 per year.

We also considered the potential impact of a K181 standard for lead for Eastman and Engelhard (Harshaw Chemical). Both of these facilities have reported significant quantities of lead in the Toxic Release Inventory (TRI). We believe that Eastman currently combusts it's commingled (largely non-dyes) wastes, and then manages the resultant residues in an onsite landfill. Based on available data, this landfill does not appear to meet the description of the exempt landfill cells, as detailed in the listing description (*i.e.,* it is not a municipal solid waste landfill or a Subtitle C landfill). Eastman, therefore, may pursue one of a variety of actions. These include: Segregating the wastes in the least costly manner feasible, eliminating the waste altogether, or sending all affected ash to a § 258.40 compliant MSW landfill. Eastman also has a Subtitle C landfill onsite, which could be used for some or all of the incinerated waste of concern. We have not assessed cost impacts associated with these options. Based on 1999 Biennial Reporting data, Engelhard already manages the majority of their lead-bearing wastes as hazardous, while the remainder appears to go to a MSW landfill. We believe, therefore, that the Engelhard facility is not likely to incur any additional costs of concern. Section 5.3 of the Economic Assessment background document provides a more complete discussion of these findings.

j. Risk Assessment and Benefits

As described in detail in Section III, we set the levels for nonwastewaters by modeling disposal in MSW landfills using several liner assumptions. We set the baseline loading limits using the results from clay-lined landfills, and we used the composite-liner results to set the loading limit for one constituent in MSWLFs meeting the liner design criteria in § 258.48. The mass loading limits are based on risks from residential use of groundwater from wells positioned near the landfills.

Groundwater generally moves relatively slowly, such that the constituents of concern are not expected to reach the nearby wells for a number of years. For the eight chemicals for which we are proposing loading limitations, we examined the groundwater travel times to the receptor wells for the 90th percentile runs of the Monte Carlo simulations (these runs were the bases of the loading limits).

[70] The eight constituents of concern are: aniline, o-anisidine, p-cresidine, 4-chloroaniline, 2,4-dimethylaniline, 1,2-phenylenediamine, 1,3-phenylenediamine, and toulene-2,4-diamine.

[71] *http://www.chemchannels.com/chemchannel/default.asp.*

The average groundwater travel time was 189 years, and the range of travel times across the eight constituents was 74 to 424 years.

As noted in the next section, due to data limitations, we have not attempted to estimate the change in net welfare potentially resulting from this proposed rule, nor have we been able to quantify human health or environmental benefits. Thus, the benefits in terms of reduced human health risk are unquantified, but are expected to occur some time after the rule is effective (between 74 to 424 years after the effective date).

k. Social Costs and Benefits

The social costs of any regulatory action should describe the total value of resources used to comply with the rule, resulting in a comprehensive measurement of change in economic net welfare. These impacts are measured following market adjustments based on industry supply and demand functions. Due to our lack of data, limited analytical budget, and strict schedule, we have not attempted to estimate the change in net welfare potentially resulting from this proposed rule. Due to these same limitations, we have not been able to quantify or monetize human health or environmental benefits. Additional data are necessary to make a firm determination as to whether there will be quantifiable net benefits (*i.e.,* benefits exceeding social costs) from the proposed rule.

Below we qualitatively describe those groups who are likely to be positively and negatively impacted by this proposed rule.

Positively Impacted Groups

- Dye, pigment, and FD&C manufacturers who may be producing acceptable lower cost substitutes to the products generating the wastes of concern,
- Population groups surrounding dye, pigment, and FD&C production facilities, plus those near unlined landfills and other landfills that do not meet the design standards in § 258.40. These populations may benefit from lower health risks due to increased management control and/or improved waste treatment, thereby theoretically experiencing reduced health care costs and increased productivity.

Negatively Impacted Groups

- Dye, pigment, and FD&C manufacturers who are subject to requirements of the proposed rule.
- Non dyes and/or pigments manufacturers who may be impacted by expanded scope requirements,
- Consumers who may be impacted if there are increases in dye, pigment, and FD&C prices as a result of the rule,
- Municipal landfills that may need to install new tanks or piping systems, or implement other procedures in order to take advantage of the proposed temporary deferral under the Clean Water Act.

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.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2120.01.

EPA is proposing to list dyes and/or pigments nonwastewaters (*i.e.,* K181 waste) under the authority of sections 2002(a), 3001(b), 3001(e)(2), 3004(d)–(m), and 3007(a) of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). Section 3001(e)(2) directs EPA to make a determination of whether or not to list under section 3001(b)(1) dyes and pigments, among other wastes. Under this authority, EPA has examined dyes and/or pigments production wastes (*e.g.,* using risk assessment tools), identified CoCs and their potential risks, and established a mass ''loadings-based'' approach that would qualify the waste as hazardous under RCRA. Under sections 2002(a) and 3007(a) of RCRA, EPA is establishing information collection requirements that are needed to ensure that the listed wastes are managed and disposed of properly.

In addition, the proposed rule satisfies EPA's duty under a Consent Decree between EPA and the Environmental Defense (formerly Environmental Defense Fund (EDF)). Under this Consent Decree, the Agency is required to ''promulgate final listing determinations for azo/benzidine, anthraquinone, and triarylmethane dye and pigment production wastes on or before February 16, 2005 * * * These listing determinations shall be proposed for public comment on or before November 10, 2003.''

EPA is proposing that the mass loadings-based listing be self-implementing, which means that no prior governmental review or approval is needed for the waste to be claimed as nonhazardous. Because of this, EPA believes that the recordkeeping requirements in the proposal are needed to ensure that generators characterize their wastes accurately and reliably, and keep records of the claims on site.

EPA believes the proposed mass loadings-based approach allows generators to evaluate the variable wastes they generate individually for hazard, so only wastes that are hazardous are listed. As a result, there should be less burden on dyes and/or pigments manufacturers than would be imposed by a traditional listing that would bring entire wastes into the hazardous waste system, regardless of the characteristics of the wastes generated by individual generators. Finally, a mass loadings-based listing approach may provide an incentive for hazardous waste generating facilities to modify their manufacturing processes or treat their wastes.

EPA estimates that 37 respondents will be subject to the new paperwork requirements under the proposed rule. The hourly recordkeeping burden from the new requirements ranges between one and 11 hours per respondent per year. This burden includes time for reading the regulations (once per respondent over three years), determining whether dyes and/or pigments nonwastewaters exceed regulatory listing levels, and keeping documentation on site, as specified.

EPA estimates the total cost to respondents subject to the new paperwork requirements under the proposed rule to be $76,626 per year. This includes a total labor cost per year of $33,066, a total operations and maintenance cost per year of $43,560, and no capital costs. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing

respondent burden, including the use of automated collection techniques, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number RCRA–2003–0001. Submit any comments related to the ICR for this proposed rule to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after November 25, 2003, a comment to OMB is best assured of having its full effect if OMB receives it by December 26, 2003. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et. seq,* generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business that is defined by the Small Business Administration by category of business using the North American Industrial Classification System (NAICS) and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

We have identified a total of 37 organic dye, pigment, and FD&C facilities in operation in the U.S., which are owned by 29 different companies that are believed to be generating wastes of concern. Of these, 16 facilities are owned by 15 small companies. This determination is based on the Small Business Administration (SBA) definition of ''small business'' for these industries, defined as fewer than 750 employees at the corporate level.[72] A number of these companies are very small, with fewer than 50 total full-time employees. Of the 13 expanded scope companies, one was determined to be a small business.

The cost of compliance impacts for all small companies potentially affected by the rule were found to range from 0.00 percent to 0.52 percent of gross annual corporate revenues, depending upon the level of nonwastewater quantities generated. The percent of annual corporate sales impact for the one expanded scope small business is estimated at 0.08 percent.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not result in significant economic impacts on a substantial number of small dyes and/or pigments production businesses subject to the rule requirements. The reader is encouraged to review and comment on the regulatory flexibility screening analysis prepared in support of this determination: ''Regulatory Flexibility Screening Analysis for the Proposed Loadings-Based Listing of Non-Wastewaters from the Production of Selected Organic Dyes, Pigments, and Food, Drug, and Cosmetic Colorants.'' This document is available in the public docket.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule would not contain a Federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The nationwide annual cost for this rule, as proposed, is estimated to be less than five million dollars. This proposed rule does not impose an enforceable duty on any State, local or tribal government; consequently it does not include any Federal mandate with the potential to result in expenditures of $100 million of more to State, local, or tribal governments. EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. In addition, the private sector is not expected to incur costs exceeding $100 million. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act. EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

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

[72] ''Table of Small Business Size Standards—Matched to North American Industrial Classification System (NAICS) Codes,'' revised May 5, 2003. Small Business Adminsitration (SBA).

Under 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.

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The proposed rule focuses on requirements for facilities generating wastes of concern. Marginal administrative burden impacts may occur to selected States and/or EPA Regional Offices such as increased administrative needs, enforcement requirements, or voluntary information requests. However, this rule, as proposed, will not have substantial direct effects on the States or the relationships between governments in its implementation. Thus, Executive Order 13132 does not apply to this rule. Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with State officials in the development of this rule. State officials were contacted concerning baseline waste management procedures for the wastes of concern.

In the spirit of Executive Order 13132, 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.

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

Executive Order 13175,[73] entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. The proposed rule focuses on requirements for all regulated sources without affecting the relationships between tribal governments in its implementation, and applies to all regulated sources, without distinction of the surrounding populations affected. Thus, Executive Order 13175 does not apply to this rule. EPA specifically solicits additional comment on this proposed rule from tribal officials.

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

The Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be economically significant under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposal is not subject to Executive Order 13045 because it is determined to not be economically significant under Executive Order 12866, and does not concern an environmental health or safety risk that we have reason to believe may cause a disproportionate effect on children. Concerned stakeholders are encouraged to submit any relevant data and provide comments on this determination.

H. Executive Order 12898: Environmental Justice

Executive Order 12898, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population'' (February 11, 1994), is designed to address the environmental and human health conditions of minority and low-income populations. EPA is committed to addressing environmental justice concerns and has assumed a leadership role in environmental justice initiatives to enhance environmental quality for all citizens of the United States. The Agency's goals are to ensure that no segment of the population, regardless of race, color, national origin, income, or net worth bears disproportionately high and adverse human health and environmental impacts as a result of EPA's policies, programs, and activities. Our goal is to ensure that all citizens live in clean and sustainable communities. In response to Executive Order 12898, and to concerns voiced by many groups outside the Agency, EPA's Office of Solid Waste and Emergency Response (OSWER) formed an Environmental Justice Task Force to analyze the array of environmental justice issues specific to waste programs and to develop an overall strategy to identify and address these issues (OSWER Directive No. 9200.3–17).

We have assessed whether today's proposed rule may help mitigate, or result in disproportionate effects on minority or low-income populations. Due to budgeting and scheduling constraints, we have not compiled data correlating individual facility locations with minority/low income populations. However, our risk assessment did not identify risks from the management of dye, pigment, and FD&C production wastewaters in onsite tanks or surface impoundments at the generating facilities. In fact, based on this assessment, we are not proposing to list these wastewaters as hazardous waste. Therefore, we believe that any populations in proximity to these manufacturing facilities are not adversely affected by common waste management practices for these wastewaters. This proposed listing will reduce risks associated with managing the targeted nonwastewaters in nonhazardous Subtitle D landfills. This may reduce risks for any sensitive populations living in proximity to such facilities who rely on ground water for drinking water supplies.

This proposed rule is expected to provide incentives for reducing the use of hazardous constituents and may thereby reduce environmental risks associated with the facilities generating these wastes. Thus, the Agency believes that this rule may help mitigate health risks to minority and low income communities living near impacted facilities. Furthermore, we have no data indicating that today's proposal would result in disproportionately negative impacts on minority or low income communities.

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

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

[73] Executive Order 13084 is revoked by this Executive Order.

12866. Furthermore, it is not expected to have a significant adverse impact on the supply, distribution, or use of energy.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve the use of any voluntary consensus standards.

List of Subjects

40 CFR Part 148

Administrative practice and procedure, Hazardous waste, Reporting and record keeping requirements, Water supply.

40 CFR Part 261

Environmental protection, Hazardous materials, Waste treatment and disposal, Recycling.

40 CFR Part 268

Environmental protection, Hazardous materials, Waste management, Reporting and record keeping requirements, Land Disposal Restrictions, Treatment Standards.

40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous material transportation, Hazardous waste, Indians-lands, Intergovernmental relations, Penalties, Reporting and record keeping requirements, Water pollution control, Water supply.

40 CFR Part 302

Environmental protection, Air pollution control, Chemicals, Emergency Planning and Community Right-to-Know Act, Extremely hazardous substances, Hazardous chemicals, Hazardous materials, Hazardous materials transportation, Hazardous substances, Hazardous wastes, Intergovernmental relations, Natural resources, Reporting and record keeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: November 10, 2003.

Michael O. Leavitt,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 148—HAZARDOUS WASTE INJECTION RESTRICTIONS

1. The authority citation for part 148 continues to read as follows:

Authority: Sec. 3004, Resource Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.*

2. Section 148.18 is amended by revising the paragraph (l) and adding (m) to read as follows:

§ 148.18 Waste-specific prohibitions—newly listed and identified wastes.

* * * * *

(l) Effective [insert date six months after date of publication of final rule], the waste specified in 40 CFR 261.32 as EPA Hazardous Waste Number K181 is prohibited from underground injection.

(m) The requirements of paragraphs (a) through (l) of this section do not apply:

(1) If the wastes meet or are treated to meet the applicable standards specified in subpart D of 40 CFR part 268; or

(2) If an exemption from a prohibition has been granted in response to a petition under subpart C of this part; or

(3) During the period of extension of the applicable effective date, if an extension has been granted under § 148.4.

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

3. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y), and 6938.

4. Section 261.4 is amended by revising paragraph (b)(15) to read as follows.

§ 261.4 Exclusions.

* * * * *

(b) * * *

(15) Leachate or gas condensate collected from landfills where certain solid wastes have been disposed, provided that:

(i) The solid wastes disposed would meet one or more of the listing descriptions for Hazardous Waste Codes K169, K170, K171, K172, K174, K175, K176, K177, K178 and K181 if these wastes had been generated after the effective date of the listing;

(ii) The solid wastes described in paragraph (b)(15)(i) of this section were disposed prior to the effective date of the listing;

(iii) The leachate or gas condensate do not exhibit any characteristic of hazardous waste nor are derived from any other listed hazardous waste;

(iv) Discharge of the leachate or gas condensate, including leachate or gas condensate transferred from the landfill to a POTW by truck, rail, or dedicated pipe, is subject to regulation under sections 307(b) or 402 of the Clean Water Act.

(v) As of February 13, 2001, leachate or gas condensate derived from K169-K172 is no longer exempt if it is stored or managed in a surface impoundment prior to discharge. As of November 21, 2003, leachate or gas condensate derived from K176, K177, and K178 is no longer exempt if it is stored or managed in a surface impoundment prior to discharge. After [date 24 months from date of final publication], leachate or gas condensate derived from K181 will no longer be exempt if it is stored or managed in a surface impoundment prior to discharge. There is one exception: if the surface impoundment is used to temporarily store leachate or gas condensate in response to an emergency situation (*e.g.*, shutdown of wastewater treatment system), provided the impoundment has a double liner, and provided the leachate or gas condensate is removed from the impoundment and continues to be managed in compliance with the conditions of this paragraph after the emergency ends.

* * * * *

5. Section 261.32 is amended by:

a. Designating the existing text and table as paragraph (a),

b. In the table by adding a new entry in alphanumeric order (by first column) under the heading ''Organic Chemicals'',

c. Adding paragraphs (b), (c) and (d).

The revisions and additions read as follows:

§ 261.32 Hazardous wastes from specific sources.

(a) * * *

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
*	* * * * * *	*
Oganic Chemicals:		
*	* * * * * *	*
K181	Nonwastewaters from the production of dyes and/or pigments (including nonwastewaters commingled at the point of generation with nonwastewaters from other processes) that, at the point of generation, contain mass loadings of any of the constituents identified in paragraph (c)(1) of this section that are equal to or greater than the corresponding paragraph (c)(1) levels, as determined on a calendar year basis. These wastes would not be hazardous if: (i) The nonwastewaters do not contain annual mass loadings of the constituent identified in paragraph (c)(2) of this section at or above the corresponding paragraph (c)(2) level; and (ii) the nonwastewaters are disposed in a Subtitle D landfill cell subject to the design criteria in § 258.40 or in a Subtitle C landfill cell subject to either § 264.301 or § 265.301. For the purposes of this listing, dyes and/or pigments production is defined in paragraph (b)(1) of this section. Paragraph (d) of this section describes the process for demonstrating that a facility's nonwastewaters are not K181. This listing does not apply to wastes that are otherwise identified as hazardous under §§ 261.21–24 and 261.31–33 at the point of generation. Also, the listing does not apply to wastes generated before any annual mass loading limit is met.	(T)
*	* * * * * *	*

* * * * *

(b) *Listing Specific Definitions:* (1) For the purposes of the K181 listing, dyes and/or pigments production is defined to include manufacture of the following product classes: Dyes, pigments, or FDA certified colors that are classified as azo, triarylmethane, perylene or anthraquinone classes. Azo products include azo, monoazo, diazo, triazo, polyazo, azoic, benzidine, and pyrazolone products. Triarylmethane products include both triarylmethane and triphenylmethane products.

(2) [Reserved]

(c)(1) *K181 Listing Levels.* Nonwastewaters containing constituents in amounts equal to or exceeding the following levels during any calendar year are subject to the K181 listing unless the conditions in the K181 listing are met:

Constituent	Chemical abstracts No.	Mass levels (kg/yr)
Aniline	62–53–3	9,300
o-Anisidine	90–04–0	110
4-Chloroaniline	106–47–8	4,800
p-Cresidine	120–71–8	660
2,4-Dimethylaniline	95–68–1	100
1,2-Phenylenediamine	95–54–5	710
1,3-Phenylenediamine	108–45–2	1,200
Toluene-2,4-diamine	95–80–7	0.99

(2) *K181 Exemption Levels.* The K181 listing does not include nonwastewaters that, at the point of generation, contain no waste constituents meeting or exceeding the following levels during any calendar year, and which meet the landfill disposal condition set out in the listing description:

Constituent	Chemical abstracts No.	Mass levels (kg/yr)
Toluene-2,4-diamine	95–80–7	140

(d) *Procedures for demonstrating that dyes and/or pigments nonwastewaters are not K181.* The following procedures establish when nonwastewaters from production of dyes/pigments can be managed as nonhazardous.

(1) *Determination based on no K181 constituents.* Generators that have knowledge (*e.g.*, knowledge of constituents in wastes based on prior sampling and analysis data and/or information about raw materials used, production processes used, and reaction and degradation products formed) that their wastes contain none of the K181 constituents (see paragraph (c) of this section) can use their knowledge to determine that their waste is not K181. The generator must document the basis for all such determinations on an annual basis and keep each annual documentation for three years.

(2) *Determination for generated quantities less than 1,000 MT/yr. for wastes that contain K181 constituents.* If the total annual quantity of dyes and/or pigments nonwastewaters generated is 1,000 metric tons or less, the generator can use knowledge of the wastes (*e.g.*, knowledge of constituents in wastes based on prior analytical data and/or information about raw materials used, production processes used, and reaction and degradation products formed) to conclude that annual mass loadings for the K181 constituents are below either the paragraph (c)(1) or (c)(2) listing levels of this section. To make this determination, the generator must:

(i) Each year document the basis for determining that the annual quantity of nonwastewaters expected to be generated will be less than 1,000 metric tons.

(ii) Track the actual quantity of nonwastewaters generated from January 1 through December 31 of each year. If, at any time within the year, the actual waste quantity exceeds 1,000 metric tons, the generator must comply with the requirements of paragraph (d)(3) of this section for the remainder of the year.

(iii) Keep a running total of the K181 constituent mass loadings over the course of the calendar year.

(iv) Keep the following records onsite for three years:

(A) The quantity of dyes and/or pigments nonwastewaters generated.

(B) The relevant process information used.

(C) The calculations performed to determine annual total mass loadings for each K181 constituent in the nonwastewaters during the year.

(3) *Determination for generated quantities greater than 1,000 MT/yr. for wastes that contain K181 constituents:*

(i) Determine which K181 constituents (see paragraph (c) of this section) are reasonably expected to be present in the wastes based on knowledge of the wastes (*e.g.*, based on prior sampling and analysis data and/or information about raw materials used, production processes used, and reaction and degradation products formed).

(ii) Develop a waste sampling and analysis plan (or modify an existing plan) to collect and analyze representative waste samples for the K181 constituents reasonably expected to be present in the wastes. At a minimum, the plan must include:

(A) A discussion of the number of samples needed to characterize the wastes fully;

(B) The planned sample collection method to obtain representative waste samples;

(C) A discussion of how the sampling plan accounts for potential temporal and spatial variability of the wastes.

(D) A detailed description of the test methods to be used, including sample preparation, clean-up (if necessary), and determinative methods.

(iii) Collect and analyze samples in accordance with the waste sampling and analysis plan.

(A) The sampling and analysis must be unbiased, precise, and representative of the wastes.

(B) The analytical measurements must be sufficiently sensitive, accurate and precise to support any claim that the constituent mass loadings are below the paragraph (c) listing levels of this section.

(iv) Record the analytical results.

(v) Record the waste quantity represented by the sampling and analysis results.

(vi) Calculate constituent-specific mass loadings (product of concentrations and waste quantity).

(vii) Keep a running total of the K181 constituent mass loadings over the course of the calendar year.

(viii) Determine whether the mass of any of the K181 constituents listed in either paragraph (c)(1) or (c)(2) of this section generated between January 1 and December 31 of any year is below the K181 listing levels.

(ix) Keep the following records onsite for three years:

(A) The sampling and analysis plan.

(B) The sampling and analysis results (including QA/QC data)

(C) The quantity of dyes and/or pigment nonwastewaters generated.

(D) The calculations performed to determine annual mass loadings.

(x) Nonhazardous waste determinations must be conducted annually to verify that the wastes remain nonhazardous.

(A) The annual testing requirements are suspended after three consecutive successful annual demonstrations that the wastes are nonhazardous. The generator can then use knowledge of the wastes to support subsequent annual determinations.

(B) The annual testing requirements are reinstated if the manufacturing or waste treatment processes generating the wastes are significantly altered, resulting in an increase of the potential for the wastes to exceed the listing levels.

(C) If the annual testing requirements are suspended, the generator must keep records of the process knowledge information used to support a nonhazardous determination. If testing is reinstated, a description of the process change must be retained.

(4) *Recordkeeping for (c)(2) exemption.* For the purposes of meeting the landfill disposal condition set out in the K181 listing description, the generator must maintain onsite for three years documentation demonstrating that each shipment of waste was received by a landfill cell subject to the landfill design standards set out in the listing description.

(5) Waste holding and handling. During the interim period, from the point of generation to completion of hazardous waste determination, the generator is responsible for storing the wastes appropriately. If the wastes are determined to be hazardous and the generator has not complied with the subtitle C requirements during the interim period, the generator would be subject to an enforcement action for improper management.

6. Appendix VII to part 261 is amended by adding the following entry in alphanumeric order (by the first column) to read as follows.

APPENDIX VII TO PART 261—BASIS FOR LISTING HAZARDOUS WASTE

EPA hazardous waste No.	Hazardous constituents for which listed
*	* * * * * *
K181	Aniline, o-anisidine, 4-chloroaniline, p-cresidine, 2,4- dimethylaniline, 1,2-phenylenediamine, 1,3-phenylenediamine, toluene-2,4-diamine.
*	* * * * * *

* * * * *

Appendix VIII to Part 261—Hazardous Constituents

7. Appendix VIII to Part 261 is amended by adding in alphabetical sequence of common name the following entries:

* * * * *

Common name	Chemical abstracts name	Chemical abstracts No.	Hazardous waste No.
* * *	* *	*	*
o-Anisidine (o-Aminoanisole)	Benzenamine, 2-Methoxy-	90–04–0	
* * *	* *	*	*
p-Cresidine	2-Methoxy-5-methylbenzenamine	120–71–8	
* * *	* *	*	*
2,4-Dimethylaniline (2,4-xylidine)	Benzenamine, 2,4-dimethyl-	95–68–1	
* * *	* *	*	*
1,2-	1,2-Phenylenediamine Benzenediamine	95–54–5	
* * *	* *	*	*
1,3-	1,3-Phenylenediamine Benzenediamine	108–45–2	
* * *	* *	*	*

PART 268—LAND DISPOSAL RESTRICTIONS

8. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

Subpart C—Prohibitions on Land Disposal

9. Subpart C is amended by adding § 268.20 and adding and reserving §§ 268.21 through 268.29 to read as follows:

§ 268.20 Waste specific prohibitions—Dyes and/or pigments production wastes.

(a) Effective [*date six months from date of publication of final rule*], the waste specified in 40 CFR Part 261 as EPA Hazardous Waste Number K181, and soil and debris contaminated with this waste, radioactive wastes mixed with this wastes, and soil and debris contaminated with radioactive wastes mixed with this waste are prohibited from land disposal.

(b) The requirements of paragraph (a) of this section do not apply if:

(1) The wastes meet the applicable treatment standards specified in Subpart D of this Part;

(2) Persons have been granted an exemption from a prohibition pursuant to a petition under § 268.6, with respect to those wastes and units covered by the petition;

(3) The wastes meet the applicable treatment standards established pursuant to a petition granted under § 268.44;

(4) Hazardous debris has met the treatment standards in § 268.40 or the alternative treatment standards in § 268.45; or

(5) Persons have been granted an extension to the effective date of a prohibition pursuant to § 268.5, with respect to these wastes covered by the extension.

(c) To determine whether a hazardous waste identified in this section exceeds the applicable treatment standards specified in § 268.40, the initial generator must test a sample of the waste extract or the entire waste, depending on whether the treatment standards are expressed as concentrations in the waste extract or the waste, or the generator may use knowledge of the waste. If the waste contains regulated constituents in excess of the applicable Subpart D levels, the waste is prohibited from land disposal, and all requirements of Part 268 are applicable, except as otherwise specified.

10. In § 268.40, the Table of Treatment Standards is amended by revising the entry for F039 to add constituents in alphabetical sequence, and by adding in alphanumeric order the new entry for K181 to read as follows:

§ 268.40 Applicability of treatment standards.

* * * * *

TREATMENT STANDARDS FOR HAZARDOUS WASTES

[**Note:** NA means not applicable]

Waste code	Waste description and treatment/regulatory subcategory [1]	Regulated hazardous constituent		Wastewaters—concentration in mg/L [3], or technology code [4]	Nonwastewaters—concentration in mg/kg [5] unless noted as "mg/L TCLP", or technology code
		Common name	CAS [2] No.		
*	* *	*	*	*	*
F039	Leachate (liquids that have percolated through land disposed wastes) resulting from the disposal of more than one restricted waste classified as hazardous under Subpart D of this part. (Leachate resulting from the disposal of one or more of the following EPA Hazardous Wastes and no other Hazardous Waste retains its EPA Hazardous Waste Number(s): F020, F021, F022, F026, F027, and/or F028).	* * *			
		o-Anisidine (2-methoxyaniline)	90–04–0	0.010	0.66
		* * *			
		p-Cresidine	120–71–8	0.010	0.66
		* * *			
		2,4-Dimethylaniline (2,4-xylidine)	95–68–1	0.010	0.66
		* * *			
		1,3-Phenylenediamine	108–45–2	0.010	0.66
		* * *			
		Toluene-2,4-diamine	95–80–7	0.020	1.30
		* * *			
*	* *	*	*	*	*
K181	Nonwastewaters from the production of dyes and/or pigments (including nonwastewaters commingled at the point of generation with nonwastewaters from other processes) that, at the point of generation, contain mass loadings of any of the constituents identified in paragraph (c)(1) of this section that are equal to or greater than the corresponding paragraph (c)(1) levels, as determined on a calendar year basis.	Aniline	65–53–3	0.81	14
		o-Anisidine (2-methoxyaniline)	90–04–0	0.010	0.66
		4-Chloroaniline	106–47–8	0.46	16
		p-Cresidine	120–71–8	0.010	0.66
		2,4-Dimethylaniline (2,4xylidine)	95–68–1	0.010	0.66
		1,2-Phenylenediamine	95–54–5	(6)	(7)
		1,3-Phenylenediamine	108–45–2	0.010	0.66
		Toluene-2,4-diamine	95–80–7	0.020	7.30
*	* *	*	*	*	*

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.

[6] CMBST; or CHOXD fb (BIODG or CARBN); or BIODG fb CARBN.

[7] CMBST.

* * * * *

11. The Table—Universal Treatment Standards in § 268.48 is revised by adding in alphabetical sequence the following entries under the heading organic constituents:

§ 268.48 Universal treatment standards.

(a) * * *

UNIVERSAL TREATMENT STANDARDS

[**Note:** NA means not applicable]

Regulated constituent common name	CAS [1] No.	Wastewater standard—concentration in mg/L [2]	Nonwastewater standard—concentration in mg/kg [3] unless noted as "mg/L TCLP"
* * * * *		*	*
o-Anisidine (2-methoxyaniline)	90–04–0	0.010	0.66
* * * * *		*	*
p-Cresidine	120–71–8	0.010	0.66
* * * * *		*	*
2,4-Dimethylaniline (2,4-xylidine)	95–68–1	0.010	0.66
* * * * *		*	*
1,3-Phenylenediamine	108–45–2	0.010	0.66
* * * * *		*	*
Toluene-2,4-diamine	95–80–7	0.020	1.30
* * * * *		*	*

[1] 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.

[2] Concentration standards for wastewaters are expressed in mg/L and are based on analysis of composite samples.

[3] 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 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.

* * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

12. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

13. Section 271.1(j) is amended by adding the following entries to Table 1 and Table 2 in chronological order by date of publication to read as follows.

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	**Federal Register** reference	Effective date
* * * * *	*	*	*
[*insert date of signature of final rule*].	Listing of Hazardous Waste K181	[*insert Federal Register page numbers for final rule*].	[*insert effective date of final rule*]
* * * * *	*	*	*

TABLE 2.—SELF-IMPLEMENTING PROVISIONS OF THE SOLID WASTE AMENDMENTS OF 1984

Effective date	Self-implementing provision	RCRA citation	FEDERAL REGISTER reference
* * * * *	*	*	*
[*Insert effective date of final rule*].	Prohibition on land disposal of K181 waste, and prohibition on land disposal of radioactive waste mixed with K181 wastes, including soil and debris	3004(g)(4)(C) and 3004(m)	[*Insert date of publication date of final rule Federal Register page numbers*] [*FR page numbers*].
* * * * *	*	*	*

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

14. The authority citation for part 302 continues to read as follows:

Authority: 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

15. In § 302.4, Table 302.4 is amended by adding the following new entry in alphanumeric order at the end of the table to read as follows:

§ 302.4 Designation of hazardous substances.

* * * * *

TABLE 302.4.—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES

[**Note:** All comments/notes are located at the end of this table]

Hazardous substance	CASRN	Statutory code†	RCRA waste No.	Final RQ pounds (Kg)
* * * * *			*	*
K181 ..... Nonwastewaters from the production of dyes and/or pigments (including nonwastewaters commingled at the point of generation with nonwastewaters from other processes) that, at the point of generation, contain mass loadings of any of the constituents identified in paragraph (c)(1) of this section that are equal to or greater than the corresponding paragraph (c)(1) levels, as determined on a calendar year basis.	.....	4	K181	(##)

†—Indicates the statutory source defined by 1, 2, 3, and 4, as described in the note preceding Table 302.4.

* * * * * * *

##——The Agency may adjust the statutory RQ for this hazardous substance in a future rulemaking; until then, the statutory RQ applies.

* * * * *

[FR Doc. 03–28783 Filed 11–24–03; 8:45 am]

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Federal Register

Tuesday,
November 25, 2003

Part III

Federal Communications Commission

47 CFR Parts 1, 2, 20, 21, 22, 24, 25, 27, 74, 78, 80, 87, 90, 95, 97, and 101

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets; Proposed Rule and Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 20, 21, 22, 24, 25, 27, 74, 78, 80, 87, 90, 95, 97, and 101

[WT Docket No. 00–230; FCC 03–113]

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document we seek comment on several actions the Commission could take to further enhance spectrum access and efficient use of spectrum through the development of more robust secondary markets in spectrum usage rights in the wireless radio and satellite services. We also seek comment on how to encourage the development of information and clearinghouse mechanisms that will facilitate secondary market transactions between licensees and new users in need of access to spectrum. Finally, we seek comment on further streamlining of application processing for spectrum leasing, transfer of control, license assignments, expanding leasing to additional services, and modifying or eliminating other regulatory barriers impeding secondary market transactions.

DATES: Comments by the public on the proposals set forth in the Further Notice of Proposed Rulemaking (*Further NPRM*) are due December 5, 2003. Reply comments are due January 5, 2004.

FOR FURTHER INFORMATION CONTACT: Paul Murray, Wireless Telecommunications Bureau, at (202) 418–7240, or via the Internet at *Paul.Murray@fcc.gov;* for additional information concerning the information collections contained in this document, contact Judith-B. Herman at (202) 418–0214, or via the Internet at *Judith.B-Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further NPRM* portion of the Commission's Report and Order and Further Notice of Proposed Rulemaking, FCC 03–113, in WT Docket No. 00–230, adopted on May 15, 2003, and released on October 6, 2003. Contemporaneous with this document, the Commission issues a Report and Order (published elsewhere in this publication). The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

Synopsis of the Further NPRM

I. Introduction

A. Wireless Radio Services

1. We adopt a Further Notice of Proposed Rulemaking (*Further NPRM*) that proposes several actions the Commission could take to further enhance spectrum access and efficient spectrum use on a wider scale following adoption of the *Report and Order* in this proceeding. We seek comment on how to encourage the development of information and clearinghouse mechanisms that will facilitate secondary market transactions between licensees and new users in need of access to spectrum. We also seek comment on further streamlining of application processing for spectrum leasing, transfers of control, and license assignments, expanding leasing to additional services not covered by the *Report and Order,* and modifying or eliminating other regulatory barriers impeding secondary market transactions.

B. Satellite Services

2. In the *Further NPRM,* we further explore and seek comment on improving access to unused or underutilized satellite spectrum through secondary markets.

II. Background

3. In November 2000, the Commission concurrently adopted the *Policy Statement* and the *Notice of Proposed Rulemaking* (*NPRM*), 65 FR 81475 (December 26, 2000) in this proceeding regarding secondary markets in spectrum usage rights. The *Policy Statement* enunciated general goals and principles for the further development of those secondary markets, while the *NPRM* proposed concrete steps the Commission might take to implement such policies with respect to Wireless Radio Services and Satellite Services. Thirty-seven parties commented on the proposals set forth in the *NPRM,* and twenty-one filed reply comments.

4. In 2002, the Commission's staff-level Spectrum Policy Task Force undertook a comprehensive review of spectrum policy. In examining 90 years of spectrum policy, the Task Force sought to assist the Commission in developing policies that are more responsive to the consumer-driven evolution of new wireless technologies, devices, and services. The findings and recommendations submitted to the Commission in November 2002 in the *Spectrum Policy Task Force Report* addressed many issues relevant to the promotion of secondary markets in spectrum usage rights.

5. Concurrent with the adoption of the *Further NPRM,* and as part of the same document, we adopted a Report and Order portion (*Report and Order*), in which we take several actions to remove unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights in the Wireless Radio Services. Specifically, in the *Report and Order,* we take several steps to facilitate and streamline the ability of spectrum users to gain access to licensed spectrum by entering into spectrum leasing arrangements that are suited to the parties' respective needs. As a threshold matter, we revise the Commission's interpretation of the *de facto* control standard relating to section 310(d) of the Communications Act, 47 U.S.C. 310(d), in the context of spectrum leasing, replacing the standard that has been in place since 1963 under the *Intermountain Microwave* decision, 12 FCC 2d 559 (1963), with a refined standard that better accords with our contemporary market-oriented spectrum policies, fast-changing consumer demands, and technological advances. The *Intermountain Microwave* standard, which focuses its *de facto* control analysis on whether licensees exercise close working control over all of the facilities using licensed spectrum, is not required by the Communications Act. Moreover, this standard impedes innovative and efficient leasing arrangements with third party spectrum users that do not require Commission approval under the statute. The updated standard we adopt today for leasing refines the *de facto* control analysis, consistent with statutory requirements, by focusing instead on whether licensees continue to exercise effective working control over any spectrum they lease to others.

6. In the *Report and Order,* we implement two different options for spectrum leasing. One option enables licensees and ''spectrum lessees'' to enter into leasing arrangements, without the need for Commission approval, so long as the licensee retains *de facto* control of the leased spectrum under the newly refined standard. The other option permits parties to enter into arrangements in which the licensee transfers *de facto* control to the lessee

pursuant to streamlined approval procedures.

7. In addition, consistent with our efforts to facilitate secondary markets in spectrum by providing for streamlined approval procedures for certain spectrum leasing arrangements that involve transfers of *de facto* control, the *Report and Order* implements similar streamlined Commission approval procedures for all license assignments (whether a full or partial assignment of the license) and transfers of control in the same Wireless Radio Services covered by our newly adopted spectrum leasing policies.

III. Further Notice of Proposed Rulemaking

8. We recognize that the steps taken in the *Report and Order* are limited in scope, addressing only the legal framework for certain types of leasing transactions involving exclusive use wireless licenses. In order to facilitate secondary markets and improve opportunities for more users to gain access to spectrum, we believe we must provide a greater range of incumbent licensees with the requisite regulatory framework as well as the practical capability and economic incentive to permit access to unused spectrum encompassed within their authorizations. Thus, additional actions by the Commission are needed to further promote more flexible and, ultimately, more efficient use of the spectrum, with significant public interest benefits.

A. Achieving a More Efficient Spectrum Marketplace

1. The Commission's Role in Providing Secondary Market Information and Facilitating Exchanges

9. In the *Policy Statement,* we observed that the market for spectrum, unlike the market for most other goods and services, lacks an efficient means for identifying buyers and sellers, comparing prices, and completing transactions. We also noted that negotiation for spectrum transactions can be complicated by the Commission's technical and service rules, and that approval of transactions by the Commission can involve complex submissions in a time-consuming and expensive process for the parties involved.

10. Our vision for the future spectrum marketplace presumes that access to adequate information is essential for ensuring that improved secondary markets achieve the highest benefit for spectrum users and consumers. Entities desiring to obtain access to spectrum must be able to identify the potential suppliers of that access, and we seek to ensure that the costs of obtaining such information and entering into transactions governing spectrum access are not driven by regulatory constraints.

11. There are a variety of approaches the Commission could pursue to promote access to spectrum information needed in the secondary marketplace. The simplest of these approaches—maintaining an on-line database of licensees, lessees, and certain other types of users—is most readily facilitated by Commission action. Specifically, because the Commission is responsible for issuing spectrum licenses and enforcing its rules and policies, it necessarily must collect certain basic and pertinent information, such as the names of licensees and the geographic areas and frequency bands for which they hold their authorizations.

12. In the *Report and Order,* we provide for the public availability of this type of information in the leasing context. Based on the notifications and applications required to be filed by licensees and spectrum lessees, the ULS database will contain information on, *inter alia,* the identity of each licensee and spectrum lessee, licensee and lessee contact information, the spectrum and geographic area encompassed within the lease, and the term of the lease. We ask parties to comment on whether collection of this type of information by the Commission is sufficient to provide potential users of spectrum with adequate information about possible spectrum lease opportunities. Should we collect additional information from licensees, spectrum lessees, or any other authorized users about the nature of their operations (*e.g.*, more detail about the geographic area actually covered and the frequencies actually used)? Would the collection of more detailed operational information be burdensome for affected parties? Does the Commission receive information through any other data gathering requirements that might be useful for secondary market purposes? In addition, we ask parties about their experience in searching on ULS and how to ensure that it is a useful tool for researching secondary market opportunities.

13. We also seek comment on whether and to what extent the Commission should support or encourage the establishment of additional information services, such as listing offers to transfer, assign, or lease, establishing exchange mechanisms, or brokering exchanges. As a general matter, we continue to believe that the private sector is better suited both to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties. We seek comment on the likelihood that private sector mechanisms will develop for the collection and dissemination of secondary market information.

14. We also request comment on the potential for independent third parties, *i.e.*, parties other than licensees and potential lessees, to emerge as ''market-makers'' that not only collect and disseminate information, but actually negotiate, broker, or otherwise facilitate spectrum leasing transactions. We ask interested parties to comment whether they think there is a useful role to be played by market-makers in facilitating secondary markets and increased access to unused spectrum. Are such facilitators necessary? If so, will they emerge naturally as rules allowing secondary market trading are established, or are there steps the Commission should take to promote them? If the Commission takes steps to promote market-makers, what steps should it take?

15. Finally, if interested parties have any alternative proposals for facilitating operation of the marketplace in spectrum capability, we request that they outline and describe such alternatives.

2. Developing Policies That Maximize Potential Public Benefits Enabled by Advanced Technologies, Including Opportunistic Devices

16. Both the *Policy Statement* and the *Spectrum Policy Task Force Report* emphasize that emerging technologies are creating significant new opportunities for enabling more intensive and efficient use of spectrum. In particular, these developments increasingly allow more users the technical ability to access unused spectrum in different bands for short periods of time, and to do so with more tolerance of interference than in the past. The Spectrum Policy Task Force noted that the increased use of digital technologies in general, and specific advances in software-defined radio, frequency-agile radio, and spread spectrum technologies, were creating new opportunities for spectrum access and use. Both the *Policy Statement* and the *Spectrum Policy Task Force Report* noted that these technological advances have important implications with respect to the nature of policies the Commission might adopt to facilitate access to spectrum, including access via secondary markets. Both recommended that the Commission develop licensing

and access models that take this new technological potential into account.

17. We seek comment here on additional steps that the Commission can take to implement spectrum licensing policies that eliminate unnecessary regulatory barriers and promote the potential public benefits made possible by this increasingly dynamic and innovative nature of spectrum use. We agree with the *Spectrum Policy Task Force Report* that these technological advances potentially provide several answers to current and future spectrum policy challenges. In particular, they make possible more intensive and efficient use of spectrum. They also allow operators to take advantage of the time dimension of the radio spectrum, which could enable additional access to spectrum for more users and services.

18. We also request comment on the recommendations made in the *Spectrum Policy Task Force Report* regarding Commission policies on access to spectrum as provided by opportunistic devices in currently licensed bands. In particular, we propose to move forward with the Task Force's general recommendation that, with regard to currently licensed bands, the Commission focus on advancing and improving a secondary markets approach to access to spectrum by opportunistic devices during the near term. Under this approach, the Commission initially would look to promote secondary markets through multiple steps, the first of which we are taking in the *Report and Order.*

19. The *Spectrum Policy Task Force Report* noted that a secondary markets approach did not necessarily require that the prospective opportunistic user negotiate individually with each affected licensee. It suggested that other mechanisms, such as band managers, frequency coordinators, and other intermediaries such as clearinghouses, could possibly manage the secondary uses on licensees' behalf. We seek comment on the possible use of any or all of these mechanisms, and how any such tool should be structured by the Commission.

20. Finally, we seek comment on whether the policies and procedures adopted in the *Report and Order* provide sufficient flexibility for dynamic leasing arrangements involving opportunistic uses of currently licensed spectrum bands. If not, we seek comment on additional steps the Commission should take consistent with our statutory authority. To facilitate secondary access by opportunistic devices, should the Commission more exhaustively define the nature of the rights embodied in ''exclusive use'' licenses in the Wireless Radio Services?

B. Forbearance From Individualized Prior Commission Approval for Certain Categories of Spectrum Leases and Transfers of Control/License Assignments

21. The *Report and Order* takes significant steps to facilitate certain categories of spectrum leasing and to reduce the regulatory process requirements that can delay the timely implementation of business arrangements, increase transaction costs, and present potential regulatory uncertainty. Despite these advancements, however, we are concerned that even the streamlined regulatory process we have established for *de facto* transfer leasing may raise unnecessary hurdles for transactions that we could find, as a categorical determination, are consistent with the public interest.

22. Similarly, we have adopted policies in the *Report and Order* that should significantly streamline and facilitate the regulatory process applicable to transfers of control and license assignments in a significant number of our Wireless Radio Services. Nevertheless, we continue to consider additional actions we might take to minimize any unnecessary regulatory impediments to the effectuation of marketplace transactions while ensuring that we satisfy our statutory obligations relevant to license transfers of control and assignments.

23. The record before us suggests the need to explore in greater detail how to grant increased flexibility to parties to design leasing arrangements that are responsive to their business needs and to implement them without facing unnecessary regulatory delays. We also want to assess whether the public interest objectives and policy goals that underpin any revised approach to *de facto* transfer leasing that we may adopt are also applicable to some categories of outright license transfers and assignments. As part of this examination, we will assess whether, in light of all relevant statutory and public interest factors, we should strive to provide some parity in treatment between lease arrangements that involve a transfer of *de facto* control and full assignment of licenses and transfers of licensee control. This review thus must assess the possible applicability of forbearance or other streamlining steps to transaction applications.

24. *Forbearance standard.* Section 10 of the Communications Act authorizes the Commission to forbear from applying any provision of the Communications Act with respect to telecommunications carriers or telecommunications services (or a particular class thereof), provided a three-pronged test is satisfied. Wireless radio service licensees that are telecommunications carriers, as defined by the Act, or otherwise provide commercial mobile radio services (CMRS) and common carrier-based services, fall within the scope of the Commission's statutory forbearance authority. The forbearance proposals we describe with respect to spectrum leasing thus would be applicable only to entities and services meeting this test. Regulatory processing of leasing transactions involving spectrum and authorizations restricted to private use would not be encompassed within any forbearance-based structure we may adopt.

25. In determining whether forbearance from the prior approval processes is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including whether it will enhance competition among telecommunications service providers. If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for finding that forbearance is in the public interest (one of the three prongs of the test).

1. Forbearance With Respect to Certain Spectrum Leasing Arrangements

26. We seek comment on whether to forbear from individual prior review and approval by the Commission for certain categories of leasing arrangements involving a transfer of *de facto* control that would not raise any public interest concerns. We propose particular benchmarks or elements for leasing transactions (related to the public interest concerns we generally consider in evaluating transactions involving a transfer of *de jure* and/or *de facto* control) that would, if satisfied, allow spectrum lease agreements to be handled under the forbearance model we propose in this *Further NPRM.* We also seek comment on appropriate notification requirements for leases that would not be subject to individualized prior approval under this proposal.

a. Elements of Leasing Transactions That Would Not Require Prior Commission Approval

27. We propose to forbear from the requirements of sections 308, 309, and 310(d) of the Communications Act to the extent necessary to permit us to

process notification filings regarding leases involving a transfer of *de facto* control that satisfy the conditions enunciated in this section without 30 days prior public notice and without prior Commission review and consent. Rather, as discussed below, the parties to the leasing arrangement would be required to file a notification with the Commission within 14 days of execution of the lease. Responsibility for compliance with Commission rules, resolving interference issues, and making Commission filings would shift to the lessee, in the same manner as described under the *de facto* transfer leasing model in the Report and Order above.

28. *The lessee must satisfy applicable eligibility and use restrictions associated with the leased spectrum.* For a leasing agreement to be eligible for processing pursuant to this forbearance proposal, the lessee would be required to meet any applicable eligibility limitations and comply with any use restrictions associated with the spectrum it plans to lease. A lessee would also have to meet our basic qualification requirements for holding an authorization.

29. We seek comment on this proposed element. We note that inclusion of this element does not stand as an absolute bar to a lease contemplating spectrum usage that is inconsistent with applicable regulations but only serves to prevent such a lease proposal from being implemented without prior public notice or Commission review. We believe that, at present, such proposals should be subject to Commission review and evaluation before the lease is implemented. Is there any way to permit greater flexibility in lessee use of spectrum with forbearance-based notification without undermining other policies adopted by the Commission? Do retaining use and eligibility restrictions for lessees as a condition of permissible forbearance processing serve as a significant barrier to implementation of spectrum leases?

30. While we propose to require a lessee to meet any eligibility limitations applicable to the licensee from which it is leasing spectrum, we request comment about how to apply this objective, if we adopt it, in the context of licensees that are designated entities and/or entrepreneurs. Should we require a lessee to be eligible for the same level of competitive bidding benefits, such as bidding credits, as the licensee from which it is leasing? Should we require only that the lessee be qualified to hold the license? If so, do we impose unjust enrichment obligations on a lessee that is qualified for a lesser level of competitive bidding benefits? How do we ensure that the Commission has an opportunity to calculate and collect any unjust enrichment payments?

31. *The lessee must comply with the foreign ownership provisions applicable to Commission licensees.* In order for parties to a lease to avail themselves of forbearance processing as discussed in this *Further NPRM,* we first propose that, for a lease involving any radio authorization, the lessee not be a foreign government or the representative thereof. This limitation is derived from section 310(a), which is an absolute ban on foreign government holding of Commission radio authorizations. Second, for leases involving common carrier radio authorizations, we propose that the lessee must meet the requirements of sections 310(b)(1) through (3), *i.e.,* it must not be an alien or a representative thereof, a corporation organized under the laws of any foreign government, or have more than 20 percent direct foreign ownership. Third, we propose that, as a condition of eligibility for forbearance, the lessee must not have more than 25 percent indirect foreign ownership, or must have previously obtained a declaratory ruling from the Commission in advance of entering into the subject lease that its lease of the spectrum at issue is consistent with the Commission's foreign ownership policies.

32. We request parties to address the merits of applying the proposed foreign ownership conditions. Do the conditions ensure that we are meeting our obligations to enforce and apply sections 310(a) and (b) in the context of spectrum leases that we allow to proceed without individualized prior Commission approval of a lease arrangement? What risk exists that parties could attempt to escape the applicability of the foreign ownership limitations by implementing a lease following only notification to the Commission? Conversely, is this element too strict in terms of applying our foreign ownership policies? Is there any way we can expand the scope of permissible indirect foreign ownership in lessees where we are not individually reviewing the application?

33. We note that, as part of our foreign ownership review process, we coordinate with Executive Branch agencies to ensure that the level and identity of the foreign ownership does not present any concerns with respect to national security, law enforcement, foreign policy, or trade policy. We seek comment on whether our proposed foreign ownership conditions for forbearance raise any questions concerning enforcement of national security, law enforcement, foreign policy, or trade policy by Executive Branch agencies. What steps do we need to take to ensure that national security and other concerns addressed by Executive Branch agencies are satisfactorily handled? We note that no Executive Branch agencies provided comments for the record on this issue and particularly seek their input at this time.

34. *The spectrum lease arrangement must not raise any competitive concerns.* The Commission acknowledges in the *Report and Order* the potential competitive effects that may be associated with a spectrum lease. We seek to clarify under what conditions leases would not pose any significant risk to our competition policies such that we would allow these transactions to proceed without individual Commission review and approval. We note that to the extent we can create more certainty for the parties involved in transactions, we are more likely to promote efficient secondary markets.

35. The benchmarks under which we would allow spectrum leases to proceed without prior Commission approval must consider the competitive effects on both the input and output markets. The input market looks at the spectrum and the number of licensees in an area, while the output market concerns itself with wireless service and the number of entities actually providing service. If concentration increases in the output market (*i.e.,* the number of service providers decreases) as a result of a transaction, there is a potential that higher prices may be charged to consumers. If concentration in the input market increases (*i.e.,* fewer licensees), then there is a potential that higher prices will be charged to the actual providers of service for use of the spectrum, also leading to higher prices to consumers.

36. For the output market, we look at the effect on service providers. We propose that, in order to be eligible for forbearance processing under this proposal, a spectrum lease arrangement must not result in the loss of service in any geographic area by an independent, facilities-based CMRS provider involved in the transaction. We note that this requirement should impose no burden on spectrum licensees that provide service in a given market and that simply wish to lease unused portions of their spectrum. Nor should this requirement burden licensees that have not constructed and are therefore not providing service. The only effect of this condition should be on a licensee that

is providing service and that, as a result of a contemplated lease, would cease to provide such service. We decline, at this time, to forbear from review of this latter class of leases. We request comment whether this is an appropriate safe harbor or whether some other benchmark would more effectively serve the public interest while ensuring that spectrum lease applications processed pursuant to forbearance-based procedures do not pose unacceptable threats to our competition policies. If we adopt this or another safe harbor, we request comment whether we should require the licensee, the lessee, or both to certify that the lease would not result in the loss of an existing, independent competitor in the geographic area encompassed within the lease.

37. For the input market, we consider the potential competitive effects by looking at the amount of spectrum held by the parties involved in the lease. For leases involving a transfer of *de facto* control, we propose to consider the lessee as having influence over the spectrum encompassed within the subject lease agreement. In the case of *de facto* transfer leasing, the lessee is gaining sufficient control of the spectrum to be able to affect competition in the geographic area encompassed by the lease. Although the Commission has eliminated the spectrum cap it applied to certain CMRS offerings and replaced it with a case-by-case examination of the competitive effects of a proposed transaction, we believe that a defined, readily understood benchmark is necessary in this context. Identifying a readily ascertainable safe harbor provides certainty to parties. We request commenters to provide us with recommendations for a safe harbor definition that satisfies these objectives, including a discussion of how the proposed safe harbor level will ensure that no significant competitive issues are posed by a particular lease transaction.

38. We note that our prior spectrum cap addressed only CMRS offerings, which are a subset of the wireless services to which we are proposing to extend the opportunity to implement spectrum leases without advance individualized review by the Commission. As a supplement to or replacement of a defined CMRS benchmark, we could specify that a lessee have an attributable interest in no more than a specified amount of common carrier wireless spectrum in the geographic market. We request commenters endorsing a limitation based on total common carrier wireless spectrum to discuss the appropriate level and the justification for their recommendation.

39. We request comment on these proposals for ensuring that spectrum leases for which we no longer require prior individualized review and approval do not raise competitive issues. With regard to competitive issues, do we need to be concerned only about CMRS spectrum? Are there any individual services covered by our proposals in this *Further NPRM* for which we need to be concerned about potential anticompetitive effects resulting from aggregation of spectrum? Are there other groups of services (similar to the services previously covered by the CMRS spectrum cap—PCS, cellular, and certain SMR spectrum) for which we should establish a total spectrum aggregation benchmark in order to prevent any adverse competitive effects stemming from spectrum leases implemented without prior Commission approval? How should we account for leases of private spectrum in this competitive benchmark setting? How should we determine what spectrum is attributable to a particular entity for competition analysis purposes? Should we consider a test based on ''significant influence'' over the spectrum?

40. When combined with our benchmark protecting the level of competition in the output market, is a benchmark tied to level of spectrum aggregation, whether for CMRS only, other sets of services, or common carrier wireless services generally, an appropriate means for enforcing our competition policies in the context of spectrum leases that may proceed without prior Commission review and approval? We seek to ensure that any benchmarks we define are not too restrictive and thus likely to impede marketplace arrangements that do not raise any competitive concerns. Conversely, we wish to avoid benchmark levels that present unacceptable levels of competitive risk. Is there a better way to define a competitive benchmark?

41. *Addressing any other public interest concerns associated with spectrum leases implemented pursuant to forbearance procedures.* Finally, we seek comment on whether spectrum leasing arrangements involving transfers of *de facto* control may raise any other public interest concerns that we need to address in defining those types of leases that could be implemented without individualized prior approval under an exercise of our forbearance authority. We request that commenters identifying any other relevant public interest considerations discuss whether those concerns can be addressed by some form of benchmark or safe harbor, and what that benchmark or safe harbor might be.

42. Are these proposed prerequisites to spectrum leasing sufficiently clear to permit licensees and lessees to readily comply with them and to provide the information required by a modified Form 603 that we would employ for purposes of notifying us of a spectrum lease? Are there any steps we can take to simplify any of these benchmarks and to facilitate licensee/lessee compliance therewith?

43. Under the proposed forbearance model, parties would be able to implement a lease after filing the required notification and without any prior Commission review necessarily having occurred. The Commission and members of the public would be allowed to review the notification and the Commission could request additional information from the parties if so warranted. As a result, could forbearance processing undercut our ability to enforce our policies? What actions can and should we take in response to a spectrum lease that is improperly implemented under our forbearance processing proposal?

b. Notification

44. As part of our forbearance proposal, we propose that the parties to a spectrum lease arrangement that qualifies for forbearance be required to file, within 14 days of executing the lease, a notification with the Commission similar to that filed by parties to a *pro forma* assignment or transfer of control, including the date on which the parties expect to put the lease into effect. The notifications would be placed on an informational public notice on a weekly basis, and would be ''deemed approved'' as of the date of the public notice. We seek comment on this proposal as well as any other proposal that commenters might suggest.

45. We note that by placing the notifications on public notice, we provide members of the public with the opportunity to scrutinize such filings, similar to our handling of notifications concerning *pro forma* transfers of control and assignment of licenses. Any interested party would be entitled, consistent with our rules and policies concerning standing, to file a petition for reconsideration within 30 days of the date of that informational public notice. Similarly, Commission staff would be able to reconsider the grant on its own motion within 30 days of the public notice date, and the Commission would be able to reconsider the grant on

its own motion within 40 days of the public notice date.

46. We note that we want to ensure that we have sufficient information about lease arrangements in order to effectuate our public interest responsibilities while minimizing the burden on the filing parties in terms of the information they must submit to the Commission. Accordingly, we request parties to discuss the types of information and level of detail that should be included in leasing notifications filed in accordance with this proposed procedure. How much detail should the parties provide regarding the ownership and affiliates of a lessee? What information should the parties provide about any spectrum overlaps created by a spectrum lease?

c. Compliance With the Forbearance Standard

47. As noted above, forbearance from prior approval for spectrum leases involving a transfer of *de facto* control would be available only where telecommunications carriers and telecommunications services are involved in the transaction. We believe that, if we establish the benchmarks outlined above or something comparable, forbearing from the public notice and prior approval requirements would meet the test imposed by section 10.

48. We request commenters to address whether the conditions we have proposed above for permitting leases to proceed without prior public notice and Commission review and approval satisfy the section 10 requirements to support adoption of forbearance. Specifically, have we accurately assessed satisfaction of the section 10 requirements in this context? Can parties provide any further explanation why forbearance from the 30-day public notice period and individualized prior Commission review and approval supports a finding that the section 10 test has been met? Are there other factors that need to be assessed in making the section 10 determination? To the extent parties suggest alternative or additional conditions and benchmarks to be used to define leasing arrangements that can be processed on a forbearance basis, we request that they address in detail the section 10 implications of their proposals.

2. Eliminating Prior Commission Approval for Spectrum Leases Involving Non-Telecommunications Carriers and Non-Telecommunications Services

49. Because our section 10 forbearance authority applies only to providers of telecommunications services, we may forbear from applying section 310(d) requirements only for leases involving telecommunications carriers and telecommunications services. Nevertheless, we wish to explore whether we can provide similar relief to parties whose lease transactions otherwise meet the conditions we have proposed above for forbearance processing but do not fall within the scope of section 10. We believe such action is necessary and appropriate in order to place substantively similar wireless transactions involving different types of licenses on a comparable basis and to minimize unnecessary regulatory discrimination.

50. As a practical matter, many licenses that are beyond the scope of section 10 are not subject to the statutory requirement of 30 days public notice prior to Commission approval, which applies only to common carrier and broadcast licenses. Nonetheless, section 310(d) requires prior Commission review and approval of all transaction applications involving non-common carrier and non-broadcast licenses (as well as applications involving common carrier and broadcast licenses). While the review period may be shortened because the 30-day public notice period is not required as part of that process, the requirement of prior Commission approval can still cause delays and costs for parties seeking to enter into such transactions, many of which raise no significant public interest issues.

51. We therefore seek comment on whether and how the Commission can structure its review to minimize possible delays in processing time for leases involving non-telecommunications carriers and non-telecommunications services. (We note that this proposal encompasses only services covered by the *Report and Order* and services that might be added pursuant to this *Further NPRM.* Are there policy or legal barriers to designating additional categories of leases involving non-telecommunications carriers and non-telecommunications services that would not be subject to prior approval? Do we have authority to take action under other existing provisions of the Communications Act? Are there any other steps we can take in our processing of spectrum lease applications and/or notifications related to such facilities to help place these types of filings on comparable footing with spectrum leases involving only telecommunications services and telecommunications carriers?

3. Forbearance With Respect to Certain Transfers and Assignments

52. We seek to promote secondary markets generally. Secondary markets include not only spectrum leasing arrangements but also transfers of control of licensees and assignment of licenses. In order to not distort the marketplace in favor of spectrum leases and against transfers or assignments that might otherwise be pursued as a matter of sound business decision-making, we believe it is important to ensure that leases involving the temporary transfer of *de facto* control and transfers and assignments involving the permanent transfer of *de facto* and *de jure* control are treated consistently to the extent feasible under our statutory obligations. We further believe that many of the same policy and public interest considerations that apply in the leasing context are equally applicable to transfers and assignments. Accordingly, we seek comment in this section on whether to use our forbearance authority to permit certain transfers of control and assignment of licenses to proceed without prior individualized Commission review and consent, based on benchmarks similar to those we propose to use in the leasing context. We ask parties to address whether the differences between a transfer of *de jure* and *de facto* control, on the one hand, and the transfer of *de facto* control alone pursuant to a lease agreement, on the other hand, warrant similar or distinct regulatory treatments. In addition to the fact that one type of transaction involves a transfer of *de jure* control, we note that such a transfer also is irrevocable. Under a lease, in contrast, the licensee retains an interest in the authorization and may revoke the lease under the terms agreed to by the parties or as prescribed by our rules and policies.

53. Specifically, we seek comment on whether transfers of control and assignment of licenses (including applications proposing to disaggregate spectrum and/or partition a geographic area, or a partial assignment) meeting certain conditions or benchmarks could be eligible for a forbearance-based notification-only consent process. Could we determine that prior review of such transactions is not necessary to fulfill our public interest duties and goals? Clearly, any transfer and assignment arrangements found to be eligible for forbearance-based regulatory processing must be subject to appropriate conditions to ensure that crucial Commission policies are not thwarted by means of secondary market arrangements. Would allowing these categories of transactions to proceed

with a minimum of regulatory cost and delay facilitate the movement of spectrum in the secondary market to its highest valued use, improve efficient use of spectrum, increase opportunities for access to spectrum where needed, and benefit wireless consumers by enhancing the services made available to them?

54. If we were to permit transfers of control and assignment of licenses to proceed on a notification-only basis, we request comment on transactions involving unjust enrichment payments and/or the assumption by a transferee or assignee of the licensee's installment payment plan terms. Under such a regulatory structure, should the presence of either one or both of these factors disqualify a transfer of control or assignment of license from processing under our forbearance procedures? Alternatively, would we be able to build a process for determining the amount of the applicable unjust enrichment payment as well as preparing and signing the documents necessary for a transferee or assignee to assume some portion or all of a licensee's installment payment obligations that ensures that these efforts do not unduly delay implementation of a lease agreement while affording the Commission sufficient time to act?

55. If we were to allow transfers of control and assignment of licenses to proceed without prior Commission approval, what safe harbors or conditions should we impose to ensure that our public interest objectives are not impeded by permitting such transactions to proceed without individualized Commission review? We could apply the same conditions and elements set forth above for spectrum lease arrangements, including: the transferee or assignee must satisfy applicable eligibility and use restrictions associated with the licensed spectrum; the transferee or assignee must comply with the foreign ownership requirements applicable to Commission licensees; the transfer or assignment must not raise any competitive concerns; and, the transfer or assignment must not raise any other public interest concerns, to the extent we determine we need to adopt any other benchmarks or conditions.

56. We request commenters to assess the appropriateness of each of these conditions in applying forbearance from prior public notice and Commission consent to transfers of control and assignment of licenses. Further, the same questions raised regarding these conditions and benchmarks in the context of spectrum leasing eligible for forbearance processing are applicable in this context, and we request interested parties to address those matters here as well. In particular, would forbearance from prior Commission approval for transfers and assignments that meet these conditions facilitate our objectives for development of secondary markets? Would comparability of treatment between spectrum leases, on the one hand, and transfers of control and license assignments, on the other hand, help promote a marketplace that provides incentives to parties to employ the most appropriate arrangements and more effectively drive spectrum use to its highest valued use? In light of the fact that transfers and assignments involve transfer of *de jure* as well as *de facto* control, and on a permanent basis, should we impose any conditions on forbearance that would not apply in the leasing context?

57. If we were to pursue forbearance for transfer and assignment applications, should we employ the same notification requirements as proposed for spectrum leases in a forbearance regime as set forth in the *Report and Order*? Does this provide sufficient notice to interested parties, in light of the differences between spectrum leases and transfers of *de jure* and *de facto* control? Could this process be revised in any way to achieve a better balance among the competing public policy objectives implicated by any such plan for forbearance for transfers and assignments?

58. We request commenters to address whether the forbearance conditions noted above would satisfy the section 10 requirements for extending forbearance to some applications involving transfers of control and/or license assignments. Can parties provide any further explanation why forbearance from the 30-day public notice period and individualized prior Commission review and approval supports a finding that the section 10 test has been met? To the extent parties suggest alternative or additional conditions and benchmarks to be used to define transfers of control and assignment of licenses that might be processed on a forbearance basis, we request that they address in detail the section 10 implications of their proposals.

59. In assessing whether forbearance from prior public notice and individualized Commission review meet the section 10 test, we request commenters to consider the provisions of section 310(d), in particular the requirement that no transfer of control or assignment of license may take place unless the Commission finds that ''the public interest, convenience, and necessity will be served thereby.'' The statutory transfer of control obligations help to ensure that a licensee, initially found qualified to hold a Commission authorization, does not in turn replace itself with an unqualified entity or somehow use the transfer/assignment process to shirk its obligations to the Commission. We wish to ensure that any forbearance policies adopted in the context of transfer and assignment applications will not undercut our ability to carry out this obligation.

60. We acknowledge that in seeking comment on extending forbearance policies to some transfer and assignment applications, we are striving to balance competing goals. We anticipate that more successful functioning of secondary markets—both spectrum leases and outright transfers and assignments—will benefit consumers by increasing the range of wireless services available to them and driving spectrum to its highest valued use. But our public interest considerations are not limited solely to an assessment of competitive issues. We must also look to the Commission's other statutory objectives in weighing whether forbearance from traditional application processing for transfer and assignment applications in total furthers the public interest and whether it can be authorized in accordance with the provisions of section 10. We specifically request comment from interested parties regarding all the factors that should be taken into account in making our public interest calculus in this situation.

61. Finally, to the extent that we pursue forbearance from traditional regulatory processing for substantial transfer and assignment applications in the Wireless Radio Services encompassed within the *Report and Order* or in any additional services based on this *Further NPRM,* relief from prior public notice and Commission approval requirements would be available only for telecommunications services and telecommunications carriers. In a manner parallel to adopting forbearance-based notification processing for spectrum leases, we recognize the need to provide consistent treatment to similar types of wireless service licenses. In addition, in the case of transfers and assignments, there is a real likelihood in today's environment that a licensee would have licenses that would be eligible for forbearance and some that would not. We seek comment on how to ensure that we can expeditiously process a proposed transfer of control or assignment of license that involves both categories of licenses. Are there alternative ways we can streamline processing of transfer and assignment applications involving

non-telecommunications services and non-telecommunications carriers? We note that we seek comment only with respect to services covered by the *Report and Order* and services that might be added pursuant to this *Further NPRM.*

C. Extending the Policies Adopted in the Report and Order to Additional Spectrum-Based Services

62. In the *Report and Order,* we extend our new leasing policies to most Wireless Radio Services in which licensees hold exclusive rights to use the licensed spectrum. We wish to consider extending our leasing policies, as adopted in the *Report and Order* and as they may be modified based on this *Further NPRM,* to additional spectrum-based services. In light of our conclusions about the public interest benefits of spectrum leasing in the services for which we have adopted spectrum leasing policies, we consider in this *Further NPRM* whether we should extend the policies adopted in the *Report and Order* to some of the radio services that we have excluded to date.

63. *Public safety services.* Our Public Safety Radio Pool is regulated pursuant to part 90 of our rules. State and local jurisdictions rely upon our Public Safety Radio Pool to carry out their public safety obligations. The pool encompasses the licensing of the radio communications of state and local governmental entities and certain other categories of activities. Communications transmitted over these facilities may include communications among members of a firefighting team, directions to an ambulance crew, and coordination among different police and fire agencies responding to a regional crisis. In many instances, such public safety communications are highly time-critical, but episodic in nature.

64. We seek comment here on whether to permit licensees in the Public Safety Radio Pool to lease access rights to their licensed spectrum. Initially, we note that any such leasing would be a voluntary transaction by a public safety licensee, and not the use of this spectrum by third parties without consent by that licensee. We also recognize that public safety licensees require near-instant access to their full spectrum capacity, when demand surges due to emergencies. Using traditional technology, the only way to guarantee such access has been full-time dedicated spectrum. New technologies, however, may allow both ultra-reliable near-instant access by public safety licensees and use by other licensees at times of low public safety demand. We note that the Spectrum Policy Task Force recommended that the Commission consider permitting public safety licensees to lease their spectrum usage rights under conditions in which they could immediately reclaim and use their spectrum in such emergencies. Some have proposed to allow public safety licensees to lease their spectrum to others on an interruptible basis, whereby third parties could lease under the condition that they would immediately cease using the spectrum if the public safety licensees exercised their right to preempt such leased use. Under these circumstances, the public safety entity would lose no access to use of its spectrum, which it nevertheless could also make available at certain times to third parties. We intend to begin a proceeding later this year on cognitive radio technologies, including those that would enable interruptible spectrum leasing. That proceeding will consider the state of technology as well as changes to the Commission's technical rules, policies, procedures, or practices that could facilitate the economic development of such technologies.

65. In light of this, we request that commenters evaluate whether we should permit public safety licensees to lease their spectrum to third parties. Generally, we ask whether leasing in this spectrum will further the public interest, for instance, by resulting in more efficient use of the public safety spectrum, by providing another avenue for multiple public safety entities to use the same spectrum, and/or of providing financial resources to public safety licensees. Should we permit public safety licensees to lease to entities that are not eligible to obtain a public safety authorization, which would provide for a larger number of possible arrangements? If we permit leasing of public safety radio pool spectrum, should it be subject to any special rules in light of the importance of ensuring adequate access to spectrum for public safety purposes? Parties supporting leasing in the public safety frequencies should identify any elements of such arrangements that the Commission should consider in adopting policies.

66. We also seek comment on the significance, if any, of the 1997 Balanced Budget Act for spectrum leasing of 700 MHz public safety spectrum. In that Act, Congress directed the Commission to reallocate 24 MHz of the spectrum recovered from TV channels 60-69 for public safety services, and the Commission did so shortly thereafter. Congress specifically defined the ''public safety services'' that are intended to benefit from this spectrum allocation. Section 337(f) of the Communications Act defines the term ''public safety services'' as services: ''(A) the sole or principal purpose of which is to protect the safety of life, health, or property; (B) that are provided—(i) by State or local government entities; or (ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public by the provider.''

67. We seek comment on whether this allocation of spectrum under section 337(a)(1) affects the ability of licensees in the Public Safety 700 MHz band to lease this spectrum for use that does not meet the definition of public safety services. We also seek comment on the significance for spectrum leasing, if any, of the statutory provision that permits nongovernmental organizations to be authorized as licensees of this spectrum by the relevant governmental entities. Because we recently adopted the same eligibility framework for the 50 MHz of spectrum at 4940-4990 MHz that is designated in support of public safety (the 4.9 GHz band), we pose the same questions relative to that band.

68. We also note that certain portions of the 700 MHz public safety spectrum are subject to special licensing regimes under our rules. For instance, 2.4 MHz of the Public Safety 700 MHz band is licensed to each state as a geographic area ''State License.'' The Commission adopted the State License structure after concluding that it would allow, but not require, each state to plan and develop shared, wide-area systems under a substantially streamlined licensing process. In this regard, the Commission revised the rules to allow state licensees to authorize appropriate public safety agencies, including federal entities, within a state and its political subdivisions to use the spectrum pursuant to the state licensee's authorization. We seek comment on the significance, if any, of this regime to our consideration of whether to permit licensees to lease this spectrum.

69. Similarly, we point out that a total of 12.5 MHz of the Public Safety 700 MHz band (the ''General Use'' channels), as well as 6 MHz of public safety spectrum at 821–824/866–869 MHz, is administered by regional or state-level planning committees. We seek comment on whether and/or how leasing would work for spectrum governed by these planning committees and processes.

70. Section 337(c) of the Communications Act provides that the Commission must waive any rules

(other than its regulations regarding harmful interference) necessary to authorize entities providing public safety services to operate on unassigned non-public safety spectrum, if the Commission makes five specific findings. First, the applicant must demonstrate that no other spectrum allocated for public safety use is immediately available. Second, the public safety entity must demonstrate that its use of the requested spectrum will not cause harmful interference to other spectrum users entitled to protection. Third, it must show that public safety use of the frequencies is consistent with other public safety spectrum allocations in the geographic area in question. Fourth, the applicant must show that the unassigned frequencies were allocated for their present use not less than two years prior to the grant of the application at issue. Finally, the applicant must demonstrate that grant of the application is consistent with the public interest. Waivers granted under section 337(c) thus are intended to meet a public safety entity's immediate need for spectrum. Can we extend the spectrum leasing policies adopted in the *Report and Order* to licenses granted under section 337(c)? Are there special considerations we should take into account in making this determination? Are there any additional limits that should be imposed on public safety licensees granted licenses under this section in entering into spectrum leasing arrangements?

71. Finally, some public safety spectrum is specifically designated for ''interoperability,'' ''mutual aid,'' or similar activities. Given the importance of this spectrum in the event of significant disaster or other activity requiring communication and coordination, are there any unique factors we should take into account in considering whether, and if so how, to permit licensees to voluntarily lease this spectrum?

72. *Various Private Wireless and Personal Radio Services.* The Private Wireless Services include spectrum licensed under parts 80 (Maritime Services), 87 (Aviation Services), and 97 (Amateur Radio Service). The Personal Radio Services include spectrum licensed under part 95 of our rules. We use a variety of methods to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. In assessing whether our spectrum leasing policies should be extended to any of these services, the nature of the authorization granted to users of the covered spectrum must be taken into account.

73. Some services encompassed within parts 80, 87, and 95 are licensed by rule. The rules governing these services indicate who may operate in the particular services and constitute the authorization to operate; no individual licenses are issued by the Commission. Specifically, users of the Wireless Medical Telemetry Service, Medical Implant Communications Service, Family Radio Service, Radio Control Radio Service, Citizens Band Service, Low Power Radio Service, and Multi-Use Radio Service do not receive an individualized license to cover operation. Given this licensing approach, we query whether it makes sense to extend our spectrum leasing policies to any services where licenses are issued by rule. We request any parties addressing this issue to discuss the legal and practical ramifications of their position, as well as whether spectrum leasing in such services would further the public interest.

74. In other private and personal wireless services, users have access to spectrum because they have passed a testing requirement. Upon successful completion of the required testing, users have the privilege of using the spectrum pursuant to an operator license. Moreover, these operators generally are not entitled to exclusive access to spectrum but instead must share access to the spectrum with all operators who have successfully completed the exam requirements.

75. Indeed, in some cases, the operations in these services are not governed by the issuance of a Commission license. We also note that in many of these services, stations do not have a fixed transmitting location. We point out that, for many of the services authorized and regulated under these parts, a user does not have authority to transfer or assign an authorization or license. Finally, spectrum throughout these rule parts is subject to shared, not exclusive, use.

76. These factors potentially present significantly different issues in considering whether spectrum leasing is meaningful and/or beneficial in these services than does spectrum leasing of exclusively licensed spectrum. For instance, if a licensee has no ability to transfer or assign a license, should that individual or entity have the ability to engage in spectrum leasing under the policies adopted in this rulemaking? Accordingly, we seek comment on the special considerations potentially applicable to the implementation of spectrum leasing to any of these services. We invite comments on the propriety of expanding the scope of our leasing policies to reach such services. Would such leasing promote more efficient spectrum use? Is spectrum leasing even a reasonable concept for some of these services? Would it further the public interest? Conversely, could it undermine the purposes of these services?

77. The *Report and Order* facilitates spectrum leasing by licensees on Industrial/Business Radio frequencies with exclusive authorizations, but requires that they lease only to entities that are also eligible for Industrial/Business Radio licensees. Should we revise our policies to permit leasing on these frequencies to commercial providers of wireless services? We seek comment on the significance, if any, to our determination on this issue of the Commission's decision in 2000 to permit such licensees to convert to commercial operation or to assign a private license to a commercial licensee in certain defined circumstances.

78. *Wireless services on shared frequencies.* In the *Report and Order*, we declined to allow leasing on shared frequencies, since parties can readily obtain their own authorizations on shared frequencies and they are not foreclosed from applying for an authorization by the existence of another licensee in the same geographic area. In light of our proposals in this *Further NPRM* to expand spectrum leasing and to take other steps to promote secondary markets, we wish to give further consideration to the possible value and implementation of spectrum leasing pursuant to authorizations involving shared frequencies. It might be possible, for example, for a group of licensees operating on the same frequency on a shared basis to cooperate in leasing spectrum to another entity. We recognize that leasing on shared frequencies may raise different implementation issues than leasing pursuant to an authorization involving the exclusive use of a block of frequencies in a particular geographic area. We welcome comments on the feasibility and possible public interest benefits of leasing involving shared frequencies. To the extent commenters take a position on this issue, we request that they address any implementation issues or other considerations that might be unique to this type of leasing. We also ask commenters whether permitting leasing on such spectrum would defeat the purpose of having shared spectrum available to a number of potential users as licensees or would in fact promote achievement of such goals.

79. *Non-multilateration LMS*. Non-multilateration LMS systems, regulated under part 90, transmit data to and from objects passing through particular locations (*e.g.*, automated tolls, monitoring of railway cars), and are licensed on a site-by-site basis, except that municipalities or other governmental operations may file for a non-multilateration license covering an Economic Area. Should the Commission extend its spectrum leasing rules to non-multilateration LMS? Given the nature of the operations and in light of the shared spectrum usage in this service, would spectrum leasing potentially be of benefit in this service?

80. *Instructional Television Fixed Service and Multipoint Distribution Service*. These services currently are regulated under parts 74 and 21, respectively. Our rules currently allow ITFS licensees to lease their excess channel capacity to others. Specifically, an ITFS licensee may lease up to 95 percent of its channel capacity for non-educational programming, consistent with policies unique to this leasing environment. We recently instituted a comprehensive review of the service rules relating to MDS and ITFS. Among other issues, we sought comment on whether there are any circumstances under which we should restrict or require leasing in order to ensure that access to spectrum is not unduly limited.

81. In this proceeding, we query whether we should extend the policies developed in this docket to leasing involving ITFS and MDS licensees, which have developed with their own approach to excess capacity leasing. Should we offer leasing based on the models used in this docket as an alternative format to the licensees in this service as well? Should the leasing policies adopted in this rulemaking replace the leasing standards that have been developed on a case-by-case basis for ITFS and MDS? How does action in this proceeding fit with the issues being considered in the open rulemaking proposing to evaluate the licensing structure for ITFS and MDS? We note that the record compiled in this proceeding on this issue may be taken into account in WT Docket No. 03–66 as we overhaul the rules and policies generally applicable to ITFS and MDS.

82. *Cable Television Relay Service*. This category includes cable television relay service under part 78. Although we explicitly excluded this service from consideration in the *NPRM*, we now request comment from interested parties as to whether we should permit spectrum leasing in this service. Parties addressing this issue should discuss any special considerations that should affect our decision whether to permit licensees voluntarily to lease this spectrum.

83. *Multichannel Video Distribution and Data Service*. Multichannel Video Distribution and Data Service (MVDDS) is regulated pursuant to subpart P of part 101. MVDDS licensees ''must use spectrum in the 12.2–12.7 GHz band for any digital fixed non-broadcast service (broadcast services are intended for reception of the general public and not on a subscribership basis) including one-way direct-to-home/office wireless service.'' This service was established subsequent to the Commission's adoption of the *NPRM* in this proceeding. Although the Commission established multiple geographic service areas, the rules specifically provide that each geographic area license will be auctioned to one licensee. We request interested parties to address whether the Commission's decision to authorize only one licensee per service area in this band should affect our determination whether to permit licensees voluntarily to lease this spectrum. What would be the benefits and/or harms of extending our spectrum leasing policies to this service?

84. *700 MHz Guard Band Managers.* The part 27 Guard Band Manager Service is not included within the scope of action take in the *Report and Order*. Should we take any action to revise the rules that govern the activities of 700 MHz guard band managers? Should such band managers be given the same opportunities as other licensees to engage in a greater range of spectrum leasing activities? Do the considerations related to interference and other operational factors affect the determination we might make with respect to leasing in the 700 MHz guard band manager frequencies?

85. *Satellite Services*. Although we decided in the *Report and Order* to make no changes in the spectrum leasing policies applicable to our satellite services at this time, we remain receptive to proposals for extending the policies we have developed in this proceeding to satellite services or considering alternative lease arrangements. Accordingly, we request parties to address whether we should take any further action in this proceeding to make spectrum leasing as defined in this proceeding available to satellite services as well in order to promote more efficient use of spectrum.

86. *Forbearance*. The forbearance provisions of section 10 apply only to telecommunication services and telecommunications carriers. Some of the licenses listed above involve spectrum operations that do not fall within the definition of telecommunications services. Do we have any other basis under the Act pursuant to which we could adopt any of the policies set forth in the *Report and Order* or proposed in this *Further NPRM*?

87. *Extending streamlined processing of transfer and assignment applications to additional services*. The *Report and Order* applies streamlined processing rules to transfer and assignment applications involving authorizations in the services for which we adopt spectrum leasing policies. Should we expand the scope of authorizations to which this streamlined processing applies? Can we encompass non-telecommunications services and non-telecommunications carriers within this streamlined process? Does it make sense to extend streamlined application processing to transfer and assignment applications involving other services? We request commenters to document the benefits and/or harms (depending upon the position they take) associated with expanding the availability of streamlined processing of transfer and assignment applications to additional services. We note that we seek comment only with respect to services covered by the *Report and Order* and services that might be added pursuant to this *Further NPRM*.

D. Application of the New De Facto Control Standard for Spectrum Leasing to Other Issues and Types of Arrangements

88. As noted in the *Report and Order*, we are at present limiting application of our newly adopted *de facto* control standard to the leasing context. Thus, the facilities-based *Intermountain Microwave* standard for evaluating *de facto* control continues to be the prevailing standard in other regulatory contexts that call for assessment of the exercise of *de facto* control over an applicant or licensee, such as in the case of designated entity and entrepreneur eligibility and management agreements.

89. We now examine whether we should apply our new *de facto* control standard to regulatory contexts other than leasing. We seek comment on whether our conclusion that the *Intermountain Microwave* standard no longer serves the public interest in the leasing context is also relevant to our application of the standard in other contexts. Alternatively, we seek comment on whether there are policy reasons to continue using a facilities-based approach to *de facto* control analysis in other regulatory contexts. Are there contexts in which evaluating

licensee control of facilities continues to be important to regulatory objectives that are distinguishable from our objectives in the leasing context? If we elect to continue using a facilities-based approach in some contexts but not others, how do we reconcile the existence of divergent *de facto* control standards under section 310(d) and other provisions of the Act?

90. *Designated entity and entrepreneur eligibility.* At present, our rules for determining affiliation under our designated entity and entrepreneur policies largely incorporate the *Intermountain Microwave* test. We request commenters to address whether the new standard for assessing *de facto* control adopted in the *Report and Order* should also be employed for assessing affiliation and eligibility for designated entity and entrepreneur status. Specifically, does section 309(j) implicate different concerns from section 309(d)? Do the statutory objectives of section 309(j) require more of a focus on actual facilities control by the beneficiary of our designated entity/entrepreneur policies, or is it sufficient that such an entity can obtain an authorization in an auction and then lease the spectrum pursuant to the Commission authorization without constructing and operating its own facilities? The underlying goals of section 309(j) necessarily will affect whether we conclude that the new *de facto* control standard is suitable in this context. Would the new *de facto* control standard ensure that the intended beneficiaries of section 309(j) in fact receive those benefits and that the designated entity/entrepreneur rules (to the extent they are retained) can not be unfairly manipulated?

91. *Management agreements.* The Commission has long permitted the use of management agreements and other agency arrangements by its licensees as a means to manage their authorized services and facilities. The issue of whether a licensee has retained *de facto* control vis-á-vis a manager in turn has long been premised on the *Intermountain Microwave* decision and our related *Motorola* decision. This assessment of management agreements is inherently a case-by-case determination as well as strongly tied to the control of facilities and operations implemented pursuant to a Commission authorization. Should we adopt the new *de facto* control standard for management agreements as well? Is there anything in the new standard that would forbid elements of management agreements previously entered into in reliance on the *Intermountain Microwave* and *Motorola* standards? Could extending a revised *de facto* control standard to management agreements allow parties to enter into a purported management agreement—which would not be subject to the notification and other obligations applicable to spectrum leasing—when in fact the arrangement should be considered under spectrum leasing policies? Would this allow parties to undercut our efforts to obtain adequate information for enforcement purposes as well as facilitating the efficient functioning of secondary markets?

92. Finally, are there any other contexts in which we currently use the *Intermountain Microwave* standard but should now consider adoption of our new *de facto* control standard? We request commenters identifying any such situations to discuss the appropriateness of the new standard in terms of overall policy objectives as well as practical deployment considerations.

E. Effect of Secondary Markets on Designated Entity/Entrepreneur Policies

93. The Commission's designated entity and entrepreneur policies were adopted to further statutory requirements and to promote participation in the provision of spectrum-based services by certain designated entities. These policies were created in 1994 as one component of the Commission's implementation of the competitive bidding policies and procedures mandated by sections 309(j)(3) and 309(j)(4) of the Act. Historically, the Commission's designated entity policies have sought to ensure that small businesses were given the opportunity to participate in the provision of spectrum-based services.

94. The Commission currently applies a control test to ensure that its designated entity and entrepreneur policies serve the programs' intended beneficiaries. Section 1.2110(c)(2) sets forth the controlling interest standard and is generally used for determining which entities are eligible for small business or entrepreneur status. The premise of this rule is that all parties that control an applicant or have the power to control an applicant, and such parties' affiliates, will have their gross revenues counted and attributed to the applicant in determining the applicant's eligibility for small business status or for any other size-based status using a gross revenue threshold.

95. From the outset, the Commission has also been determined to ensure, pursuant to section 309(j)(4)(E), that the designated entity and entrepreneur policies would not be abused. As the Commission has explained, these policies are designed, among other reasons, to ''deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our preferences to obtain a license at a lower cost than they otherwise would have to pay and later sell it at the market price.'' The Commission has also indicated that the unjust enrichment rules were designed to recapture for the government a portion of the value of the bidding credit or other special provision if a designated entity prematurely transfers its licenses to an ineligible entity. The Commission's unjust enrichment provisions have been codified in section 1.2111 of the Commission's rules.

96. We inquire whether we should alter the policies adopted in the *Report and Order* for designated entity leasing under the *de facto* transfer leasing option or under the proposals contained in this *Further NPRM.* Should we permit a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same small business designated entity status as that of the licensee? What would be the public interest benefits of revising the policies and rules in this manner? Would such a revision be consistent with our unjust enrichment policies and rules? What alternative approaches might the Commission take were it to decide to provide additional flexibility to designated entity licensees? How would we best design policies so as to ensure compliance with our statutory obligations to prevent unjust enrichment?

IV. Procedural Matters

A. Initial Regulatory Flexibility Analysis Regarding the Further NPRM

97. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), *see* 5 U.S.C. 603, the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Further NPRM.* Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Further NPRM*, and they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission will send a copy of the *Further NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small

Business Administration (SBA) in accordance with the Regulatory Flexibility Act. *See* 5 U.S.C. 603(a).

1. Need for, and Objectives of, the Proposed Rules

98. While the changes we adopt today in the *Report and Order* are an important step towards facilitating leasing of spectrum usage rights and enhancing the functioning of the secondary spectrum marketplace generally, we believe that there are additional measures that we might take to improve efficiency and promote access to a secondary spectrum market in order to ensure the greatest benefit to spectrum users and consumers. Thus, in the *Further NPRM,* we seek comment on: (1) How to encourage the development of information and clearinghouse mechanisms to facilitate secondary market transactions between licensees and new users in need of access to spectrum; (2) further streamlining of application processing for spectrum leasing, transfers of control, and license assignments; (3) expanding our spectrum leasing policies to additional services not encompassed within the *Report and Order;* (4) applying the new *de facto* control standard adopted for spectrum leasing to other issues and types of arrangements; and, (5) evaluating whether the spectrum leasing policies adopted in the *Report and Order* for designated entities should be altered in any respect. We discuss the potential impact of these on small entities in the paragraphs that follow.

2. Legal Basis

99. The potential actions on which comment is sought in this *Further NPRM* would be authorized under sections 1, 4(i), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 303(r).

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

100. The RFA requires that an initial 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 impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' This IRFA describes and estimates the number of small entity licensees that may be affected if the proposals in this *Further NPRM* are adopted.

101. This *Further NPRM* could result in rule changes that, if adopted, would create new opportunities and obligations for Wireless Radio Services licensees and other entities that may lease spectrum usage rights from these licensees. When identifying small entities that could be affected by our new rules, we provide information describing auctions results, including the number of small entities that are winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated. Consequently, to assist the Commission in analyzing the total number of potentially affected small entities, we request commenters to estimate the number of small entities that may be affected by any rule changes resulting from this *Further NPRM.*

a. Wireless Radio Services

102. Many of the potential rules on which comment is sought in this *Further NPRM,* if adopted, would affect small entity licensees of the Wireless Radio Services identified herein:

103. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category ''Cellular and Other Wireless Telecommunications.'' Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

104. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

105. *220 MHz Radio Service—Phase II Licensees.* The Phase II 220 MHz service is subject to spectrum auctions. In an order relating to this service, we adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very

small business won any of these licenses.

106. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

107. *Upper 700 MHz Band Licenses.* The Commission released an order authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

108. *Paging.* In a recent order relating to paging, we adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service Report*, 608 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

109. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

110. *Narrowband PCS.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in an order relating to narrowband PCS. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

111. *Specialized Mobile Radio (SMR).* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held

on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

112. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed ''small business'' status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

113. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

114. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PLMR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

115. The Commission's 1994 Annual Report on PLMRs indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

116. Fixed Microwave Services. Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to ''Cellular and Other Wireless Telecommunications'' companies—that is, an entity with no more than 1,500 persons. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

117. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997, and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003, and closed the same day. One license was awarded. The winning bidder was not a small entity.

118. *39 GHz Service.* The Commission defines ''small entity'' for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

119. *Local Multipoint Distribution Service.* An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined ''small entity'' for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

120. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small

business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In an order relating to the 218–219 MHz Service, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this IRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

121. *Location and Monitoring Service (LMS).* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

122. *Rural Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

123. *Air-Ground Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

124. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

125. *Multiple Address Systems.* MAS entities, in general, fall into two categories: (1) Those using MAS spectrum for profit-based uses, and (2) those using MAS spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

126. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the ''Cellular and Other Wireless Telecommunications'' definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

127. *Incumbent 24 GHz Licensees.* The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any entity employing no more than 1,500 persons. We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

128. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million. ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved

these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

129. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order,* we adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not required. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

130. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 MDS licensees that are defined as small businesses under either the SBA's or the Commission's rules. Some of those 440 small business licensees may be affected by the proposals in the *Further NPRM.*

131. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the *Further NPRM.*

132. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

133. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and other Program Distribution, consisting of all such companies having annual receipts of no more than $12.5 million. According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year. Of this total, 1,180 firms had annual receipts of $10 million or less, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Thus, under this standard, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the *Further NPRM.*

134. *Cable System Operators (Rate Regulation Standard).* The Commission has developed, with SBA approval, its own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. The Commission's rules define a ''small system,'' for purposes of rate regulation, as a cable system with 15,000 or fewer subscribers. The Commission does not request nor does the Commission collect information concerning cable systems serving 15,000 or fewer subscribers, and thus is unable to estimate, at this time, the number of small cable systems nationwide.

135. *Cable System Operators (Telecom Act Standard).* The Communications Act, as amended, also contains a size standard for a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

136. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. No auction has yet been held in this service, although an action has been scheduled for January 14, 2004. Accordingly, there are no licensees in this service.

b. Private Wireless Radio Services

137. *Amateur Radio Service.* These licensees are believed to be individuals, and therefore are not small entities.

138. *Aviation and Marine Services.* Small businesses in the aviation and

marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars. There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

139. *Personal Radio Services.* Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under part 95 of our rules. These services include Citizen Band Radio Service (CB), General Mobile Radio Service (GMRS), Radio Control Radio Service (R/C), Family Radio Service (FRS), Wireless Medical Telemetry Service (WMTS), Medical Implant Communications Service (MICS), Low Power Radio Service (LPRS), and Multi-Use Radio Service (MURS). There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being adopted. Since all such entities are wireless, we apply the definition of cellular and other wireless telecommunications, pursuant to which a small entity is defined as employing 1,500 or fewer persons. Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by the proposed rules.

140. Despite the paucity, or in some instances, total absence, of information about their status as licensees or regulatees or the number of operators in each such service, users of spectrum in these services are listed here as a matter of Commission discretion in order to fulfill the mandate imposed on the Commission by the Regulatory Flexibility Act to regulate small business entities with an understanding towards preventing the possible differential and adverse impact of the Commission's rules on smaller entities. Further, the listing of such entities, despite their indeterminate status, should provide them with fair and adequate notice of the possible impact of the proposals contained in the *Further NPRM.*

141. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services. There are a total of approximately 127,540 licensees in these services. Governmental entities as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.

c. Satellite-Related Services

142. *Fixed Satellite Transmit/Receive Earth Stations.* The most recent Commission data shows that there are approximately 3,149 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of earth station licensees that are small business entities under SBA definitions.

143. *Fixed Satellite Small Transmit/Receive Earth Stations.* The most recent Commission data shows that there are approximately 3,149 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of fixed satellite small transmit/receive earth station licensees that are small business entities under SBA definitions.

144. *Fixed Satellite Very Small Aperture Terminal (VSAT) Systems (14 GHz).* These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single ''blanket'' application may be filed for a specified number of small antennas and one or more hub stations. The most recent Commission data shows that there are 485 current VSAT System authorizations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of VSAT system licensees that are small business entities under SBA definitions.

145. *Mobile Satellite Earth Stations.* The most recent Commission data shows that there are 21 licensees. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of mobile satellite earth station licensees that are small business entities under SBA definitions.

146. *Radio Determination Satellite Earth Stations.* The most recent Commission data shows that there are four licensees. We do not request nor collect annual revenue information, and are unable to estimate the number of radio determination satellite earth station licensees that are small business entities under SBA definitions.

147. *Space Stations (Geostationary).* The most recent Commission data shows that there currently are an estimated 75 Geostationary Space Station authorizations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of geostationary space station licensees that are small business entities under SBA definitions.

148. *Space Stations (Non-Geostationary).* The most recent Commission data shows that there currently are seven Non-Geostationary Space Station authorizations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of non-geostationary space station

licensees that are small business entities under SBA definitions.

149. *Direct Broadcast Satellites.* Because DBS provides subscription services, DBS falls within the SBA-recognized definition of ''Cable and Other Program Distribution.'' This definition provides that a small entity is one with $12.5 million or less in annual receipts. Currently, there are nine DBS authorizations, though there are only two DBS companies in operation at this time. We do not request nor collect annual revenue information for DBS services, and are unable to determine the number of DBS operators that would constitute a small business entity under SBA definitions.

150. *Digital Audio Radio Services (DARS).* Commission records show that there are two Digital Audio Radio Services authorizations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of DARS licensees that are small business entities under SBA definitions.

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

151. The policies and proposals in the *Further NPRM* could apply to a significant number of Commission licensees and spectrum lessees in a range of wireless services. The *Further NPRM* explores possible steps to allow certain spectrum leasing arrangements, and possibly license assignments and transfers of control, to be implemented without prior individualized Commission approval, using forms similar to those used at present for obtaining prior Commission approval of these types of transactions. At most, the *Further NPRM* proposals would shift the timing of filing of forms for certain of the transactions. In addition, the *Further NPRM* inquires about extending to additional services the spectrum leasing procedures adopted in the *Report and Order* for spectrum manager leasing arrangements and *de facto* transfer leasing arrangements. Licensees otherwise would have to obtain prior Commission consent to transfers of control or license assignments on similar forms.

152. Consideration of extending the spectrum leasing policies adopted in the *Report and Order* to additional services specified in the *Further NPRM* implicates potential reporting, recordkeeping and compliance requirements for licensees and spectrum lessees in these additional services, including: (1) Retention of lease agreements; (2) reporting of spectrum leasing terms to the Commission; (3) licensee and lessee compliance with the Commission's technical and service rules; (4) licensee filings with the Commission on behalf of the lessee; (5) licensee verification of lessee compliance with Commission rules; (6) licensee supervision of a lessee's adherence to the Commission's rules and policies; and (7) the leasing of spectrum by entities designated as ''small business'' or ''very small business'' under the Commission's rules. Licensees and lessees may retain or hire outside professionals (*e.g.,* legal and engineering staff) to draft lease agreements, provide consulting services, maintain records, and comply with applicable Commission rules. They also may employ existing or new employees to be responsible for reporting, recordkeeping, and other compliance requirements.

153. The *Further NPRM* also explores what steps the Commission should take, possibly including additional information submissions, to promote effective functioning of secondary markets in spectrum usage rights. The *Further NPRM* does not, however, propose any specific reporting, recordkeeping or compliance requirements in this regard. We seek comment on what, if any, requirements we should impose if we adopt the proposals set forth in the *Further NPRM*.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

154. 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.''

155. Regarding our inquiry in the *Further NPRM* about how to facilitate increased access to spectrum usage information, we do not anticipate any adverse impact on small entities. In fact, small (and large) entities should benefit by obtaining access to information that would enable their acquisition of spectrum that suits particular business needs. In addition, we note that we are encouraging parties to comment on whether we should develop an on-line information database, require more detailed operational information from licensees/lessees, create additional information services, encourage private sector collection and distribution of information, or allow independent third parties to act as ''market makers.'' Although certain information collection requirements might impact entities, including small entities, due to increased reporting requirements, the *Further NPRM* and this IRFA provide interested parties with an opportunity to comment on the possible burdens associated with each of the possible steps.

156. We also seek comment in the *Further NPRM* as to whether there are any additional steps that could be taken to further an efficient secondary marketplace through technological advances, opportunistic spectrum users, or other mechanisms (*e.g.,* spectrum managers). We do not anticipate that any rules we decide to adopt in this area would adversely impact small entities. We believe that small (and large) entities will benefit from removing any unnecessary regulatory barriers to efficient spectrum usage.

157. Regarding our proposal in the *Further NPRM* to forbear from individual prior review and approval by the Commission for certain categories of leasing arrangements involving a transfer of *de facto* control, we do not anticipate any adverse impact on small entities. In this connection, while we believe that lessening regulatory requirements would facilitate leasing arrangements entered into by all entities, including both small and large entities, we are mindful that forbearance must also be in the public interest. Consequently, we seek comment on various aspects of this proposal and specifically request commenters, including small entities, to comment on the eligibility criteria for forbearance set forth in the *Further NPRM*. We realize that although some of the specific criteria could impact small entities, overall small entities should benefit from a more streamlined approach. Moreover, these specific criteria affect all entities, whether large or small entities. For example, lessees will need to comply with our foreign ownership restrictions before forbearance would apply. This requirement would be equitably applied to all entities seeking to obtain spectrum through a spectrum leasing arrangement. Moreover, even where possible spectrum lessees may not take advantage of entering into spectrum leasing arrangements without individualized prior Commission approval, such entities (again, whether large or small entities) would be able to

seek approval by means of our prior approval procedures for spectrum leasing arrangements.

158. Similarly, regarding our possible forbearance from individual prior review and approval by the Commission for transfer and assignment transactions, as proposed in the *Further NPRM*, it seems unlikely that small entities would suffer any adverse impact. Nonetheless, we seek comment on the various eligibility criteria that might be employed and, in particular, we encourage small entities to comment on the impact that our unjust enrichment and installment payment policies might have on this proposal.

159. Regarding the possible extension of the spectrum leasing policies adopted in the *Report and Order* to a number of excluded wireless services, as proposed in the *Further NPRM*, we anticipate generally that there would be no adverse impact on small entities. Because there are substantial numbers of small entities in all the wireless services, small entities could be significantly affected by our extension of leasing policies to the wireless services excluded by the *Report and Order.* We believe, however, that these small entities would likely benefit from the increased flexibility that leasing arrangements will offer in meeting their particular spectrum needs.

160. Regarding the possibility of extending our decision to streamline the application processing for transfer and assignment applications to other wireless services, as proposed in the *Further NPRM*, we anticipate no adverse impact to small entities. The information that would be collected under a more streamlined approach is similar to what is currently required under our transfer and assignment rules and should facilitate spectrum leasing by reducing transaction costs, uncertainty, and delay. While an alternative would be to require no approval, we believe that this would run counter to our statutory responsibilities under section 310(d) of the Communications Act.

161. Regarding our analysis in the *Further NPRM* of the question of whether to apply our new *de facto* control standard to regulatory contexts other than leasing, we cannot determine at this time what the impact on small entities might be. Should we move away from the facilities-based approach of our *Intermountain Microwave* standard, it may be presumed that small entities would have more flexibility to enter into certain types of management agreements. On the other hand, such an approach might not be warranted in connection with our designated entity and entrepreneur eligibility rules and policies. We thus encourage small entities to comment on the various issues raised in the *Further NPRM* regarding an appropriate standard for defining *de facto* control.

162. Finally, regarding our inquiry in the *Further NPRM* into whether the restrictions adopted for designated entity leasing should be altered, we believe that small entities would likely benefit from the removal of certain restrictions. But as noted above, there is a balance of competing considerations taking place here. We hope that small entities in particular will comment on what approach best promotes an efficient secondary spectrum market, provides benefits to small entities, and considers our statutory and public interest obligations.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

163. None.

B. Initial Paperwork Reduction Act of 1995 Analysis Regarding the Further NPRM

164. In the *Further NPRM*, this document seeks comment on a proposed information collection As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due at the same time as other comments on this document and must have a separate heading designating them as responses to the Initial Paperwork Reduction Analysis (IPRA). OMB comments are due January 26, 2004. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Comment Dates Regarding the Further NPRM

165. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the *Further NPRM* on or before December 5, 2003 and reply comments on or before January 5, 2004. Comments and reply comments should be filed in WT Docket No. 00-230. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding.

166. Comments may be filed either by filing electronically, such as by using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies. Parties are strongly urged file their comments using ECFS (given recent changes in the Commission's mail delivery system). Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Only one copy of an electronic submission must be filed. In completing the transmittal screen, the electronic filer should include its full name, Postal Service mailing address, and the applicable docket or rulemaking number, WT Docket No. 00-230. Parties also may submit comments electronically by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form (your e-mail address).'' A sample form and directions will be sent in reply.

167. Parties who choose to file by paper may submit such filings by hand or messenger delivery, by U.S. Postal Service mail (First Class, Priority, or Express Mail), or by commercial overnight courier. Parties must file an original and four copies of each filing in WT Docket No. 00–230. Parties that want each Commissioner to receive a personal copy of their comments must file an original plus nine copies. If paper filings are hand-delivered or messenger-delivered for the Commission's Secretary, they must be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002–4913. To receive an official ''Office of the Secretary'' date stamp, documents must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission. (The filing hours at this facility are 8 a.m. to 7 p.m.) If paper filings are submitted by mail though the U.S. Postal Service (First Class mail, Priority Mail, and Express Mail), they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. If paper filings are submitted by commercial overnight courier (*i.e.,* by overnight delivery other

than through the U.S. Postal Service), such as by Federal Express or United Parcel Service, they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. (The filing hours at this facility are 8 a.m. to 5:30 p.m.)

168. Parties may also file with the Commission some form of electronic media submission (*e.g.,* diskettes, CDs, tapes, etc.) as part of their filings. In order to avoid possible adverse affects on such media submissions (potentially caused by irradiation techniques used to ensure that mail is not contaminated), the Commission advises that they should not be sent through the U.S. Postal Service. Hand-delivered or messenger-delivered electronic media submissions should be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002–4913. Electronic media sent by commercial overnight courier should be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743.

169. Regardless of whether parties choose to file electronically or by paper, they should also send one copy of any documents filed, either by paper or by e-mail, to each of the following: (1) Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, facsimile (202) 863–2898, or e-mail at *qualexint@aol.com;* and (2) Paul Murray, Commercial Wireless Division, Wireless Telecommunications Bureau, 445 12th Street, SW., Washington, DC 20554, or e-mail at *Paul.Murray@fcc.gov.*

170. Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. These documents also will be available electronically at the Commission's Disabilities Issues Task Force Web site, *www.fcc.gov/dtf,* and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from 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 at *qualexint@aol.com.* This document is also available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418–7426, TTY (202) 418–7365, *Brian.Millin@fcc.gov,* or send an e-mail to *access@fcc.gov.*

D. Ex Parte Rules Regarding the Further NPRM—Permit-But-Disclose Proceeding

171. With regard to the *Further NPRM,* 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 Commission rules. *See generally* 47 CFR 1.1202, 1.1203, and 1.1206.

V. Ordering Clauses

172. Pursuant to the authority contained in sections 1, 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 303(r), the *Further NPRM* is adopted.

173. The Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of the Report and Order and the Further NPRM of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–29193 Filed 11–24–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 27

[WT Docket No. 00–230; FCC 03–113]

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, we adopt final rules that remove unnecessary regulatory barriers to the development of more robust secondary markets in radio spectrum usage rights. First, we promote the wider use of spectrum leasing arrangements by facilitating the ability of licensees in our Wireless Radio Services that hold ''exclusive'' authority to lease some or all of their spectrum usage rights to third parties for any amount of spectrum and in any geographic area encompassed by the license, for any period of time within the term of the license. Second, we adopt streamlined approval procedures for license assignments and transfers of control in these Wireless Radio Services.

DATES: Effective January 26, 2004, except for §§ 1.913(a), 1.913(a)(3), 1.2002(d), 1.2003, 1.9003, 1.9020(e), 1.9030(e), and 1.9035(e), which contain information collection requirements that are not effective until approved by the Office of Management and Budget (OMB), and 1.948(j), which is effective on April 5, 2004. The agency will publish a document in the **Federal Register** announcing the effective date of the rules that require information collection.

FOR FURTHER INFORMATION CONTACT: Paul Murray, Wireless Telecommunications Bureau, at (202) 418–7240, or via the Internet at *Paul.Murray@fcc.gov;* for additional information concerning the information collections contained in this document, contact Judith B. Herman at (202) 418–0214, or via the Internet at *Judith.B-Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order portion (*Report and Order*) of the Commission's Report and Order and Further Notice of Proposed Rulemaking, FCC 03–113, in WT Docket No. 00–230, adopted on May 15, 2003, and released on October 6, 2003. Contemporaneous with this document, the Commission issues a Further Notice of Proposed Rulemaking (published elsewhere in this publication). The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

Paperwork Reduction Act

This R&O contains a new information collection as described in Section D of the Final Regulatory Flexibility Analysis in Appendix C infra. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection(s) contained in this R&O as required by the Paperwork Reduction Act of 1995, Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection(s) contained in this proceeding. Public and agency comments are due January 26, 2004. Comments should address: (a) Whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Control Number: 3060–xxxx.

Title: Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets.

Form No.: FCC Form 603.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents/Annually: 71,262.

Estimated Time per Response: 9 hrs.

Total Annual Burden: 641,311 hrs.

Total Annual Costs: $117,088,018.33

Needs and Uses: The required notifications and applications will provide the Commission with useful information about spectrum usage and helps to ensure that licensees and lessees are complying with Commission interference and non-interference related policies and rules. Similar information and verification requirements have been used in the past for licensees operating under authorizations, and such requirements will serve to minimize interference, verify that lessees are legally and technically qualified to hold licenses, and ensure compliance with Commission rules.

Synopsis of the Report and Order

I. Introduction

A. Wireless Radio Services

1. In the *Report and Order,* we take several actions to remove unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights in the Wireless Radio Services. Specifically, we take several steps to facilitate and streamline the ability of spectrum users to gain access to licensed spectrum by entering into spectrum leasing arrangements that are suited to the parties' respective needs. As a threshold matter, we revise the Commission's interpretation of the *de facto* control standard relating to section 310(d) of the Communications Act, 47 U.S.C. 310(d), in the context of spectrum leasing, replacing the standard that has been in place since 1963 under the *Intermountain Microwave* decision, 12 FCC 2d 559 (1963), with a refined standard that better accords with our contemporary market-oriented spectrum policies, fast-changing consumer demands, and technological advances. The *Intermountain Microwave* standard, which focuses its *de facto* control analysis on whether licensees exercise close working control over all of the facilities using licensed spectrum, is not required by the Communications Act. Moreover, this standard impedes innovative and efficient leasing arrangements with third party spectrum users that do not require Commission approval under the statute. The updated standard we adopt for leasing refines the *de facto* control analysis, consistent with statutory requirements, by focusing instead on whether licensees continue to exercise effective working control over any spectrum they lease to others.

2. We implement two different options for spectrum leasing. One option enables licensees and ''spectrum lessees'' to enter into leasing arrangements, without the need for Commission approval, so long as the licensee retains *de jure* control of the license and *de facto* control of the leased spectrum under the newly refined standard. The other option permits parties to enter into

arrangements in which the licensee transfers *de facto* control to the lessee pursuant to streamlined approval procedures.

3. In addition, consistent with our efforts to facilitate secondary markets in spectrum by providing for streamlined approval procedures for certain spectrum leasing arrangements that involve transfers of *de facto* control, we determine to implement similar streamlined Commission approval procedures for all license assignments (whether a full or partial assignment of the license) and transfers of control in the same Wireless Radio Services covered by our newly adopted spectrum leasing policies.

B. Satellite Services

4. Based on the record before us, we decline to revise the rules governing fixed and mobile satellite services in this *Report and Order.* We find that the current market for transponder leasing and access to unused spectrum allocated to satellite services through Special Temporary Authority appears to be working well.

II. Background

5. In November 2000, the Commission concurrently adopted the *Policy Statement* and the *Notice of Proposed Rulemaking (NPRM),* 65 FR 81475 (December 26, 2000), in this proceeding regarding secondary markets in spectrum usage rights. The *Policy Statement* enunciated general goals and principles for the further development of those secondary markets, while the *NPRM* proposed concrete steps the Commission might take to implement such policies with respect to Wireless Radio Services and Satellite Services. Thirty-seven parties commented on the proposals set forth in the *NPRM,* and twenty-one filed reply comments.

6. In 2002, the Commission's staff-level Spectrum Policy Task Force undertook a comprehensive review of spectrum policy. In examining 90 years of spectrum policy, the Task Force sought to assist the Commission in developing policies that are more responsive to the consumer-driven evolution of new wireless technologies, devices, and services. The findings and recommendations submitted to the Commission in November 2002 in the *Spectrum Policy Task Force Report* addressed many issues relevant to the promotion of secondary markets in spectrum usage rights.

III. Report and Order

A. Spectrum Leasing Arrangements in Wireless Radio Services

1. Facilitating the Use of Spectrum Leasing Will Further the Public Interest

7. In this *Report and Order,* we find that revising and clarifying our policies and rules to promote the use of a wide array of spectrum leasing arrangements will serve the public interest. Consistent with the goals articulated in the *NPRM,* we grant those licensees holding exclusive use licenses in the Wireless Radio Services identified in this *Report and Order* the right to lease any or all of their spectrum usage rights (*i.e.*, in any amount of spectrum, in any geographic area covered by the license, and for any period of time during the term of the license) to third party spectrum lessees pursuant to the policies and procedures enunciated herein. We also permit these leasing arrangements to be renewable, contingent on renewal of the underlying license authorization, and will allow certain types of subleasing provided that specified conditions are met.

8. We establish a revised *de facto* transfer of control standard for leasing in the Wireless Radio Services in order to better accommodate the various components of the public interest that are relevant to these services and provide two options for spectrum leasing. The first option is consistent with the general approach proposed in the *NPRM.* Under this leasing option, licensees must retain *de jure* control of the license and *de facto* control of the leased spectrum (under the updated *de facto* control standard that replaces the *Intermountain Microwave* standard in the context of leasing). The licensee acts, in effect, as a ''spectrum manager'' with regard to leased spectrum, and remains directly and primarily responsible for ensuring that each of its lessees complies with all applicable Commission policies and rules. We also provide for a second leasing option in response to many commenters' interest in leasing policies that would permit a different, more flexible type of arrangement than proposed in the *NPRM.* Under this second leasing option, licensees are permitted to transfer *de facto* control of the leased spectrum, and associated responsibilities, to spectrum lessees for the term of the lease. In this ''*de facto* transfer'' leasing, spectrum lessees will be held directly and primarily responsible for compliance with applicable policies and rules.

2. Revising the Section 310(d) *De Facto* Control Standard for Spectrum Leasing

9. We replace the *Intermountain Microwave* standard with a new, more flexible *de facto* control standard for spectrum leasing that better balances the statutory requirements of Section 310(d) with more recent statutory and policy changes affecting Wireless Radio Services. The *Intermountain Microwave* ''facilities-based'' control standard is outdated in that it unnecessarily impedes the Commission's efforts to develop flexible and efficient leasing arrangements that permit third-party access to unused or underutilized spectrum usage rights (for either short or long term). We therefore adopt a new set of criteria for determining *de facto* control based on the licensee exercising effective working control over the use of any spectrum it leases, as opposed to direct control of the facilities themselves.

a. Rationale for Revising the Section 310(d) *De Facto* Control Standard for Spectrum Leasing

10. We determine that, in the context of spectrum leasing, retaining the *Intermountain Microwave* standard for evaluating *de facto* control issues under section 310(d) no longer serves the public interest. Specifically, we determine that a new *de facto* control standard—one that continues to require that licensees exercise sufficient working control over the use of their leased spectrum so as to be consistent with the requirements of section 310(d), but also allows additional flexibility to licensees to enter into certain types of leasing arrangements without the need for prior Commission approval—should replace the standard set forth in *Intermountain Microwave* and its progeny.

11. By its very nature, the *Intermountain Microwave* standard imposes significant constraints on the development of these secondary markets because it restricts the ability of licensees to make spectrum available for a defined period to third-party users that would prefer to construct and use their own facilities instead of being forced to rely on the licensees' facilities and technology. The *Intermountain Microwave* standard is a ''facilities-based'' standard that focuses on whether the licensee exercises close working control over many different aspects of the operation of the station facilities using the licensed spectrum. Specifically, applying a six factor test, the Commission examines whether the licensee: (1) Has unfettered use of all station facilities and equipment; (2)

controls daily operations; (3) determines and carries out the policy decisions (including preparation and filing of applications with the Commission); (4) is in charge of employment, supervision and dismissal of personnel operating the facilities; (5) is in charge of the payment of financial obligations, including expenses arising out of operations; and (6) receives the monies and profits from the operation of the facilities. In sum, the *Intermountain Microwave* standard interprets section 310(d) *de facto* control as requiring that licensees themselves exercise close working control of both the actual facilities/equipment operating the radio frequency (RF) energy and the policy decisions (*e.g.*, business decisions) regarding use of the spectrum.

12. The *Intermountain Microwave* standard for *de facto* control, and the particular factors specified therein, are not required by section 310(d). In particular, the Act does not require a facilities-based *de facto* control standard whereby licensees are the only entities that can control the use of each facility and associated policies without Commission approval, and we conclude that such an interpretation is overly circumscribed and restrictive.

13. We conclude that the *Intermountain Microwave* standard is increasingly out of step with the flexible spectrum use policies we are adopting in the Wireless Radio Services and that we consider essential to furthering our obligations to promote the public interest in today's environment. Accordingly, we adopt a more refined interpretation of the section 310(d) *de facto* control standard in the context of spectrum leasing and today's increasingly flexible regulatory policies. This revised standard will permit licensees and spectrum users to enter into certain types of leasing arrangements, without them being deemed transfers of *de facto* control that would require prior Commission approval, so long as the licensee maintains effective working control of the leased spectrum and has the ongoing responsibility for ensuring compliance with applicable Commission policies and rules during the term of the lease.

b. Indicia of *De Facto* Control for Spectrum Leasing Arrangements

14. In the context of spectrum leasing, we no longer interpret *de facto* control under section 310(d) as requiring that the Wireless Radio Services licensees affected by this proceeding exercise close working control over, determine the services on, and set the policies affecting the station(s) operating with the spectrum licensed to them under their authorizations. Instead, when leasing spectrum, these licensees must act as spectrum managers to ensure that the spectrum lessees comply with applicable policies and rules.

15. For all Wireless Radio Services affected in this proceeding, we establish the following two factors for interpreting whether a licensee retains *de facto* control for purposes of section 310(d) when it acts as a spectrum manager when leasing spectrum to a spectrum lessee. First, the licensee remains responsible for ensuring the lessee's compliance with the Communications Act and all applicable policies and rules directly related to the use of the spectrum. This responsibility includes maintaining reasonable operational oversight over the leased spectrum so as to ensure that the spectrum lessee complies with all applicable technical and service rules, including safety guidelines relating to radiofrequency radiation. In addition, the licensee must retain responsibility for meeting all applicable frequency coordination obligations and resolving interference-related matters, and must retain the right to inspect the lessee's operations and to terminate the lease to ensure compliance. Second, the licensee is responsible for all interactions with the Commission, including notification about the spectrum leasing arrangement and all Commission filings required under the license authorization and applicable service rules that are directly related to the use of the leased spectrum.

16. *Licensee responsibility for lessee compliance with Commission policies and rules.* Under the first factor, the licensee remains fully responsible for ensuring that its lessee's operations are in compliance with the Communications Act and all applicable policies and rules directly related to the use of the spectrum. This retention of legal and actual control of the spectrum requires the licensee to take steps through contractual provisions and actual oversight and enforcement of such provisions to ensure that the spectrum lessee operates in conformance with applicable technical and use rules governing the license authorization. In addition, this means that a licensee must maintain a reasonable degree of actual working knowledge about the lessee's activities and facilities that affect its ongoing compliance with the Commission's policies and rules. These responsibilities include: coordinating operations and modifications of the lessee's system to ensure compliance with Commission rules regarding non-interference with co-channel and adjacent channel licensees (and any authorized spectrum user); making all determinations as to whether an application is required for any individual lessee stations (*e.g.*, those that require frequency coordination, submission of an Environmental Assessment under 47 CFR 1.1307, those that require international coordination, those that affect radio frequency quiet zones described in 47 CFR 1.924, or those that require notification to the Federal Aviation Administration under 47 CFR part 17); and, ensuring that the lessee complies with the Commission's safety guidelines relating to human exposure to radiofrequency (RF) radiation (*e.g.*, 47 CFR 1.1307(b) and related rules). Furthermore, the licensee is responsible for resolving all interference-related matters, including conflicts between its lessee and any other lessee or licensee (or authorized spectrum user). We will permit a licensee to use agents (*e.g.*, counsel, engineering consultants) when carrying out these responsibilities, so long as the licensee continues to exercise effective control over its agents' actions as necessary.

17. Other key elements of the licensee's continuing control are that it must be able to inspect the lessee's operations and that it must retain the right to terminate the lease in the event the spectrum lessee fails to comply with the terms of the lease and/or the Commission's requirements. If the licensee or the Commission determines that there is any violation of the Commission's rules or that the lessee's system is causing harmful interference, the licensee must immediately take steps to remedy the violation, resolve the interference, suspend or terminate the operation of the system, or take other measures to prevent further harmful interference until the situation can be remedied. If the lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Commission, the licensee must use all legal means necessary to enforce the order.

18. Licensee responsibility for interactions with the Commission, including all filings, required under the license authorization and applicable service rules directly related to the leased spectrum. Pursuant to the second factor, the licensee is required to engage in all of the licensee interactions with the Commission that are required under the applicable service rules and policies and are directly related to the use of the spectrum. As a preliminary matter, the licensee must file the necessary notification with the Commission,

including information establishing the spectrum lessee's eligibility to lease the spectrum pursuant to the rules applicable to this type of leasing arrangement. In addition, the licensee is responsible for making all required filings (*e.g.*, applications, notifications, and correspondence) associated with the license authorization that are directly affected by the lessee's use of the licensed spectrum. Licensees may use agents (such as counsel and engineering consultants) to complete these electronic filings, just as they do now under current policies.

19. We will not hold the licensee responsible for the lessee's compliance with Commission rules and policies (and associated interactions with the Commission) that are not directly related to the use of the leased spectrum. To the extent a spectrum lessee provides a communications service over the leased spectrum, it may become subject to certain rules and regulatory treatment based on its provision of such service. For instance, lessees that operate as common carriers would have certain rights and obligations under Title II of the Act based on their regulatory status as service providers. Lessees acting as telecommunications carriers may also have certain funding obligations (*e.g.*, universal service fund). Lessees may also provide other types of services (*e.g.*, non-common carrier services, information services, etc.) that subject them to other provisions of the Act and specified regulatory treatment independent of their status as spectrum lessees. In these circumstances, the licensee should not have any responsibility for the lessee's compliance or interactions with the Commission.

20. *Reliance on contractual provisions.* The obligations imposed on the licensee and lessee in the context of our revised *de facto* control standard may be reinforced by the terms of the contract between the parties. Thus, one would expect the spectrum leasing agreement to identify the right of the spectrum lessee to use certain frequencies within the licensee's service area. The agreement may well detail the operating parameters of the lessee's system (*e.g.*, power, maximum antenna heights, frequencies of operation, base station location(s), area(s) of operation, and other parameters) as appropriate, depending upon the service involved and the nature of the lease. The spectrum lessee would agree to operate its system in compliance with all technical specifications for the system consistent with Commission rules. In sum, we will allow parties to determine precise terms and provisions of their contract, consistent with, and except as otherwise reflected in, the mandates, requirements, and other obligations set out in this *Report and Order.* We note, however, that to the extent that parties' leasing arrangements entered into pursuant to this revised *de facto* control standard do not in fact embody the principles set forth above, the Commission may determine that the lease constitutes an unauthorized transfer of control and pursue appropriate enforcement action.

c. Consistency of the New *De Facto* Control Standard for Spectrum Leasing With Section 310(d) Requirements

21. Neither the specific language of Section 310(d) nor the general statutory framework of the Communications Act requires that the Commission apply a facilities-based *de facto* control analysis when interpreting section 310(d) requirements. Rather, the specific factors employed in that type of analysis were derived from the Commission's determination, at that time, that there were a particular set of powers and responsibilities that the licensee should not relinquish in holding a license in order that the Commission conclude that the licensee had not ''transferred, assigned or disposed of in any manner'' a ''construction permit or station license, or any rights thereunder.''

22. Section 310(d)'s purpose generally is to ensure that a licensee that the Commission has already passed upon as qualified in a particular service retains both *de jure* and *de facto* control over the licensed spectrum pursuant to the Act and applicable policies and rules, remains directly accountable to the Commission for ensuring that the licensed spectrum is used in compliance with applicable policies and rules, and prevents ultimate control of the license from being delegated to a non-licensee without Commission approval. We conclude that providing licensees with the flexibility to lease certain of their spectrum usage rights to third parties, without the need for Commission approval, is consistent with the section 310(d) requirements so long as the licensee exercises both *de jure* control and *de facto* control, as we have refined that latter standard in the spectrum leasing context.

23. While the refined *de facto* control standard adopted above departs from the specific factors set forth in *Intermountain Microwave*, the two approaches share a fundamental interpretation of statutory requirements under section 310(d). Under both approaches, a licensee's continued control over the licensed use of spectrum lies at the heart of what it means to retain the license and the rights thereunder. Where the two standards differ is in the significance attached to certain non-licensed activities that relate to the license, and in the degree of control that a licensee must retain over its license and specific license rights to avoid a determination that it has ''transferred, assigned, or disposed of in any manner'' such license or rights.

24. Under the *Intermountain Microwave* analysis set forth in the Commission's 1963 decision, various specified activities, rights, roles, and obligations not covered by the license itself—such as the financing of station operations, the employment of station personnel, and the receipt of profits from station operations—bear on the question of whether a licensee has, in some manner, disposed of its license or any rights thereunder. The financing of station operations or the receipt of station profits, for example, were deemed to implicate section 310(d) not because the licensee had disposed of a right under the license to finance the station facilities or to receive profits (which are not, after all, rights under the license), but instead because the Commission had decided at the time of that decision that when a non-licensee assumes this type of role, the licensee may have partially or indirectly relinquished (*i.e.*, ''transferred, assigned, or disposed of in any manner'') its licensed right to use the spectrum. Today's wireless communications environment, however, has dramatically changed from 1963, and we can no longer generally assume that the licensee must perform non-licensed activities identified by *Intermountain Microwave*—either individually or together—in order to conclude that the licensee has retained its license and all rights thereunder.

25. We observe that even under *Intermountain Microwave*, a non-licensee's mere use of licensed spectrum does not necessarily imply that the licensee has transferred, assigned or disposed of the license or any license rights. The linchpin is control. If the licensee continues to hold a sufficient degree of control over the non-licensee's use, there has been no transfer, assignment, or disposition. The necessary degree of control that the licensee exercises with regard to the third party's spectrum use need not be complete; so long as the licensee retains the requisite degree of control over a license right, the licensee may permit a third party certain use of the licensed spectrum without disposing of that right, even if the third party uses the

spectrum on a daily basis without direct supervision, and even if that licensee has given the third party certain enforceable rights to continue that use.

26. We have structured the new *de facto* control standard to include a set of core responsibilities (described above) that a licensee must retain, and cannot delegate to a spectrum lessee, in order to maintain a level of control over a lessee's use of the spectrum sufficient to satisfy the underlying purposes of section 310(d). These responsibilities are defined by their statutory or regulatory relevance. A licensee exercising these defined responsibilities with regard to the spectrum lessees and leased spectrum will effectively retain *de facto* control of the license under section 310(d), consistent with the public interest.

3. Wireless Radio Services Eligible for Spectrum Leasing

27. We will apply the spectrum leasing policies and procedures set forth in this *Report and Order* to all of the exclusive use licenses in the Wireless Radio Services that were included in the *NPRM* proposal. Thus, exclusive use licenses in the following services would be encompassed under the spectrum leasing procedures we adopt in this *Report and Order*: The Cellular Radiotelephone Service (part 22); the Rural Radiotelephone Service (part 22); the Offshore Radiotelephone Service (part 22); the Air-Ground Radiotelephone Service (part 22); the Paging and Radiotelephone Service (part 22); the narrowband Personal Communications Services (part 24); the broadband Personal Communications Service (part 24); the Wireless Communications Service in the 698–746 MHz band (part 27); the Wireless Communications Service in the 746–764 MHz and 776–794 MHz bands (part 27); the Wireless Communications Service in the 2305–2320 MHz and 2345–2360 MHz bands (part 27); the 220 MHz Service (excluding public safety licensees) (part 90); the Specialized Mobile Radio (SMR) Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licensees in the General Category channels) (part 90); the Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (part 90); paging operations under part 90; the Business and Industrial/Land Transportation (B/ILT) channels (part 90) (which would include all B/ILT channels above 512 MHz and those in the 470–512 MHz band where a licensee has achieved exclusivity, but excluding B/ILT channels in the 470–512 MHz band where a licensee has not achieved exclusivity and those channels below 470 MHz, including those licensed pursuant to 47 CFR 90.187(b)(2)(v)); the Local Multipoint Distribution Service (part 101); the 24 GHz Service (part 101); the 39 GHz Band (part 101); the Multiple Address Systems band (part 101); the Private Operational Fixed Point-to-Point Microwave Service (part 101); the Common Carrier Fixed Point-to-Point Microwave Service (part 101); and, the Local Television Transmission Service (part 101). New services in these parts also may be included within the spectrum leasing rules and policies adopted herein, subject to a separate determination to exclude a service in the proceeding establishing service rules. Nothing in this *Report and Order* is intended to supplant any existing rules or policies permitting shared operation of facilities, private carrier operation, or the sale of excess capacity on a licensee's system.

28. In addition, we will extend these leasing policies to two additional sets of exclusive use licenses: (1) VHF Public Coast Station licenses, a subset of the part 80 services, and (2) 218–219 MHz Service, one of the part 95 services. Finally, we will apply these policies to the new part 27 services in the paired 1392–1395 MHz and 1432–1435 MHz bands and the unpaired 1390–1392 MHz, 1670–1675 MHz, and 2385–2390 MHz bands, as set forth in the order establishing these services. We permit spectrum leasing activities for all covered licensees, whether their authorized use is limited to private or non-commercial operation, or not. For services where shared spectrum can become exclusive under a particular authorization as a result of surpassing loading levels as specified in the applicable rules, we will look at the specific authorization to determine whether it is exclusive on this basis such that the licensee could avail itself of our leasing procedures. Finally, in services where we have adopted licensing with a geographic service area overlay protecting incumbent Wireless Radio Service licensees, the remaining incumbents will also be permitted to engage in leasing. (To the extent an incumbent licensee is not a Wireless Radio Service licensee, as in the instance of broadcast licensees in the 700 MHz bands, we are not at this time permitting it to lease spectrum pursuant to the policies and procedures adopted herein.)

29. The following Wireless Radio Services are excluded from the leasing policies set forth in this *Report and Order*: the Guard Band Manager Service (part 27, subpart G); Experimental Radio, Auxiliary, Special Broadcast, and Other Program Distributional Services (part 74); Maritime Services other than VHF Public Coast Stations regulated under subpart J (part 80); Aviation Services (part 87); Public Safety Radio Services (part 90); the Location and Monitoring Service with regard to licenses for non-multilateration LMS systems (part 90); Personal Radio Services other than the 218–219 MHz Service (part 95); and the Amateur Radio Service (part 97). In addition, at this time we continue to exclude the ITFS and the Multipoint Distribution Service (MDS)/Multichannel Multipoint Distribution Service (MMDS), parts 74 and 21 services, noting that a recent proceeding has been initiated that raises leasing issues, among others, with respect to those particular services. We also exclude the Multi-channel Video Distribution and Data Service (MVDDS) because that service was not included within the scope of the *NPRM* and was established subsequently without any provisions regarding leasing. Finally, we also exclude public safety licensees regulated by part 90, including all public safety licensees that have obtained their licenses pursuant to section 337 authority. In the *Further Notice*, we consider whether to permit spectrum leasing in a number of these services.

30. In our view, leasing on shared frequencies presents implementation concerns, particularly when the shared (or non-exclusive) nature of licensing on such frequencies permits interested parties to seek their own authorizations to operate and where the loading levels may convert a license on a previously shared frequency to an exclusive license. We do, however, consider in the *Further Notice* whether to extend our leasing policies to these and other additional services.

4. Specific Policies and Procedures Applicable to Spectrum Leasing Arrangements

a. ''Spectrum Manager'' Leasing—Spectrum Leasing Arrangements That Do Not Involve a Transfer of *De Facto* Control Under Section 310(d)

31. Under spectrum manager leasing, licensees are not required to obtain prior Commission approval for such leases, but must notify the Commission of the lease and provide certain certifications and information regarding the spectrum lessees and the lease terms.

(i) Respective Rights and Responsibilities of Licensees and Spectrum Lessees

32. *Licensees' rights and responsibilities.* Under spectrum

manager leasing arrangements, we grant licensees the right to lease any or all of their spectrum usage rights to spectrum lessees, and to do so without the need for Commission approval, so long as licensees retain *de jure* control of the license and act as spectrum managers with regard to the leased spectrum by continuing to exercise *de facto* control over that spectrum, pursuant to the standard enunciated above. The Commission will hold licensees directly and primarily responsible for ensuring their lessees' compliance with the Act and applicable Commission policies and rules. Failure of a licensee to meet the criteria of the revised *de facto* control standard would constitute an unauthorized transfer of control under section 310(d). The licensee must also file a notification with the Commission that it has entered into a spectrum leasing arrangement. Failure to do so would subject a licensee to possible enforcement action as a substantive rule violation.

33. Since the licensee retains *de facto* control of the leased spectrum and is held directly accountable for lessee compliance with applicable policies and rules concerning the leased spectrum under this particular type of leasing arrangement, the Commission will look first to the licensee to exercise its responsibilities and ensure compliance. To the extent a licensee fails to ensure its lessee's compliance, the licensee will be subject to enforcement action, including admonishments, monetary forfeitures, and/or license revocation, as appropriate, pursuant to sections 503(b) (forfeiture provisions) and 312 (license revocation provisions) of the Communications Act. We will not, however, hold licensees responsible for their lessees' compliance with Commission rules and policies that are not directly related to the use of the leased spectrum.

34. Because leasing pursuant to this option requires that spectrum lessees meet certain eligibility requirements, we will require that licensees submit appropriate certifications by the lessee as part of the lease notification. We will permit licensees to reasonably rely on those certifications. To the extent, however, that a licensee has knowledge that a spectrum lessee does not satisfy these eligibility requirements, or reasonably should have such knowledge, then allowing such leasing to proceed would violate our spectrum manager leasing policies and we will subject that licensee to appropriate enforcement action. In addition, licensees retain responsibility for maintaining compliance with applicable eligibility and ownership requirements imposed on them pursuant to the license authorization. Spectrum leasing cannot be used by licensees and lessees as a means of thwarting or abusing the basic qualifications and eligibility policies applicable to licensees.

35. *Spectrum lessees' rights and responsibilities.* The spectrum lessee must comply with Commission requirements associated with the license, and must maintain an ongoing relationship with the licensee from whom it leases spectrum. The lessee must certify that it meets all applicable general eligibility requirements associated with the leased spectrum (with such certifications becoming part of the notification submitted by the licensee, as noted above). The lessee's eligibility certifications will be similar to the certifications currently submitted by applicants seeking a license authorization in the particular service. We will hold the spectrum lessee directly accountable for these certifications.

36. Although we intend to enforce our operational rules and policies directly against the licensee in the first instance, as discussed above, we also determine to hold spectrum lessees independently accountable for complying with the Act and our policies and rules. The lessee also must accept Commission oversight and enforcement consistent with the license authorization. The lessee must cooperate fully with any investigation or inquiry conducted by either the Commission or the licensee, allow the Commission or the licensee to conduct on-site inspections of transmission facilities, and even suspend operations under certain conditions. Spectrum lessees who violate our rules or other federal laws potentially will be subjected to forfeitures under section 503(b) of the Communications Act, other administrative sanctions, and criminal prosecution. In addition, to the extent that lessees in their leasing activities qualify as common carriers under section 332 of the Communications Act and Title II, they may also be subject to appropriate enforcement actions.

37. We also will require both the licensee and spectrum lessee to retain a copy of the lease agreement and to make it available upon request by the Commission.

38. *Subleasing.* We will allow spectrum lessees to sublease their spectrum usage rights under certain conditions. Specifically, the licensee must agree to permit subleasing and must be in privity with the sublessee so that the licensee can act as spectrum manager by exercising *de facto* control over the subleased spectrum. Pursuant to the notification requirements for this type of leasing, the licensee also must notify the Commission about the sublease. Licensees may seek to protect themselves from the risks associated with subleasing arrangements by including provisions in their leases that prohibit the spectrum lessee from entering into a sublease.

39. *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal.

(ii) Application of Particular Service Rules and Policies

40. *Interference-related service rules.* The interference and RF safety rules applicable to the licensee as a condition of its license authorization will also apply to the spectrum lessee. Spectrum manager licensees will have direct responsibility and accountability for ensuring that their spectrum lessees comply with these rules, including responsibility for resolving all interference disputes and complying with safety guidelines relating to radiofrequency radiation.

41. *General eligibility policies and rules.* Under spectrum manager leasing, we will require that spectrum lessees satisfy the eligibility and qualification requirements that are applicable to licensees under their license authorization. Specifically, as a policy matter we extend to spectrum lessees the eligibility requirements of section 310 pertaining to foreign ownership, doing so in order to both protect the national security and promote the public interest benefits of foreign investment in U.S. telecommunications markets. Accordingly, we will require that spectrum lessees meet applicable foreign ownership eligibility requirements by certifying that they meet section 310(a) requirements and, to the extent that section 310(b) applies (*e.g.*, to the extent they are common carriers), that they meet those requirements as well. As part of the notification process for this type of leasing arrangement, each spectrum lessee must certify that it is not a foreign government or representative of a foreign government in the same manner as required of licensees pursuant to section 310(a). In addition, if the

spectrum lessee intends to provide a service to which section 310(b) applies, it must certify that it is not an alien or representative of an alien, is not organized under the laws of a foreign government, does not have more than one-fifth direct alien ownership, or either does not have more than one-quarter indirect alien ownership or has obtained the necessary declaratory ruling approving its level of ownership above one-quarter indirect alien ownership.

42. We will also require, as a general policy matter, that spectrum lessees satisfy the qualification requirements, including character qualifications, applicable to the licensee under the license authorization. Thus, for instance, the lessee must not be a person subject to the denial of Federal benefits under the Anti-Drug Abuse Act of 1988. Similarly, the lessee must certify whether it is a person who has been convicted of a felony, had a license revoked for any reason (*e.g.*, misrepresentation or lack of candor), had any application for initial, modification, or renewal of a station authorization, license, or construction permit denied by the Commission, or has been convicted of unlawful monopolization.

43. *Use restrictions.* With regard to use restrictions, where a license authorization in a particular service is flexible, and imposes few if any restrictions on the types of services that licensees may offer, spectrum lessees too will be permitted to offer any of these services regardless of the specific services being offered by the licensee. To the extent the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, we also will restrict spectrum lessees in the same manner. Thus, for example, to the extent that licensees in private services are restricted from deploying commercial services on their spectrum, we also restrict lessees from using the spectrum for commercial services.

44. *Designated entity/entrepreneur policies and rules.* Under this leasing option, we determine that designated entity and entrepreneur licensees will be able to undertake spectrum leasing arrangements so long as doing so is consistent with our existing designated entity and entrepreneur policies and rules. A designated entity and/or entrepreneur licensee may lease to any spectrum lessee and avoid the application of our unjust enrichment rules and/or transfer restrictions so long as the lease does not result in the lessee becoming a ''controlling interest'' or affiliate that would cause the licensee to lose its designated entity or entrepreneur status. We will require each licensee notifying the Commission about a lease involving a license still subject to entrepreneur transfer restrictions or potentially subject to unjust enrichment obligations to certify that the lease does not affect the licensee's continuing eligibility to hold a license won in closed bidding or to retain bidding credit or installment payment benefits. Accordingly, nothing we do herein alters a designated entity's or entrepreneur's obligation to comply with our attribution requirements or changes the rules regarding the five-year transfer restriction for C and F block licenses won in closed bidding. Where a designated entity or entrepreneur licensee that is participating in the Commission's installment payment program enters into a lease that preserves its eligibility, the licensee remains fully and solely responsible for the outstanding debt amount, as reflected in our rules and any applicable financing documents. To the extent that there is any conflict between the revised *de facto* control standard for spectrum leasing arrangements, as set forth in this *Report and Order*, and the *de facto* control standard in our rules for designated entities and entrepreneurs, we will apply the latter for determinations regarding whether the licensee has maintained the requisite degree of ownership and control to allow it to remain eligible for the licenses or for other benefits such as bidding credits and installment payments.

45. *Construction/performance requirements.* We will allow licensees to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization. This reliance will be permissible whether the licensee is required to construct and operate one or more specific facilities, cover a certain percentage of geographic area, reach a certain percentage of population, or provide ''substantial service.'' In addition, we determine that applicable performance or buildout requirements remain a condition of the license, and cannot be passed on to spectrum lessees even though the activities of the latter may be ''counted'' for purposes of measuring buildout. To the extent that a licensee seeks to rely on the activities of a spectrum lessee to meet the licensee's obligation, and for some reason the lessee fails to engage in those activities, the Commission will enforce the applicable performance or buildout requirements against the licensee, consistent with our existing rules. Similarly, to the extent there are rules relating to discontinuance of operation, the Commission will enforce these rules against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

46. *Policies and rules relating to competition.* Assessment of potential competitive effects of transactions, whether they be transfers of control, license assignments, or spectrum leasing arrangements, remains an important element of our policies to promote facilities-based competition and guard against the harmful effects of anticompetitive conduct. Accordingly, we will apply the Commission's general competition policies to spectrum manager leasing arrangements.

47. Specifically, the cellular cross-interest rule and associated policies will be applied to spectrum leasing arrangements involving cellular authorizations in Rural Service Areas (RSAs). Thus, a cellular licensee in an RSA (or any entity with an attributable interest in such a licensee) would not be permitted to enter into a spectrum lease involving the other cellular spectrum block to the extent the spectrum lessee would have the authority to make decisions or otherwise engage in activities that determine or significantly influence the nature and types of services provided using the leased spectrum, the terms upon which those services are offered, or the prices charged. For leases meeting these tests, the cellular spectrum is attributable to the spectrum lessee.

48. In addition, we retain the discretion to consider the use of leased spectrum by a lessee to provide facilities-based commercial mobile radio services as a relevant factor when assessing marketplace competition in the Commercial Mobile Radio Services (CMRS) in transactions involving either the licensee or the spectrum lessee. As we indicated when we eliminated the CMRS spectrum cap, the Commission now evaluates the competitive effects of CMRS spectrum aggregation on a case-by-case basis. In those circumstances where information on potential competitive harm comes to our attention or where serious allegations of substantial competitive harm are made, we must determine, based on a case-by-case review of all relevant factors, whether services provided over both leased and licensed spectrum in specific product and geographic markets should be taken into account. Thus, the presence of a spectrum lease or other arrangement between or among CMRS providers may be attributable.

49. Although we anticipate that most leasing arrangements will serve to enhance competition, including the entry of new facilities-based competitors, we must nonetheless ensure that leasing does not enable harmful anticompetitive conduct. Because spectrum manager leases require only notification to the Commission, it is important that parties to such leases provide certain basic information to the Commission and the marketplace regarding any potential impact of the lease on facilities-based competition. At the same time, it is important that any such disclosure requirements not be so burdensome that they would discourage parties from using the spectrum leasing model to negotiate spectrum access arrangements that pose no competitive threat. To balance these interests, we will require, as part of the spectrum manager lease notification process, in which certain lessees provide necessary certifications relating to these policies. Specifically, if the lease involves spectrum in the cellular services in Rural Service Areas, spectrum lessees must certify that the leasing arrangements do not violate the cellular cross-interest rules. In addition, spectrum lessees leasing CMRS spectrum (which includes cellular, broadband PCS, and SMR spectrum regulated as CMRS) must disclose to the Commission whether they hold direct or indirect interests (of 10 percent or more) in any entity that already has access to 10 MHz or more of CMRS spectrum (through a license or lease) in the same geographic area. For the purpose of implementing this requirement, we define these direct or indirect interests in the same manner as defined pursuant to existing rules for wireless licensees under part 1 of our rules. In particular, a lessee must disclose whether it has a 10 percent direct or indirect interest in an entity, as defined in § 1.2112 of subpart Q of our rules. We will also require these leasing parties to indicate whether the lease arrangement reduces the number of CMRS competitors in the market. Such disclosure requirements will help to ensure market transparency, and will also help the Commission to distinguish those leases that may warrant further inquiry to assess whether there is a competitive impact from the likely vast majority of leases that will have no competitive impact and require no further inquiry.

50. *Regulatory classification.* We determine that for those license authorizations under which licensees have the opportunity to choose whether to operate as and be regulated under a CMRS/common carrier or a PMRS/non-common carrier structure (or both), spectrum lessees will also be entitled, to the same extent, to select their own regulatory status. In the case of a service in which the regulatory status of licensees is prescribed by rule, the lessee will be presumed to be bound by the status set forth in the rules and applied to the licensee. Under this type of spectrum leasing, to the extent that a spectrum lessee seeks to operate under a different regulatory status than the licensee or the service, the lessee will be responsible for meeting the obligations relating to its choice.

51. *Various other rules, including certain statutory obligations.* Under spectrum manager leasing, spectrum lessees will be subject to other statutory and related regulatory requirements—including Title II obligations or other requirements, such as those relating to the Communications Assistance for Law Enforcement Act (CALEA), Equal Employment Opportunity (EEO), Telecommunications Relay Service (TRS), North American Numbering Plan (NANP), universal service funds, and regulatory fee payment obligations—depending upon the nature of their operations on the leased spectrum and the terms of the applicable statutory and/or regulatory provisions. These regulatory requirements are generally applied to entities based on the type of service they provide without regard to their status as a licensee or a lessee. For instance, such provisions may apply to common carriers or telecommunications carriers as defined under the Communications Act. Thus, if a lessee is operating as a common carrier, it will be subject to sections 201 and 202 of the Communications Act of 1934, as amended, and the related obligations attendant to being a provider of wireless services on a common carrier basis. The applicability of these types of provisions will be independent of an entity's status as licensee or spectrum lessee.

52. While the rules and statutory requirements cited above apply to lessees as well as licensees based on the provision of service, we note that our E911 requirements expressly apply only to ''licensees'' instead of particular services. Thus, a spectrum lessee who provides facilities-based service does not come within the literal scope of the E911 rule. Because we do not intend that spectrum leasing be used as a means of circumventing the underlying purposes of our service rule and policies, including our E911 rules, licensees retain their E911 obligations with respect to leased spectrum. Accordingly, to the extent that a spectrum manager leasing arrangement involves a lessee providing CMRS services, the licensee must continue to ensure that the E911 obligations are being met, whether by the licensee or its lessee.

(iii) Notification

53. For spectrum manager leasing, we will require that licensees provide notification to the Commission that they have entered into this type of spectrum leasing arrangement. This notification must be submitted in advance of operation, as discussed below, and failure to notify the Commission prior to operation would constitute a substantive rule violation subject to enforcement action. This notification provides us with useful information about spectrum usage and helps us to ensure that licensees and lessees are complying with our interference and non-interference related policies and rules.

54. *Notification requirements.* Licensees must report these leases to the Commission within 14 days of execution, and at least 21 days in advance of operation. Licensees will be required to submit the following information on each spectrum lease to the Commission: (1) Necessary information on the identity of the spectrum lessee (including necessary contact information) and its eligibility to lease spectrum; (2) the specific spectrum leased (in terms of amount, frequency, and geographic area involved), including the call sign affected by the lease; (3) the term of the lease; and (4) other information required pursuant to the policies applicable to these leasing arrangements (*e.g.*, foreign ownership and other certifications), as discussed above. This notification will contain information similar to that submitted currently on our Form 603. Such submission will be placed on an informational public notice on a weekly basis, unless the license involved is not subject to prior public notice requirements. We include an advance notification requirement so as to allow the Commission and the public some opportunity to review the leasing arrangement prior to operation. While we will not usually require the lease parties to file a copy of the lease agreement with the notification, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection upon request by the Commission or its representatives. For spectrum manager leasing arrangements of one year or less, licensees must provide notice at least ten days in advance of operation. In all other respects, the rules generally applicable to spectrum manager leasing

arrangements, as enunciated above, apply to these shorter-term arrangements.

55. *Commission authority to investigate and terminate the lease.* The Commission retains the ability to investigate and terminate any spectrum leasing arrangement to the extent it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control under our new standard or raises foreign ownership, competitive, or other public interest concerns. We will closely monitor leasing information and activity to ensure that licensees and lessees do not use this leasing option as a means of thwarting or abusing the Act or applicable Commission policies and rules (*e.g.*, the basic qualifications and rules applicable to licensees). Commission review of a spectrum lease implemented under this option might be initiated if information were to come to the attention of our staff—through the notification process or other sources (*e.g.*, news reports or press releases)—that suggested a potential problem with the lease under the applicable rules and policies. Alternatively, interested parties might seek informal guidance or a formal determination from the Commission regarding a particular lease arrangement by means of a letter to the Commission, a petition, or a complaint. Such processes are no different from current practices before the Commission where an entity may provide information to the Commission staff and pose questions about the permissibility of, for example, the terms and practices of the parties under a management agreement or other business transaction. We believe that these processes will ensure that we are able to terminate a leasing arrangement under this option where warranted in fulfillment of our statutory and public interest obligations.

b. *''De Facto* Transfer'' Leasing—Spectrum Leasing Arrangements That Involve Transfers of *De Facto* Control Under Section 310(d)

56. We also provide licensees and spectrum lessees with an alternative model for spectrum leasing—one in which licensees can delegate *de facto* control of the leased spectrum and associated legal responsibilities to their spectrum lessees. Under this *''de facto* transfer'' leasing, we include two general categories for this type of spectrum leasing: (1) ''Long-term'' leasing arrangements (*i.e.*, leases with individual or combined terms of longer than 360 days); and (2) ''short-term'' leasing arrangements (leases of 360 days or less). Although these leasing arrangements involve transfers of *de facto* control under Section 310(d) that necessitate Commission approval, we adopt significantly streamlined procedures to minimize the regulatory burdens and transaction costs imposed on parties entering into these arrangements.

(i) Long-Term *De Facto* Transfer Spectrum Leasing Arrangements

57. This leasing option enables licensees and spectrum lessees to enter into the kind of long-term spectrum leasing arrangements endorsed by many of the commenters. Under this option, referred to as *de facto* transfer leasing, licensees will be permitted to transfer *de facto* control of the leased spectrum to lessees pursuant to streamlined approval procedures as long as the leasing arrangements meet certain conditions. We define these long-term leases as lease arrangements involving transfer of *de facto* control to a spectrum lessee that do not qualify as temporary ''short-term'' leasing (*i.e.*, leasing of no more than 360 days duration).

(a) Respective Rights and Responsibilities of Licensees and Spectrum Lessees

58. *Licensees' rights and responsibilities.* Under this leasing option, licensees may lease any or all of their spectrum usage rights pursuant to spectrum lease arrangements in which they retain *de jure* control of their licenses but transfer *de facto* control of leased spectrum, and associated responsibilities, to spectrum lessees. Under these *de facto* transfer leases, licensees are not required to exercise the kind of operational oversight over the leased spectrum and the lessee that is prescribed for licensees with regard to spectrum manager leasing (which requires no Commission approval). We thus relieve licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules.

59. While licensees are relieved of many responsibilities under this leasing option, they nonetheless retain some residual responsibilities regarding the leased spectrum. The lease does not involve a complete and permanent transfer of control, and the licensee retains *de jure* control of the license as well as some degree of actual control, such that it retains some responsibility to the Commission for operations on spectrum encompassed within its license. While we seek to carefully limit this licensee responsibility in order not to impede commercially viable leasing arrangements, licensees who are implementing these leases cannot relinquish all rights and responsibilities of the license authorization to their lessees. Moreover, we think it is appropriate to expect our licensees to exercise an appropriate degree of care when entering into *de facto* transfer leasing arrangements. For instance, if a licensee engages in a sham leasing arrangement with an affiliate in an effort to enable that affiliate to undertake activities that might otherwise put the license at risk if undertaken directly by the licensee, we would subject the licensee to appropriate enforcement action. We will also hold the licensee accountable for its own violations, including those related to its lease arrangement with the lessee. In addition, we find that it may be appropriate to hold the licensee responsible in specific cases for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge or should have knowledge. An example of this type of situation might include the case where a licensee allows a lessee to continue to operate on the leased spectrum despite a Commission order that the lessee cease operations.

60. *Spectrum lessees' rights and responsibilities.* Under *de facto* transfer leasing, the primary responsibility for ensuring compliance with Commission policies and rules is transferred to spectrum lessees. We will hold lessees primarily and directly responsible for complying with the interference, technical, or other service rules (including eligibility requirements) applicable to the licensee pursuant to the Act, the Commission's rules, and the terms of the underlying authorization. We determine that, under the procedures we adopt herein, spectrum lessees will be granted an instrument of authorization that brings them within the scope of our direct forfeiture procedures under section 503(b) of the Act. Lessees will assume responsibility for interacting with the Commission regarding the leased spectrum, and making all related filings.

61. If there is a question about interference or other technical performance issue, the Commission's Enforcement Bureau will first approach the authorized spectrum lessee, and the lessee will be expected to bring its operations into compliance with the Commission's requirements. To the extent that spectrum lessees violate the Communications Act, Commission rules, a Commission order, or a term or condition of an authorization, they will be subject to monetary forfeitures pursuant to section 503(b)(1) in the same manner as any other person holding an authorization.

62. *Subleasing.* We conclude that permitting subleasing for long-term *de facto* transfer leases will afford parties additional flexibility in their business arrangements. We thus will permit spectrum lessees under long-term leasing arrangements to sublease spectrum, provided certain conditions are met. Specifically, parties entering into a sublease will be required to comply with the Commission's rules for obtaining approval for leasing arrangements and will be governed by those same policies. As with spectrum manager leasing arrangements, licensees may seek to protect themselves from the risks associated with subleasing arrangements by including provisions in their leases that prohibit the spectrum lessee from entering into a sublease. Where a sublease has been approved by the Commission, the sublessee will become the party primarily responsible for compliance with Commission rules and policies, although the lessee and licensee will continue to have some responsibility to the Commission for their actions as well as those of the sublessee. In addition, when the parties to a sublease file their application with the Commission, they must include written consent from the licensee to the proposed sublease. This will ensure that the licensee is aware of the sublease and the role of the new sublessee in operating on frequencies covered by the licensee's license.

63. *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal. The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the extension of the spectrum leasing arrangement.

(b) Application of Particular Service Rules and Policies

64. *Interference-related service rules.* As with all other forms of spectrum leasing discussed in this *Report and Order,* spectrum lessees must comply with all of the interference rules applicable to licensees under the license authorization. Under this type of leasing arrangement, however, as distinct from spectrum manager leasing above, spectrum lessees are primarily responsible for complying with these rules, including responsibility for resolving all interference disputes and complying with safety guidelines relating to radiofrequency radiation.

65. *Eligibility policies and rules.* Spectrum lessees under this *de facto* transfer leasing option must meet the same eligibility and qualification restrictions (including character qualifications) that are applicable to licensees under their license authorization. These include general eligibility restrictions placed on the licensees under their authorizations, such as foreign ownership limitations. As with spectrum manager leasing, they also include qualification restrictions. The lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988, and must certify whether it is a person who has been convicted of a felony, had a license revoked for any reason (*e.g.*, misrepresentation or lack of candor), or been convicted of unlawful monopolization.

66. *Use restrictions.* Spectrum lessees entering into *de facto* transfer leasing arrangements must comply with the use restrictions that the Commission has imposed with respect to particular services and authorizations, as with spectrum manager leasing.

67. *Designated entity/entrepreneur policies and rules.* Under this *de facto* transfer leasing option, designated entity and entrepreneur licensees may enter into leasing arrangements with any entity under the streamlined processing procedures described below, subject to any applicable transfer restrictions and/or any applicable unjust enrichment payment obligations. For example, under this option, a licensee holding a C or F block broadband PCS license won in closed bidding may, during the first five years of the license's initial term, enter into a spectrum leasing arrangement with a non-eligible entity only if the licensee's five-year construction requirement has already been met. A licensee paying for a license under the Commission's installment payment program may enter into a long-term leasing arrangement for that license without triggering unjust enrichment obligations, provided that the lessee would qualify for installment payments under terms as favorable as the licensee's. However, nothing in a spectrum leasing agreement can modify the licensee's sole responsibility for its debt obligation to the government, pursuant to the Commission's rules and any applicable notes and security agreements. A licensee using installment payment financing that seeks to enter into a spectrum leasing arrangement with a lessee that would not qualify for an installment loan under terms as favorable as the licensee's must make full payment of the remaining unpaid principal and must pay any interest accrued through the effective date of the lease. Small business bidding credit unjust enrichment payments will be required and calculated as they would if the license were being assigned or transferred. Accordingly, we will require each licensee applying to the Commission to enter into a long-term *de facto* transfer leasing arrangement to certify whether or not the license is subject to entrepreneur transfer restrictions or unjust enrichment obligations. In addition, we will require each licensee applying to the Commission to enter into a long-term *de facto* transfer leasing arrangement involving a license still subject to the installment payment program, and its proposed lessee, to execute the Commission-approved financing documentation.

68. *Construction/performance requirements.* We will allow licensees using this leasing option to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization. Our policies here are identical to the approach taken with respect to the spectrum manager leasing option. Because we determine that applicable performance or buildout requirements remain a condition of the license, and cannot be passed on to spectrum lessees even though the activities of the latter may be ''counted'' for purposes of measuring buildout, the Commission is not imposing any buildout obligations on the spectrum lessee.

69. *Policies and rules relating to competition.* As with spectrum manager leasing, the Commission's policies relating to cellular cross-interest restrictions and promoting facilities-based competition and guarding against the harmful effects of anticompetitive conduct will be applied to long-term *de facto* transfer spectrum leasing arrangements, and we will require that spectrum lessees submit the same certifications relating to competition matters. Attribution of spectrum will necessarily depend upon the actual circumstances of a given lease.

70. *Regulatory classification.* As with spectrum manager leasing arrangements, a spectrum lessee under long-term *de facto* transfer leasing will be entitled to select its own regulatory status, either as a CMRS/common carrier or PMRS/non-

common carrier (or both), to the same extent as the licensee would be able to do under the applicable service rules. Under this leasing option, spectrum lessees are the entities responsible for meeting the necessary filing and notification obligations.

71. *Various other rules, including statutory obligations.* Under this type of leasing, we will subject spectrum lessees to various other statutory and related regulatory requirements '' including Title II obligations or other requirements, such as those relating to the Communications Assistance for Law Enforcement Act (CALEA), Equal Employment Opportunity (EEO), Telecommunications Relay Service (TRS), North American Numbering Plan (NANP), universal service funds, and regulatory fee payment obligations ''in the same manner as if they were licensees with regard to the leased spectrum. We do so because spectrum lessees gain *de facto* control of the leased spectrum (including associated rights and responsibilities) as well as a form of authorization under this leasing option. Similarly, we will require that long-term *de facto* transfer spectrum lessees that lease spectrum from licensees subject to E911 obligations meet those same obligations. To the extent a licensee or lessee has any uncertainty regarding the applicability of particular statutory or regulatory provisions, it can seek guidance from the Commission.

(c) Streamlined Approval Procedures

72. We adopt a set of streamlined procedures to facilitate parties' ability to enter into these long-term *de facto* transfer spectrum leasing arrangements. By adopting these streamlined procedures, we reduce transaction costs, uncertainty, and delay to facilitate spectrum leasing, consistent with our goals in this proceeding, while at the same time ensuring that the Commission fulfills its statutory responsibilities.

73. *Specific approval procedures.* Parties entering into long-term *de facto* transfer leasing arrangements will be required to file an application with the Commission that includes information similar to that submitted currently using Form 603 for transfers and assignments. These spectrum leasing applications will be placed promptly on public notice once the application is sufficiently complete. Petitions to deny filed in accordance with section 309(d) will be due within 14 days of the initial public notice date. The Wireless Telecommunications Bureau (Bureau) will either affirmatively consent to, deny, or ''offline'' the application no later than 21 days following the initial public notice listing the spectrum lease application. Under this streamlined process, where there are no issues requiring further review and if no petition to deny, opposition, or other comments concerning the lease application are filed, the consent will be reflected in the first public notice issued after the grant. If, on the other hand, any opposition is submitted, the Bureau will address the arguments raised in an order.

74. If the Bureau determines, based upon its own review or in light of filings by interested parties, that there are issues that cannot be resolved within the abbreviated time frame, it will notify the applicants and remove the application from streamlined processing. For instance, the Bureau could offline an application to the extent it might raise competition concerns or foreign ownership issues that require further examination. If an application is removed from streamlined processing, the Bureau will issue a public notice so indicating. Within 90 days of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application. In addition, interested parties may seek reversal of a grant by filing a petition for reconsideration or an application for review.

75. *Spectrum leasing applications.* We are streamlining the submission form to minimize the burden on lease applicants while ensuring that we receive the information we need to complete our review of the proposed arrangement and to enforce our interference and other requirements as applicable to the lessee and the licensee. The application must include information about the licensee and the call sign affected by the lease, the identity of the spectrum lessee, the term of the lease, the particular spectrum leased, the geographic area encompassed within the lease, and sufficient information to demonstrate that the lease agreement meets the conditions imposed by the rules we adopt in this *Report and Order.* While we will not routinely require the lease applicants to submit a copy of the lease agreement with the application, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection by the Commission or its representatives.

76. Following approval of a lease application, the spectrum lessee will be directly and primarily responsible for compliance with Commission rules and policies in the geographic areas and on the frequencies covered by the lease. Through the process of approving the application, the spectrum lessee will be granted an authorization and will be placed on a par with the licensee in terms of the Commission's ability to take enforcement action pursuant to the Act. The Commission will be able to initiate an enforcement action against parties found to be in violation of Commission rules, including any misrepresentations about the lease, and actual behavior subsequent to the Commission's consent. The spectrum lessee also will become responsible for making any applicable filings, including applications and notifications, submission of any materials required to support a required Environmental Assessment, any reports required by our rules and applicable to the lessee, information necessary to facilitate international or Interdepartment Radio Advisory Committee (IRAC) coordination, or any other submissions applicable to the lessee's operations. In addition, spectrum lessees will be obligated to maintain accurate information on file. To facilitate our recordkeeping as well as access to information necessary to undertake any necessary enforcement inquiries or actions, we will make clear in ULS the relationship among each licensee, its lessees, and their sublessees in order to reflect the associations with the licensee's underlying call sign.

77. *Forbearance from Section 309(b) requirements relating to 30-day notice and comment for common carrier licenses.* Section 309(b) of the Act requires that, if a transfer or assignment of common carrier licenses involves a ''substantial change in ownership or control,'' a 30-day public notice and comment period must be provided. To the extent necessary to permit us to approve spectrum applications involving common carrier or CMRS licenses in less than 30 days pursuant to the procedures discussed above, we forbear from the section 309(b) 30-day public notice requirement.

(ii) Temporary, Short-Term *De Facto* Transfer Spectrum Leasing Arrangements

78. We adopt a separate set of policies and procedures to facilitate the leasing of spectrum usage rights involving a transfer of de facto control to meet temporary, short-term needs for spectrum. Because these short-term leasing arrangements are by definition only temporary and raise different and fewer concerns from those associated

with long-term leasing arrangements discussed above, we adopt even more expedited approval procedures and permit more flexible leasing policies.

79. We find that the public interest would be served by facilitating short-term de facto transfer leasing arrangements that meet entities' temporary needs for access to spectrum. There are legitimate specific needs that can most easily and efficiently be addressed through these kinds of short-term leasing arrangements, and we conclude that the public interest would be served by providing special procedures tailored to enable parties to enter into such arrangements, with minimal costs and delay, that can meet their temporary needs for access to spectrum. Accordingly, with regard to all of the wireless services affected by this *Report and Order,* we will approve, pursuant to our authority to grant special temporary authority (STA) under section 309(f) of the Communications Act, short-term *de facto* transfer leasing arrangements, for a period of up to 360 days, if they meet the specified conditions discussed below. We believe that in order to permit meaningful, timely short-term arrangements, we must ensure that our processes do not unduly delay the efforts of a licensee and lessee to implement this type of agreed-to business arrangement. Also, by virtue of the temporary nature of these leases, we determine that additional flexibility with respect to certain of the service rules is appropriate, and we accordingly will not require that short-term spectrum lessees meet all of the regulatory requirements that are applicable to the licensee.

80. We believe potential spectrum users' needs for near-term, temporary access to spectrum usage rights can best be achieved under our statutory STA authority. Section 309(f) empowers the Commission to grant STA applications if it finds that ''there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest.'' Under this authority, the Commission may grant such applications for a period of up to 180 days and may renew the STA for as much as an additional 180 days per renewal.

81. Because of special considerations related to the temporary nature of such leases, and the specific need to minimize costs, uncertainty, and delay when addressing parties' short-term needs for access to spectrum that would benefit the public, we determine that short-term leasing arrangements that meet specific conditions generally warrant grant of an STA. Our findings in this *Report and Order* support the determination that the temporary operations associated with a short-term lease are in the public interest. Moreover, timely initiation of operations under such a short-term arrangement often is necessary to permit the spectrum lessee to meet service needs. Parties to a short-term lease may rely on the findings contained in this *Report and Order,* but must still include an individualized statement of why the proposed arrangement meets the public interest requirements of section 309(f).

82. Consistent with our statutory authority concerning temporary authorizations, we define a short-term lease as a lease agreement with a term of no more than 360 days. To fall within this definition, the lease may have an initial term of up to 180 days, which may be renewed for as much as an additional 180 days. Thus, a short-term lease potentially could have an initial term of 180 days or less, and be renewable one or more times up to a maximum of 360 days.

83. We also adopt safeguards to ensure that these special policies and procedures are provided only for temporary arrangements appropriate for the STA process we adopt here. We will not permit parties to convert these temporary arrangements into longer term leases in a manner that would evade the policies we have adopted for long-term arrangements involving a transfer of *de facto* control discussed earlier in this *Report and Order*.

(a) Respective Rights and Responsibilities of Licensees and Spectrum Lessees

84. *Licensees' and spectrum lessees' rights and responsibilities*. Under these short-term *de facto* transfer leasing arrangements, we will hold the spectrum lessee primarily accountable for compliance with the Commission's rules and policies (which generally will be operational, technical, and interference-based), to the extent they are applicable to the lessee's use of the leased spectrum. The licensee will generally not be directly liable for the acts of its lessee, but will be accountable for its own willful or repeated violations, including those related to its lease arrangement with the lessee. Similarly, both licensees and short-term spectrum lessees will be subject to our jurisdiction and to possible enforcement action for violation of any technical or other rules that are applicable to the license, to the same extent and in the same manner as any other licensee. In addition, we will specifically and individually condition grant of these short-term spectrum leasing applications on the requirement that the spectrum lessee must temporarily suspend, terminate, or modify its operations without a hearing if the Commission or its staff issues an order determining that the lessee is or may be in violation of the Act, a rule, or other term or condition of the authorization.

85. *Enforcement of restrictions on short-term leasing*. As discussed above, the special policies and procedures that we adopt here are intended to be used only for short-term leasing arrangements. Accordingly, we will carefully review filings made by parties, and require appropriate certifications, to ensure that such leasing arrangements do not exceed 360 days. We also note that should we find evidence on our own investigation or have evidence brought to our attention that the parties to a leasing arrangements are attempting to use the short-term leasing procedures for a lease that in fact will exceed 360 days (or the parties reasonably expect the lease to run for longer than 360 days), we will take all appropriate enforcement action against the licensee and lessee, including possible forfeitures, revocation of authority to operate pursuant to the lease, and/or revocation of the underlying license. Among other things, we will guard against the attempted use of affiliates to evade the short-term lease time limit as well as arrangements that seek to undercut fundamental Commission policies in the guise of being a short-term lease.

86. *Extension of leasing beyond 360 days*. We recognize that there may be circumstances in which parties enter into a short-term *de facto* transfer leasing arrangement expecting that the spectrum lessee's needs would not extend beyond 360 days and, at some later time, determine that they would like to maintain the spectrum lease beyond the short-term period. If so, then the parties must submit (in sufficient time prior to the expiration of the STA) the appropriate applications under our long-term spectrum leasing procedures, and obtain Commission consent pursuant to those procedures. With specific regard to designated entity licensees that seek to continue leasing to their spectrum lessees (or to their affiliates or controlling interests, as determined under our ''controlling interest'' standard) beyond 360 days, we will permit them to convert their arrangements to a long-term lease to the extent that they comply with our long-term leasing procedures and that they pay any unjust enrichment that would have been owed had the parties filed a

long-term spectrum leasing application in the first instance.

87. We will not permit parties to effectively convert a short-term lease into a longer term arrangement and, by so doing, undermine or evade the applicable policies and procedures that we have adopted for long-term spectrum leasing arrangements. Accordingly, we will monitor the parties' use of these short-term leasing arrangements to ensure that they are not entering into a series of short-term leasing arrangements or otherwise leasing pursuant to these special policies and procedures as a means to evade policies and procedures (*e.g.*, designated entity and/or entrepreneur rules or use restrictions) applicable to longer *de facto* control leasing arrangements. We also will deny any application to extend a short-term lease into something longer in those situations in which the parties would not have been able, in the first instance, to use the long-term leasing option because of the transfer, use or other restrictions applicable to the particular service.

88. *Subleasing*. In light of the fact that this type of leasing arrangement is designed to be short-term and to meet immediate needs of individual spectrum lessees, we will not permit subleasing under these short-term leasing policies.

89. *Renewal*. So long as the short-term leasing arrangement does not extend beyond a total of 360 days, a licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal. The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the extension of the spectrum leasing arrangement.

(b) Application of Particular Service Rules and Policies

90. We will require that many, but not all, of the service rules applicable to the licensee also apply to spectrum lessees in the context of short-term *de facto* transfer leasing. In particular, we will require that short-term spectrum lessees comply with all of the technical, operational, and interference-related requirements placed on licensees (just as those requirements apply to long-term lessees under the policies adopted herein). However, in order to encourage the use of short-term leasing to meet temporary needs for access to spectrum, we will provide additional flexibility to spectrum lessees by not requiring them to comply with certain of the other service rules applicable to licensees in many services.

91. *Interference-related service rules*. Requiring that short-term spectrum lessees meet the same technical, operational, and interference-related requirements imposed on the licensee will ensure that the activities of a short-term spectrum lessee do not cause interference to other operators.

92. *Eligibility policies and rules*. We will also require, under these policies, that short-term lessees satisfy all statutorily-based eligibility requirements, such as the restrictions on foreign ownership set forth in section 310 as well as the restrictions associated with the Anti-Drug Abuse Act of 1988. We note that this is consistent with our STA policies and rules.

93. *Use restrictions*. While use restrictions generally will be applied to lessees, we will permit some additional flexibility under short-term *de facto* transfer leasing with regard to one particular set of use restrictions. Specifically, we will permit licensees with service authorizations that restrict use of spectrum to non-commercial uses to enter into short-term leasing arrangements, under these STA procedures, that allow the lessee to use the spectrum commercially. Given that these leases are by definition designed to meet only temporary spectrum needs, and can in no event be extended beyond 360 days under the safeguards we are adopting, we do not believe that permitting this more flexible use by spectrum lessees will undermine the policies underlying the use restrictions of these services.

94. *Designated entity policies and rules*. Similarly, we will provide additional flexibility for short-term *de facto* transfer leases with regard to our designated entity and entrepreneur policies. Specifically, we will not subject licensees entering into short-term leases to designated entity unjust enrichment provisions or entrepreneur transfer restrictions that would be applicable if a designated entity or entrepreneur licensee were to enter into a long-term lease arrangement or transfer or assign its license. Thus, for example, a designated entity may lease spectrum on a short-term basis to a non-designated entity without triggering an unjust enrichment payment. In addition, entrepreneur licensees will not be restricted from entering into short-term leases with non-eligible entities. We find that allowing this degree of flexibility in short-term leasing arrangements serves the public interest by making additional spectrum available for short-term use, and that because of the short-term nature of the leases involved and because of the safeguards we adopt, this approach will not undermine basic policies underlying our designated entity or entrepreneur rules by which licensees build out their systems and provide spectrum-based services. For instance, we do not permit designated entity and/or entrepreneur licensees to rely on short-term leasing arrangements to meet their buildout obligations. And, as discussed previously, we impose safeguards and restrictions to ensure that licensees and short-term spectrum lessees cannot convert these short-term arrangements into longer term arrangements that circumvent the designated entity or entrepreneur policies applicable to long-term leasing arrangements.

95. *Construction/performance requirements*. Unlike the policies applicable to long-term *de facto* transfer leasing arrangements described above, licensees will not be permitted to rely on the activities of their short-term spectrum lessees when seeking to establish that they have met any applicable construction requirements. These short-term leasing arrangements are expressly designed to be temporary in nature, and therefore cannot be counted to establish that the licensee is meeting the purposes and policies underlying our buildout rules, including the goal of ensuring establishment of service in rural areas.

96. *Policies relating to competition*. We will not extend the Commission's policies concerning competition to short-term *de facto* transfer leasing arrangements. Because these short-term leasing arrangements are by definition only temporary, and cannot be extended beyond 360 days (unless the arrangement would qualify under the long-term spectrum leasing policies and procedures discussed above), we conclude that these spectrum leasing arrangements do not raise concerns about the consolidation of control over spectrum that could have the type of unacceptable anticompetitive effects that are contrary to the public interest.

97. *Regulatory classification*. As with both spectrum manager leasing arrangements and long-term *de facto* transfer leasing, a short-term lessee will be entitled to select its own regulatory status, either as a CMRS/common carrier or PMRS/non-common carrier (or both), to the same extent as the licensee

would be able to do under the applicable service rules. Under this leasing option, spectrum lessees are the entities responsible for meeting the necessary filing and notification obligations.

98. *Various other rules, including statutory obligations*. As with long-term *de facto* transfer leasing, we will subject short-term spectrum lessees to various other statutory and related regulatory requirements—including Title II obligations or other requirements, such as those relating to CALEA, EEO, TRS, NANP, universal service funds, and regulatory fee payment obligations—in the same manner as if they were licensees with regard to the leased spectrum. To the extent a licensee or lessee has any uncertainty regarding the applicability of particular statutory or regulatory provisions, it can seek guidance from the Commission. However, given the short-term nature of these leasing arrangements, we will not require lessees to comply with E911 requirements to the extent the requirements are placed on licensees.

(c) STA Approval Procedures

99. Parties seeking to implement short-term *de facto* transfer leases pursuant to the policies and procedures set forth above will submit their request containing information similar to that currently provided under Form 603, along with the required showing that the request meets the section 309(f) standards. The spectrum lessee must certify that it meets the specified conditions so as to qualify for these short-term leasing procedures. The Bureau will then review the application, which will not be placed on public notice, in an expedited fashion, acting on the STA request within ten days if the leasing arrangement meets the specified conditions. The STA, which can be for any term of up to 180 days, will become effective on the date of grant. In the event the parties seek to renew the lease for any period of time, up to another 180 days, they must submit another filing, subject to the same procedures. In no event may the cumulative STA period extend beyond a total of 360 days.

5. Other Miscellaneous Matters Concerning Spectrum Leasing

100. *Expiration or termination of spectrum leases*. For all spectrum leases facilitated under the policies enunciated in this *Report and Order*, the lease notification (in the case of spectrum manager leasing arrangements) or lease application (in the case of *de facto* transfer leasing arrangements) must set forth the planned termination date for the lease. For spectrum manager leasing arrangements subject only to a notification requirement, no further filing is required at termination unless the lease is terminated by the licensee or by the parties' mutual agreement in advance of the original termination date. In either event, the licensee would be required to file a notification within ten (10) days of the early termination date. For *de facto* transfer leases subject to the streamlined processing rules, our consent to the leasing arrangement proposed in an application will include consent to return the leased spectrum to the licensee at the end of the lease term. This consent will also encompass return of the spectrum to the licensee prior to the lease termination date upon notification (on the applicable form) by the licensee of its unilateral termination of the lease. A similar notification will be required if the parties jointly seek to terminate the lease at an earlier date.

101. *Extension of spectrum leasing arrangements*. Spectrum leasing arrangements entered into under the policies set forth in this *Report and Order* may be extended beyond the initial term set forth in the lease notification or application. For spectrum manager leasing arrangements, the licensee must notify the Commission of the extension of the arrangement within 14 days of execution of the extension and at least 21 days in advance of operating under the extended term. For long-term *de facto* transfer leasing arrangements, the licensee and spectrum lessee must notify the Commission at least 21 days in advance of operating under the extended term. Finally, for short-term *de facto* transfer leasing arrangements, the parties may extend the short-term arrangement, so long as it would not result in an arrangement exceeding 360 days, by notifying the Commission of the extension at least 10 days in advance of operating under the extended term.

102. *Assignment of leases*. With regard to spectrum manager leasing arrangements, we will permit a spectrum lessee to assign a lease to another entity provided that the licensee has agreed to such an assignment, files a notification with us, and is in privity with the lease assignee so that the licensee can act as spectrum manager by exercising *de facto* control over the subleased spectrum. With regard to *de facto* transfer leases, a spectrum lessee may file an application with us, assuming that the proposed arrangement meets the test for streamlined processing, for approval to assign the leasing authorization (or a subset thereof) to a third entity. For this type of leasing, we also require privity between the licensee and the lease assignee. In addition, should there be a *pro forma* assignment of the lease, the parties involved in the *pro forma* transaction will be required to file a notification regarding the action subject to the same rules and procedures regarding *pro forma* transactions undertaken by licensees.

103. *Transfer of control of spectrum lessees*. In the case of spectrum manager leasing, we will require the licensee to notify the Commission, prior to consummation of a substantial transfer of control, pursuant to the same notification procedures required for spectrum manager leasing arrangements. Similarly, for leases involving a transfer of *de facto* control, because our consent to a lease application involves an assessment of the qualifications of the lessee, we will require that a lessee contemplating a transfer of substantive control obtain prior Commission consent, using the same procedures we have outlined above for *de facto* transfer leasing. Finally, should there be a *pro forma* transfer of control of the lessee, the parties involved in the *pro forma* transaction will be required to file a notification subject to the same rules and procedures regarding *pro forma* transactions undertaken by licensees.

104. *Revocation or automatic cancellation of a license or of a spectrum lessee's operating authority*. For all spectrum leases discussed in this *Report and Order*, in the event we revoke an authorization held by a licensee that has entered into a lease arrangement, such revocation will require the lessee to terminate its operations since the spectrum lessee gains its access to the licensed spectrum through the licensee's authorization. Similarly, a license may automatically cancel if the licensee fails to comply with certain defined requirements, and the lessee similarly would be required to terminate its operations. In addition, we note that the lessee will have no greater right to obtain a comparable license than any other interested parties. If the Commission revokes the authority of a spectrum lessee to operate, that action by itself does not affect the status of the licensee before the Commission.

105. *Conditions regarding spectrum leasing arrangements entered into by licensees in the installment payment program*. We recognize that licensees currently participating in the Commission's installment payment program may seek to take advantage of the kinds of flexible spectrum leasing arrangements that we are facilitating by our action today. In permitting such licensees to enter into spectrum

manager and *de facto* transfer leasing arrangements, we will require appropriate, commercially reasonable safeguards to ensure that they continue to meet their existing obligations to the Commission to pay license installment payment obligations. Accordingly, as a condition of participation in the new spectrum leasing opportunities set out in this *Report and Order*, licensees in the installment payment program, as well as their spectrum lessees (and any sublessees), will be required to take such actions and enter into such agreements that the Commission, in its discretion, determines are warranted to protect the integrity of the licensees' payment obligations for the licenses and the Commission's priority lien and security interest in the licenses and related proceeds (collectively ''security interest''). To this end, we delegate to the Wireless Telecommunications Bureau and the Office of Managing Director (Bureau/OMD) the authority to make these determinations and implement the appropriate safeguards, consistent with the following guidelines:

- For a licensee participating in the Commission's installment payment program entering into a spectrum leasing arrangement, any new or existing documentation evidencing the Commission's security interest (hereinafter ''financing documents'') should include express reference to spectrum leasing arrangements involving spectrum lessees, as provided for in this *Report and Order*. This documentation should, at the least, make it clear that the Commission's security interest covers the licensee's rights in the lease payments.
- Any spectrum lease agreement that provides for a lease of spectrum that is licensed under the installment payment program should contain provisions providing that: (a) Any lease is subject to the execution of Commission-approved financing documents and the certification of such execution; (b) any lease can only be with lessees that are qualified to enter into such arrangements under the Commission's rules and regulations; (c) the lessee is required to comply with the Commission's rules and regulations and other applicable law, at all times, and give the licensee or the Commission the right to revoke, cancel, or terminate the lease for failure to comply; (d) the lessee may not hold itself out to the public as the holder of the license and the lessee will not have the right to nor under any circumstances undertake to hold itself out as a licensee by virtue of such lease; (e) the license remains subject to the Commission's security interest, and the lease is not an assignment, sale, or transfer of the license itself; and (f) the licensee will not consent to any assignment in whole or part of such a lease, regardless of whether or not the lessee is the subject of reorganization and/or liquidation proceedings in bankruptcy, a receivership, or otherwise, unless such action is in compliance with the Commission's rules and regulations. The Bureau/OMD should ensure that the appropriate financing documentation reflects the licensee's obligation to include the foregoing provisions in its spectrum leases.
- In addition to the foregoing, the Bureau/OMD may require the lessee or any sublessee to execute, as a condition of leasing, appropriate documentation that, *inter alia*, acknowledges (1) the Commission's status as a secured party, and (2) the Commission's right to execute and file documentation that it deems necessary to protect its license-based security interests (*e.g.*, financing and continuation statements) without the lessee's (or sublessee's) approval.
- Finally, with respect to licenses that are still subject to the installment payment program, no licensee or potential lessee may file a spectrum leasing notification or application (or otherwise participate in the leasing contemplated in this *Report and Order*) without first executing the Commission-approved financing documentation and so certifying, as described above.

106. *Bankruptcy or receivership.* Finally, we note the possibility that either a licensee or spectrum lessee may enter into bankruptcy or receivership during the term of a spectrum leasing arrangement. In such event, the measures described in the preceding paragraph will help ensure that the public's interest in recouping the full amount of a licensee's debt obligations to the Commission is not unduly compromised. In addition, we believe that in all cases (regardless of whether a debt is owed or not) the public interest is best served if a licensee's or lessee's regulatory obligations and responsibilities are clearly preserved during bankruptcy or receivership. Accordingly, we will require all leases—both spectrum manager and *de facto* transfer spectrum leasing arrangements—to contain the following basic provisions: The spectrum lessee must comply with the Commission's rules and regulations and other applicable law at all times, and if the lessee fails to so comply, the lease may be revoked, cancelled, or terminated by either the licensee or the Commission; if the license is revoked, cancelled, terminated, or otherwise ceases to be in effect, the lessee has no continuing authority to use the leased spectrum, unless otherwise authorized by the Commission; the lease is not an assignment, sale, or transfer of the license itself; the lease shall not be assigned to any entity that is not eligible or qualified to enter into a spectrum leasing arrangement under the Commission's rules and regulations; and, the licensee will not consent to any assignment of the lease except to the extent such assignment complies with the Commission's rules and regulations.

6. Collection of Information on Spectrum Leasing

107. As a result of the policies and procedures we are adopting for spectrum leasing arrangements in this *Report and Order*, including the notification procedures for spectrum manager leasing and streamlined application procedures for *de facto* transfer leasing, the Commission will be making a significant amount of information available in ULS with regard to spectrum leasing. We anticipate that this information, combined with the information the Commission gathers in connection with its licensing process (*e.g.*, transfers of control, assignments of licenses), will be helpful to entities seeking to gain access to spectrum usage rights through leasing. At this time, we will not impose any additional information filing requirements with regard to spectrum leasing.

108. As noted in the *Policy Statement*, we generally believe that if the market is dependent upon this information to flourish, economic incentives will encourage private sector entities to undertake the task. Spectrum brokers with specific expertise on the properties of different spectrum bands could match parties interested in acquiring spectrum usage rights with existing licensees. Thus, we support the establishment of private spectrum exchanges and spectrum brokers, as well as the development of services that list spectrum resources that licensees are offering for sale or lease. Also, we note that determining whether the Commission should collect any additional data to facilitate leasing raises several concerns that must be considered. For instance, such information may involve data (*e.g.*, areas of available spectrum) that could disclose a company's business plans or sensitive information to its competitors. Also, collection of this information would impose costs on the Commission as well as licensees. Before imposing

any additional information collection role for the Commission, we would want to establish that such a role would bring important benefits that would not otherwise be adequately addressed.

109. Even though we take no action at this time, we will further explore this issue in the *Further Notice* because we believe that access to information is a necessary ingredient in promoting secondary markets, particularly for potential participants who may command fewer resources.

B. Streamlined Approval Processes for License Assignments and Transfers of Control

110. We extend the same type of streamlined approval procedures applicable to long-term *de facto* transfer leasing, as adopted above, to our approval procedures for license assignments and transfers of control in those services affected by our spectrum leasing policies. Many of the public interest objectives and policy goals underlying our approach to long-term *de facto* transfer leasing apply with equal force to these transactions, and we will thereby achieve parity of treatment between these secondary market transactions by taking this action now in this *Report and Order*.

111. *Specific approval procedures.* The streamlined procedures that we adopt for processing license transfer or assignment applications will be implemented using Form 603, as revised to enable quicker processing. Applications will be placed promptly on public notice once sufficiently complete. Petitions to deny filed in accordance with section 309(d) will be due within 14 days of the initial public notice date. No later than 21 days following the initial public notice listing the transfer or assignment application, the Bureau will either affirmatively consent to, deny, or offline the application. As with long-term *de facto* transfer leasing applications, where there are no issues requiring further review and if no petition to deny, opposition, or other comments concerning the lease application are filed, the consent will be reflected in the first public notice issued after the grant. If, on the other hand, any opposition is submitted, the Bureau will address the arguments raised in an order.

112. If the Bureau determines, based upon its own review or in light of filings by interested parties, that there are issues that cannot be resolved within the abbreviated time frame, it will notify the applicants and remove the application from streamlined processing so that additional information that require further examination can be gathered. If off-lined from streamlined processing, the Bureau will issue a public notice so indicating. Within 90 days of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application. In addition, interested parties may seek reversal of a grant by filing a petition for reconsideration or an application for review.

113. *Forbearance from Section 309(b) requirements relating to 30-day notice and comment for common carrier licenses.* To the extent that the license transfers and assignments involve common carrier or CMRS licenses, our streamlining of the approval procedures to enable consent to an application within 21 days of issuance of the public notice require that we forbear from the section 309(b) 30-day public notice and comment requirement. We determine that the streamlining procedures we are adopting meet the statutory test for forbearance.

114. Examining the first prong of the test for establishing forbearance, we find that a 30-day notice and comment period for license assignments and transfers of control is not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory. Similarly, with regard to the second prong of the section 10 forbearance standard, we conclude that requiring a 30-day notice and comment period is not necessary for the protection of consumers. Using these procedures, the Commission will review all applications for transfers or assignments and, as noted above, interested parties will continue to have the opportunity to file comments. Finally, applying the third prong of the section 10 forbearance standard, we determine that forbearance from the 30-day comment period required by section 309(b) is consistent with the public interest. Forbearance will promote competition by allowing parties to transfer or assign spectrum authorizations without undue regulatory delay.

C. Secondary Markets in Satellite Services

115. In the *NPRM,* the Commission requested comment on whether it should make various changes to its policies and rules in order to bolster secondary markets. Based on the record before us, we decide not to make changes to our Satellite Services in this *Report and Order*. Several of the requests and recommendations made by commenting parties raise issues that go beyond the focus of this proceeding and thus are more appropriately addressed in separate proceedings or are already being considered in other proceedings. Specifically, with respect to New Skies' request regarding revising downlink power limits from C-band satellites, New Skies raised this issue in response to Telesat's request to place ANIK F1 on the Permitted List, and the International Bureau found that there was no risk of harmful interference raised by the proposed satellite operations at issue. Furthermore, New Skies raised this issue in response to the rulemaking specifically focused upon streamlining of the Commission's part 25 rules concerning earth station licensing (*Part 25 Earth Station Streamlining NPRM*) 66 FR 1283, (January 8, 2001). We defer to that proceeding because that record on this issue is better developed. New Skies' comments on the Permitted Space Station List are also beyond the scope of this proceeding. In any case, the International Bureau has previously explained that only routinely licensed earth stations are allowed to communicate with space stations on the Permitted Space Station List without further authorization. Finally, the Commission is considering proposals to eliminate the routine licensing requirements for certain receive-only dishes in the *Part 25 Earth Station Streamlining NPRM*.

116. The request by SIA to eliminate the need for prior Commission approval of *pro forma* transfers of control or assignments is more appropriately considered in other future proceedings that may review our overall satellite licensing procedures. Similarly, we deny HBO's recommendation that the Commission clarify liability for control of program content because that request is beyond the scope of this proceeding. In response to Teledesic's proposal to relax satellite anti-trafficking rules, we note that we recently eliminated those rules. Finally, we determine that the rest of Teledesic's proposals, including its suggestions concerning allowing short-term satellite spectrum leases, raise issues that are inter-related with our due diligence or buildout rules and our ability to prevent potential interference among satellites and between satellites and terrestrial wireless licensees. As such, we conclude that they too are more appropriately considered in the context of specific rulemakings on those subjects.

117. In addition, we are not persuaded by HBO's suggestion that changes are necessary in our policies regarding requests for waivers of

technical and service rules. We note that parties are free to petition the Commission at any time to waive any of its rules. Finally, we agree with SIA that, based on the record before us, there has been no demonstrable need for the Commission to have a greater role in collecting and disseminating information on licensed satellite spectrum. Accordingly, we will not take on such role at this time.

IV. Procedural Matters

A. Final Regulatory Flexibility Act Analysis Regarding the Report and Order

118. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), *see* 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM*. The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

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

119. In the *Report and Order,* we adopt policies, rules, and procedures designed to facilitate the ability of many Wireless Radio Services licensees, including small businesses, to lease spectrum usage rights to third parties. Our action is intended to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communication services, including small businesses, to enter into spectrum leasing arrangements with many Wireless Radio Service licensees.

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

120. Although no comments were submitted directly in response to the IRFA, many commenters noted that spectrum leasing could benefit small or rural carriers by enabling access to unused spectrum licensed to other entities, and could promote the deployment of wireless services to rural and underserved populations. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), for example, stated that the Commission would serve the public interest by granting small carriers additional flexibility needed to serve their communities and reducing administrative burdens on those small carriers that may wish to pursue innovative arrangements for spectrum access with other license holders. In a similar vein, the Rural Telecommunications Group (RTG) noted that the leasing of spectrum usage rights would increase the use of assigned spectrum and would place spectrum into the hands of rural telephone companies and entrepreneurs who are willing to serve the less populated portions of license areas.

121. In addition to these general observations, the Commission in the *NPRM* had specifically requested comment on the extent to which the qualification and eligibility rules and policies that are generally applicable to each licensee in a particular service should be applied to third-party entities seeking to lease spectrum. The Commission requested comment on whether and how the ''designated entity,'' entrepreneur, bidding credit, and unjust enrichment rules that apply to many services should be implemented with respect to spectrum leasing arrangements between designated entity licensees and third parties that do not qualify for the same status. The Commission noted that, while interested in promoting spectrum leasing, it also sought to ensure that its approach would not invite circumvention of the underlying purposes of these designated entity-related policies and rules.

122. In response to this request for comment, RTG agreed with the Commission that leasing should not be used as a means of circumventing eligibility or service rules. Leap Wireless International, Inc. (Leap Wireless), a designated entity, argued that the Commission should retain and apply its designated entity restrictions to all forms of spectrum leasing. Leap Wireless further contended that permitting designated entities to lease spectrum usage rights to entities that are not similarly qualified would allow manipulation and evasion of the Commission's designated entity policies and rules.

123. In contrast, a number of commenters argued that designated entity licensees should be free to enter into lease agreements with non-designated entities. Alaska Native Wireless, L.L.C. (Alaska Native Wireless), Cook Inlet Region, Inc. (Cook Inlet), TeleCorp PCS, Inc. (TeleCorp), and Winstar Communications, Inc. (Winstar) stated that designated entities, entrepreneurs, small businesses, and minorities should be permitted to lease their spectrum without restrictions on spectrum lessee eligibility under the designated entity rules. Alaska Native Wireless, Cingular Wireless LLC (Cingular Wireless), and Cook Inlet argued that if the eligibility rules were applied to lessees, many small businesses and entrepreneurs would be unable to take advantage of the benefits of secondary markets. These parties suggested that unrestricted leasing would give designated entity licensees a mechanism for raising capital to build out and operate their systems in unleased license areas. Nextel Communications, Inc. (Nextel), AT&T Wireless Services, Inc. (AT&T Wireless), and Cingular Wireless argued that the Commission should refrain from imposing an eligibility requirement that would limit the pool of potential lessees.

124. With regard to the applicability of the Commission's unjust enrichment rules, a number of commenters argued that designated entities that lease spectrum to non-designated entities should not be required to make unjust enrichment payments to the Commission. The U.S. Small Business Administration opposed applying unjust enrichment provisions to the leasing of spectrum by designated entities because it believes that leasing spectrum is fundamentally different from selling it. Similarly, AT&T Wireless argued that small businesses that lease spectrum have not been ''unjustly enriched'' because they are not selling the asset that was discounted. The National Telephone Cooperative Association (NTCA) stated that requiring small businesses, such as rural telephone companies, to repay bidding credits would serve as a significant disincentive for carriers to be inventive about using spectrum. Blooston, Mordkofsky, Dickens, Duffy, and Predergast (Blooston Rural Carriers) argued that allowing small businesses to retain the full value of their bidding credits when leasing their spectrum would promote greater opportunity for small businesses, because it would encourage these carriers to enter into a variety of business ventures.

125. In contrast, RTG stated that designated entities should have the right to lease their spectrum to any party that qualifies to use the spectrum, but then should be required to pay back any auction subsidies they received from the Commission. RTG noted that unjust enrichment payments would not foreclose such spectrum leasing as the cost likely would be factored into the lease negotiations between designated entities and non-designated entities. Cook Inlet also argued that a licensee who received the benefit of a bidding credit and who subsequently enters into a long-term lease should be required to pay back some or all of the bidding credit. With respect to short-term leases,

however, Cook Inlet argued that a licensee should not have to make an unjust enrichment payment.

126. The Commission devoted significant consideration to the applicability of its designated entity qualification rules to potential spectrum lessees seeking access to spectrum licensed to designated entities, as well as the applicability of its unjust enrichment policies. Reaching a decision on these issues required a balancing of complex competing considerations. The Commission concluded, however, that its statutory obligations and its goals to promote opportunities for designated entities (which include a significant number of small businesses) would be better served by enforcing its designated entity and unjust enrichment policies in the context of spectrum leases involving *de facto* transfer leasing.

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

127. 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 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).

128. In the following paragraphs, we further describe and estimate the number of small entity licensees that may be affected by the rules we adopt in the *Report and Order*. Since this rulemaking proceeding applies to multiple services, we will analyze the number of small entities affected on a service-by-service basis. Because the *Report and Order* does not revise any rules involving the Satellite Services, we do not provide an assessment of satellite-related small businesses. When identifying small entities that could be affected by our new rules, we provide information describing auction results, including the number of small entities that are winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated.

129. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category ''Cellular and Other Wireless Telecommunications.'' Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

130. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

131. *220 MHz Radio Service—Phase II Licensees.* The Phase II 220 MHz service is subject to spectrum auctions. In an order relating to this service, we adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

132. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476

CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

133. *Upper 700 MHz Band Licenses.* The Commission released an order authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

134. *Paging.* In a recent order relating to paging, we adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service Report,* 608 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

135. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

136. *Narrowband PCS.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in an order relating to narrowband PCS. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

137. *Specialized Mobile Radio (SMR).* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

138. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed ''small business'' status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

139. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

140. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial,

business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

141. The Commission's 1994 Annual Report on PLMRs indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

142. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to ''Cellular and Other Wireless Telecommunications'' companies—that is, an entity with no more than 1,500 persons. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

143. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

144. *39 GHz Service.* The Commission defines ''small entity'' for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

145. *Local Multipoint Distribution Service.* An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined ''small entity'' for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

146. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In an order relating to the 218–219 MHz Service, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

147. *Location and Monitoring Service (LMS).* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross

revenues for the preceding three years not exceeding $15 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

148. *Rural Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

149. *Air-Ground Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

150. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

151. *Multiple Address Systems.* MAS entities, in general, fall into two categories: (1) Those using MAS spectrum for profit-based uses, and (2) those using MAS spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

152. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the ''Cellular and Other Wireless Telecommunications'' definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

153. *Incumbent 24 GHz Licensees.* The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any entity employing no more than 1,500 persons. We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

154. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million. ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

4. Description of Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

155. The projected reporting, recordkeeping, and other compliance requirements resulting from this proceeding will apply to all entities in the same manner. We believe that equitably applying the same rules to all entities helps to promote fairness in the spectrum leasing process, and we do not believe that the costs and/or administrative burdens associated with the new rules will disproportionately affect small entities. Indeed, the rules adopted today should benefit small entities by giving them more information, more flexibility, and more options for acquiring valuable spectrum.

156. Parties seeking to implement spectrum leasing arrangements must file an electronic application on ULS, in accordance with the procedures discussed in the *Report and Order.* While we will not routinely require the lease applicants to file a copy of the lease agreement with the application, parties must maintain copies of the lease and the filed application, and must make them available for inspection by the Commission or its representatives.

157. For spectrum manager leasing arrangements, the licensee is responsible for filing a notification with the Commission regarding the nature of the arrangement. The licensee remains primarily responsible to the Commission for ensuring that the spectrum lessee operates consistent

with the applicable interference-related and other service rules. (The lessee remains subject to all of the interference-related service rules and most of the non-interference-related rules, including the eligibility and qualification rules and use restrictions, applicable to the licensee.) The licensee also submits any filings to the Commission required in connection with the lessee's operations under the spectrum manager leasing arrangement. The Commission retains the authority, in appropriate situations, to proceed directly against a spectrum lessee in order to halt unacceptable interference.

158. Following Commission approval of *de facto* transfer leasing applications, spectrum lessees assume primary responsibility for compliance with Commission rules and policies in the geographic areas and on the frequencies covered by the lease. As under spectrum manager leasing arrangements, lessees are subject to all of the interference-related service rules and most of the non-interference-related rules, including the eligibility and qualification rules, though lessees in short-term leasing arrangements have additional flexibility with regard to certain use restrictions otherwise applicable to licensees in particular services. Lessees become responsible for making any applicable filings, including ULS applications and notifications, submission of any materials required to support a required Environmental Assessment, any reports required by our rules and applicable to the lessee, information necessary to facilitate international or IRAC coordination, or any other submissions that would be applicable to the lessee's operations if it instead were a full licensee. In addition, lessees are obligated to maintain accurate information on file pursuant to § 1.65 of the Commission's rules, 47 CFR 1.65. To facilitate our recordkeeping as well as access to information necessary to undertake any necessary enforcement inquiries or actions, we will assign a specific designator to the approved lease operations, which will reflect its association with the licensee's underlying call sign.

159. For both short-term and long-term *de facto* transfer leasing, the licensee retains certain residual responsibilities to the Commission for operations on spectrum encompassed within its license. We would subject the licensee to appropriate enforcement action if, for example, a licensee engaged in a sham leasing arrangement with an affiliate in an effort to enable that affiliate to undertake activities that might otherwise put the license at risk if undertaken directly by the licensee. We will also hold the licensee responsible for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge.

160. Our adoption of streamlined processing for transfer of control and license assignment applications requires all entities to file an application with us in order to obtain Commission consent. This requirement currently applies to all entities, regardless of size, and will continue to do so. In connection with implementing this streamlined review process, the required application forms may be simplified or streamlined, thus reducing the burdens on small businesses and all other potential applicants, regardless of size.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

161. The RFA requires an agency to describe any significant alternatives that it considered in reaching its final decision, 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.

162. Establishment of policies, rules, and streamlined procedures to facilitate the ability of parties to enter into a wide variety of flexible leasing arrangements involving our Wireless Radio Services. We do not anticipate any adverse impact on small entities as a result of taking steps to facilitate spectrum leasing in many of our Wireless Radio Services and reducing the regulatory burdens associated with entering into such arrangements. Indeed, facilitating spectrum leasing arrangements will permit spectrum lessees to obtain access to and use spectrum in a manner best suited to meeting the particular needs and business plans of both licensees and lessees. By affording existing licensees additional flexibility to enter into leasing arrangements with third parties that can put spectrum into use, we will help to alleviate spectrum constraints and provide new opportunities to put underutilized or fallow spectrum to efficient use. We believe that the rules and policies we adopt will benefit all parties, including small entities, that would like to lease their spectrum to others or obtain additional spectrum for their own use. Small entities, like all covered entities, will be governed by reduced filing requirements and reduced regulatory uncertainty.

163. Replacement of the Intermountain Microwave standard with a new *de facto* control standard for determining whether an unauthorized transfer of control has occurred in the context of spectrum leasing. We anticipate no adverse impact on small entities as a result of adopting a new standard for assessing *de facto* control in the context of spectrum leasing. We believe that this revised *de facto* control standard achieves a better balance between the statutory requirements of section 310(d) of the Communications Act of 1934, as amended, and the realities of today's wireless marketplace and advancing technologies. By adopting this revised standard, we can permit licensees and spectrum lessees to enter into spectrum manager leasing arrangements without having to first obtain prior Commission approval. To the extent that the spectrum manager leasing arrangement can be tailored to meet the needs of a licensee and a spectrum lessee, this option will provide small entities as well as all other entities with an opportunity to enter into spectrum leasing arrangements for which only a notification to the Commission is required.

164. *Applicability of spectrum leasing rules to many, but not all, Wireless Radio Services.* The *Report and Order* extends flexible spectrum leasing opportunities to a wide array of our Wireless Radio Services. These new policies will benefit a number that entities that are licensees in these services as well as entities that might seek to lease spectrum from license holders, specifically including small entities. Because of the potential benefits for this wide-ranging group of entities, we have not designed particular benefits for small entities, which might provide this latter category with unwarranted competitive advantages. With regard to our decision to exclude certain Wireless Radio Services and certain categories of Wireless Radio Service licensees, including services involving operation on shared frequencies, from the scope of the new rules adopted in the *Report and Order,* we acknowledge that certain small (and large) entities that might benefit from entering into spectrum leasing agreements will not be allowed to take advantage of our new rules at this time. While we decide not to extend our spectrum leasing policies and rules to licensees in the excluded services in the *Report and Order,* we note that in the

Further Notice, we consider whether to extend our leasing policies to these and other additional services. An alternative to this approach would have been to allow other or all wireless licensees to enter into spectrum leasing agreements at this time. Many of these services were excluded by the explicit provisions of the *NPRM* from consideration, and thus we have little record to support extending spectrum leasing rules to these services at this time. Rather, the *Further Notice* issued in conjunction with the *Report and Order* seeks additional comment on the appropriateness of extending the spectrum leasing rules adopted in the *Report and Order* to other categories of Wireless Radio Service licensees.

165. *General applicability of license service rules and policies to spectrum lessees.* The *Report and Order* determines that, as a general matter, the service rules and policies governing a licensee will also be applied to a spectrum lessee. We acknowledge that this approach may cause administrative compliance burdens and costs for small entities that choose to become spectrum lessees. These same costs and burdens, however, are imposed on all entities seeking to become spectrum lessees, just as all licensees wishing to enter into spectrum leasing arrangements must comply with the applicable requirements governing the form of arrangement. An alternative to the approach adopted in the *Report and Order* would be to hold only the licensee responsible for compliance with the Commission's rules and policies. This approach would affect the burdens and responsibilities applicable to licensees that choose to enter into spectrum leasing, many of whom may be small entities. We reject this approach because we believe that our decision here will help prevent the undermining of our service rules and policies unless and until we explicitly decide to change such rules and policies. In fact, small (and large) entities, as well as the public, will benefit from licensees and lessees adhering to, for example, our interference and RF radiation rules.

166. *Licensee reliance on spectrum lessee activities to meet construction or performance obligations.* We decided in the *Report and Order* that licensees that engage in spectrum leasing arrangements remain responsible for complying with the construction or performance obligations associated with the license. The *Report and Order* determines that licensees that participate in spectrum manager leasing arrangements and long-term *de facto* transfer spectrum leasing arrangements can rely upon the activities of their spectrum lessees in satisfying their construction and/or performance obligations. We anticipate no adverse impact on small entities as a result of this decision, since our approach in fact offers additional flexibility for licensees and should encourage parties to enter into leasing agreements without added concern that the arrangement will impede licensee compliance with our construction and performance rules. The *Report and Order* also determined that licensees that participate in short-term *de facto* transfer spectrum leasing arrangements would not be able to rely upon the activities of the short-term lessee to satisfy the construction and/or performance obligations. Since short-term *de facto* transfer spectrum leasing arrangements are intended to be of limited duration, we believe that this step is necessary to ensure that licensees do not seek to evade enforcement of our construction and/or performance obligations. This action poses no greater burden on small entities but treats all licensees that seek to enter into spectrum leasing arrangements on a comparable basis.

167. *Applicability of designated entity eligibility and unjust enrichment policies.* In the *Report and Order*, we continue to apply the existing designated entity and entrepreneur policies to both spectrum manager leasing arrangements and long-term *de facto* transfer leasing arrangements. Under the spectrum manager leasing policies, we allow designated entity and entrepreneur licensees to enter into leasing arrangements with spectrum lessees without triggering application of the Commission's unjust enrichment rules and/or transfer restrictions so long as the lease does not allow the lessee to become a ''controlling interest'' or ''affiliate'' of the licensee (as defined under existing Commission rules) such that the licensee would lose its designated entity or entrepreneur status. For long-term *de facto* transfer spectrum leasing, we allow licensees that have received designated entity benefits or hold a license as an entrepreneur to enter into long-term *de facto* transfer spectrum leasing arrangements with other entities, subject to provisions on transfer restrictions and unjust enrichment that apply to transfers or assignments of such licenses. We decide, however, not to subject short-term *de facto* transfer spectrum leasing arrangements to the designated entity eligibility and unjust enrichment policies, in order to promote the availability of spectrum pursuant to spectrum leasing arrangements to meet short-term needs. We believe that providing this flexibility for leasing arrangements that are of short duration will not undermine enforcement of our general rules and policies. In each of these types of leasing arrangements, small entities will be affected by these policies, but will be treated comparably to larger entities that may be affected as licensees, spectrum lessees, or potential spectrum lessees.

168. Our decision in this area necessarily balances competing statutory obligations, competing public interest considerations, and the competing viewpoints expressed in comments filed with the Commission in this docket. We believe, however, that our decision about how to address these issues in the context of the three categories of spectrum leasing arrangements discussed in the *Report and Order* strikes an appropriate balance of these many competing considerations that serves the public interest in facilitating secondary market transactions while also upholding the integrity of our rules promoting opportunities designated entities and entrepreneurs. The Commission already provides significant benefits to small businesses that have become licensees pursuant to our designated entity and entrepreneur policies. In the *Report and Order*, we allow these licensees to enter into spectrum manager and long-term *de facto* transfer leasing arrangements so long as doing so does not undermine those policies. As for short-term *de facto* transfer arrangements, we also do not apply these policies because we conclude that the opportunities for licensees and lessees to undermine our policies are slim in the context of arrangements of very limited duration, and because we seek to provide special flexibility in our rules when allowing parties to address short-term spectrum needs.

169. Accordingly, we decide that licensees that enter into spectrum manager and long-term *de facto* transfer leasing arrangements may confront limitations on their ability to enter into arrangements with interested parties to the extent that a particular license is still covered by any designated entity rules and policies restricting eligibility under the license. Under spectrum manager leasing arrangements, designated entity and entrepreneur licensees may enter into leasing arrangements insofar as such arrangements would not cause them to lose their designated entity or entrepreneur status under the Commission's applicable rules. For long-term *de facto* transfer arrangements, licensees must reimburse

the government for unjust enrichment for leasing spectrum to a lessee in the same manner as it would have been required to pay had the licensee instead transferred it to that entity. Further, in accordance with the Commission's rules and any applicable notes and security agreements, we will continue to hold a licensee participating in the Commission's installment payment program solely responsible for the debt obligation to the government. We believe that holding otherwise would allow entities to circumvent the rules concerning designated entities and would undermine the Commission's policies underlying those rules. The designated entity rules implement an explicit Congressional mandate to the Commission to allocate licenses so as to promote ''economic opportunity and competition,'' and to ''ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wider variety of applicants, including small businesses.'' If we did not require designated entities to abide by any applicable designated entity eligibility and unjust enrichment rules and policies when leasing to non-designated entities, parties could easily undermine rules fulfilling our Congressional mandate to set aside spectrum for the sole use of designated entities.

170. *Spectrum manager subleasing*. We anticipate no adverse impact on small entities from our decision to allow spectrum manager lessees to sublease their spectrum usage rights under certain conditions. In fact, subleasing would likely benefit small (and large) entities by offering additional flexibility to obtain spectrum that fits an entity's particular business needs.

171. *Spectrum manager leasing arrangements—notification to the Commission*. The *Report and Order* requires licensees that enter into a spectrum manager leasing arrangement to provide notification of the lease arrangement to the Commission. We anticipate no adverse economic impact on small entities as a result of requiring this notification filing. The required notification is not onerous, and will provide the Commission, other spectrum licensees (including small entities), other spectrum lessees (including small entities), potential spectrum lessees (including small entities), and the public with essential information about spectrum usage. It will also help to ensure licensee and lessee compliance with our interference, service, and other rules and polices.

172. *De facto transfer leasing arrangements—streamlined approval procedures*. The *Report and Order* adopts a streamlined prior approval process for parties entering into *de facto* transfer leasing arrangements pursuant to streamlined approval procedures. These streamlined procedures, designed to facilitate spectrum leasing to the greatest extent possible and consistent with the public interest, apply equally to small and large entities, and amount to a reduction in applicable regulatory requirements. We anticipate no adverse impact on small entities as a result of this action. In fact, our adoption of this second spectrum leasing option and related streamlined processing requirements should further enhance the development of more robust secondary markets in spectrum usage rights resulting in increased benefits to small (and large) entities seeking greater flexibility and increased access to spectrum. We believe that small entities that might not be able to afford to acquire spectrum at auction will be able to reduce their spectrum acquisition costs and access a particular amount of spectrum that meets their individual business needs.

173. In addition, the information collected under this streamlined approach is similar to what is currently required under our transfer and assignment rules and should facilitate spectrum leasing by reducing transaction costs, uncertainty, and delay. While an alternative would be to require no approval, we believe that this would run counter to our statutory responsibilities under section 310(d) of the Communications Act.

174. *De facto transfer subleasing*. We anticipate no adverse impact to small entities from our decision to allow *de facto* transfer lessees to sublease their spectrum usage rights under certain conditions. Consistent with our rationale concerning spectrum manager subleasing, we believe that subleasing under *de facto* transfer leasing arrangements would likely benefit small (and large) entities by offering additional flexibility to obtain spectrum that fits an entity's particular business needs.

175. *Short-term de facto transfer leasing arrangements*. In the *Report and Order*, we extend many of the policies applicable to long-term *de facto* transfer leasing arrangements to short-term *de facto* transfer leasing arrangements, except that we ease certain restrictions on lessees that enter into short-term *de facto* transfer leasing arrangements. We anticipate no adverse impact on small entities from this action. Due to the fact that these short-term leases are intended to address temporary spectrum needs, we believe that it is appropriate to permit additional flexibility for such arrangements. Thus, for example, we will allow licensees with authorizations that limit use to non-commercial purposes to enter into lease agreements that allow the lessee to use the spectrum commercially. Similarly, we will not subject licensees entering into short-term leases to designated entity unjust enrichment provisions or to entrepreneur transfer restrictions that would be applicable if a designated entity or entrepreneur licensee were to enter into a long-term lease arrangement or transfer or assign its license. Our approach here should benefit small (and large) entities by facilitating the use of short-term leases that meet temporary spectrum needs while maintaining the integrity of other Commission policies.

176. *Streamlined processing for transfer of control and license assignment applications*. In addition to establishing spectrum leasing policies, the *Report and Order* also extends the same type of streamlined approval procedures applicable to long-term *de facto* transfer leasing arrangements to our review and approval procedures for license assignments and transfers of control in those services affected by our spectrum leasing policies. We anticipate no adverse impact on small entities as a result of this action. In fact, more timely processing of transfer of control and license assignment applications should benefit small (and large) entities in the same manner as contemplated by our streamlined approval procedures for long-term *de facto* transfer leasing, should promote the efficient operation in the marketplace of both small and large entities, and should benefit the public.

6. Report to Congress

177. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

V. Ordering Clauses

178. Pursuant to the authority of sections 1, 4(i), 8, 9, 10, 301, 303(r), 308,

309, 310, 332, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 158, 161, 301, 303(r), 308, 309, 310, 332, and 503, this *Report and Order* and the policies set forth therein are adopted and parts 1 and 27 of the Commission's rules, 47 CFR parts 1 and 27, are amended to establish policies and procedures to facilitate spectrum leasing arrangements and to streamline approval procedures for license assignments and transfers of control under the policies enunciated in the *Report and Order*. The rules will become effective January 26, 2004, except for §§ 1.913(a), 1.913(a)(3), 1.2002(d), 1.2003, 1.9003, 1.9020(e), 1.9030(e), and 1.9035(e), which contain information collection requirements that are not effective until approved by the Office of Management and Budget (OMB), and 1.948(j), which will become effective on April 5, 2004. The agency will publish a document in the **Federal Register** announcing the effective date of the rules that require information collection.

179. Pursuant to section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. 5(c), the Wireless Telecommunications Bureau and the Office of the Managing Director are granted delegated authority to implement the policies facilitating spectrum leasing as well as streamlining of application processing for license assignments and transfers of control, including, but not limited to, the development and implementation of the revised forms necessary to implement the policies adopted in this *Report and Order*.

180. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of the *Report and Order* and the Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

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

47 CFR Part 27

Communications common carriers, Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 27 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

■ 2. Amend § 1.913 by revising the section heading, paragraph (a) introductory text and paragraphs (a)(3), (b)(1), and (b)(2) to read as follows:

§ 1.913 Application and notification forms; electronic and manual filing.

(a) *Application and notification forms.* Applicants, licensees, and spectrum lessees (*see* § 1.9003 of subpart X of this part) shall use the following forms and associated schedules for all applications and notifications:

* * * * *

(3) *FCC Form 603, Application for Assignment of Authorization or Transfer of Control; Notification or Application for Spectrum Leasing Arrangement.* FCC Form 603 is used by applicants and licensees to apply for Commission consent to assignments of existing authorizations, to apply for Commission consent to transfer control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. It is also used for Commission consent to partial assignments of authorization, including partitioning and disaggregation. In addition, it is used by licensees and spectrum lessees (*see* § 1.9003 of subpart X of this part) to notify the Commission regarding spectrum manager leasing arrangements and to apply for Commission consent for *de facto* transfer leasing arrangements pursuant to the rules set forth in subpart X of this part (*see* subpart X of this part).

* * * * *

(b) * * *

(1) Attachments to applications and notifications should be uploaded along with the electronically filed applications and notifications whenever possible. The files, other than the ASCII table of contents, should be in Adobe Acrobat Portable Document Format (PDF) whenever possible.

(2) Any associated documents submitted with an application or notification must be uploaded as attachments to the application or notification whenever possible. The attachment should be uploaded via ULS in Adobe Acrobat Portable Document Format (PDF) whenever possible.

* * * * *

■ 3. Amend § 1.948 by adding paragraph (j) to read as follows:

§ 1.948 Assignment of authorization or transfer of control, notification of consummation.

* * * * *

(j) *Streamlined processing for certain applications.* Applications for assignment of authorizations or transfer of control relating to the Wireless Radio Services identified in this subsection will be processed pursuant to streamlined approval procedures, as discussed herein.

(1) *Services eligible for streamlined processing.* Applications for assignment of authorizations or transfers of control relating to the following services are subject to the streamlined approval processes:

(i) The Paging and Radiotelephone Service (part 22 of this chapter);

(ii) The Rural Radiotelephone Service (part 22 of this chapter);

(iii) The Air-Ground Radiotelephone Service (part 22 of this chapter);

(iv) The Cellular Radiotelephone Service (part 22 of this chapter);

(v) The Offshore Radiotelephone Service (part 22 of this chapter);

(vi) The narrowband Personal Communications Service (part 24 of this chapter);

(vii) The broadband Personal Communications Service (part 24 of this chapter);

(viii) The Wireless Communications Service in the 698–746 MHz band (part 27 of this chapter);

(ix) The Wireless Communications Service in the 746–764 MHz and 776–794 MHz bands (part 27 of this chapter);

(x) The Wireless Communications Service in the 1390–1392 MHz band (part 27 of this chapter);

(xi) The Wireless Communications Service in the paired 1392–1395 MHz and 1432–1435 MHz bands (part 27 of this chapter);

(xii) The Wireless Communications Service in the 1670–1675 MHz band (part 27 of this chapter);

(xiii) The Wireless Communications Service in the 2305–2320 and 2345–2360 MHz bands (part 27 of this chapter);

(xiv) The Wireless Communications Service in the 2385–2390 MHz band (part 27 of this chapter);

(xv) The VHF Public Coast Station service (part 80 of this chapter);

(xvi) The 220 MHz Service (excluding public safety licensees) (part 90 of this chapter);

(xvii) The Specialized Mobile Radio Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licenses in the General Category channels) (part 90 of this chapter);

(xviii) The Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (part 90 of this chapter);

(xix) Paging operations under part 90 of this chapter;

(xx) The Business and Industrial/Land Transportation (B/ILT) channels in which the licensees hold exclusive use rights (part 90 of this chapter) (including all B/ILT channels above 512 MHz and those in the 470–512 MHz band where a licensee has achieved exclusivity, but excluding B/ILT channels in the 470–512 MHz band where a licensee has not achieved exclusivity and those channels below 470 MHz, including those licensed pursuant to 47 CFR 90.187(b)(2)(v));

(xxi) The 218–219 MHz band (part 95 of this chapter);

(xxii) The Local Multipoint Distribution Service (part 101 of this chapter);

(xxiii) The 24 GHz Band (part 101 of this chapter);

(xxiv) The 39 GHz Band (part 101 of this chapter);

(xxv) The Multiple Address Systems band (part 101 of this chapter);

(xxvi) The Local Television Transmission Service (part 101 of this chapter);

(xxvii) The Private-Operational Fixed Point-to-Point Microwave Service (part 101 of this chapter); and,

(xxviii) The Common Carrier Fixed Point-to-Point Microwave Service (part 101 of this chapter).

(2) *Streamlined approval procedures.* (i) Applications, if sufficiently complete and the required application fee has been paid (*see* § 1.1102 of subpart G of this part), will be accepted for filing and will be placed on public notice, except no prior public notice will be required for applications involving authorizations in the Private Wireless Services, as specified in § 1.933(d)(9).

(ii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iii) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for further review no later than 21 days following the date on which the application has been filed and any required application fee has been paid (see § 1.1102 of subpart G of this part).

(iv) Grant of consent to an application will be reflected in a public notice (*see* § 1.933(a)) promptly issued after the grant.

(v) If the Bureau determines to remove an application from streamlined processing, it will issue a Public Notice indicating that the application has been removed from streamlined processing. Within 90 days of the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

■ 4. Amend § 1.2002 by adding paragraph (d) to read as follows:

§ 1.2002 Applicants required to submit information.

* * * * *

(d) The provisions of paragraphs (a) and (b) of this section are applicable to spectrum lessees (*see* § 1.9003 of subpart X of this part) engaged in spectrum manager leasing arrangements and *de facto* transfer leasing arrangements pursuant to the rules set forth in subpart X of this part.

■ 5. Amend § 1.2003 by revising the introductory text and the entry for ''FCC 603'' to read as follows:

§ 1.2003 Applications affected.

The certification required by § 1.2002 must be filed with the following applications and any other requests for authorization filed with the Commission, as well as for spectrum leasing notifications and spectrum leasing applications (*see* subpart X of this part), regardless of whether a specific form exists.

* * * * *

FCC 603 Wireless Telecommunications Bureau Application for Assignment of Authorization and Transfer of Control; Notification or Application for Spectrum Leasing Arrangement;

* * * * *

■ 6. Amend § 1.8002 by removing ''and'' in paragraph (a)(4), by removing the period at the end of paragraph (a)(5) and adding ''; and'' in it's place, and by adding paragraph (a)(6) to read as follows:

§ 1.8002 Obtaining an FRN.

(a) * * *

(6) Anyone entering into a spectrum leasing arrangement as a spectrum lessee (*see* subpart X of this part).

* * * * *

■ 7. Add the following new subpart X to part 1, to read as follows:

Subpart X—Spectrum Leasing

Scope and Authority

Sec.
1.9001 Purpose and scope.
1.9003 Definitions.
1.9005 Included services.

General Policies and Procedures

1.9010 *De facto* control standard for spectrum leasing arrangements.
1.9020 Spectrum manager leasing arrangements.
1.9030 Long-term *de facto* transfer leasing arrangements.
1.9035 Short-term *de facto* transfer leasing arrangements.
1.9040 Contractual requirements applicable to spectrum leasing arrangements.
1.9045 Requirements for spectrum leasing arrangements entered into by licensees participating in the installment payment program.
1.9050 Who may sign spectrum leasing notifications and applications.
1.9055 Assignment of file numbers to spectrum leasing notifications and applications.
1.9060 Amendments, waivers, and dismissals affecting spectrum leasing notifications and applications.

Subpart X—Spectrum Leasing

Scope And Authority

§ 1.9001 Purpose and scope.

(a) The purpose of part 1, subpart X is to implement policies and rules pertaining to spectrum leasing arrangements between licensees in the services identified in this subpart and spectrum lessees. These spectrum leasing policies and rules also implicate other Commission rule parts, including parts 1, 2, 20, 22, 24, 26, 27, 80, 90, 95,

and 101 of title 47, chapter I of the Code of Federal Regulations.

(b) Licensees holding exclusive use rights are permitted to engage in spectrum leasing whether their operations are characterized as commercial, common carrier, private, or non-common carrier.

§ 1.9003 Definitions.

De facto transfer leasing arrangement. A spectrum leasing arrangement in which a licensee retains *de jure* control of its license while transferring *de facto* control of the leased spectrum to a spectrum lessee, pursuant to the spectrum leasing rules set forth in this subpart.

FCC Form 603. FCC Form 603 is the form to be used by licensees and spectrum lessees that enter into spectrum leasing arrangements pursuant to the rules set forth in this subpart. Parties are required to submit this form electronically when entering into spectrum leasing arrangements under this subpart, except that licensees falling within the provisions of § 1.911(d) of subpart F of this part may file the notification either electronically or manually.

Long-term de facto transfer leasing arrangement. A long-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual term, or series of combined terms, of more than 360 days.

Short-term de facto transfer leasing arrangement. A short-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual or combined term of not longer than 360 days.

Spectrum leasing application. The application submitted to the Commission by a licensee and a spectrum lessee seeking approval of a *de facto* transfer leasing arrangement.

Spectrum leasing arrangement. An arrangement between a licensed entity and a third-party entity in which the licensee leases certain of its spectrum usage rights in the licensed spectrum to the third-party entity, the spectrum lessee, pursuant to the rules set forth in this subpart. The arrangement may involve the leasing of any amount of licensed spectrum, in any geographic area or site encompassed by the license, for any period of time during the term of the license authorization. Two different types of spectrum leasing arrangements, spectrum manager leasing arrangements and *de facto* transfer leasing arrangements, are permitted under this subpart.

Spectrum leasing notification. The required notification submitted by a licensee to the Commission regarding a spectrum manager leasing arrangement.

Spectrum lessee. A third-party entity that leases certain spectrum usage rights from a licensee pursuant to the spectrum leasing rules set forth in this subpart.

Spectrum manager leasing arrangement. A spectrum leasing arrangement in which a licensee retains both *de jure* control of its license and *de facto* control of the leased spectrum that it leases to a spectrum lessee, pursuant to the spectrum leasing rules set forth in this subpart.

§ 1.9005 Included services.

The spectrum leasing policies and rules of this subpart apply to the following services in the Wireless Radio Services in which commercial or private licensees hold exclusive use rights:

(a) The Paging and Radiotelephone Service (part 22 of this chapter);

(b) The Rural Radiotelephone Service (part 22 of this chapter);

(c) The Air-Ground Radiotelephone Service (part 22 of this chapter);

(d) The Cellular Radiotelephone Service (part 22 of this chapter);

(e) The Offshore Radiotelephone Service (part 22 of this chapter);

(f) The narrowband Personal Communications Service (part 24 of this chapter);

(g) The broadband Personal Communications Service (part 24 of this chapter);

(h) The Wireless Communications Service in the 698–746 MHz band (part 27 of this chapter);

(i) The Wireless Communications Service in the 746–764 MHz and 776–794 MHz bands (part 27 of this chapter);

(j) The Wireless Communications Service in the 1390–1392 MHz band (part 27 of this chapter);

(k) The Wireless Communications Service in the paired 1392–1395 MHz and 1432–1435 MHz bands (part 27 of this chapter);

(l) The Wireless Communications Service in the 1670–1675 MHz band (part 27 of this chapter);

(m) The Wireless Communications Service in the 2305–2320 and 2345–2360 MHz bands (part 27 of this chapter);

(n) The Wireless Communications Service in the 2385–2390 MHz band (part 27 of this chapter);

(o) The VHF Public Coast Station service (part 80 of this chapter);

(p) The 220 MHz Service (excluding public safety licensees) (part 90 of this chapter);

(q) The Specialized Mobile Radio Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licenses in the General Category channels) (part 90 of this chapter);

(r) The Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (part 90 of this chapter);

(s) Paging operations under part 90 of this chapter;

(t) The Business and Industrial/Land Transportation (B/ILT) channels (part 90 of this chapter) (including all B/ILT channels above 512 MHz and those in the 470–512 MHz band where a licensee has achieved exclusivity, but excluding B/ILT channels in the 470–512 MHz band where a licensee has not achieved exclusivity and those channels below 470 MHz, including those licensed pursuant to 47 CFR 90.187(b)(2)(v));

(u) The 218–219 MHz band (part 95 of this chapter);

(v) The Local Multipoint Distribution Service (part 101 of this chapter);

(w) The 24 GHz Band (part 101 of this chapter);

(x) The 39 GHz Band (part 101 of this chapter);

(y) The Multiple Address Systems band (part 101 of this chapter);

(z) The Local Television Transmission Service (part 101 of this chapter);

(aa) The Private-Operational Fixed Point-to-Point Microwave Service (part 101 of this chapter); and,

(bb) The Common Carrier Fixed Point-to-Point Microwave Service (part 101 of this chapter).

General Policies and Procedures

§ 1.9010 De facto control standard for spectrum leasing arrangements.

(a) Under the rules established for spectrum leasing arrangements in this subpart, the following standard is applied for purposes of determining whether a licensee retains *de facto* control under section 310(d) of the Communications Act with regard to spectrum that it leases to a spectrum lessee.

(b) A licensee will be deemed to have retained *de facto* control of leased spectrum if it enters into a spectrum leasing arrangement and acts as a spectrum manager with regard to portions of the licensed spectrum that it leases to a spectrum lessee, provided the licensee satisfies the following two conditions:

(1) *Licensee responsibility for lessee compliance with Commission policies and rules.* The licensee must remain fully responsible for ensuring the spectrum lessee's compliance with the Communications Act and all applicable policies and rules directly related to the use of the leased spectrum.

(i) Through contractual provisions and actual oversight and enforcement of

such provisions, the licensee must act in a manner sufficient to ensure that the spectrum lessee operates in conformance with applicable technical and use rules governing the license authorization.

(ii) The licensee must maintain a reasonable degree of actual working knowledge about the spectrum lessee's activities and facilities that affect its ongoing compliance with the Commission's policies and rules. These responsibilities include: Coordinating operations and modifications of the spectrum lessee's system to ensure compliance with Commission rules regarding non-interference with co-channel and adjacent channel licensees (and any authorized spectrum user); making all determinations as to whether an application is required for any individual spectrum lessee stations (*e.g.*, those that require frequency coordination, submission of an Environmental Assessment under § 1.1307 of subpart I of this part, those that require international or Interdepartment Radio Advisory Committee (IRAC) coordination, those that affect radio frequency quiet zones described in § 1.924 of subpart F of this part, or those that require notification to the Federal Aviation Administration under part 17 of this chapter); and, ensuring that the spectrum lessee complies with the Commission's safety guidelines relating to human exposure to radiofrequency (RF) radiation (*e.g.*, § 1.1307(b) and related rules of subpart I of this part). The licensee is responsible for resolving all interference-related matters, including conflicts between its spectrum lessee and any other spectrum lessee or licensee (or authorized spectrum user). The licensee may use agents (*e.g.*, counsel, engineering consultants) when carrying out these responsibilities, so long as the licensee exercises effective control over its agents' actions.

(iii) The licensee must be able to inspect the spectrum lessee's operations and must retain the right to terminate the spectrum leasing arrangement in the event the spectrum lessee fails to comply with the terms of the arrangement and/or applicable Commission requirements. If the licensee or the Commission determines that there is any violation of the Commission's rules or that the spectrum lessee's system is causing harmful interference, the licensee must immediately take steps to remedy the violation, resolve the interference, suspend or terminate the operation of the system, or take other measures to prevent further harmful interference until the situation can be remedied. If the spectrum lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Commission, the licensee must use all legal means necessary to enforce compliance.

(2) *Licensee responsibility for interactions with the Commission, including all filings, required under the license authorization and applicable service rules directly related to the leased spectrum.* The licensee remains responsible for the following interactions with the Commission:

(i) The licensee must file the necessary notification with the Commission, as required under § 1.9020(d).

(ii) The licensee is responsible for making all required filings (*e.g.*, applications, notifications, correspondence) associated with the license authorization that are directly affected by the spectrum lessee's use of the licensed spectrum. The licensee may use agents (*e.g.*, counsel, engineering consultants) to complete these filings, so long as the licensee exercises effective control over its agents' actions and complies with any signature requirements for such filings.

§ 1.9020 Spectrum manager leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a spectrum manager leasing arrangement, without the need for prior Commission approval, provided that the licensee retains *de jure* control of the license and *de facto* control, as defined and explained in this subpart, of the leased spectrum. The licensee must notify the Commission of the spectrum leasing arrangement pursuant to the rules set forth in this section.

(b) *Rights and responsibilities of the licensee.* (1) The licensee is directly and primarily responsible for ensuring the spectrum lessee's compliance with the Communications Act and applicable Commission policies and rules.

(2) The licensee retains responsibility for maintaining its compliance with applicable eligibility and ownership requirements imposed on it pursuant to the license authorization.

(3) The licensee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(c) *Rights and responsibilities of the spectrum lessee.* (1) The spectrum lessee must comply with the Communications Act and with Commission requirements associated with the license.

(2) The spectrum lessee is responsible for establishing that it meets the eligibility and qualification requirements applicable to spectrum lessees under the rules set forth in this section.

(3) The spectrum lessee must comply with any obligations that apply directly to it as a result of its own status as a service provider (*e.g.*, Title II obligations if the spectrum lessee acts as a telecommunications carrier or acts as a common carrier).

(4) In addition to the licensee being directly accountable to the Commission for ensuring the spectrum lessee's compliance with the Commission's operational rules and policies (as discussed in this subpart), the spectrum lessee is independently accountable to the Commission for complying with the Communications Act and Commission policies and rules, including those that apply directly to the spectrum lessee as a result of its own status as a service provider.

(5) In leasing spectrum from a licensee, the spectrum lessee must accept Commission oversight and enforcement consistent with the license authorization. The spectrum lessee must cooperate fully with any investigation or inquiry conducted by either the Commission or the licensee, allow the Commission or the licensee to conduct on-site inspections of transmission facilities, and suspend operations at the direction of the Commission or the licensee and to the extent that such suspension would be consistent with the Commission's suspension policies.

(6) The spectrum lessee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(d) *Applicability of particular service rules and policies.* Under a spectrum manager leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization.

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (*see* sections 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements,

including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to the denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of subpart P of this part).

(v) The licensee may reasonably rely on the spectrum lessee's certifications that it meets the requisite eligibility and qualification requirements contained in the notification required by this section.

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 of subpart Q of this part and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 of subpart Q of this part and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee so long as doing so does not result in the spectrum lessee becoming a ''controlling interest'' (*see* § 1.2110(c)(2) of subpart Q of this part) or affiliate (*see* § 1.2110(c)(5) of subpart Q of this part) of the licensee such that the licensee would lose its eligibility as a small business or entrepreneur. To the extent there is any conflict between the revised *de facto* control standard for spectrum leasing arrangements, as set forth in this subpart, and the definition of controlling interest (including its *de facto* control standard) set forth in § 1.2110 of subpart Q of this part, the latter definition governs for determining whether the licensee has maintained the requisite degree of ownership and control to allow it to remain eligible for the license or for other benefits such as bidding credits and installment payments.

(5) *Construction/performance requirements.* Any performance or build-out requirement applicable under a license authorization (*e.g.*, a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable performance or build-out requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Cellular cross-interest rule.* The cellular cross-interest rule applies to spectrum manager leasing arrangements involving a cellular authorization in a Rural Service Area (RSA), and leased cellular spectrum is attributable to the spectrum lessee pursuant to § 22.942 of this chapter (*see* §§ 22.942, 22.909 of this chapter).

(7) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a Private Mobile Radio Service (PMRS), private, or non-commercial basis.

(8) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152 of subpart G of this part). Where, however, regulatory fees are paid annually on a per-unit basis (such as for Commercial Mobile Radio Services (CMRS) pursuant to § 1.1152 of subpart G of this part), the licensee and spectrum lessee are each required to pay fees for those units associated with its respective operations.

(9) *E911 requirements.* If E911 obligations apply to the licensee (*see* § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum.

(e) *Notification regarding the spectrum manager leasing arrangement.* A licensee that enters into a spectrum manager leasing arrangement must notify the Commission of that arrangement in advance of operation, as set forth herein.

(1) *Notification procedures.* (i) The licensee must submit the notification to the Commission by electronic filing, except that licensees falling within the provisions of § 1.911(d) of subpart F of this part may file the notification either electronically or manually. Except as provided in paragraph (e)(1)(ii) of this section, such notification must be submitted within 14 days of execution of the spectrum leasing arrangement and at least 21 days in advance of commencing operations.

(ii) For spectrum manager leasing arrangements of one year or less, the licensee must provide notification to the Commission within 14 days of execution of the spectrum leasing arrangement and at least ten (10) days in advance of operation. If the licensee and spectrum lessee seek to extend this leasing arrangement for an additional term beyond the initial term, the licensee must provide the Commission with notification of the new spectrum leasing arrangement at least 21 days in advance of operation under the extended term.

(2) *Application fees.* There are no application fees required for the filing of a spectrum manager leasing notification.

(3) *Public notice of notifications.* Notifications under this subpart will be placed on an informational public notice on a weekly basis (*see* § 1.933(a) of subpart F of this part).

(4) *Contents of notification.* The notification must contain all information requested on the applicable form, FCC Form 603, and any additional information and certifications required by the rules in this chapter and any rules pertaining to the specific service for which the notification is filed.

(5) *Effective date of a spectrum manager leasing arrangement.* The spectrum manager leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, as of the beginning date of the term as specified in the spectrum leasing notification.

(f) *Commission termination of a spectrum manager leasing arrangement.* The Commission retains the right to investigate and terminate any spectrum manager leasing arrangement if it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control of the leased spectrum, is otherwise in violation of the rules in this chapter, or raises foreign ownership, competitive, or other public interest concerns. Information concerning any such termination will be placed on public notice.

(g) *Expiration, extension, or termination of a spectrum leasing arrangement.* (1) Absent Commission termination or except as provided in paragraph (g)(2) or (g)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the spectrum leasing notification.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing notification provided that the licensee notifies the Commission of the extension within 14 days of execution of the extension and at least 21 days in advance of operation under the extended term.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(h) *Assignment of a spectrum leasing arrangement.* The spectrum lessee may assign its spectrum leasing arrangement to another entity provided that the licensee has agreed to such an assignment, is in privity with the assignee, and notifies the Commission at least 21 days before the consummation of the assignment, pursuant to the notification procedures set forth in this section. In the case of a *pro forma* assignment, the licensee may file the notification regarding the action subject to the rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of subpart F of this part. The Commission will place information concerning a notification related to an assignment, whether substantial or *pro forma,* on public notice.

(i) *Transfer of control of a spectrum lessee.* The licensee must notify the Commission of any transfer of control of a spectrum lessee at least 21 days before the consummation of the transfer of control, pursuant to the notification procedures of this section. In the case of a *pro forma* transfer of control of the spectrum lessee, the licensee may file the notification regarding the action subject to the same rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of subpart F of this part. The Commission will place information concerning a notification related to a transfer of control, whether substantial or *pro forma,* on public notice.

(j) *Revocation or automatic cancellation of a license or a spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have any authority to operate under the license, except as provided in paragraph (j)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931 of subpart F of this part) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(k) *Subleasing.* A spectrum lessee may sublease the leased spectrum usage rights subject to the licensee's consent and the licensee's establishment of privity with the spectrum sublessee. The licensee must submit a notification regarding the spectrum subleasing arrangement in accordance with the notification procedures set forth in this section.

(l) *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal (*see* § 1.949 of subpart F of this part).

§ 1.9030 Long-term de facto transfer leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a long-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A ''long-term'' *de facto* transfer leasing arrangement has an individual term, or series of combined terms, of more than 360 days.

(b) *Rights and responsibilities of the licensee.* (1) Except as provided in paragraph (b)(2) of this section, the licensee is relieved of primary and direct responsibility for ensuring that the spectrum lessee's operations comply with the Communications Act and Commission policies and rules.

(2) The licensee is responsible for its own violations, including those related to its spectrum leasing arrangement with the spectrum lessee, and for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge or should have knowledge.

(3) The licensee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(c) *Rights and responsibilities of the spectrum lessee.* (1) The spectrum lessee assumes primary responsibility for complying with the Communications Act and applicable Commission policies and rules.

(2) The spectrum lessee is granted an instrument of authorization pertaining to the *de facto* transfer leasing arrangement that brings it within the scope of the Commission's direct forfeiture provisions under section 503(b) of the Communications Act.

(3) The spectrum lessee is responsible for interacting with the Commission regarding the leased spectrum and for making all related filings (*e.g.,* all applications and notifications, submissions of any materials required to support a required Environmental Assessment, any reports required by Commission rules and applicable to the lessee, information necessary to facilitate international or Interdepartment Radio Advisory Committee (IRAC) coordination).

(4) The spectrum lessee is required to maintain accurate information on file pursuant to Commission rules (*see* § 1.65 of subpart A of this part).

(5) The spectrum lessee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(d) *Applicability of particular service rules and policies.* Under a long-term *de facto* transfer leasing arrangement, the service rules and policies apply in the

following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization.

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (*see* sections 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of subpart P of this part).

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* (i) A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 of subpart Q of this part and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 of subpart Q of this part and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a long-term *de facto* transfer leasing arrangement with any entity under the streamlined processing procedures described in this section, subject to any applicable unjust enrichment payment obligations and/or transfer restrictions (*see* § 1.2111 of subpart Q of this part and § 24.839 of this chapter).

(ii) A licensee holding a license won in closed bidding (*see* § 24.709 of this chapter) may, during the first five years of the license term, enter into a spectrum leasing arrangement with an entity not eligible to hold such a license pursuant to the requirements of § 24.709(a) of this chapter so long as it has met its five-year construction requirement (*see* §§ 24.203, 24.839(a)(6) of this chapter).

(iii) The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the application under the same rules that apply in the context of a license assignment or transfer of control (*see* § 1.2111 of subpart Q of this part and § 24.714 of this chapter). If the spectrum leasing arrangement involves only part of the license area and/or part of the bandwidth covered by the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated (*see* § 1.2111(e) of subpart Q of this part and § 24.714(c) of this chapter). A licensee will receive no reduction in its unjust enrichment payment obligation for a spectrum leasing arrangement that ends prior to the end of the fifth year of the license term.

(iv) A licensee that participates in the Commission's installment payment program (*see* § 1.2110(g) of subpart Q of this part) may enter into a long-term *de facto* transfer leasing arrangement without triggering unjust enrichment obligations provided that the lessee would qualify for as favorable a category of installment payments. A licensee using installment payment financing that seeks to lease to an entity not meeting the eligibility standards for as favorable a category of installment payments must make full payment of the remaining unpaid principal and any unpaid interest accrued through the effective date of the spectrum leasing arrangement (*see* § 1.2111(c) of subpart Q of this part). This requirement applies regardless of whether the licensee is leasing all or a portion of its bandwidth and/or license area.

(5) *Construction/performance requirements.* Any performance or build-out requirement applicable under a license authorization (*e.g.*, a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and the legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable build-out or performance requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Cellular cross-interest rule.* The cellular cross-interest rule applies to spectrum leasing arrangements involving a cellular authorization in a Rural Service Area (RSA), and leased cellular spectrum is attributable to the spectrum lessee pursuant to § 22.942 of this chapter (*see* §§ 22.942, 22.909 of this chapter).

(7) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis.

(8) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152 of subpart G of this part). Where, however, regulatory fees are paid annually on a per-unit basis (such as for CMRS services pursuant to § 1.1152 of subpart G of this part), the licensee and spectrum lessee each are required to pay fees for those units associated with its respective operations.

(9) *E911 requirements.* To the extent the licensee is required to meet E911 obligations (*see* § 20.18 of this chapter), the spectrum lessee is required to meet those obligations with respect to the spectrum leased under the spectrum leasing arrangement insofar as the spectrum lessee's operations are encompassed with the E911 obligations.

(e) *Spectrum leasing application.* Parties entering into a long-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 603, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.911(d) of subpart F of this part may file the notification either electronically or manually.

(1) *Application fees.* The spectrum leasing application will be treated as a transfer of control for purposes of determining the applicable application fees as set forth in § 1.1102 of subpart G of this part.

(2) *Streamlined approval procedures.* (i) The spectrum leasing application will be placed on public notice once the application is sufficiently complete and accepted for filing (*see* § 1.933 of subpart F of this part).

(ii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939 of subpart F of this part except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iii) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for further review no later than 21 days following the date on which the application has been filed and any required application fee has been paid (*see* § 1.1102 of subpart G of this part).

(iv) Grant of consent to the application will be reflected in a Public Notice (*see* § 1.933(a)(2) of subpart F of this part) promptly issued after the grant.

(v) If the Bureau determines to remove an application from streamlined processing, it will issue a public notice indicating that the application has been removed from streamlined processing. Within 90 days of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to an application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) If any petition to deny is filed and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(3) *Public notice of application.* Applications under this subpart will be placed on an informational public notice on a weekly basis (*see* § 1.933(a) of subpart F of this part).

(4) *Contents of the application.* The application must contain all information requested on the applicable form, FCC Form 603, and any additional information and certifications required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed.

(5) *Effective date of a de facto transfer leasing arrangement.* If the Commission consents to the *de facto* transfer leasing arrangement, the *de facto* transfer leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(f) *Expiration, extension, or termination of spectrum leasing arrangement.* (1) Except as provided in paragraph (f)(2) or (f)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the application. The Commission's consent to the *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the application procedures set forth in § 1.9030(e). Where there is pending before the Commission at the date of termination of the spectrum leasing arrangement a proper and timely application seeking to extent the arrangement, the parties may continue to operate under the original spectrum leasing arrangement without further action by the Commission until such time as the Commission shall make a final determination with respect to the application.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(g) *Assignment of spectrum leasing arrangement.* The spectrum lessee may assign its lease to another entity provided that the licensee has agreed to such an assignment, there is privity between the licensee and the assignee, and the assignment of the spectrum lessee is approved by the Commission pursuant to the same application and approval procedures set forth in this section. In the case of a *pro forma* assignment, the parties involved in the *pro forma* transaction may file the notification regarding the action subject to the rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of subpart F of this part. The Commission will place information concerning the notification relating to an assignment, whether substantial or *pro forma*, on public notice.

(h) *Transfer of control of spectrum lessee.* A spectrum lessee contemplating a transfer of control must obtain Commission consent using the same application and Commission consent procedures set forth in this section. In the case of a *pro forma* transfer of control of the spectrum lessee, the parties involved in the *pro forma* transaction may file the notification regarding the action subject to the rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of subpart F of this part. The Commission will place information concerning the notification relating to a transfer of control, whether substantial or *pro forma*, on public notice.

(i) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have authority to operate under the license, except as provided in paragraph (i)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931 of subpart F of this part) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(j) *Subleasing.* A spectrum lessee may sublease spectrum usage rights subject to the following conditions. Parties entering into a spectrum subleasing arrangement are required to comply

with the Commission's rules for obtaining approval for spectrum leasing arrangements provided in this subpart and are governed by those same policies. The application filed by parties to a spectrum subleasing arrangement must include written consent from the licensee to the proposed arrangement. Once a spectrum subleasing arrangement has been approved by the Commission, the sublessee becomes the party primarily responsible for compliance with Commission rules and policies.

(k) *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal (*see* § 1.949 of subpart F of this part). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the extension of the spectrum leasing arrangement.

§ 1.9035 Short-term de facto transfer leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a short-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A ''short-term'' *de facto* transfer leasing arrangement has an individual or combined term of not longer than 360 days.

(b) *Rights and responsibilities of licensee.* The rights and responsibilities applicable to a licensee that enters into a short-term *de facto* transfer leasing arrangement are the same as those applicable to a licensee that enters into a long-term *de facto* transfer leasing arrangement, as set forth in § 1.9030(b).

(c) *Rights and responsibilities of spectrum lessee.* The rights and responsibilities applicable to a spectrum lessee that enters into a short-term *de facto* transfer leasing arrangement are the same as those applicable to a spectrum lessee that enters into a long-term *de facto* transfer leasing arrangement, as set forth in § 1.9030(c).

(d) *Applicability of particular service rules and policies.* Under a short-term *de facto* leasing arrangement, the service rules and policies apply to the licensee and spectrum lessee in the same manner as under long-term *de facto* transfer leasing arrangements (*see* § 1.9030(d)), except as provided herein:

(1) *Use restrictions and regulatory classification.* Use restrictions applicable to the licensee also apply to the spectrum lessee except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis, and except that a licensee with an authorization that restricts use of spectrum to non-commercial uses may enter into a short-term *de facto* transfer leasing arrangement that allows the spectrum lessee to use the spectrum commercially.

(2) *Designated entity/entrepreneur rules.* Unjust enrichment provisions (*see* § 1.2111 of subpart Q of this part) and transfer restrictions (*see* § 24.839 of this chapter) do not apply with regard to a short-term *de facto* transfer leasing arrangement.

(3) *Construction/performance requirements.* The licensee is not permitted to attribute to itself the activities of its spectrum lessee when seeking to establish that performance or build-out requirements applicable to the licensee have been met.

(4) *Cellular cross-interest rule and policies.* The cellular cross-interest rule and policies (*see* § 22.942 of this chapter) do not apply with regard to short-term *de facto* transfer leasing arrangements.

(5) *E911 requirements.* If E911 obligations apply to the licensee (*see* § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum. A spectrum lessee entering into a short-term *de facto* transfer leasing arrangement is not separately required to comply with any such obligations in relation to the leased spectrum.

(e) *Spectrum leasing application.* Parties entering into a short-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 603, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.911 of subpart F of this part may file the application either electronically or manually. Commission approval of such application is granted pursuant to special temporary authority (STA) policies (*see* section 309(f) of the Communications Act).

(1) *Application fees.* The spectrum leasing application will be treated as a transfer of control for purposes of determining the applicable application fees as set forth in § 1.1102 of subpart G of this part.

(2) *Approval procedures.* (i) The spectrum leasing application must be filed at least ten (10) days prior to the date on which the spectrum lessee seeks to commence operation under the spectrum leasing arrangement. If the application meets the conditions specified in this section for a short-term *de facto* transfer leasing arrangement, it will be granted or denied within ten (10) days of receipt of the complete application.

(ii) The Commission may grant authority to permit operation under a short-term *de facto* transfer leasing arrangement for a maximum period of 180 days. The Commission may grant extension of the temporary authority as provided in § 1.9035(g)(2).

(iii) In no event may parties use the procedures for short-term *de facto* transfer leasing arrangements to enter into arrangements that would exceed 360 days.

(3) *Contents of the application.* (i) The application must contain all information requested on the applicable form, FCC Form 603, and any additional information and certifications required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed.

(ii) The application must contain a showing that grant of the temporary authority to permit implementation of the short-term *de facto* transfer leasing arrangement would further the public interest.

(4) *Effective date of spectrum leasing arrangement.* The spectrum leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, on the date specified in the grant of temporary authority.

(f) *Restrictions on the use of short-term de facto* transfer leasing arrangements. (1) The licensee and spectrum lessee are not permitted to use the special rules and expedited procedures applicable to short-term *de facto* transfer leasing arrangements for arrangements that in fact will exceed 360 days, or that the parties reasonably expect to exceed 360 days.

(2) The licensee and spectrum lessee must submit, in sufficient time prior to

the expiration of the short-term *de facto* transfer spectrum leasing arrangement, the appropriate application under the rules and procedures applicable to long-term *de facto* leasing arrangements, and obtain Commission consent pursuant to those procedures.

(g) *Expiration, extension, or termination of the spectrum leasing arrangement.* (1) Except as provided in paragraph (g)(2) or (g)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the grant of temporary authority. The Commission's grant of temporary authority pursuant to the *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) Upon proper application (*see* § 1.9035(e)), a short-term *de facto* transfer leasing arrangement may be extended beyond the initial term set forth in the application, for one or more terms of up to 180 days each, provided that the initial term and extension(s) together would not result in a leasing arrangement that exceeds a total of 360 days.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(h) *Conversion of a short-term spectrum leasing arrangement into a long-term de facto transfer leasing arrangement.* (1) In the event the licensee and spectrum lessee involved in a short-term *de facto* transfer leasing arrangement seek to extend the spectrum leasing arrangement beyond the 360-day limit for short-term *de facto* transfer leasing arrangements, the parties may do so provided that they meet the conditions set forth in paragraphs (h)(2) and (h)(3) of this section.

(2) If a licensee that holds a license that continues to be subject to transfer restrictions and/or requirements relating to unjust enrichment pursuant to the Commission's small business and/or entrepreneur provisions (*see* § 1.2110 of subpart Q of this part and § 24.709 of this chapter) seeks to extend a short-term *de facto* transfer leasing arrangement with its spectrum lessee (or related entities, as determined pursuant to § 1.2110(b)(2) of subpart Q of this part) beyond 360 days, it may convert its arrangement into a long-term *de facto* transfer spectrum leasing arrangement provided that it complies with the procedures for entering into a long-term *de facto* transfer leasing arrangement and that it pays any unjust enrichment that would have been owed had the licensee filed a long-term *de facto* transfer spectrum leasing application at the time it applied for the initial short-term *de facto* transfer leasing arrangement.

(3) The licensee and spectrum lessee are not permitted to convert a short-term *de facto* transfer leasing arrangement into a long-term *de facto* transfer leasing arrangement if the parties would have been restricted, in the first instance, from entering into a long-term *de facto* transfer leasing arrangement because of a transfer, use, or other restriction applicable to the particular service (*see* § 1.9030).

(i) *Assignment of spectrum leasing arrangement.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(g)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(j) *Transfer of control of spectrum lessee.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(h)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(k) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(i)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(l) *Subleasing.* A spectrum lessee that has entered into a short-term *de facto* transfer leasing arrangement is not permitted to enter into a spectrum subleasing arrangement.

(m) *Renewal.* The rule applicable with regard to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(k)) applies in the same manner to short-term *de facto* transfer leasing arrangements, except that the extension of the short-term *de facto* transfer leasing arrangement into the term of the renewed license authorization cannot enable the combined terms of the short-term *de facto* transfer leasing arrangements to exceed 360 days. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal (*see* § 1.949 of subpart F of this part).

§ 1.9040 Contractual requirements applicable to spectrum leasing arrangements.

(a) Agreements between licensees and spectrum lessees concerning spectrum leasing arrangements entered into pursuant to the rules of this subpart must contain the following provisions:

(1) The spectrum lessee must comply at all times with applicable rules set forth in this chapter and other applicable law, and the spectrum leasing arrangement may be revoked, cancelled, or terminated by the licensee or Commission if the spectrum lessee fails to comply with the applicable requirements;

(2) If the license is revoked, cancelled, terminated, or otherwise ceases to be in effect, the spectrum lessee has no continuing authority or right to use the leased spectrum unless otherwise authorized by the Commission;

(3) The spectrum leasing arrangement is not an assignment, sale, or transfer of the license itself;

(4) The spectrum leasing arrangement shall not be assigned to any entity that is ineligible or unqualified to enter into a spectrum leasing arrangement under the applicable rules as set forth in this subpart;

(5) The licensee shall not consent to an assignment of a spectrum leasing arrangement unless such assignment complies with applicable Commission rules and regulations.

(b) Agreements between licensees that hold licenses subject to the Commission's installment payment program (*see* § 1.2110 of subpart Q of this part and related service-specific rules) and spectrum lesseeys must contain the following additional provisions:

(1) The express acknowledgement that the license remains subject to the Commission's priority lien and security interest in the license and related proceeds, consistent with the provisions set forth in § 1.9045; and

(2) The agreement that the spectrum lessee shall not hold itself out to the public as the holder of the license and shall not hold itself out as a licensee by virtue of its having entered into a spectrum leasing arrangement.

§ 1.9045 Requirements for spectrum leasing arrangements entered into by licensees participating in the installment payment program.

(a) If a licensee that holds a license subject to the Commission's installment payment program (*see* § 1.2110 of subpart Q of this part and related service-specific rules) enters into a spectrum leasing arrangement pursuant to the rules in this subpart, the licensee

remains fully and solely responsible for the outstanding debt amount owed to the Commission. Nothing in a spectrum leasing arrangement, or arising from a spectrum lessee's bankruptcy or receivership, can modify the licensee's sole responsibility for its obligation to repay its entire debt obligation under the installment payment program pursuant to applicable Commission rules and regulations and the associated note(s) and security agreement(s).

(b) If a licensee holds a license subject to the installment payment program rules (*see* § 1.2110 of subpart Q of this part and related service-specific rules), the licensee and spectrum lessee may effectuate a spectrum leasing arrangement with respect to that license only insofar as Commission-required and approved note(s) and security agreement(s) have been executed that expressly establish, in the context of a spectrum leasing arrangement, the licensee's sole responsibility and obligation to repay the entire amount of its debt obligations to the Commission relating to the license.

§ 1.9050 Who may sign spectrum leasing notifications and applications.

Under the rules set forth in this subpart, certain notifications and applications to the Commission must be filed by licensees and spectrum lessees that enter into spectrum leasing arrangements. In addition, the rules require that certain notifications and applications be filed by the licensee and/or the spectrum lessee after they have entered into such arrangements. Whether the signature of the licensee, the spectrum lessee, or both, is required will depend on the particular notification or application involved, and whether the leasing arrangement concerns a spectrum manager leasing arrangement or a *de facto* transfer leasing arrangement.

(a) Except as provided in paragraph (b) of this section, the notifications, applications, amendments, and related statements of fact required by the Commission (including certifications) must be signed as follows (either electronically or manually, *see* paragraph (d) of this section):

(1) By the licensee or spectrum lessee, if an individual;

(2) By one of the partners if the licensee or lessee is a partnership;

(3) By an officer, director, or duly authorized employee, if the licensee or lessee is a corporation; or

(4) By a member who is an officer, if the licensee or lessee is an unincorporated association.

(b) Notifications, applications, amendments, and related statements of fact required by the Commission may be signed by the licensee or spectrum lessee's attorney in case of the licensee's or lessee's physical disability or absence from the United States. The attorney shall, when applicable, separately set forth the reason why the application is not signed by the licensee or lessee. In addition, if any matter is stated on the basis of the attorney's belief only (rather than knowledge), the attorney shall separately set forth the reasons for believing that such statements are true. Only the original of notifications, applications, amendments, and related statements of fact need be signed.

(c) Notifications, applications, amendments, and related statements of fact need not be signed under oath. Willful false statements made therein, however, are punishable by fine and imprisonment (*see* 18 U.S.C. section 1001), and by appropriate administrative sanctions, including revocation of license pursuant to section 312(a)(1) of the Communications Act of 1934 or revocation of the spectrum leasing arrangement.

(d) ''Signed,'' as used in this section, means, for manually filed notifications and applications only, an original hand-written signature or, for electronically filed notifications and applications only, an electronic signature. An electronic signature shall consist of the name of the licensee or spectrum lessee transmitted electronically via ULS and entered on the application as a signature.

§ 1.9055 Assignment of file numbers to spectrum leasing notifications and applications.

Spectrum leasing notifications or applications submitted pursuant to the rules of this subpart are assigned file numbers and service codes in order to facilitate processing in the manner in which applications in subpart F are assigned file numbers (*see* § 1.926 of subpart F of this part).

§ 1.9060 Amendments, waivers, and dismissals affecting spectrum leasing notifications and applications.

(a) Notifications and applications regarding spectrum leasing arrangements may be amended in accordance with the policies, procedures, and standards applicable to applications as set forth in subpart F of this part (*see* §§ 1.927 and 1.929 of subpart F of this part).

(b) The Commission may waive specific requirements of the rules affecting spectrum leasing arrangements and the use of leased spectrum, on its own motion or upon request, in accordance with the policies, procedures, and standards set forth in subpart F of this part (*see* § 1.925 of subpart F of this part).

(c) Notifications and pending applications regarding spectrum leasing arrangements may be dismissed in accordance with the policies, procedures, and standards applicable to applications as set forth in subpart F of this part (*see* § 1.935 of subpart F of this part).

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

■ 8. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

■ 9. Amend § 27.4 by removing the definition of *Band Manager.*

■ 10. Amend § 27.10 by revising the undesignated introductory paragraph to read as follows:

§ 27.10 Regulatory status.

Except with respect to *Guard Band Manager* licenses, which are subject to subpart G of this part, the following rules apply concerning the regulatory status in the frequency bands specified in § 27.5.

* * * * *

■ 11. Revise § 27.12 to read as follows:

§ 27.12 Eligibility.

Except as provided in § 27.604, any entity other than those precluded by section 310 of the Communications Act of 1934, as amended, 47 U.S.C. 310, is eligible to hold a license under this part.

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Tuesday,
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Part IV

Department of Housing and Urban Development

America's Affordable Communities Initiative, HUD's Initiative on Removal of Regulatory Barriers: Proposals for Incentive Criteria on Barrier Removal in HUD's Funding Allocations; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4882–N–01]

America's Affordable Communities Initiative, HUD's Initiative on Removal of Regulatory Barriers: Proposals for Incentive Criteria on Barrier Removal in HUD's Funding Allocations

AGENCY: Office of the General Counsel, HUD.

ACTION: Notice.

SUMMARY: In June 2003, HUD announced America's Affordable Communities Initiative, a new Departmentwide initiative that will focus on breaking down regulatory barriers that impede the production of affordable housing. As part of this effort, HUD will, among other things, analyze federal, state, and local regulations and procedures that are duplicative, contradictory, or burdensome, and work within the federal government and with HUD's state and local partners to break down these barriers. HUD will undertake activities designed to promote barrier removal by state and local governments and, where feasible, provide incentives to state and local governments to remove regulatory barriers to affordable housing.

The purpose of this notice is to solicit comment from prospective applicants on proposals to provide incentives to barrier removal in HUD's funding allocations and on an initial proposal for providing incentive to barrier removal in HUD's Fiscal Year (FY) 2004 competitive funding process.

As an initial incentive action, HUD proposes to establish in the majority of its FY2004 Notices of Funding Availability (NOFAs), including HUD's SuperNOFA, a policy priority for increasing the supply of affordable housing through the removal of regulatory barriers. This new policy priority will be added to the list of policy priorities that HUD traditionally includes in its NOFAs. As a policy priority (and like the other policy priorities), higher rating points will be available to governmental applicants that are able to demonstrate successful efforts in removing regulatory barriers to affordable housing, and to nongovernmental applicants that are associated with jurisdictions that have undertaken successful efforts in removing barriers.

This notice describes how HUD proposes to award these policy points in its NOFAs. HUD welcomes comments on this proposal, including the process described to obtain these points. While this notice describes one initial proposal for providing incentives to HUD grantees to undertake and support the removal of barriers to affordable housing, HUD is considering other proposals and welcomes comments from the public on other ideas for ways HUD can provide incentives in its funding processes or other mechanisms to encourage localities to remove barriers and increase the supply of affordable housing.

DATES: *Comment Due Date:* December 29, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500. Comments should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (weekdays 8 a.m. to 5 p.m. Eastern time) at the above address. Facsimile (FAX) comments are not acceptable.

FOR FURTHER INFORMATION CONTACT: Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Office of General Counsel, Room 10282, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500, telephone (202) 708–1793 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background: Policies Restricting Affordable Housing

Increasing opportunities for affordable rental and homeownership housing is one of the highest priorities of the Department. Over the last 15 years, there has been increased recognition that unnecessary, duplicative, excessive or discriminatory public processes often significantly increase the cost of housing development and rehabilitation. Often referred to as ''regulatory barriers to affordable housing,'' many public statutes, ordinances, regulatory requirements, or processes and procedures significantly impede the development or availability of affordable housing without providing a commensurate or demonstrable health or safety benefit. ''Affordable housing'' is decent quality housing that low-, moderate-, and middle-income families can afford to buy or rent without spending more than thirty percent of their income. Spending more than thirty percent of income on shelter may require families to sacrifice other necessities of life.

Addressing these barriers to housing affordability is a necessary component of any overall national housing policy. However, addressing such barriers must be viewed as a complement, not a substitute for other efforts to meet affordable housing needs. For many families, federal, state and local subsidies are fundamental tools for meeting these affordable housing needs. In many instances, however, other sometimes well-intentioned public policies work at cross-purposes with subsidy programs by imposing significant constraints. From exclusionary zoning that keeps out affordable housing, especially multifamily housing, to other regulations and requirements that unnecessarily raise the costs of construction, the need to address this issue is clear. For example, affordable rehabilitation is often constrained by outmoded building codes that require excessive renovation. Barrier removal will not only make it easier to find and get approval for affordable housing sites but it will also allow available subsidies to go further in meeting these needs. For housing for moderate-income families often referred to as ''work force'' housing, barrier removal can be the most essential component of meeting housing needs.

The Advisory Commission on Regulatory Barriers to Affordable Housing in its 1991 report ''Not in My Backyard: Removing Barriers to Affordable Housing'', *http://www.huduser.org/bibliodb/Bibliography.asp?id=5806,* estimated that these policies and procedures directly increase construction or rehabilitation costs by up to 35 percent. Over the past twelve years, numerous academic studies have confirmed this finding. In addition to direct cost impacts, many policies and processes further exacerbate the problem by constraining overall housing supply with a general deleterious impact upon overall housing affordability. A 35 percent reduction in development costs would allow millions of American families to buy or rent housing that they currently cannot afford.

In 1990, in the Cranston-Gonzales National Affordable Housing Act, Congress, for the first time, recognized the importance of public policies and processes to the supply of affordable housing. Section 105(b)(4) requires state and local governments to explain as part of their Comprehensive Housing Affordability Strategy (CHAS)—now included in HUD's Consolidated Plan—

whether a proposed public policy affects housing affordability and describe the jurisdiction's strategy to remove or ameliorate negative effects, if any, of such policies (*see* 24 CFR 91.210(e) and 24 CFR 91.310(d)). Congress, in Title XII of the 1992 Housing and Community Development Act, reiterated its interest in this important subject by authorizing grants for regulatory barrier removal and established a Regulatory Barriers Clearinghouse (*see http://www.regbarriers.org*). In the American Homeownership Act of 2000, Congress reauthorized the Clearinghouse and simplified procedures for a barrier removal grant program.

II. HUD's Incentive Proposal

Because of the now widely recognized impact that excessive or exclusionary policies and processes have had upon the costs of low-, moderate-, and middle-income housing programs and upon overall housing supply and costs, the importance of reducing costs in HUD-assisted housing, the 13-year Congressional recognition of this issue, and the Department's overall commitment to increasing the supply of new and rehabilitated affordable housing, HUD proposes to undertake actions and efforts that provide incentives to governments and their constituents to work to remove regulatory barriers to affordable housing. This notice advises of one proposal and seeks ideas for other mechanisms to encourage this priority. HUD is considering including in the list of policy priorities for its NOFAs, commencing in FY2004, a policy priority for the removal of regulatory barriers.

The inclusion of regulatory barrier removal as a policy priority in HUD NOFAs would be designed to provide support and encouragement to applicants, including applicants that are non-governmental, to (1) directly undertake activities that will remove barriers to affordable housing within their communities or support such undertaking by units of government and others, (2) streamline local governmental processes and procedures or support such undertaking, and (3) eliminate redundant or excessive requirements, or statutes, regulations, and codes which impede the development or availability of affordable housing, or support such undertaking.

This policy priority also relates to HUD's Strategic Goals for (1) ''Increasing Homeownership Opportunities'' by making the home buying process less complicated and less expensive, and (2) ''Promoting Decent Affordable Housing'' by expanding access to affordable housing by making it more readily available in the community. The inclusion of this policy priority in HUD NOFAs would be in addition to policy priorities, which are currently included in HUD's NOFAs and which reflect the mission and strategic goals of the Department. Advance notice of the proposed addition of this policy priority is appropriate because HUD wants to initiate, in advance of its FY2004 funding round, discussion among state and local governments and their constituents (particularly those that are applicants for HUD funding) regarding local efforts that have been taken to remove regulatory barriers to affordable housing. Press coverage of affordable housing has confirmed the importance of this issue throughout the nation. Increasing the supply of affordable housing will be successful when all parties at the local level (governments, residents, housing providers, and nonprofit organizations) are involved and working together to support efforts to break down regulatory barriers to affordable housing. Partnerships are frequently formed between governments and nonprofit organizations for HUD funding, and this particular policy priority in NOFAs is directed to further promoting those partnerships, and promoting the communitywide efforts to remove barriers to affordable housing.

III. Programs Covered by the NOFA Incentive Proposal

The programs that HUD proposes to be subject to the questions, evaluation and rating system described in Section IV of this notice, may include, but not necessarily be limited to the HUD programs and initiatives listed in this Section III, which are those for which Congress generally appropriates funding on an annual basis and for which HUD generally issues a NOFA to make funding available. Programs may be added depending upon appropriations for FY2004 or administrative decision on the part of the Department, and programs may be removed from the list depending upon the Department's determination of the appropriateness of applying this policy priority to a particular program.

- Lead Hazard Control Program
- Healthy Homes Demonstration
- Youthbuild
- Rural Housing and Economic Development
- Continuum of Care
  - Supportive Housing Program (SHP)
  - Shelter Plus Care (S+C)
  - Section 8 Moderate Rehabilitation SRO Program for Homeless Individuals
- Shelter Plus Care Renewals
- Housing Opportunities for Persons With AIDS (HOPWA)
- Section 202 Supportive Housing for the Elderly
- Section 811 Supportive Housing for Persons With Disabilities
- Assisted Living Conversion Program
- Resident Opportunities and Self-Sufficiency (ROSS) Program
- ROSS for Resident Service Delivery Models—Elderly
- ROSS for Resident Service Delivery Models—Family
- ROSS for Neighborhood Networks
- ROSS for Homeownership Supportive Services
- Service Coordinators in Multifamily Housing
- Community Outreach Partnership Centers
- Housing Counseling
- Lead Hazard Reduction Demonstration
- HUD Urban Scholars Fellowship Program
- Early Doctoral Student Research Grant Program
- Doctoral Dissertation Research Grant Program
- HOPE VI
- Brownfields Economic Development Initiative (BEDI)

For HUD's Self-Help Housing Opportunities Program (SHOP) and programs that may be similar to SHOP in which large national or regional organizations distribute HUD funds on a competitive basis among organizations to facilitate the funded-programs' eligible activities, the larger organizations will implement the policy priority through their funding availability documents. That is, the organizations competing for the HUD funds made available by the larger organizations will have the opportunity, through their application for funds, to claim the points made available for this policy priority.

The list of proposed programs that would be covered by this option reflects the Department's objective to apply this policy priority to as many HUD-funded programs as possible. As will be more fully discussed in the sections of this notice that follow the application of the policy priority is not directed only to state, local, and tribal governments involved in efforts to remove barriers to affordable housing, but also to those organizations and individuals that reside in areas for which state, local, or tribal governments have undertaken such efforts. Successful efforts to remove regulatory barriers to affordable

housing are those in which residents and organizations are working with and supporting the efforts and actions of their local governments to remove barriers to affordable housing. Although the Department has worked to make this policy priority applicable to as many applicants for HUD funding as possible, there is recognition that this policy priority may not be one for which all applicants will be eligible for the higher points made available, but that is the case for all of the policy priorities listed in HUD NOFAs. HUD has strived not only to make the information to be provided by applicants to obtain the incentive points easily obtainable, but also to promote dialogue between housing advocates and their governments on removal of regulatory barriers.

IV. Evaluation Criteria

Although the policies and processes that affect housing affordability are many and diverse, the following evaluative questions have been determined to be significantly important and have broad-based applicability to measure state, local, and tribal government efforts at regulatory reform so as to be considered good ''markers'' for effective regulatory reform.

All applicants submitting applications in response to FY2004 NOFAs will be invited to address the questions below to be eligible to receive points allocated for the policy priority of regulatory barrier removal.

Local jurisdictions applying for funding, as well as housing authorities, nonprofit organizations, and other qualified applicants applying for funding for a project located in an incorporated jurisdiction, are invited to answer the 12 questions in Part A and may be asked to provide supporting statements, references, and documentation. The references or documentation to support the affirmative statements may be provided as hard copy, or Web site URLs where the information may be found. An applicant that scores at least 3 in Column 2 will receive one point in the NOFA evaluation. An applicant that scores 6 or greater in Column 2 will receive two points in the evaluation.

State agencies or departments applying for funding, as well as housing authorities, nonprofit organizations and other qualified applicants applying for funds for projects located in unincorporated areas will be invited to answer the 6 questions in Part B and may be asked to provide supporting statements, references, and documentation. The references or documentation to support the affirmative statements may be provided as hard copy, or Web site URLs where the information may be found. An applicant that scores at least 2 in Column 2 will receive one point in the NOFA evaluation. An applicant that scores 3 or greater will receive two points in the respective evaluation.

Applicants that will be providing services in multiple jurisdictions can choose to address the questions in either Part A or Part B for that jurisdiction in which the preponderance of services will be performed if an award is made. In no case can an applicant receive for this policy priority greater than two points for barrier removal activities. For applicants that are tribes or Tribally Designated Housing Entities (TDHEs), the tribes or TDHEs can choose to complete either Part A or Part B based upon a determination by the tribes or TDHE as to whether the tribe's or the TDHE's association with the local jurisdiction or the state would be the more advantageous for its application.

HUD invites careful review of these questions and welcomes comments on whether these questions address the significant governmental regulatory areas relative to affordable housing, and are sufficiently broad-based to measure governmental efforts at regulatory reform. The questions are also designed to motivate nongovernmental applicants to take notice of the regulatory reform efforts of their governments (or lack of such efforts) promote regulatory barrier reform where there are no such efforts, and support and encourage continued efforts where efforts at barrier removal have been undertaken.

A. Local Jurisdictions and Other Applicants Applying for Projects Located in Incorporated Jurisdictions (''Jurisdiction'')

	1.	2.
1(a). Does your Jurisdiction's comprehensive plan (or in the case of a tribe or TDHE, a local Indian Housing Plan) include a ''housing element'' which estimates current and anticipated housing needs for all existing and future residents for at least the next ten years, including various types of housing such as multifamily housing and housing for low-, moderate-, and middle-income residents, and does the housing element provide for policies and procedures to address that need?	No____	Yes____
1(b). Does your zoning ordinance and map or other land use regulations conform to the Jurisdiction's comprehensive plan and provide sufficient land use and density categories to address existing and future housing needs, including low-, moderate-, and middle-income housing, and is sufficient land zoned or mapped ''as of right'' in these categories to meet all existing and future housing needs? (For purposes of this notice, ''as-of-right,'' as applied to zoning, means uses and development standards that are determined in advance and specifically authorized by the zoning ordinance. The ordinance is largely self-enforcing because little or no discretion occurs in its administration.)	No____	Yes____
2. Does your Jurisdiction impose development impact fees?	Yes____	No____
3. If yes to 2 above, does your Jurisdiction provide waivers of these fees for affordable housing for low-, moderate-, and middle-income housing?	No____	Yes____
4. Has your Jurisdiction adopted specific building code language regarding housing rehabilitation that encourages the continued use or reuse of legally existing buildings through various degrees of housing rehabilitation? Such a code establishes gradated regulatory requirements applicable as different levels of work are performed in existing buildings. Such a code increases regulatory requirements in proportion to the extent of rehabilitation that an owner/developer chooses to do on a voluntary basis and the additional improvements required as a matter of regulatory policy. For further information *see* HUD publication: ''Smart Codes in Your Community: A Guide to Building Rehabilitation Codes'' *(http://www.huduser.org/publications/destech/smartcodes.html)*	No____	Yes____

A. LOCAL JURISDICTIONS AND OTHER APPLICANTS APPLYING FOR PROJECTS LOCATED IN INCORPORATED JURISDICTIONS (''JURISDICTION'')—Continued

	1.	2.
5. Does your Jurisdiction use a recent version (*i.e.* published within the last 5 years) of one of the nationally recognized model building codes (*i.e.* the International Code Council (ICC), the Building Officials Code Administrators (BOCA), the Southern Building Code International (SBCI), the International Conference of Building Officials (ICBO), the National Fire Protection Association (NFPA)) without significant amendment or modification, or alternatively in the case of a tribe or TDHE, has adopted a building code that is substantially equivalent to one or more of the recognized model building codes?	No____	Yes____
6. Does your Jurisdiction's zoning ordinance or land use regulations permit manufactured and modular housing ''as of right'' in all residential districts and zoning classifications in which similar site-built housing is permitted subject to design, density, building size and other similar requirements applicable to all housing in that district irrespective of the method of production?	No____	Yes____
7. Within the past five years, has the Jurisdiction official (*i.e.*, chief executive, mayor, county chairman, city manager, administrator, or a tribally recognized official, *etc.*), the local legislative body, or planning commission, directly or in partnership with major private or public stakeholders, convened or funded comprehensive studies, commissions, or panels to review, or the Jurisdiction has established an ongoing process to review the rules, regulations, development standards, and processes of the jurisdiction to assess their impact on the supply of affordable housing and have major regulatory or other reforms been implemented as a result of that study?	No____	Yes____
8. Within the past five years has your Jurisdiction modified infrastructure requirements (*e.g.* water, sewer, sidewalks street width) to significantly reduce the cost of new housing development or rehabilitation?	No____	Yes____
9. Does your Jurisdiction give ''as-of-right'' density bonuses as an incentive for any market rate residential development that includes a portion of housing for low-, moderate-, or middle-income housing? (As applied to density bonuses, ''as of right'' means a density bonus granted for a fixed percentage or number of additional market rate dwelling units in exchange for the provision of a fixed number of affordable dwelling units and without the use of discretion in determining the number of additional market rate units.)	No____	Yes____
10. Has your Jurisdiction established a single, consolidated permit application process for housing development that includes building, zoning, engineering, environmental, and related permits?	No____	Yes____
11. Does your Jurisdiction, as a matter of public policy, provide for expedited or ''fast track'' permitting and approvals for all affordable housing projects in your community?	No____	Yes____
12. Has your Jurisdiction established time limits for government review and approval or disapproval of development permits in which failure to act by the government within the designated time period deems the project approved?	No____	Yes____
13. Does your Jurisdiction explicitly allow ''accessory apartments'' either as: (1) a special exception or conditional use in all single-family residential zones or, (2) ''as of right'' in a significant number of residential districts otherwise zoned for single-family housing?	No____	Yes____
Total Points	____	____

B. STATE AGENCIES AND DEPARTMENTS OR OTHER APPLICANTS APPLYING FOR PROJECTS LOCATED IN UNINCORPORATED AREAS

	1.	2.
1. Does your State, either in its planning and zoning enabling legislation or in any other legislation, require a ''housing element'' in all local jurisdictions'' comprehensive plans or zoning ordinances which estimates current and anticipated housing needs for all existing and future residents for at least the next ten years, including low-, moderate- and middle-income residents, and does the housing element require local policies and procedures to address that need?	No____	Yes____
2. Does your state have an agency or office that includes a specific mission to determine whether local governments have policies or procedures that are raising costs or otherwise discouraging affordable housing?	No____	Yes____
3. Does your state have a legal or administrative requirement that local governments undertake periodic regulatory and barrier removal self-evaluation to encourage the construction or rehabilitation of affordable housing?	No____	Yes____
4. Does your state have a technical assistance or education program for local jurisdictions on identifying regulatory barriers and recommending strategies to local governments for their removal?	No____	Yes____
5. Does your state provide significant grant programs to local governments for housing, community development and/or transportation funding linked or prioritized on the basis of regulatory barrier removal? If yes, what are they?	No____	Yes____
6. Within the past five years has your state made any changes to its own processes or requirements to significantly reduce the cost of new housing development or rehabilitation including. (a) streamlining or consolidating the state's own approval processes involving permits for water or wastewater, environmental review, or other State-administered permits or programs involving housing development; or (b) any other requirement for local jurisdictions regarding permitting, land use, building or subdivision regulations, or related administrative procedures involving housing development? If yes, describe.	No____	Yes____
Total Points	No____	Yes____

To assist NOFA applicants in reviewing their state and local regulatory environments so they can effectively address the questions above that are proposed to be incorporated in all FY2004 NOFAs, the Department recommends visiting HUD's Regulatory Barriers Clearinghouse (RBC) at *http://www.huduser.org/rbc/*. This Web site was created to support state, local, and tribal governments and other organizations seeking information about laws, regulations, and policies affecting the development, maintenance, improvement, availability and cost of affordable housing. To encourage better understanding of the impact of regulatory issues on housing affordability the Web site includes an extensive bibliography of major studies and guidance materials to assist state, local and tribal governments in fashioning solutions and approaches to expanding housing affordability through regulatory reform at *http://www.huduser.org/rbc/relevant_publications.html.*

V. Solicitation of Public Comment

Again, HUD welcomes comments from prospective applicants that may be eligible for the higher rating points offered under this initial proposal, from other applicants, and from other interested members of the public. HUD seeks comments on the process for obtaining the points as proposed in this notice, and alternative ideas or suggestions on how this priority matter may be addressed through HUD's NOFA or other processes, such as HUD's Consolidated Plan. HUD also invites comments as to whether the regulatory barrier questions being posed to applicants would be accurate indicators of regulatory reform. HUD also invites comments as to whether there are other changes in local government developmental approval processes, land use or building regulations, subdivision regulations, or administrative procedures that can significantly reduce the cost of new housing development or rehabilitation that have not been included. During the public comment period, HUD may meet with representatives of state, local, and tribal governmental officials, as well as nonprofit organizations, to discuss this proposal and solicit more directly views, suggestions, and alternatives on how incentive criteria can work effectively with respect to HUD's award and allocation of funds or other processes.

HUD will publish a second notice advising of the responses to the solicitation of public comment, and announcing if HUD intends to proceed with this proposal for the FY 2004 competitive funding process. If HUD decides to proceed with this proposal, the second notice will also advise of any significant changes that HUD intends to make in the implementation of the proposal. HUD also anticipates publishing additional notices on this or other methods of utilization of incentive criteria for removal of regulatory barriers in HUD funding allocations, and in this regard HUD welcomes ideas from the public on other proposals that should be considered.

Dated: October 28, 2003.

A. Bryant Applegate,

Senior Counsel and Director of America's Affordable Communities Initiative.

[FR Doc. 03–29324 Filed 11–24–03; 8:45 am]

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Federal Register

Tuesday,
November 25, 2003

Part V

Department of Housing and Urban Development

America's Affordable Communities Initiative, HUD's Initiative on Removal of Regulatory Barriers: Identification of HUD Regulations That Present Barriers to Affordable Housing; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4890–N–01]

America's Affordable Communities Initiative HUD's Initiative on Removal of Regulatory Barriers: Identification of HUD Regulations That Present Barriers to Affordable Housing

AGENCY: Office of General Counsel, HUD.

ACTION: Notice.

SUMMARY: In June 2003, HUD announced a new initiative, America's Affordable Communities Initiative. America's Affordable Communities Initiative focuses on breaking down regulatory barriers that impede the production or rehabilitation of affordable housing. As part of this initiative, HUD will, among other things, examine federal, state, and local regulations to identify those regulations that present significant barriers to the production or rehabilitation of affordable housing. The goal of these activities is to determine the feasibility of removing the barriers or reducing the burden imposed by the barriers. The purpose of this notice is to solicit public comment from HUD's program partners and participants, as well as other interested members of the public, on HUD regulations that address the production and rehabilitation of affordable housing and present barriers to the production and rehabilitation of affordable housing throughout America.

DATES: *Comment Due Date:* January 26, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–0500. Comments should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours (weekdays 8 a.m. to 5 p.m. Eastern time) at the above address. Facsimile (FAX) comments are not acceptable.

FOR FURTHER INFORMATION CONTACT: Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Office of General Counsel, Room 10282, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–0500, telephone (202) 708–1793 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: In an effort to break down regulatory barriers that impede the production of affordable housing across our nation, in June 2003, HUD announced America's Affordable Communities Initiative (the Initiative). This departmentwide initiative will harness existing HUD resources to develop tools to measure and ultimately mitigate the harmful effects of excessive barriers to affordable housing. The Initiative has its roots in the Department's renewed emphasis to increase the stock of housing to meet our nation's housing demands. For example, in calendar year 2001, HUD announced the creation of the Regulatory Barriers Clearinghouse, a central, web-based repository of successful affordable housing endeavors. The Regulatory Barriers Clearinghouse offers state and local governments, nonprofits, builders, and developers alike the opportunity to share ideas and solutions for overcoming state and local regulatory barriers to affordable housing. The Regulatory Barriers Clearinghouse, like the Initiative, presents a public forum to facilitate the identification and resolution of regulatory barriers to affordable housing. The Regulatory Barriers Clearinghouse can be found at *http://www.regbarriers.org.*

One of the tasks of the Initiative will be to examine federal, state, and local regulatory barriers to affordable housing and determine the feasibility of removing the barriers or, at a minimum, reducing the burden created by the barriers. HUD, as the federal agency with responsibility for promoting and facilitating the production and rehabilitation of affordable housing, will first examine its own regulations. HUD has commenced the process of reviewing its own regulations that address the production and rehabilitation of affordable housing to identify those that constitute unnecessary, excessive, cumbersome, or duplicative departmental regulatory requirements. HUD intends to target those regulations that raise costs substantially or significantly impede the development or rehabilitation of America's stock of affordable housing.

For this task, HUD seeks the assistance of its current and former program participants and partners, which include states and local governments, public housing agencies, state finance agencies, nonprofit and for-profit organizations, and the general public. HUD's regulations may be found in title 24 of the Code of Federal Regulations (24 CFR), or on the Internet at *http://www.access.gpo.gov/cgi-bin/cfrassemble.cgi?title=200324.*

Many HUD regulations reflect statutory requirements for which HUD has no authority to change. Other HUD regulations reflect statutory requirements for which HUD was authorized to exercise discretion, but only in the manner of implementation of the statute. Consequently, HUD may be able to revise the manner of implementation but not the underlying requirement. Nonetheless, HUD welcomes the identification of HUD regulations that impose barriers to the production or rehabilitation of affordable housing. Where HUD has no authority to change a regulation due to statutory requirements, the identification of the regulation may nevertheless assist HUD in identifying statutes that present barriers to affordable housing and for which a statutory amendment may be both appropriate and feasible. In these cases, HUD will consult with the appropriate Congressional committees to discuss statutory changes.

Although some regulations may impose or appear to impose barriers to the production or rehabilitation of affordable housing, they may nonetheless be necessary to protect the safety and security of certain housing residents or the surrounding communities. These regulations may establish requirements for housing that is decent, safe and sanitary (requirements that HUD has a statutory obligation to fulfill) or the regulations may establish accessibility standards for the elderly or persons with disabilities. Change to these types of regulations may not be possible. Even though HUD may be unable to change certain regulations, HUD nonetheless solicits comments on all regulations that present or appear to present barriers to affordable housing.

With the identification of HUD regulations that impose barriers to affordable housing, HUD also welcomes proposals or suggestions for how these regulations may be changed in those cases where it may be apparent that total repeal of the regulation is not feasible. For example, where application and approval processes are a necessary part of the production or rehabilitation of affordable housing, HUD is interested in comments on whether these processes are too cumbersome or too complicated and is equally interested to receive proposals on how these processes can be streamlined and simplified.

To submit comments in response to this notice, HUD requests that

commenters clearly identify the HUD regulation by its section number in 24 CFR (for example, 24 CFR 275.42). HUD also requests that the commenter identify the specific concerns or problems with the regulation. At the conclusion of the public comment period, HUD will review all regulations identified by commenters. HUD will then issue a second notice that advises the public of the regulations identified by commenters, as well as HUD's plans for next steps in the ongoing process of addressing its own regulatory barriers to affordable housing.

Removal of regulatory barriers or reduction of the burden of regulatory barriers is a priority initiative for HUD, and HUD welcomes the public's participation in this process.

Dated: October 28, 2003.

A. Bryant Applegate,

Senior Counsel and Director of America's Affordable Communities Initiative.

[FR Doc. 03–29325 Filed 11–24–03; 8:45 am]

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Federal Register

Tuesday,
November 25, 2003

Part VI

Department of the Treasury

31 CFR Part 103

Designation of Burma as a Jurisdiction of Primary Money Laundering Concern; Designation of Myanmar Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern; Notice and Proposed Rules

DEPARTMENT OF THE TREASURY

Designation of Burma as a Jurisdiction of Primary Money Laundering Concern; Designation of Myanmar Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of designations.

DATES: The designations contained in this notice became effective on November 18, 2003.

SUMMARY: On November 18, 2003, the Secretary of the Treasury designated Burma (also known as Myanmar) as a jurisdiction of primary money laundering concern in accordance with the requirements and procedures of 31 U.S.C. 5318A, as added by section 311(a) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Also on November 18, under the same authority, the Secretary of the Treasury designated the Burmese financial institutions Myanmar Mayflower Bank and the Asia Wealth Bank as financial institutions of primary money laundering concern.

SUPPLEMENTARY INFORMATION: The text of the designations follows.

Dated: November 19, 2003.

Richard S. Carro,

Senior Advisor to the General Counsel, (Regulatory Affairs).

Designation of Burma as a Jurisdiction of Primary Money Laundering Concern

Pursuant to 31 U.S.C. 5318A, as added by section 311(a) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. 107–56), subject to the requirements and procedures and based upon consideration of the factors articulated therein as reflected in the accompanying Administrative Record, I hereby designate the jurisdiction of Burma (also known as Myanmar) as a primary money laundering concern.

Dated: November 18, 2003.

John W. Snow,

Secretary of the Treasury.

Designation of Myanmar Mayflower Bank and Asian Wealth Bank as Primary Money Laundering Concerns

Pursuant to 31 U.S.C. 5318A, as added by section 311(a) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (Pub. L. 107–56), subject to the requirements and procedures and based upon consideration of the factors articulated therein as reflected in the accompanying Administrative Record, I hereby designate the Burmese financial institutions Myanmar Mayflower Bank and Asia Wealth Bank as primary money laundering concerns.

Dated: November 18, 2003.

John W. Snow,

Secretary of the Treasury.

[FR Doc. 03–29395 Filed 11–24–03; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

Imposition of Special Measures Against Burma as a Jurisdiction of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: On November 18, 2003, the Secretary of the Treasury designated Burma as a jurisdiction of primary money laundering concern pursuant to 31 U.S.C. 5318A, as added by section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. The Department of the Treasury, acting through FinCEN, is issuing this proposed rule to impose special measures against this jurisdiction.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before December 26, 2003.

ADDRESSES: It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC area may be delayed. Comments submitted by electronic mail may be sent to *regcomments@fincen.treas.gov* with the caption in the body of the text, ''ATTN: Section 311—Designation of Burma.'' Comments also may be submitted by paper mail to FinCEN, PO Box 39, Vienna, VA 22183, Attn: Section 311 Special Measure Regulation (Burma). Please submit comments by one method only. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not toll-free number).

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, (202) 622–1927; the Executive Office for Terrorist Financing and Financial Crimes, (Treasury), (202) 622–0470; or the Office of Chief Counsel (FinCEN), (703) 905–3590 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The Secretary of the Treasury has designated Burma as a jurisdiction of primary money laundering concern under 31 U.S.C. 5318A, as added by section 311(a) of the USA PATRIOT Act (Pub. L. 107–56).

Treasury, acting through FinCEN, is also proposing the imposition of special measures authorized by section 5318A(b)(5). The special measures imposed under this section would generally prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts in the United States for, or on behalf of, Burmese financial institutions, unless (as explained below) operation of those accounts is not prohibited by Executive Order 13310 of July 28, 2003, and the Burma-related activities of such accounts are solely to affect transactions that are exempt from, or licensed pursuant to, Executive Order 13310. This prohibition extends to correspondent or payable-through accounts maintained for other foreign banks when such accounts are used by the foreign bank to provide financial services to a Burmese financial institution indirectly.

Additionally, the Secretary designated two Burmese financial institutions, Myanmar Mayflower Bank and Asia Wealth Bank, as financial institutions of primary money laundering concern. By a separate proposed rule, Treasury and FinCEN are proposing the imposition of the fifth special measure as well. This special measure would prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts for, or on behalf of, Myanmar Mayflower Bank or Asia Wealth Bank, notwithstanding any exemption from, or license issued pursuant to Executive Order 13310.

I. Background

A. Section 311 of the USA PATRIOT Act

On October 26, 2001, the President signed the Act into law. Title III of the Act amends the anti-money laundering provisions of the Bank Secrecy Act (BSA) (codified in subchapter II of chapter 53 of title 31, United States Code) to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 311 of the Act (Section 311) added section 5318A to the BSA, granting the Secretary of the Treasury (Secretary) authority to designate a foreign jurisdiction, institution(s), class(es) of transactions, or type(s) of account(s) to be of ''primary money laundering concern,'' and to require U.S. financial institutions to take certain ''special measures'' against the primary money laundering concern.

Section 311 identifies factors to consider as well as agencies and departments to consult before the Secretary may designate a primary money laundering concern. The statute also provides similar procedures, *i.e.*, factors and consultation requirements, for selecting specific special measures against the designee.

Taken as a whole, Section 311 provides Treasury with a range of options that can be adapted to target most effectively specific money laundering and terrorist financing concerns. These options give the Secretary the authority to bring additional and useful pressure on those jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can obtain more information about the concerned jurisdictions, institutions, transactions, and accounts; more effectively monitor the respective institutions, transactions, and accounts; and/or protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that pose a money laundering concern.

1. Required Consultations and Statutory Considerations To Be Made Prior To Designating a Foreign Jurisdiction To Be of Primary Money Laundering Concern

Before making a finding that reasonable grounds exist for concluding that a jurisdiction is of primary money laundering concern, the Secretary is required to consult with both the Secretary of State and the Attorney General.

In addition to these consultations, the Secretary is required by statute to consider ''such information as the Secretary determines to be relevant, including the following potentially relevant factors,'' when designating a foreign jurisdiction:

- Evidence that organized criminal groups, international terrorists, or both, have transacted business within the designated jurisdiction;
- The extent to which the jurisdiction or financial institutions operating in the jurisdiction offer bank secrecy or special regulatory advantages to nonresidents or nondomiciliaries of the jurisdiction;
- The substance and quality of administration of the bank supervisory and counter-money laundering laws of the jurisdiction;
- The relationship between the volume of financial transactions occurring in the jurisdiction and the size of the economy of the jurisdiction;
- The extent to which the jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups;

• Whether the United States has a mutual legal assistance treaty with the jurisdiction, and the experience of United States law enforcement and regulatory officials in obtaining information about transactions originating in, or routed through or to, such jurisdiction; and

• The extent to which the jurisdiction is characterized by high levels of official or institutional corruption.

Thus, a designation is based on consideration of the relevant facts and factors, in conjunction with a consultation process, which leads to a decision by the Secretary that there are reasonable grounds to conclude that the jurisdiction is of primary money laundering concern.

2. Imposition of Special Measures

If the Secretary determines that a foreign jurisdiction is of primary money laundering concern, the Secretary must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of special measures that can be imposed, individually, jointly, in any combination, and in any sequence.[1]

The Secretary's imposition of special measures follows procedures similar to those for designations, but carries with it additional consultations to be made and factors to consider. The statute requires the Secretary to consult with appropriate agencies and other interested parties[2] and to consider the following specific factors:

• Whether similar action has been or is being taken by other nations or multilateral groups;

• Whether the imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;

• The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction; and

• The effect of the action on United States national security and foreign policy.

3. Procedures for Imposing Special Measures

In this proposed rulemaking, the Secretary seeks to impose the fifth special measure (31 U.S.C. 5318A(b)(5)) against Burma. This special measure may only be imposed through the issuance of a regulation.

B. Burma

Burma (also known as Myanmar) has no effective anti-money laundering controls in place. As a result, in June 2001 Burma was designated as a Non-Cooperative Country or Territory (NCCT) by the Financial Action Task Force (FATF)[3] for its lack of basic anti-money laundering provisions and weak oversight of the banking sector. Following the designation by the FATF, in April 2002, FinCEN issued an advisory to U.S. financial institutions to give enhanced scrutiny to all transactions originating in or routed to or through Burma, or involving entities organized or domiciled, or persons maintaining accounts, in Burma. Deficiencies identified by FATF and the FinCEN advisory included:

• Burma lacks a basic set of anti-money laundering laws and regulations.

• Money laundering is not a criminal offense for crimes other than drug trafficking in Burma.

• The Burmese Central Bank has no anti-money laundering regulations for financial institutions.

• Banks licensed by Burma are not legally required to obtain or maintain identificaiton information about their customers.

• Banks licensed by Burma are not required to maintain transaction records of customer accounts.

• Burma does not require financial institutions to report suspicious transactions.

• Burma has significant obstacles to international co-cooperation by judicial authorities.

In June 2002, Burma responded to this international pressure by enacting an anti-money laundering law that purportedly addresses some of these deficiencies. The necessary regulations required for its effective implementation, however, are not in place. As a result, the Burmese anti-money laundering law is ineffective and unenforceable, and cannot be regarded as effectively remedying any of the identified deficiencies. Due to Burma's lack of progress, the FATF called upon its member jurisdictions to impose additional countermeasures on Burma as of November 3, 2003.

The United States continues to recognize that Burma is a haven for international drug trafficking. On January 31, 2003, the President also signed Presidential Determination No. 2003–14, identifying Burma as a major illicit drug producing and/or drug transiting country pursuant to section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107–228) and as a country that has failed demonstrably during the previous twelve months to adhere to its obligations under international counter-narcotics agreements and take the measures set forth in section 489(a)(1) of the Foreign Assistance Act of 1961, as amended (FAA). In addition, this past year Burma continued to be named as a major money laundering country. A major money laundering country is defined by statute as one ''whose financial institutions engage in currency transactions including significant amounts of proceeds from international narcotics trafficking.'' FAA section 481(e)(7).

C. Economic Sanctions

On July 28, 2003, the President signed both the Burmese Freedom and Democracy Act of 2003 and Executive Order 13310, imposing economic sanctions on Burma. These sanctions generally include: (1) A ban on the exportation or reexportation, directly or indirectly, of financial services to Burma; (2) the blocking of property and interests in property of the State Peace and Development Council of Burma and three state-owned foreign trade banks that are in the United States or in the possession or control of U.S. persons; and (3) a ban on the importation of Burmese goods into the United States. The new sanctions have frozen hundreds of thousands of dollars of assets and have disrupted an already weak economy, especially in the important garment sector where many firms have closed or moved outside of Burma.

[1] Available special measures include requiring: (1) Recordingkeeping and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or conditions on the opening or maintaining of correspondent or payable-through accounts; 31 U.S.C. 5318A(b)(1)–(5). For a complete discussion of the range of possible countermeasures, *see* 68 FR 18917 (April 17, 2003) (proposing to impose special measures against Nauru).

[2] Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission (SEC), the Commodity Future Trading Commission (CFTC), the National Credit Union Administration (NCUA), and, in the sole discretion of the Secretary, ''such other agencies and interested parties as the Secretary may find to be appropriate.'' The consultation process must also include the Attorney General and the Secretary of State if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions maintaining correspondent account relationships with the disignated jurisdiction.

[3] For further informaiton on the FATF go to *http://www.fatf-gafi.org.*

Executive Order 13310 prohibits broadly the provision of financial services to Burma from the United States or by a U.S. person, subject to limited exceptions.[4] Since the President signed the Order, however, Treasury has issued several licenses to permit transactions with Burma for certain specified purposes. For example, Treasury issued licenses authorizing transactions for the conduct of the official business of the United States Government, the United Nations, the World Bank, and the International Monetary Fund, and non-commercial personal remittances of up to $300 per household per quarter. The exemptions and licenses reflect the judgment of the United States that certain transactions are necessary and appropriate, even within the framework of this sanctions regime.

D. The Proposed Section 311 Special Measures

The proposed imposition of Section 311 special measures reinforces the existing restrictions on transactions with Burma that are outlined above. Although they are similar in their effect, the proposed Section 311 special measures differ in certain respects and serve distinct policy goals. First, the proposed Section 311 special measures are potentially broader than the existing sanctions in at least one respect—they would apply to all foreign branches of Burmese financial institutions. Second, the purposes served by the Section 311 action differ markedly from the purposes of the economic sanctions described above. This action under Section 311 is premised on the Secretary's determination that Burma poses an unacceptable risk of money laundering and other financial crimes, due to its failure to implement an effective anti-money laundering regime. The goals of this action include protecting the U.S. financial system and encouraging Burma to make the necessary changes to its anti-money laundering regime. The existing sanctions pursuant to Executive Order 13310, on the other hand, were imposed for different reasons, in particular to take additional steps with respect to the government of Burma's continued repression of the democratic opposition.

These underlying purposes for the designation of Burma fuel another intended consequence, namely, to encourage other jurisdictions and financial institutions to take similar steps to cut off Burma from the international financial system due to the unacceptable risk of money laundering. In addition to stemming the flow of illicit funds from Burma into the United States, the act of naming Burma publicly and formally denying them access to the U.S. financial system is an important statement to the rest of the world about the need for caution in financial dealings with Burma and the need for reform.

Next, this action fulfills an important role of the United States in supporting the multilateral effort to encourage Burma to implement effective anti-money laundering controls. The FATF has called on all members to impose additional countermeasures as a result of Burma's failure to address its money laundering deficiencies. The assessment of Section 311 special measures, premised squarely on the absence of money laundering controls, fulfills this obligation in a way that the existing sanctions cannot.

Finally, the proposed Section 311 special measures incorporate the exemptions from, and licenses issued pursuant to, Executive Order 13310. Thus, U.S. financial institutions may maintain otherwise prohibited correspondent account relationships so long as the maintenance of such accounts is not prohibited by E.O. 13310 and provided that the only transactions conducted on behalf of Burmese financial institutions are those that are otherwise permissible under the existing sanctions regime. The policy of allowing certain transactions under the Executive Order should not be undermined by Section 311 special measures. However, Burma has been designated under Section 311 of the Act due to inadequate anti-money laundering controls, and the fact that the overarching purpose for a transaction is permissible under the Executive Order does not itself reduce the risk of money laundering. Therefore, while the exemptions and licenses are incorporated into the proposed Section 311 special measures, U.S. financial institutions processing such transactions must still conduct enhanced scrutiny to guard against the flow of illicit proceeds.

II. Designation of Burma as a Jurisdiction of Primary Money Laundering Concern

Based upon a review and analysis of relevant information, consultations with relevant agencies and departments, and a consideration of the factors outlined above, the Secretary has determined that Burma is a jurisdiction of primary money laundering concern. See the notice published elsewhere in this separate part.

The Secretary has found Burma to be a jurisdiction of primary money laundering concern due to a number of factors, including: (1) Inadequate anti-money laundering controls; and (2) lack of cooperation with U.S. law enforcement agencies in criminal matters.

As provided by Section 311, the Secretary also considered the following:

1. Evidence That Organized Criminal Groups, International Terrorists, or Both, Have Transacted Business in That Jurisdiction

As set forth in the accompanying Section 311 designation of the two Burmese banks, Myanmar Mayflower Bank and Asia Wealth Bank,[5] the Secretary has information that specific financial institutions within Burma are essentially controlled by and used to facilitate money laundering for organized drug trafficking organizations such as the United Wa State Army[6] and members of the Kokang ethnic group. The Burmese government has failed to take any regulatory or enforcement action against these financial institutions, despite their well-known criminal links. Additionally, there is evidence of activity within Burma involving the counterfeiting of U.S. currency. This activity is believed to be linked to Burmese government officials, and the Burmese government has failed to cooperate with U.S. law enforcement on the matter.

2. The Extent to Which That Jurisdiction or Financial Institutions Operating in That Jurisdiction Offer Bank Secrecy or Special Regulatory Advantages to Non-Residents or Nondomiciliaries of That Jurisdiction

There are no explicit secrecy provisions within Burmese law. Burma does not have an offshore sector catering to foreign investors or depositors, and the Burmese anti-money laundering law contains customer identification and recordkeeping requirements. However, as noted above, this law cannot be enforced absent implementing regulations, which Burma has failed to issue. Thus, as a practical matter, the laws that would give rise to effective anti-money laundering controls and transparency are unenforceable.

[4] For example, the prohibition does not extend to transacitons relating to certain contracts entered into prior to May 21, 1997. *See* Executive Order 13310, § 13.

[5] *See* the notice published in today's edition of the **Federal Register**.

[6] The United States as designated the United Wa State Army as significant narcotics traffickers under the Foreign Narcotics Kingpin Designation Act (the ''Kingpin Act''), 21 U.S.C. 1901–1908, 8 U.S.C 1182.

3. The Substance and Quality of Administration of the Bank Supervisory and Counter-Money Laundering Law of That Jurisdiction

In addition to the deficiencies discussed above, the Central Bank of Burma—which is responsible for the regulation and supervision of all Burmese financial institutions—has failed to include anti-money laundering provisions within its regulations for financial institutions.

4. The Relationship Between the Volume of Financial Transactions Occurring in That Jurisdiction and the Size of the Economy of the Jurisdiction

Assessment of this factor is difficult due to difficulties in estimating the overall size of the Burmese economy. Official data is unreliable, and the black market and border trade likely comprise a significant portion of the overall economy.

5. The Extent to Which That Jurisdiction Is Characterized as an Offshore Banking or Secrecy Haven by Credible International Organizations or Multilateral Expert Groups

As noted above, in June 2001, the FATF identified Burma as non-cooperative in international efforts to fight money laundering due to significant deficiencies in its anti-money laundering system. In October 2003, due to Burma's continuing failure to address these deficiencies, the FATF called upon its members to impose additional countermeasures on Burma as of November 3, 2003.

6. Whether the United States Has a Mutual Legal Assistance Treaty With That Jurisdiction, and the Experience of United States Law Enforcement Officials in Obtaining Information About Transactions Originating in or Routed Through or to Such Jurisdiction

The U.S. does not have a mutual legal assistance treaty with Burma. Additionally, U.S. law enforcement indicates that they rarely gain access to bank-related information pursuant to investigations. Moreover, as previously indicated, U.S. law enforcement has received no cooperation regarding counterfeiting investigations involving Burma.

7. The Extent to Which That Jurisdiction Is Characterized by High Levels of Official or Institutional Corruption

Transparency International—the leading international non-governmental organization devoted to curbing corruption—has ranked Burma as the fourth most corrupt jurisdiction out of 133 jurisdictions assessed worldwide.

III. Imposition of Special Measures

As a result of the designation of Burma as a jurisdiction of primary money laundering concern, and based upon consultations [7] and the consideration of all relevant factors, the Secretary has determined that grounds exist for the imposition of the special measures authorized by section 5318A(b)(5). Thus, the proposed rulemaking would prohibit covered financial institutions from establishing, maintaining, administering, or managing in the United States any correspondent or payable-through account for, or on behalf of, a Burmese financial institution. This prohibition would extend to any correspondent or payable-through account maintained in the United States for any foreign bank if the account is used by the foreign bank to provide banking services indirectly to a Burmese financial institution. Financial institutions covered by this proposed rule that obtain knowledge that this is occurring would be required to ensure that any such account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship in the manner set forth in this rulemaking. Other than with respect to Myanmar Mayflower Bank and Asia Wealth Bank, the proposed rule does, however, allow U.S. financial institutions to maintain correspondent accounts otherwise prohibited by this rule if such accounts are permitted to be maintained pursuant to Executive Order 13310 and the Burma-related activity of those accounts is solely for the purpose of conducting transactions that are exempt from, or authorized by regulation, order, directive, or license issued pursuant to, Executive Order 13310.

In imposing this special measure, the Secretary has considered the following pursuant to section 5318A(a)(4)(b):

1. Similar Actions Have Been or Will be Taken by Other Nations or Multilateral Groups Against Burma Generally

In June 2001, the FATF designated Burma as an NCCT, resulting in FATF members issuing advisories to their financial sectors recommending enhanced scrutiny of transactions involving Burma. In April 2002 FinCEN issued an advisory notifying U.S. financial institutions that they should accord enhanced scrutiny with respect to transactions and accounts involving Burma. In October 2003, FATF called upon its 33 members to take additional countermeasures with respect to Burma as of November 3, 2003. Imposition of the fifth special measure on Burma is consistent with this call for additional countermeasures and forms part of an international effort to protect the financial system. Based on informal discussions and the past practices of the FATF membership, the majority of FATF members are expected to take countermeasures, including all of the Group of Seven countries. The countermeasures imposed by such FATF members will likely include imposition of additional reporting requirements, issuance of additional advisories, shifting the burden for reporting obligations, and/or restrictions on the licensing of Burmese financial institutions.

2. Imposition of the Fifth Special Measure Would Not Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated With Compliance, for Financial Institutions Organized or Licensed in the United States

U.S. financial institutions are already prohibited from providing financial services to Burma, unless such services are exempted or licensed. The imposition of the fifth special measure potentially imposes a broader prohibition than currently exists, because it would preclude maintaining correspondent accounts for foreign branches of Burmese financial institutions. However, on balance, it is unlikely that the imposition of the fifth special measure will create any significant additional costs or place U.S. financial institutions at a competitive disadvantage. In fact, Treasury's action is intended to encourage other jurisdictions and financial institutions to take similar steps to cut off Burma from the international financial system, which would further minimize any potential competitive disadvantage for U.S. financial institutions.

Moreover, the proposed rule would not itself require U.S. financial institutions to perform additional due diligence on their existing foreign bank correspondent account customers beyond what is already required under existing regulations.

3. The Proposed Action or the Timing of the Action Will Not Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities Involving the Jurisdiction

Given the preexisting sanctions on Burma, it is unlikely that these new measures or the timing of the new

[7] For purposes of this action, the required consultation with the Federal functional regulators was performed at the staff level.

measures will have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities of Burma.

4. The Proposed Action Would Enhance the National Security of the United States and Is Consistent With, and in Furtherance of, United States Foreign Policy

The imposition of this countermeasure on Burma is consistent with an overall foreign policy strategy to enhance our national security through comprehensive economic and political sanctions against Burma.

IV. Section-by-Section Analysis

A. Overview

The designation published elsewhere in this separate part and this proposed rule are intended to deny Burmese financial institutions access to the U.S. financial system through correspondent accounts, which includes payable-through accounts. The proposed rule would prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent accounts in the United States for, or on behalf of, a Burmese financial institution. If a U.S. financial institution covered by this proposed rule learns that a correspondent account that it maintains for a foreign bank is being used by that foreign bank to provide services indirectly to a Burmese financial institution, the U.S. institution must ensure that the account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship. As explained below, the proposed rule does not itself require U.S. financial institutions to perform additional due diligence on foreign bank customers.

The proposed rule does allow U.S. financial institutions to maintain otherwise prohibited correspondent accounts to the extent they are permitted pursuant to Executive Order 13310 and the Burma-related activities of those accounts are for the purpose of conducting transactions that are exempt from, or licensed pursuant to, Executive Order 13310.

B. Definitions

Correspondent account. Section 103.186(a)(1) of the proposed rule's definition of correspondent account is the definition contained in 31 U.S.C. 5318A(e) (as added by Section 311 of the Act), which defines the term for banks to mean an account established to receive deposits from or make payments on behalf of a foreign financial institution, or handle other financial transactions related to the foreign financial institution.

In the case of a U.S. depository institution, this broad definition would include most types of banking relationships between a U.S. depository institution and a foreign financial institution, including payable-through accounts. In the case of securities broker-dealers, futures commission merchants, introducing brokers, and mutual funds, a correspondent account would include any account that permits the foreign financial institution to engage in (1) trading in securities and commodity futures or options, (2) funds transfers, or (3) other types of financial transactions. Treasury is using the same definition for purposes of the proposed rule as that established in the final rule implementing Sections 313 and 319(b) of the Act [8] with two notable exceptions: (1) the term also applies to such accounts maintained by futures commission merchants, introducing brokers, and mutual funds; and (2) the definition applies to such accounts maintained for any Burmese financial institution, as opposed to just Burmese banks.

Covered financial institution. Section 103.186(a)(2) of the proposed rule defines covered financial institution to mean all of the following: any insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; a credit union; a thrift institution; a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*); a broker or dealer registered or required to register with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); a futures commission merchant or an introducing broker registered, or required to register, with the CFTC under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and an investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3)) that is an open-end company (as defined in section 5 of the Investment Company Act of 1940 (15 U.S.C. 80a–5) that is registered, or required to register, with the SEC pursuant to that Act.

Burmese financial institution. Section 103.186(a)(3) of the proposed rule defines a Burmese financial institution to include all foreign banks chartered or licensed by Burma and any other person organized under the law of Burma who conducts as a business one or more of the following activities or operations on behalf of customers: trading in (1) Money market instruments; (2) exchange, interest rate, and index instruments; (3) transferable securities; and (4) commodity futures or options. The definition of foreign bank is that contained in 31 CFR 103.11(o). The inclusion in this definition of financial institutions other than depository institutions is done in recognition that these activities are alternate viable routes for money laundering activity. Foreign branches and offices of Burmese financial institutions are included in this definition. However, subsidiaries are not at this time. Also, the Central Bank of Burma is not a Burmese financial institution.

C. Requirements for Covered Financial Institutions

1. Prohibition on Correspondent Accounts

Section 103.186(b)(1) of the proposed rule would prohibit generally all covered financial institutions from establishing, maintaining, administering, or managing a correspondent or payable-through account in the United States for, or on behalf of, a Burmese financial institution. The prohibition would require all covered financial institutions to review their account records to determine that they maintain no accounts directly for, or on behalf of, a Burmese financial institution. This prohibition is subject to the exception contained in section 103.186(b)(4), described below.

2. Prohibition on Indirect Correspondent Accounts

Under section 103.186(b)(2) of the proposed rule, if a covered financial institution obtains knowledge that a correspondent or payable-through account that it maintains for a foreign bank is being used by that foreign bank to provide services indirectly to a Burmese financial institution, the U.S. institution must ensure that the account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship. In contrast to the obligation placed on covered financial institutions to identify correspondent accounts maintained directly for, or on behalf of, a Burmese financial institution in section 103.186(b)(1), this section would not itself impose an independent obligation on covered financial institutions to review or investigate correspondent accounts they

[8] 67 FR 60562 (September 26, 2002) (codified at 31 CFR 103.175 (d)(1))

maintain for foreign banks to ascertain whether a foreign bank is using the account to provide services to a Burmese financial institution. Instead, if covered financial institutions become aware, through due diligence that is otherwise appropriate or required under existing anti-money laundering obligations, that a foreign bank is using its correspondent account to provide banking services indirectly to a Burmese financial institution, then the covered financial institutions must ensure that the account is no longer used for such purposes. This reflects the approach taken in the proposed rulemaking imposing special measures against Nauru.[9]

Additionally, when a covered financial institution becomes aware that a foreign bank customer is using the U.S. correspondent account to provide services to a Burmese financial institution indirectly, the covered financial institution may afford that foreign bank customer a reasonable opportunity to take corrective action prior to terminating the U.S. correspondent account. Should the foreign bank customer refuse to comply, or if the covered financial institution cannot obtain adequate assurances that the account will no longer be used for impermissible purposes, the covered financial institution must terminate the account in accordance with this regulation. Treasury has also incorporated the requirement of termination within a reasonable period of time and the reinstatement of a terminated correspondent account found in the final regulation implementing Sections 313 and 319(b) of the Act.[10]

This provision is likewise subject to the exception contained in section 103.186(b)(3), described below.

3. Exception

Section 103.186(b)(3) provides for an exception to the prohibition on both direct and indirect correspondent account relationships of the proposed rule. U.S. financial institutions covered by the proposed rule may maintain a correspondent account relationship otherwise prohibited by this rule if the maintenance of such an account is permitted pursuant to Executive Order 13310 and if the transactions involving Burmese financial institutions that are conducted through the correspondent account are limited solely to transactions that are exempted in, or otherwise authorized by regulation, order, directive, or license issue pursuant to, Executive Order 13310. As described previously in section I(C)(1), certain transactions with Burma are exempt from the prohibitions of Executive Order 13310 or have been authorized through the licensing process. The general licenses (*i.e.*, those of general applicability) or other authorizations issued will be set forth in 31 CFR part 537, and are available on the website of Treasury's Office of Foreign Assets Control, *http://www.treas.gov/offices/eotffc/ofac/sanctions/sanctguide-burma.html.* To ensure that those authorized activities are available as a practical matter, U.S. correspondent accounts permitted to operate pursuant to Executive Order 13310 may be used to effect those permitted transactions.

4. Reporting and Recordkeeping Not Required

Section 103.186(b)(3) of the proposed rule states that it does not impose any reporting or recordkeeping requirement upon any covered financial institution that is not otherwise required by applicable law or regulation.

V. Designation of Burma To Be of Primary Money Laundering Concern

Effective November 18, 2003, Burma was designated by the Secretary of the Treasury to be a jurisdiction of primary money laundering concern under 31 U.S.C. 5318A, as added by Section 311(a) of the Act. See the notice published elsewhere in this separate part.

VI. Public Comments Requested

Comments are invited from all interested persons concerning this proposed rulemaking, and are specifically sought from the financial sector, including domestic financial institutions and agencies, concerning the appropriateness and effectiveness of this particular special measure, the ability to comply with the special measure, and any competitive disadvantage, cost, or burden associated with compliance.

VII. Regulatory Flexibility Act

It is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. As explained above, financial institutions covered by this proposed rulemaking are already prohibited under existing sanctions from maintaining correspondent accounts for Burmese financial institutions. Given the comprehensive sanctions regime, Treasury and FinCEN believe that few foreign correspondent bank customers of small U.S. financial institutions covered by the proposed rulemaking will themselves maintain correspondent accounts for Burmese financial institutions. Treasury and FinCEN specifically request comment on the extent to which the prohibition contained in the proposed rule would affect small U.S. financial institutions beyond obligations already imposed by existing economic sanctions.

VIII. Executive Order 12866

Because this rule involves a foreign affairs function of the United States, it is not subject to Executive Order 12866, ''Regulatory Planning and Review.''

List of Subjects in 31 CFR Part 103

Banks and banking, Brokers, Counter-money laundering, Counter-terrorism, Currency, Foreign banking, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, 31 CFR part 103 is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 is revised to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; title III, sec. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107–56, 115 Stat. 307; 12 U.S.C. 1818; 12 U.S.C. 1786(q).

2. Subpart I of part 103 is proposed to be amended by adding § 103.186 under the undesignated centerheading ''SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS'' to read as follows:

§ 103.186 Special measures against Burma.

(a) *Definitions.* For purposes of this section:

(1) *Correspondent account* means an account established to receive deposits from, or make payments on behalf of, a foreign financial institution, or handle other financial transactions related to such institution.

(2) *Covered financial institution* has the same meaning as provided in § 103.175(f)(2) and also includes the following:

(i) A futures commission merchant or an introducing broker registered, or required to register, with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and

[9] 68 FR 18917 (April 17, 2003).

[10] 67 FR 60562 (September 26, 2002) (codified at 31 CFR 103.177).

(ii) An investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–5)) that is an open-end company (as defined in section 5 of the Investment Company Act (15 U.S.C. 80a–5)) and that is registered, or required to register, with the Securities and Exchange Commission pursuant to that Act.

(3) *Burmese financial institution* means the following:

(i) Any foreign bank, as that term is defined in § 103.11(o), chartered or licensed by Burma, including branches and offices located outside Burma; and

(ii) Any other person organized under the law of Burma, including branches or offices located outside of Burma, who conducts as a business one or more of the following activities or operations on behalf of customers:

(A) Trading in money market instruments;

(B) Trading in exchange, interest rate, and index instruments;

(C) Trading in transferable securities; or

(D) Trading in commodity futures or options.

(b) *Requirements for covered financial institutions*—(1) *Prohibition on correspondent accounts.* A covered financial institution shall terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, a Burmese financial institution.

(2) *Prohibition on indirect correspondent accounts.* (i) If a covered financial institution has or obtains knowledge that a correspondent account established, maintained, administered, or managed by that covered financial institution in the United States for a foreign bank is being used by the foreign bank to provide banking services indirectly to a Burmese financial institution, the covered financial institution shall ensure that the correspondent account is no longer used to provide such services, including, where necessary, terminating the correspondent account; and

(ii) A covered financial institution required to terminate an account pursuant to paragraph (b)(2)(i) of this section:

(A) Shall do so within a commercially reasonable time, and shall not permit the foreign bank to establish any new positions or execute any transactions through such account, other than those necessary to close the account; and

(B) May reestablish an account closed pursuant to this paragraph if it determines that the account will not be used to provide banking services indirectly to a Burmese financial institution.

(3) *Exception.* The provisions of paragraphs (b)(1) and (2) of this section shall not apply to a correspondent account provided that the operation of such account is not prohibited by Executive Order 13310 and the transactions involving Burmese financial institutions that are conducted through the correspondent account are limited solely to transactions that are exempted from, or otherwise authorized by regulation, order, directive, or license pursuant to, Executive Order 13310.

(4) *Reporting and recordkeeping not required.* Nothing in this section shall require a covered financial institution to maintain any records, obtain any certification, or report any information not otherwise required by law or regulation.

Dated: November 19, 2003.

William F. Baity,

Acting Director, Financial Crimes Enforcement Network.

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DEPARTMENT OF THE TREASURY

31 CFR Part 103

Imposition of Special Measures Against Myanmar Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: On November 18, 2003, the Secretary of the Treasury designated Myanmar Mayflower Bank (Mayflower Bank) and Asia Wealth Bank, both Burma banks, as financial institutions of primary money laundering concern pursuant to 31 U.S.C. 5318A, as added by section 311 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. The Department of the Treasury, acting through FinCEN, is issuing this proposed rule to impose special measures against these two institutions.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before December 26, 2003.

ADDRESSES: It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC area may be delayed. Comments submitted by electronic mail may be sent to *regcomments@fincen.treas.gov* with the caption in the body of the text, ''Attn: Section 311—Designation of Burmese Banks.'' Comments also may be submitted by paper mail to FinCEN, P.O. Box 39, Vienna, VA 22183, Attn: Section 311 Special Measures Regulations (Burmese Banks). Please submit comments by one method only. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, (202) 622–1927; the Executive Office for Terrorist Financing and Financial Crimes (Treasury) (202) 622–0470; or the Office of Chief Counsel (FinCEN), (703) 905–3590 (not toll free numbers).

SUPPLEMENTARY INFORMATION: The Secretary of the Treasury has designated Myanmar Mayflower Bank (Mayflower Bank) and Asia Wealth Bank to be financial institutions of primary money laundering concern under 31 U.S.C. 5318A, as added by section 311(a) of the USA PATRIOT Act (Pub. L. 107–56).

Treasury, acting through FinCEN, is also proposing the imposition of special measures authorized by section 5318A(b)(5). The special measures imposed under this section would prohibit certain U.S. financial institutions from maintaining correspondent or payable-through accounts in the United States for, or on behalf of, Mayflower Bank and Asia Wealth Bank. This prohibition extends to correspondent or payable-through accounts maintained for other foreign banks when such accounts are used to provide banking services to the two named Burmese banks indirectly.

Additionally, the Secretary designated the jurisdiction of Burma as a jurisdiction of primary money laundering concern. By a separate proposed rule, Treasury and FinCEN are proposing a special measure to prohibit certain U.S. financial institutions from maintaining correspondent or payable-through accounts for, or on behalf of, any Burmese financial institution. The special measure in this notice would prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent or payable-through accounts for, or on behalf of, Myanmar Mayflower Bank or Asia Wealth Bank, notwithstanding any

exemption from or license issued pursuant to Executive Order 13310 of July 28, 2003.

I. Background

A. Section 311 of the USA PATRIOT Act

On October 26, 2001, the President signed the Act into law. Title III of the Act amends the anti-money laundering provisions of the Bank Secrecy Act (BSA) (codified in subchapter II of chapter 53 of title 31, United States Code) to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism.

Section 311 of the Act (Section 311) added section 5318A to the BSA, granting the Secretary of the Treasury (Secretary) authority to designate a foreign jurisdiction, institution(s), class(es) of transactions, or type(s) of account(s) as a ''primary money laundering concern'' and to require U.S. financial institutions to take certain ''special measures'' against the primary money laundering concern.

Section 311 identifies factors to consider and agencies to consult before the Secretary may designate a primary money laundering concern. The statute also provides similar procedures, *i.e.,* factors and consultation requirements, for selecting the imposition of specific special measures against the designee.

Taken as a whole, Section 311 provides Treasury with a range of options that can be adapted to target most effectively specific money laundering and terrorist financing concerns. These options give the Secretary the authority to bring additional and useful pressure on those jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can gain more information about the concerned jurisdictions, institutions, transactions, and accounts; more effectively monitor the respective institutions, transactions, and accounts; and/or protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that pose a money laundering concern.

1. Required Consultations and Statutory Considerations To Be Made Prior to Designating a Foreign Financial Institution To Be of Primary Money Laundering Concern

Before making a finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary is required to consult with both the Secretary of State and the Attorney General.

In addition to these consultations, the Secretary is required by statute to consider ''such information as the Secretary determines to be relevant, including the following potentially relevant factors,'' when designating a foreign financial institution:

- The extent to which such financial institution is used to facilitate or promote money laundering in or through the jurisdiction;
- The extent to which such financial institution is used for legitimate business purposes in the jurisdiction; and
- The extent to which such action is sufficient to ensure, with respect to transactions involving the institution operating in the jurisdiction, that the purposes of this subchapter continue to be fulfilled, and to guard against international money laundering and other financial crimes.

Thus, a designation is based on consideration of the relevant facts and factors in conjunction with a consultation process, which leads to a decision by the Secretary that there are reasonable grounds to conclude that the institution is of primary money laundering concern.

2. Imposition of Special Measures

If the Secretary determines that a foreign financial institution is of primary money laundering concern, the Secretary must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of special measures that can be imposed, individually, jointly, in any combination, and in any sequence.[1]

The Secretary's imposition of special measures follows procedures similar to those for designations, but carries with it additional consultations to be made and factors to consider. The statute requires the Secretary to consult with appropriate agencies and other interested parties[2] and to consider the following specific factors:

- Whether similar action has been or is being taken by other nations or multilateral groups;
- Whether the imposition of any particular special measure would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
- The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular institution; and
- The effect of the action on United States national security and foreign policy.

3. Procedures for Imposing Special Measures

In this proposed rulemaking, the Secretary seeks to impose the fifth special measure (31 U.S.C. 5318A(b)(5)) against Mayflower Bank and Asia Wealth Bank. This special measure may only be imposed through the issuance of a regulation.

B. Burma, Myanmar Mayflower Bank, and Asia Wealth Bank

1. The Burmese Anti-Money Laundering Regime

Burma (also known as Myanmar) has no effective anti-money laundering controls in place. As a result, in June 2001 Burma was designated as a Non-Cooperative Country and Territory (NCCT) by the Financial Action Task Force (FATF)[3] for its lack of basic anti-money laundering provisions and weak oversight of the banking sector. Following the designation by the FATF, in April 2002, FinCEN issued an advisory to U.S. financial institutions to give enhanced scrutiny to all transactions originating in or routed to or through Burma, or involving entities organized or domiciled, or persons maintaining accounts, in Burma. Deficiencies identified by FATF and the FinCEN advisory included:

- Burma lacks a basic set of anti-money laundering laws or regulations.

[1] Available special measures include requiring: (1) Recordkeeping and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or conditions on the opening or maintaining of correspondent or payable-through accounts. 31 U.S.C. 5318A(b)(1)–(5). For a complete discussion of the range of possible countermeasures, *see* 68 FR 18917 (April 17, 2003) (proposing to impose special measures against Nauru).

[2] Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the National Credit Union Administration (NCUA), and, in the sole discretion of the Secretary, ''such other agencies and interested parties as the Secretary may find to be appropriate.'' The consultation process must also include the Attorney General and the Secretary of State, if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions maintaining correspondent account relationships with the designated entity.

[3] For further information on the FATF go to *http://www.fatf-gafi.org.*

• Money laundering is not a criminal offense for crimes other than drug trafficking in Burma.
• The Burmese Central Bank has no anti-money laundering regulations for financial institutions.
• Banks licensed by Burma are not legally required to obtain or maintain identification information about their customers.
• Banks licensed by Burma are not required to maintain transaction records of customer accounts.
• Burma does not require financial institutions to report suspicious transactions.
• Burma has significant obstacles to international co-cooperation by judicial authorities.

In June 2002, Burma responded to this international pressure by enacting an anti-money laundering law that purportedly addresses some of these deficiencies. The necessary regulations required for its effective implementation, however, are not in place. As a result, the Burmese anti-money laundering law is ineffective and unenforceable, and cannot be regarded as effectively remedying any of the identified deficiencies. Due to Burma's continuing lack of progress, the FATF called upon its member jurisdictions to impose countermeasures on Burma as of November 3, 2003.

The United States continues to recognize that Burma is a haven for international drug trafficking. On January 31, 2003, the President also signed Presidential Determination No. 2003–14, identifying Burma as a major illicit drug producing and/or drug transiting country pursuant to section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107–228), and as a country that has failed demonstrably during the previous twelve months to adhere to its obligations under international counter-narcotics agreements and take the measures set forth in section 489(a)(1) of the Foreign Assistance Act of 1961, as amended (FAA). In addition, this past year Burma continued to be named as a major money laundering country. A major money laundering country is defined by statute as one ''whose financial institutions engage in currency transactions including significant amounts of proceeds from international narcotics trafficking.'' FAA section 481(e)(7).

2. Mayflower Bank and Asia Wealth Bank

Mayflower Bank was incorporated in 1996 as a full-service commercial bank in Rangoon, Burma. The bank maintains 25 branches and has 1,153 employees. The Banker's Almanac and Dun and Bradstreet reports indicate that Mayflower Bank was incorporated in 1994. According to the 2003 Europa World Yearbook, the chairman of Mayflower Bank is Kyaw Win. The 1996–1997 Worldwide Correspondents Guide indicates that Mayflower Bank claims to have correspondent accounts in major cities, but advises readers to contact the bank for more information. The current issue of Thomson Bank Directory states that current financial figures for the bank are not available.

Asia Wealth Bank started its banking operation in 1995 and is one of the largest private banks in Burma, offering a wide variety of banking services. In August 2000, Asia Wealth Bank held 52 percent of the market share in fixed deposits of Burmese banks (over U.S. $23 billion). At the end of March 2001, it had 39 branches with a total of 3,200 employees (in December 2002, Dun and Bradstreet indicated only 2,200 employees). According to the 2003 Europa World Yearbook, Win Maung is the Chairman and Aik Htun is the Vice-Chair.

Presently Burma is reported to have only ten local private banks, and Mayflower Bank and Asia Wealth Bank are two of the five largest. There are also five state run (*i.e.*, public) banks in Burma.[4] Other reports indicate that there may be as many as 20 private banks, but confirm that Mayflower Bank and Asia Wealth Bank are two of the leading banks.[5]

C. Economic Sanctions

On July 28, 2003, the President signed both the Burmese Freedom and Democracy Act of 2003 and Executive Order 13310, imposing economic sanctions on Burma. These sanctions generally include: (1) A ban on the exportation or reexportation, directly or indirectly, of financial services to Burma; (2) the blocking of property and interests in property of the State Peace and Development Council of Burma and three state-owned foreign trade banks that are in the United States or in the possession or control of U.S. persons; and (3) a ban on the importation of Burmese goods into the United States. These sanctions build on an investment ban imposed under Executive Order 13047 issued pursuant to the International Emergency Economic Powers Act (IEEPA) on May 20, 1997, and a recently expanded visa ban in place since October 1996. The new sanctions have frozen hundreds of thousands of dollars of assets and have disrupted an already weak economy, especially in the important garment sector where many firms have closed or moved outside of Burma.

Executive Order 13310 prohibits broadly the provision of financial services to Burma from the United States or by a U.S. person, subject to limited exceptions.[6] Since the President signed the Order, however, Treasury has issued several licenses to permit transactions with Burma for certain specified purposes. For example, Treasury issued licenses authorizing transactions for the conduct of the official business of the United States Government, the United Nations, the World Bank, and the International Monetary Fund, and non-commercial personal remittances of up to $300 per household per quarter. The exemptions and licenses reflect the judgment of the United States that certain transactions are necessary and appropriate, even within the framework of this sanctions regime.

D. The Proposed Section 311 Special Measures

The requirements sought to be imposed against Mayflower Bank and Asia Wealth Bank pursuant to Section 311 reinforce the existing restrictions on transactions with Burma that are outlined above, and are a necessary addition to the Section 311 special measures Treasury seeks to impose on the jurisdiction of Burma. Although they are similar in their effect on these two banks, the proposed Section 311 special measures differ in certain respects and serve distinct policy goals from the economic sanctions imposed pursuant to Executive Order 13310. Most notably, the Section 311 special measures will not permit U.S. financial institutions to maintain indirect correspondent accounts even to conduct transactions that are exempt from, or licensed pursuant to, Executive Order 13310. The justification for this absolute prohibition lies in the Secretary's determination that Mayflower Bank and Asia Wealth Bank pose an unacceptable risk of money laundering and other financial crimes, and are linked to narcotics traffickers. The specific information concerning these two banks justifies their exclusion entirely from the U.S. financial system. This underscores the important policy justification for the Section 311 action—stemming the flow of illicit funds into

[4] *See* Official Myanmar Finance Ministry Web site, *http://www.Myanmar.com.*

[5] *See* Xinhua News Agency, March 8, 2002.

[6] For example, the prohibition does not extend to transactions relating to certain contracts entered into prior to May 21, 1997. *See* Executive Order 13310, § 13.

the U.S. financial system. In contrast, the existing sanctions pursuant to Executive Order 13310 were imposed for different reasons, including, for example, the government of Burma's continued suppression of the democratic opposition.

Moreover, as with the designation of Burma generally, the United States is sending a strong message to other jurisdictions and financial institutions to take similar steps to cut off these two banks from the international financial system due to the unacceptable risk of money laundering.

Finally, while the proposed special measures applicable to all Burmese financial institutions would certainly apply to Mayflower Bank and Asia Wealth Bank, a separate designation is necessary. The special measure Treasury proposes to apply to all Burmese financial institutions incorporates the licenses and exemptions applicable to the economic sanctions under Executive Order 13310. These exceptions are not appropriate when dealing with Mayflower Bank and Asia Wealth Bank, given their affiliation with narcotics traffickers. Also, by separately designating these two banks, to the extent Burma responds to the international call and begins to implement effective anti-money laundering controls, Treasury has the flexibility to alter the special measures applicable to all Burmese financial institutions while maintaining the absolute prohibition against these two institutions. The separate designation of Mayflower Bank and Asia Wealth Bank under Section 311 also fulfills another important goal of Treasury: To name publicly institutions posing risks to the international financial system and encourage all jurisdictions to exclude them.

II. Designation of Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern

Based upon a review and analysis of relevant information, consultations with relevant agencies and departments, and a consideration of the factors outlined above, the Secretary has determined that Mayflower Bank and Asia Wealth Bank are financial institutions of primary money laundering concern. See the notice published elsewhere in this separate part.

The Secretary has found Mayflower Bank and Asia Wealth Bank, both located in Burma, to be of primary money laundering concern due to a number of factors, including: (1) They are licensed in Burma, a jurisdiction with inadequate anti-money laundering controls; (2) individuals owning and controlling both banks are linked to drug trafficking and money laundering, including using the banks for such purposes; and (3) the individuals who own and control the banks are linked to the United Wa State Army (UWSA), an organization involved in narcotics trafficking, and designated as significant narcotics traffickers under the Foreign Narcotics Kingpin Designation Act,[7] and, in the case of the Asia Wealth Bank, the owners are linked to organized crime.

As provided by section 311, the Secretary also considered the following three factors, all of which counsel in favor of designating both banks:

1. The Extent to Which Such Financial Institutions, Transactions, or Types of Accounts Are Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

The Secretary has information that Mayflower Bank is owned and controlled by convicted narcotics traffickers, is essentially controlled by the UWSA, and has been used to facilitate money laundering. For example, public sources indicate that Mayflower Bank is owned by Kyaw Win. His name has been linked to a former drug lord and to others who have been identified in connection with the narcotics trade.[8] Various sources establish the connection between officials of the UWSA and Mayflower Bank, both in terms of their control over the institution as well as the use of the institution to launder funds.[9] The UWSA operates an extensive drug trafficking operation.

Asia Wealth Bank, one of Burma's largest private banks, is affiliated with prominent organizations and figures in the drug trade, including members of the Kokang ethnic group headed by notorious druglord Peng Chia-Sheng. Eike Htun, the vice chairman of the bank, has been specifically identified as having connections with Burma's narcotics trade.[10] The bank has also been a repository for funds with illicit origins, and counterfeit notes.[11]

2. The Extent to Which Such Institutions, Transactions, or Types of Accounts Are Used for Legitimate Business Purposes in the Jurisdiction

In response to economic turmoil, Burma recently suspended the banking operations of all private banks, including Mayflower Bank and Asia Wealth Bank. Although it appears that some private banks may be conducting operations despite the suspension, it is difficult to conduct legitimate business at this time. Additionally, Burmese law does not allow private banks to engage in foreign currency transactions. All foreign currency transfers into Burma are required to be executed by one of three of Burma's state banks (Myanmar Economic Bank, Myanmar Investment and Commercial Bank, and Myanmar Foreign Trade Bank).

Generally, Burma's poorly regulated banking system and ineffective money laundering legislation have created a business and investment environment conducive to the use of drug-related proceeds in legitimate commerce. Burma's economy continues to be vulnerable to drug money laundering because of its under-regulated financial system, weak anti-money laundering regime, and policies that facilitate the funneling of drug money into commercial enterprises and infrastructure investment.[12] According to a March 1998 report of Jane's Intelligence Review, about 60 percent of Burma's private investment is in one way or another related to narcotics.

3. The Extent to Which Such Action Is Sufficient To Ensure, With Respect To Transactions Involving the Jurisdiction and Institutions Operating in the Jurisdiction, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes

A determination that Mayflower Bank and Asia Wealth Bank—institutions operating in a jurisdiction with inadequate anti-money laundering laws and regulations, believed to be

[7] 21 U.S.C. 1901–1908, 8 U.S.C 1182.

[8] *See* The Age Company Limited (Melbourne), ''Burma's Banking Meltdown Goes Unnoticed Beyond its Borders,'' March 20, 2003; Asian Company Profiles Ltd., Mayflower Bank profile, July 3, 2003.

[9] The Financial Times reports that the UWSA, one of the world's largest organizations of armed drug traffickers, has taken over the Mayflower Bank in Rangoon. *See* Heritage Foundation Reports, January 2002. A Thailand article from 2002 indicates that the UWSA bought shares in the Mayflower Bank and has been providing assistance to it, describing the Bank as part of the UWSA Business Empire. *See* Bangkok Phuchatkan, January 2, 2002.

[10] *See* Backman, The Age (Melbourne), March 20, 2003; Global News Wire, BBC Monitoring, February 14, 2003.

[11] As recently as October 2002, significant funds from Yang Kya Haw, arrested for drug trafficking, were discovered in the Asia Wealth Bank. *See* Shanland (internet website), February 19, 2003. On April 30, 2002, counterfeit 1,000 Kyat notes were found at the Asia Wealth Bank branch in Pa-an, Burma. *See* Oslo Democratic Voice of Burma, May 2, 2002.

[12] *See* U.S. Department of State, International Narcotics Control Strategy Report, March 2003.

controlled by drug traffickers, and believed to be used by the UWSA and possibly other organized crime groups to conduct illegal transactions—are of primary money laundering concern plainly furthers the purposes of the BSA to guard against international money laundering and other financial crimes.

III. Imposition of Special Measures

As a result of the designation of Mayflower Bank and Asia Wealth Bank as primary money laundering concerns, and based upon consultations and the consideration of all relevant factors,[13] the Secretary has determined that grounds exist for the imposition of the special measure authorized by section 5318A(b)(5). Thus, the proposed rulemaking would prohibit covered financial institutions from establishing, maintaining, administering, or managing in the United States any correspondent or payable-through account for, or on behalf of, Mayflower Bank or Asia Wealth Bank. This prohibition would extend to any correspondent account maintained for any foreign bank if the account is used to provide banking services indirectly to either of these two banks. Financial institutions covered by this proposed rule that obtain knowledge that this is occurring would be required to ensure that any such account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship in the manner set forth in this rulemaking.

In imposing this special measure, the Secretary has considered the following pursuant to section 5318A(a)(4)(b):

1. Similar Actions Have Been or Will Be Taken by Other Nations or Multilateral Groups Against Burma Generally

In June of 2001, the FATF designated Burma as an NCCT, resulting in FATF members issuing advisories to their financial sectors recommending enhanced scrutiny of transactions involving Burma. In April 2002 FinCEN issued an advisory notifying U.S. financial institutions that they should accord enhanced scrutiny with respect to transactions and accounts involving Burma. In October 2003, FATF called upon its 33 members to take additional countermeasures with respect to Burma as of November 3, 2003. Based on informal discussions and the past practices of the FATF membership, the majority of FATF members are expected to take countermeasures, including all of the Group of Seven countries. The countermeasures imposed by such FATF members will likely include imposition of additional reporting requirements, issuance of advisories, shifting the burden for reporting obligations, and/or restrictions on the licensing of Burmese financial institutions. Imposition of the fifth special measure against Mayflower Bank and Asia Wealth Bank (as well as the jurisdiction of Burma) is consistent with this call for additional countermeasures and forms part of an international effort to protect the financial system.

2. Imposition of the Fifth Special Measure Would Not Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated With Compliance, for Financial Institutions Organized or Licensed in the United States

U.S. financial institutions are already prohibited from providing financial services to Burma, unless such services are exempted or licensed. The imposition of the fifth special measure potentially imposes a broader prohibition than currently exists for two reasons—it would preclude maintaining correspondent accounts for foreign branches of these two banks and the exemptions and licenses do not apply. However, on balance, it is unlikely that the imposition of the fifth special measure will create any significant additional costs or place U.S. financial institutions at a competitive disadvantage with respect to these two institutions. In fact, Treasury's action is intended to encourage other jurisdictions and financial institutions to take similar steps to cut off Mayflower Bank and Asia Wealth Bank from the international financial system, which would further minimize any potential competitive disadvantage for U.S. financial institutions.

Moreover, the proposed rule would not itself require U.S. financial institutions to perform additional due diligence on their existing foreign bank correspondent account customers beyond what is already required under existing regulations.

3. The Proposed Action or Timing of the Action Will Not Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities of the Two Banks

Private banks, such as Mayflower Bank and Asia Wealth Bank, are not permitted to deal in foreign exchange. All foreign currency transfers into Burma are required to be executed by one of three of Burma's state banks. And, as noted previously, it is unlikely that Mayflower Bank or Asia Wealth Bank can conduct any legitimate banking operations at this time. Therefore, this action or timing of the action would affect neither the international payment, clearance, and settlement system nor the potential legitimate banking operations of the two banks.

4. The Proposed Action Would Enhance the National Security of the United States and Is Consistent With, and in Furtherance of, United States Foreign Policy

The imposition of this countermeasure against Mayflower Bank, Asia Wealth Bank, and Burma is part of an overall foreign policy strategy to enhance our national security through comprehensive economic and political sanctions against Burma.

IV. Section-by-Section Analysis

A. Overview

The designation published elsewhere in this separate part and this proposed rule are intended to deny Mayflower Bank and Asia Wealth Bank access to the U.S. financial system through correspondent accounts, which includes payable-through accounts. The proposed rule would prohibit certain U.S. financial institutions from establishing, maintaining, administering, or managing correspondent accounts in the United States for, or on behalf of, Mayflower Bank and Asia Wealth Bank. If a U.S. financial institution covered by this proposed rulemaking learns that a correspondent account that it maintains for a foreign bank is being used by that foreign bank to provide services indirectly to Mayflower Bank or Asia Wealth Bank, the U.S. institution must ensure that the account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship. As explained below, however, the proposed rule does not itself require U.S. financial institutions to perform additional due diligence on foreign bank customers.

B. Definitions

Correspondent account. Section 103.187(a)(1) of the proposed rule's definition of correspondent account is the definition contained in 31 CFR 103.175(d), which defines the term to mean an account established to receive deposits from, or make payments on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

In the case of a U.S. depository institution, this broad definition would

[13] For purposes of this action, the required consultation with the Federal functional regulators was performed at the staff level.

include most types of banking relationships between a U.S. depository institution and a foreign bank, including payable-through accounts.

In the case of securities broker-dealers, futures commission merchants, introducing brokers, and mutual funds, a correspondent account would include any account that permits the foreign bank to engage in (1) trading in securities and commodity futures or options, (2) funds transfers, or (3) other types of financial transactions.

Treasury is using the same definition for purposes of the proposed rule as that established in the final rule implementing Sections 313 and 319(b) of the Act [14] with the notable exception that the term also applies to such accounts maintained by futures commission merchants, introducing brokers, and mutual funds.

Covered financial institution. Section 103.187(a)(2) of the proposed rule defines covered financial institution to mean all of the following: any insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; a credit union; a thrift institution; a corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*); a broker or dealer registered or required to register with the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*); a futures commission merchant or an introducing broker registered, or required to register, with the CFTC under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and an investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3)) that is an open-end company (as defined in section 5 of the Investment Company Act of 1940 (15 U.S.C. 80a–5)) that is registered, or required to register, with the SEC pursuant to that Act.

Myanmar Mayflower Bank. Section 103.187(a)(3) of the proposed rule defines Myanmar Mayflower Bank to include all headquarters, branches, and offices operating in Burma or in any jurisdiction. This definition does not include subsidiaries.

Asia Wealth Bank. Section 103.187(a)(4) of the proposed rule defines Asia Wealth Bank to include all headquarters, branches, and offices operating in Burma or in any jurisdiction. Similarly, this definition does not include subsidiaries.

C. Requirements for Covered Financial Institutions

1. Prohibition on Correspondent Accounts

Section 103.187(b)(1) of the proposed rule prohibits all covered financial institutions from establishing, maintaining, administering, or managing a correspondent or payable-through account in the United States for, or on behalf of, Mayflower Bank or Asia Wealth Bank. The prohibition would require all covered financial institutions to review their account records to determine that they maintain no accounts directly for, or on behalf of, either bank.

2. Prohibition on Indirect Correspondent Accounts

Under section 103.187 (b)(2) of the proposed rule, if a covered financial institution obtains knowledge that a correspondent or payable-through account that it maintains for a foreign bank is being used by that foreign bank to provide services indirectly to Mayflower Bank or Asia Wealth Bank, the U.S. institution must ensure that the account no longer is used to provide such services, including, where necessary, terminating the correspondent relationship. In contrast to the obligation placed on covered financial institutions to identify correspondent accounts maintained directly for, or on behalf of, a Burmese financial institution in section 103.187(b)(1), this section would not itself impose an independent obligation on covered financial institutions to review or investigate correspondent accounts they maintain for foreign banks to ascertain whether such foreign banks are using the account to provide services to Mayflower Bank or Asia Wealth Bank. Instead, if covered financial institutions become aware, through due diligence that is otherwise appropriate or required under existing anti-money laundering obligations, that a foreign bank is using its correspondent account to provide banking services indirectly to Mayflower Bank or Asia Wealth Bank, then the covered financial institutions must ensure that the account is no longer used for such purposes. This reflects the approach taken in the proposed rulemaking imposing special measures against Nauru.[15]

Additionally, when a covered financial institution becomes aware that a foreign bank customer is using a correspondent account to provide services to either of the two designated banks indirectly, the covered financial institution may afford that foreign bank customer a reasonable opportunity to take corrective action prior to terminating the U.S. correspondent account. Should the foreign bank customer refuse to comply, or if the covered financial institution cannot obtain adequate assurances that the account will no longer be used for impermissible purposes, the covered financial institution must terminate the account in accordance with this regulation. Treasury has also incorporated the requirement of termination within a reasonable period of time and the reinstatement of a terminated correspondent account found in the final regulation implementing sections 313 and 319(b) of the Act.[16]

3. Reporting and Recordkeeping Not Required

Section 103.187(b)(3) of the proposed rule states that it does not impose any reporting or recordkeeping requirement upon any covered financial institution that is not otherwise required by applicable law or regulation.

V. Designation of Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern

Effective November 18, 2003, Mayflower Bank and Asia Wealth Bank, were designated by the Secretary of the Treasury as financial institutions of primary money laundering concern under 31 U.S.C. 5318A, as added by Section 311(a) of the Act. See the notice published elsewhere in this separate part.

VI. Public Comments Requested

Comments are invited from all interested persons concerning this proposed rulemaking, and are specifically sought from the financial sector, including domestic financial institutions and agencies, concerning the appropriateness and effectiveness of this particular special measure, the ability to comply with the special measure, and any competitive disadvantage, cost, or burden associated with compliance.

VII. Regulatory Flexibility Act

It is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. As explained above, financial institutions covered by this proposed rulemaking are already

[14] 67 FR 60562 (September 26, 2002), codified at 31 CFR 103.175(d)(1).

[15] 68 FR 18917 (April 17, 2003).

[16] 67 FR 60562 (September 26, 2002) (codified at 31 CFR 103.177).

prohibited under existing sanctions from maintaining correspondent accounts for Mayflower Bank and Asia Wealth Bank. Given the limitations placed by the Burmese government on the international activities of these banks, Treasury and FinCEN believe that few foreign correspondent bank customers of small U.S. financial institutions covered by the proposed rulemaking will themselves maintain correspondent accounts for Mayflower Bank or Asia Wealth Bank. Treasury and FinCEN specifically request comment on the extent to which the prohibition contained in the proposed rule would affect small U.S. financial institutions beyond obligations already imposed by existing economic sanctions.

VIII. Executive Order 12866

Because this rule involves a foreign affairs function of the United States, it is not subject to Executive Order 12866, ''Regulatory Planning and Review.''

List of Subjects in 31 CFR Part 103

Banks and banking, Brokers, Counter-money laundering, Counter-terrorism, Currency, Foreign banking, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons set forth in the preamble, 31 CFR part 103 is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for part 103 is revised to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332; title III, sec. 311, 312, 313, 314, 319, 326, 352, Pub.L. 107–56, 115 Stat. 307; 12 U.S.C. 1818; 12 U.S.C. 1786(q).

2. Subpart I of part 103 is proposed to be amended by adding § 103.187 under the undesignated centerheading ''SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS'' to read as follows:

§ 103.187 Special measures against Myanmar Mayflower Bank and Asia Wealth Bank.

(a) *Definitions*. For purposes of this section:

(1) *Correspondent account* has the same meaning as provided in § 103.175(d).

(2) *Covered financial institution* has the same meaning as provided in § 103.175(f)(2) and also includes the following:

(i) A futures commission merchant or an introducing broker registered, or required to register, with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*); and

(ii) An investment company (as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–5)) that is an open-end company (as defined in section 5 of the Investment Company Act (15 U.S.C. 80a–5)) and that is registered, or required to register, with the Securities and Exchange Commission pursuant to that Act.

(3) *Myanmar Mayflower Bank* means all headquarters, branches, and offices of Myanmar Mayflower Bank operating in Burma or in any jurisdiction.

(4) *Asia Wealth Bank* means all headquarters, branches, and offices of Asia Wealth Bank operating in Burma or in any jurisdiction.

(b) *Requirements for covered financial institutions*—(1) *Prohibition on correspondent accounts*. A covered financial institution shall terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, Myanmar Mayflower Bank or Asia Wealth Bank.

(2) *Prohibition on indirect correspondent accounts*. (i) If a covered financial institution has or obtains knowledge that a correspondent account established, maintained, administered, or managed by that covered financial institution in the United States for a foreign bank is being used by the foreign bank to provide banking services indirectly to Myanmar Mayflower Bank or Asia Wealth Bank, the covered financial institution shall ensure that the correspondent account is no longer used to provide such services, including, where necessary, terminating the correspondent account; and

(ii) A covered financial institution required to terminate an account pursuant to paragraph (b)(2)(i) of this section:

(A) Shall do so within a commercially reasonable time, and shall not permit the foreign bank to establish any new positions or execute any transactions through such account, other than those necessary to close the account; and

(B) May reestablish an account closed pursuant to this paragraph if it determines that the account will not be used to provide banking services indirectly to Myanmar Mayflower Bank or Asia Wealth Bank.

(3) *Reporting and recordkeeping not required*. Nothing in this section shall require a covered financial institution to maintain any records, obtain any certification, or to report any information not otherwise required by law or regulation.

Dated: November 19, 2003.

William F. Baity,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 03–29288 Filed 11–24–03; 8:45 am]

BILLING CODE 4810–02–P

Federal Register

Tuesday,
November 25, 2003

Part VII

The President

Proclamation 7738—Thanksgiving Day, 2003

Executive Order 13318—Presidential Management Fellows Program

Federal Register
Vol. 68, No. 227
Tuesday, November 25, 2003

Presidential Documents

Title 3—

The President

Proclamation 7738 of November 21, 2003

Thanksgiving Day, 2003

By the President of the United States of America

A Proclamation

Each year on Thanksgiving, we gather with family and friends to thank God for the many blessings He has given us, and we ask God to continue to guide and watch over our country.

Almost 400 years ago, after surviving their first winter at Plymouth, the Pilgrims celebrated a harvest feast to give thanks. George Washington proclaimed the first National Day of Thanksgiving in 1789, and Abraham Lincoln revived the tradition during the Civil War. Since that time, our citizens have paused to express thanks for the bounty of blessings we enjoy and to spend time with family and friends. In want or in plenty, in times of challenge or times of calm, we always have reasons to be thankful.

America is a land of abundance, prosperity, and hope. We must never take for granted the things that make our country great: a firm foundation of freedom, justice, and equality; a belief in democracy and the rule of law; and our fundamental rights to gather, speak, and worship freely.

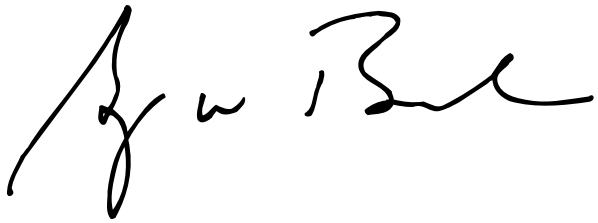
These liberties do not come without cost. Throughout history, many have sacrificed to preserve our freedoms and to defend peace around the world. Today, the brave men and women of our military continue this noble tradition. These heroes and their loved ones have the gratitude of our Nation.

On this day, we also remember those less fortunate among us. They are our neighbors and our fellow citizens, and we are committed to reaching out to them and to all of those in need in our communities.

This Thanksgiving, we again give thanks for all of our blessings and for the freedoms we enjoy every day. Our Founders thanked the Almighty and humbly sought His wisdom and blessing. May we always live by that same trust, and may God continue to watch over and bless the United States of America.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim Thursday, November 27, 2003, as a National Day of Thanksgiving. I encourage Americans to gather in their homes, places of worship, and community centers to share the spirit of understanding and prayer and to reinforce ties of family and community.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of November, in the year of our Lord two thousand three, and of the Independence of the United States of America the two hundred and twenty-eighth.



[FR Doc. 03–29643
Filed 11–24–03; 10:46 am]
Billing code 3195–01–P

Presidential Documents

Executive Order 13318 of November 21, 2003

Presidential Management Fellows Program

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, and in order to provide for the recruitment and selection of outstanding employees for service in public sector management, it is hereby ordered as follows:

Section 1. There is hereby constituted the Presidential Management Fellows Program. The purpose of the Program is to attract to the Federal service outstanding men and women from a variety of academic disciplines and career paths who have a clear interest in, and commitment to, excellence in the leadership and management of public policies and programs. Individuals selected for the Program shall be known as Presidential Management Fellows (PMFs) or Senior Presidential Management Fellows (Senior PMFs).

Sec. 2. (a) Individuals eligible for appointment as a PMF under this order are those who, in pursuing a course of study at the graduate level, have demonstrated both exceptional ability and the commitment to which section 1 refers. Such individuals at the time of application must have received, or must expect to receive soon thereafter, an appropriate advanced degree as defined by the Director of the Office of Personnel Management (OPM).

(b) Individuals eligible for appointment as a Senior PMF under this order are those who have, through extensive work experience, demonstrated both exceptional leadership or analytical ability and the commitment to which section 1 refers.

Sec. 3. The Director of OPM shall prescribe appropriate merit-based rules for the recruitment, nomination, assessment, selection, appointment, placement, and continuing career development of fellows, including rules that:

(a) reserve to the head of a department or agency or component within the Executive Office of the President (EOP) the authority to appoint a fellow who is to be employed in that department, agency, or component;

(b) provide for nomination by universities and colleges, through competitive selection processes, of eligible individuals for consideration for appointment as PMFs;

(c) carry out the policy of the United States to ensure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin; and

(d) ensure the application of appropriate veterans' preference criteria.

Sec. 4. (a) Fellows shall be appointed to positions in either:

(1) Schedule A of the excepted service; or

(2) an agency or component within the EOP excepted from the competitive service.

(b) Appointments under subsection (a) shall not exceed 2 years in duration unless extended by the head of the department or agency or component within the EOP, with the concurrence of the Director of OPM, for a period not to exceed 1 additional year.

(c) The following principles and policies shall govern service and tenure by fellows:

(1) responsibilities assigned to a PMF shall be consistent with the PMF's educational background and career interests, and the purposes of the Program;

and responsibilities assigned to a Senior PMF shall be consistent with the Senior PMF's experience and career interests, and the purposes of the Program;

(2) continuation of a fellow's appointment shall be contingent upon satisfactory performance by the fellow throughout the fellowship appointment;

(3) except as provided in paragraph (4) of this subsection, service as a fellow shall confer no right to further Federal employment in either the competitive or excepted service upon the expiration of the fellow's appointment; and

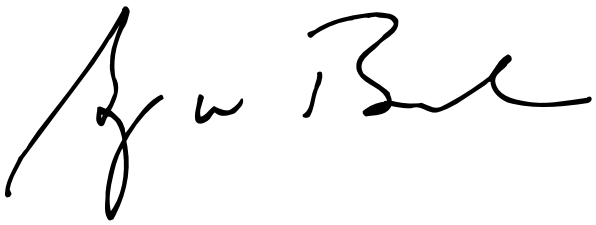
(4) competitive civil service status may be granted to a fellow who satisfactorily completes the Program and meets such other requirements as the Director of OPM may prescribe. A fellow appointed by an agency excepted from the competitive service may also be appointed to a permanent position in an excepted service agency without further competition.

Sec. 5. The Director of OPM shall provide for an orderly transition, including with respect to nominations, selection processes, and appointments, from the Presidential Management Intern Program established by Executive Order 12364 of May 24, 1982, to the Presidential Management Fellows Program established by this order. Until that transition is provided for, individuals who were selected or appointed under the provisions of Executive Order 12364 and who have not completed their scheduled periods of excepted service are hereby redesignated as Presidential Management Fellows, and continue their internships under the terms of Executive Order 12364.

Sec. 6. The Director of OPM shall prescribe such regulations as may be necessary to carry out the purposes of this order.

Sec. 7. Executive Order 12364 is superseded, except as provided in section 5 of this order.

Sec. 8. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.



THE WHITE HOUSE,
November 21, 2003.

[FR Doc. 03–29644
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Reader Aids

Federal Register

Vol. 68, No. 227

Tuesday, November 25, 2003

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FEDERAL REGISTER PAGES AND DATE, NOVEMBER

62213–62350 3
62351–62502 4
62503–62730 5
62731–63010 6
63011–63732 7
63733–63982 10
63983–64262 12
64263–64490 13
64491–64798 14
64799–64976 17
64977–65152 18
65153–65382 19
65383–65626 20
65627–65828 21
65829–66000 24
66001–66318 25

CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
7727 62351
7728 62503
7729 62505
7730 62507
7731 64483
7732 64485
7733 64491
7734 64977
7735 65153
7736 65155
7737 65627
7738 66315

Executive Orders:
12170 (See Notice of November 12, 2003) 64489
12364 (Superseded by EO 13318) 66317
13318 66317

Administrative Orders:
Memorandums:
Memorandum of October 20, 2003 63975
Presidential Determinations:
No. 2004-05 of October 21, 2003 63977
No. 2004-06 of October 21, 2003 63979
No. 2004-07 of November 1, 2003 63981
No. 2004-07 of November 7, 2003 65383
Notices:
Notice of November 12, 2003 64489

5 CFR

532 64493
2600 62213
3601 64979

7 CFR

20 62213
205 62215
319 63983
331 62218
762 62221
764 62221
905 64494
906 66001
916 64499
917 64499
984 65629
989 64502
1464 65385
1580 62731
1910 62221
1924 62221
1941 62221
1942 65829
1943 62221
1955 62221

Proposed Rules:
457 64570
624 65202
800 65210
959 65643
1423 65412

9 CFR

71 62225
77 65831
121 62218
130 .....62226, 64504
145 64507
147 64507
319 62228
381 .....62228, 63983

Proposed Rules:
93 62386
94 .....62386, 64274
95 62386

10 CFR

11 .....62509, 65765
25 .....62509, 65765
50 65386

Proposed Rules:
50 65415
61 64993

11 CFR

102 64512
106 64517
110 64512

Proposed Rules:
110 64571
113 64571
9004 64571
9034 64571

12 CFR

Proposed Rules:
352 65850
614 65417
620 65417
630 65417

14 CFR

23 .....63011, 64520
35 64799
39 .....62228, 62231, 62233, 62513, 63013, 64263, 64266, 64268, 64270, 64802, 64980, 64982, 65157, 66004
71 .....62514, 62515, 62732, 62733, 62734, 62735, 63017, 63985, 64522, 64523, 64524, 65159, 65161, 65162, 65163, 65389
73 64525

91 65382
95 65390
97 ....62234, 64983, 64985
121 65376
135 65376
145 65376

Proposed Rules:

1 ....64730, 64993, 65854
21 ....64730, 64993
25 ....64730, 64993
33 ....64730, 64993
39 ....62405, 62408, 62409, 62415, 62544, 62545, 64001, 64002, 64006, 64282, 64283, 64286, 64288, 64290, 64295, 64572, 64822, 64823, 64825, 64827, 64830, 64994, 64996, 64998, 65000, 65003, 65005, 65006, 65008, 65011, 65854, 65856, 65857, 66026, 66028, 66030
71 ....62548, 62758, 62759, 62760, 62761, 62762, 64008, 64574, 64575, 64832, 65224, 65417, 65859
73 64833
91 65854
97 65854
121 ....64730, 64993, 65854
125 65854
129 65854
135 ....64730, 64993, 65854

15 CFR

902 ....62501, 64986

Proposed Rules:

740 64009
742 64009
748 64009
754 64009
772 64009

16 CFR

305 ....65631, 65833

17 CFR

228 64952
229 64952
240 64952
241 65820
249 64952
270 64952
274 64952

Proposed Rules:

36 66032
240 ....62872, 62910, 62972
242 62972

18 CFR

4 63194

19 CFR

206 65164

20 CFR

Proposed Rules:

321 63041
404 62670
408 62670
416 62670

21 CFR

1 63017
16 62353
20 ....63017, 65392
522 65168
573 65632
1240 62353
1310 62735

Proposed Rules:

101 66040
868 65014
870 65014
882 65014
1300 62255
1301 62255
1304 ....62255, 66048
1306 66048
1307 62255
1309 ....66048, 66052
1310 66052

22 CFR

126 65633
303 66006
307 66014

Proposed Rules:

96 64296
98 64296

23 CFR

655 65496

24 CFR

203 65824

25 CFR

Proposed Rules:

161 64023

26 CFR

1 ....62516, 63733, 63734, 63986, 65634
31 63734
602 ....63734, 63986

Proposed Rules:

1 ....62549, 62553, 63743, 63744, 65346, 65419, 65645, 65646, 65864, 66059
301 62553

27 CFR

Proposed Rules:

9 ....62259, 63042

28 CFR

14 62516
81 62370
544 ....65169, 65170

29 CFR

Proposed Rules:

1910 64036
1915 64036
1926 ....64036, 65018
4022 64525
4044 64525

30 CFR

250 65172
707 65622
917 65835
943 62517
906 65422
917 65424
950 62519

31 CFR

103 65392
575 65844

Proposed Rules:

103 ....66299, 66305

32 CFR

199 65172

33 CFR

100 ....62524, 63018, 65174
101 62502
104 62501
117 ....62524, 62528, 63986, 65174, 65175, 66014
160 ....62501, 63735
165 ....62501, 62524, 63988, 64527, 64988, 65177
385 64200

Proposed Rules:

117 ....66059, 66062
165 ....64038, 65227, 65427, 66064
334 65019

37 CFR

2 63019
7 63019

38 CFR

20 64805
21 65399

39 CFR

111 66015
3001 65348

Proposed Rules:

501 65429
551 65430

40 CFR

51 63021
52 ....62236, 62239, 62501, 62529, 62738, 62869, 63021, 63991, 64532, 64537, 64540, 64543, 65845, 65846, 66000
60 62529
63 ....63852, 64432
70 ....63735, 65401, 65637
81 62239
131 ....62740, 62744
271 64550
300 ....62747, 64806
350 64720
1600 65403

Proposed Rules:

Ch. 1 65120
52 ....62263, 62264, 62553, 64576, 65229, 65234, 65646, 65866
60 62553
63 65648
81 62264
93 62690
122 63042
123 65663
133 63042
148 66164
260 65586
261 ....64834, 65586, 66164
268 66164
271 ....62264, 64578, 66164
300 ....64843, 65020
302 66164
350 64726
355 64041
501 65663

42 CFR

71 62353
73 62245
400 63692
405 63692
410 ....63196, 63398
414 63196
419 63398
426 ....63692, 65346

44 CFR

64 62748
65 ....64809, 64812, 66020
67 ....64817, 64819, 66023, 66024
206 63738

Proposed Rules:

67 ....63745, 64844, 64845, 64846, 66067

45 CFR

5b 62250

46 CFR

2 62501
31 62501
71 62501
91 62501
115 62501
126 62501
176 62501
232 62535
281 62535
287 62535
295 62535
298 62535
310 62535
355 62535
380 62535
390 62535

47 CFR

1 66252
25 ....62247, 63994
27 66252
51 63999
64 ....62249, 62751, 63029
73 ....62539, 62540, 62541, 64555

Proposed Rules:

1 66232
2 66232
20 66232
21 66232
22 ....64050, 66232
24 ....64050, 66232
25 66232
27 66232
53 65665
73 ....62554, 64578, 64579
74 66232
78 66232
80 66232
87 66232
90 ....64050, 66232
95 66232
97 66232
101 66232

48 CFR

204 ....64555, 64557
208 64559
210 64559
212 64557
213 64557
216 64661
219 64559
252 ....64557, 64559

Proposed Rules:
601....64297
602....64297
603....64297
604....64297
605....64297
606....64297
609....64297
611....64297
612....64297
613....64297
616....64297
617....64297
619....64297
622....64297
623....64297
625....64297
626....64297
628....64297
630....64297
632....64297
636....64297
637....64297
642....64297
651....64297
652....64297
653....64297
1801....64847
1803....64847
1804....64847
1805....64847
1806....64847
1807....64847
1808....64847
1809....64847
1811....64847
1821....64847

49 CFR

383....63030
571....65179, 65404
579....64568
590....65404
1572....63033
Proposed Rules:
192....62555
195....62555
224....62942
393....64072
571 ....62417, 65431, 65667
587....62421

50 CFR

229....65409
622 ....62373, 62542, 64820
635....63738, 64990
648....62250, 64821
660....62374
Proposed Rules:
17....65020
20....65023
300....63052
600....62267, 64578
622 ....62267, 62422, 66069
635....63747
648....64579
660....62763, 63053
679....62423, 65676

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT NOVEMBER 25, 2003

ENVIRONMENTAL PROTECTION AGENCY

Air quality implementation plans; approval and promulgation; various States:

Pennsylvania; published 9-26-03

PEACE CORPS

Standards of conduct; published 11-25-03

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Viruses, serums, toxins, etc.:

Bovine virus diarrhea and bovine rhinotracheitis vaccines; standard requirements; comments due by 12-5-03; published 10-6-03 [FR 03-25252]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Alaska; fisheries of Exclusive Economic Zone—

Gulf of Alaska groundfish; comments due by 12-1-03; published 10-16-03 [FR 03-26074]

Gulf of Alaska groundfish; comments due by 12-4-03; published 11-4-03 [FR 03-27605]

DEFENSE DEPARTMENT

Acquisition regulations:

Indian Incentive Program; comments due by 12-1-03; published 10-1-03 [FR 03-24629]

Service contracts and task orders approval; comments due by 12-1-03; published 10-1-03 [FR 03-24627]

EDUCATION DEPARTMENT

Grants:

Faith-based organizations; eligibility to participate in direct grant, State-administered, and other such programs; comments due by 12-1-03; published 9-30-03 [FR 03-24292]

ENERGY DEPARTMENT

Energy Efficiency and Renewable Energy Office

Consumer products; energy conservation program:

Energy conservation standards and test procedures—

Clothes washers; comments due by 12-1-03; published 10-31-03 [FR 03-27468]

Clothes washers; comments due by 12-1-03; published 10-31-03 [FR 03-27469]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Electric rate and corporate regulation filings:

Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]

ENVIRONMENTAL PROTECTION AGENCY

Air programs; approval and promulgation; State plans for designated facilities and pollutants:

Puerto Rico; comments due by 12-1-03; published 10-31-03 [FR 03-27483]

Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:

Arizona; comments due by 12-3-03; published 11-3-03 [FR 03-27263]

Air quality implementation plans; approval and promulgation; various States:

California; comments due by 12-1-03; published 10-30-03 [FR 03-27267]

Kentucky; comments due by 12-3-03; published 11-3-03 [FR 03-27551]

Missouri; comments due by 12-1-03; published 10-30-03 [FR 03-27261]

Montana and Wyoming; comments due by 12-5-03; published 11-5-03 [FR 03-27265]

Air quality planning purposes; designation of areas:

California; comments due by 12-1-03; published 10-31-03 [FR 03-27487]

Environmental statements; availability, etc.:

Coastal nonpoint pollution control program—

Minnesota and Texas; Open for comments until further notice; published 10-16-03 [FR 03-26087]

Hazardous waste program authorizations:

South Dakota; comments due by 12-3-03; published 11-3-03 [FR 03-27553]

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Vinclozolin; comments due by 12-1-03; published 9-30-03 [FR 03-24782]

Zinc phosphide; comments due by 12-1-03; published 9-30-03 [FR 03-24844]

Superfund program:

National oil and hazardous substances contingency plan—

National priorities list update; comments due by 12-1-03; published 10-30-03 [FR 03-27161]

FEDERAL COMMUNICATIONS COMMISSION

Radio spectrum, efficient use promotion; secondary markets development; regulatory barriers elimination; comments due by 12-5-03; published 11-25-03 [FR 03-29193]

Radio stations; table of assignments:

North Carolina; comments due by 12-1-03; published 10-22-03 [FR 03-26682]

Television stations; table of assignments:

New York; comments due by 12-1-03; published 10-31-03 [FR 03-27430]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Reports and guidance documents; availability, etc.:

Evaluating safety of antimicrobial new animal drugs with regard to their microbiological effects on bacteria of human health concern; Open for comments until further notice; published 10-27-03 [FR 03-27113]

HOMELAND SECURITY DEPARTMENT

Customs and Border Protection Bureau

Articles conditionally free, subject to reduced rate, etc.:

Caribbean Basin Economic Recovery Act; brassieres; preferential treatment; comments due by 12-1-03; published 9-30-03 [FR 03-24796]

Drawback:

Merchandise processing fees; claim eligibility based on substitution of finished petroleum derivatives; comments due by 12-1-03; published 10-2-03 [FR 03-24856]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and threatened species:

Critical habitat designations—

Tennessee and Cumberland River Basin mussels; technical correction; comments due by 12-5-03; published 10-6-03 [FR 03-25184]

Scarlet-chested parakeet and turquoise parakeet; comments due by 12-1-03; published 9-2-03 [FR 03-22225]

Migratory bird permits:

Icelandic eiderdown; importation; comments due by 12-4-03; published 9-5-03 [FR 03-22298]

INTERIOR DEPARTMENT

Minerals Management Service

Outer Continental Shelf; oil, gas, and sulphur operations:

Incident reporting requirements; comments due by 12-5-03; published 7-31-03 [FR 03-19459]

INTERIOR DEPARTMENT

Surface Mining Reclamation and Enforcement Office

Permanent program and abandoned mine land reclamation plan submissions:

Colorado; comments due by 12-5-03; published 11-20-03 [FR 03-28996]

JUSTICE DEPARTMENT

Grants:

Religious organizations; participation in department programs; equal treatment of all program participants; comments due by 12-1-03; published 9-30-03 [FR 03-24294]

LABOR DEPARTMENT

Employment and Training Administration

Workforce Investment Act; nondiscrimination and equal opportunity provisions:

Religious activities; Federal financial assistance; comments due by 12-1-03; published 9-30-03 [FR 03-24296]

LABOR DEPARTMENT

Workforce Investment Act; nondiscrimination and equal opportunity provisions:

Religious activities; Federal financial assistance; comments due by 12-1-03; published 9-30-03 [FR 03-24296]

NATIONAL CREDIT UNION ADMINISTRATION

Credit unions:

Conversion of insured credit unions to mutual savings banks; information disclosure; comments due by 12-1-03; published 10-1-03 [FR 03-24762]

Suretyship and guaranty requirements; maximum borrowing authority; comments due by 12-1-03; published 10-1-03 [FR 03-24761]

Freedom of Information Act; implementation; comments due by 12-1-03; published 10-30-03 [FR 03-27310]

INTERIOR DEPARTMENT

National Indian Gaming Commission

Indian Gaming Regulatory Act:

Fee rates; comments due by 11-30-03; published 10-8-03 [FR 03-25472]

PERSONNEL MANAGEMENT OFFICE

Health benefits, Federal employees:

Federal Employees Health Benefits Children's Equity Act of 2002; implementation; comments due by 12-1-03; published 10-1-03 [FR 03-24792]

Prevailing rate systems; comments due by 12-1-03; published 10-31-03 [FR 03-27382]

SECURITIES AND EXCHANGE COMMISSION

Investment companies:

Fund of funds investments; investment company's ability to acquire shares of another investment company broadened; registration forms amended; comments due by 12-3-03; published 10-8-03 [FR 03-25336]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:

Airbus; comments due by 12-1-03; published 10-30-03 [FR 03-27323]

Australia Pty Ltd.; AeroSpace Technologies; comments due by 12-4-03; published 10-24-03 [FR 03-26899]

Boeing; comments due by 12-1-03; published 11-4-03 [FR 03-27672]

Bombardier; comments due by 12-1-03; published 10-31-03 [FR 03-27426]

General Electric Co.; comments due by 12-2-03; published 10-3-03 [FR 03-25000]

McDonnell Douglas; comments due by 12-1-03; published 10-15-03 [FR 03-25979]

Saab; comments due by 12-1-03; published 10-30-03 [FR 03-27321]

Class E airspace; comments due by 12-5-03; published 10-21-03 [FR 03-26560]

TRANSPORTATION DEPARTMENT

Maritime Administration

Information collection responses; electronic transmittal options; comments due by 12-5-03; published 11-5-03 [FR 03-27761]

TREASURY DEPARTMENT

Internal Revenue Service

Income taxes:

Consolidated return regulations—

Section 108 application to consolidated group members; indebtedness income discharge; cross-reference; comments due by 12-3-03; published 9-4-03 [FR 03-22454]

Nonaccrual-experience method of accounting; use limitation; cross reference; public hearing; comments due by 12-3-03; published 9-4-03 [FR 03-22459]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.access.gpo.gov/nara/nara005.html*. Some laws may not yet be available.

S. 313/P.L. 108–130

Animal Drug User Fee Act of 2003 (Nov. 18, 2003; 117 Stat. 1361)

H.R. 274/P.L. 108–131

Blackwater National Wildlife Refuge Expansion Act (Nov. 22, 2003; 117 Stat. 1372)

H.R. 2559/P.L. 108–132

Military Construction Appropriations Act, 2004 (Nov. 22, 2003; 117 Stat. 1374)

H.R. 3054/P.L. 108–133

District of Columbia Military Retirement Equity Act of 2003 (Nov. 22, 2003; 117 Stat. 1386)

H.R. 3232/P.L. 108–134

To reauthorize certain school lunch and child nutrition programs through March 31, 2004. (Nov. 22, 2003; 117 Stat. 1389)

H.J. Res. 79/P.L. 108–135

Making further continuing appropriations for the fiscal year 2004, and for other purposes. (Nov. 22, 2003; 117 Stat. 1391)

Last List November 19, 2003

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