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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18669; Directorate Identifier 2004–NM–83–AD; Amendment 39–13757; AD 2004–16–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330, A340–200, and A340–300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Model A330, A340–200, and A340–300 series airplanes. This AD requires repetitive inspections for cracking of the chromed area of the left and right piston rods for the main landing gear (MLG) retraction actuators, and related investigative and corrective actions if necessary. This AD is prompted by reports of the piston rods for the MLG retraction actuators rupturing during flight. We are issuing this AD to detect and correct corrosion pitting and cracking of the piston rods for the MLG retraction actuators, which could result in rupture of a piston rod, non-damped extension of the MLG, high loads on the fully extended MLG, and consequent reduced structural integrity of the MLG.

DATES: Effective August 19, 2004.

The incorporation by reference of certain publications listed in the AD is approved by the Director of the Federal Register as of August 19, 2004.

We must receive comments on this AD by October 4, 2004.

ADDRESSES: Use one of the following addresses to submit comments on this AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- *Fax:* (202) 493–2251.
- 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.

For service information identified in this AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. You can examine this information at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov*, or at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC.

Docket Management System (DMS)

The FAA has implemented new procedures for maintaining AD dockets electronically. As of May 17, 2004, new AD actions are posted on DMS and assigned a docket number. We track each action and assign a corresponding directorate identifier. The DMS AD docket number is in the form ''Docket No. FAA–2004–99999.'' The Transport Airplane Directorate identifier is in the form ''Directorate Identifier 2004-NM–999-AD.'' Each DMS AD docket also lists the directorate identifier (''Old Docket Number'') as a cross-reference for searching purposes.

Examining the Dockets

You can examine the AD docket on the Internet at http://dms.dot.gov, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on certain Airbus Model A330, A340–200, and A340–300 series airplanes. The DGAC advises that it has received a report of the flightcrew on a Model A330 series airplane doing a free-fall extension of the main landing gear (MLG) during approach. Investigation revealed a rupture of the piston rod for the left MLG retraction actuator. It was determined that corrosion and cracking caused the rupture. Additional reports indicate that cracking was found on the chromed area of several piston rods; the cracking started from a line of corrosion pitting in the rod bores. These conditions, if not corrected, could result in rupture of a piston rod, non-damped extension of the MLG, and high loads on the fully extended MLG, which could result in reduced structural integrity of the MLG.

The MLG system on Model A340–200 and A340–300 series airplanes is identical to the MLG system on the affected Model A330 series airplanes. Therefore, Model A340–200 and A340–300 series airplanes may be subject to the same unsafe condition identified on the Model A330 series airplanes.

Relevant Service Information

Airbus has issued Service Bulletin A330–32–3173, Revision 01 (for Model A330 series airplanes); and A340–32–4212, Revision 01 (for Model A340–200 and -300 series airplanes); both dated June 16, 2004. The service bulletins describe procedures for repetitive detailed visual inspections for cracking of the chromed area of the left and right piston rods for the MLG retraction actuators. If any cracking is found, the corrective actions include replacing the

affected MLG retraction actuator with a new actuator before the next flight.

The service bulletins also describe procedures for related investigative actions. Those procedures include repetitive ultrasonic inspections for corrosion pitting and cracking of the inner surface of the piston rods for the MLG retraction actuators. If any corrosion pitting or cracking is found, the corrective actions include replacing the affected MLG retraction actuator with a new actuator. The compliance time for the corrective action depends on the results of the ultrasonic inspection, and is either before the next flight, or within the next 10 landings.

The service bulletins also include procedures for reporting the results of both the detailed visual and ultrasonic inspections to Airbus.

The DGAC mandated these service bulletins and issued French airworthiness directives F–2004–086 and F–2004–087, both dated June 23, 2004, to ensure the continued airworthiness of these airplanes in France.

Both of the Airbus service bulletins reference Messier-Dowty Service Bulletin A33/34–32–222, including Appendices A and B, dated December 6, 2003, as an additional source of service information for the detailed visual and ultrasonic inspections.

FAA's Determination and Requirements of This AD

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States. Therefore, we are issuing this AD to detect and correct corrosion pitting and cracking of the piston rods for the MLG retraction actuators, which could result in rupture of the piston rods, non-damped extension of the MLG, high loads on the fully extended MLG, and consequent reduced structural integrity of the MLG.

This AD requires doing the actions specified in the Airbus service information described previously, except as discussed under ''Differences Between the AD and French Airworthiness Directives.'' This AD also requires sending certain inspection results to the manufacturer.

Interim Action

We consider this AD to be interim action. The inspection reports that are required by this AD will enable the manufacturer to obtain better insight into the nature, cause, and extent of the corrosion/cracking, and eventually to develop final action to address the unsafe condition. Once final action has been identified, we may consider further rulemaking.

Differences Between the AD and French Airworthiness Directives

The French airworthiness directives do not include compliance times for airplanes equipped with piston rods that have been in service less than 36 months, as of the effective date of the French airworthiness directives. However, the FAA AD includes compliance times for these airplanes. Because this AD is an interim action, we have determined that it is necessary to address airplanes equipped with piston rods that are close to having 36 months in service, as of the effective date of the AD. This difference has been coordinated with the DGAC.

Clarification of Inspection Terminology

The Airbus service bulletins specify to do a ''detailed visual inspection'' of the chromed area of the piston rods for the MLG retraction actuators. This AD instead requires a ''detailed inspection,'' which is defined in Note 1 of this AD.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD; therefore, providing notice and opportunity for public comment before the AD is issued is impracticable, and good cause exists to make this AD effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2004–18669; Directorate Identifier 2004–NM–83–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of our docket web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, *etc.*). You can review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov*.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications with you. You can get more information about plain language at *http://www/faa.gov/language* and *http://www.plainlanguage.gov*.

Regulatory Findings

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

For the reasons discussed above, I certify that the 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. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2004–16–01 Airbus: Amendment 39–13757. Docket No. FAA–2004–18669; Directorate Identifier 2004–NM–83–AD.

Effective Date

(a) This AD becomes effective August 19, 2004.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A330, A340–200, and A340–300 series airplanes; certificated in any category; equipped with a piston rod, part number (P/N) 114256309 or 114256321, for the main landing gear (MLG) retraction actuators.

Unsafe Condition

(d) This AD was prompted by reports of the piston rods for the MLG retraction actuators rupturing during flight. We are issuing this AD to detect and correct corrosion pitting and cracking of the piston rods for the MLG retraction actuators, which could result in rupture of a piston rod, non-damped extension of the MLG, high loads on the fully extended MLG, and consequent reduced structural integrity of the MLG.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Repetitive Detailed Inspections and Corrective Actions

(f) Before each MLG retraction actuator has been in service 36 months, or within 14 days after the effective date of this AD, whichever is later: Do a detailed inspection for cracking of the chromed area of the left and right piston rod of the MLG retraction actuators. Do the inspection in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–32–3173, Revision 01 (for Model A330 series airplanes); or A340–32–4212, Revision 01 (for Model A340–200 and –300 series airplanes); both dated June 16, 2004; as applicable. Repeat the inspection thereafter at intervals not to exceed 7 days.

Note 1: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

(g) If any cracking is found during any inspection required by paragraph (f) of this AD: Before further flight, replace the MLG retraction actuator with a new or serviceable part in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–32–3173, Revision 01 (for Model A330 series airplanes); or A340–32–4212, Revision 01 (for Model A340–200 and –300 series airplanes); both dated June 16, 2004; as applicable.

Related Investigative and Corrective Actions

(h) If no cracking is found during the initial detailed inspection required by paragraph (f) of this AD: At the later of the times specified in paragraphs (h)(1) and (h)(2) of this AD, do an ultrasonic inspection for corrosion pitting or cracking of the inner surface of the piston rods for the MLG retraction actuators. Do the ultrasonic inspection in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–32–3173, Revision 01 (for Model A330 series airplanes); or A340–32–4212, Revision 01 (for Model A340–200 and -300 series airplanes); both dated June 16, 2004; as applicable. Any corrective action must be done at the times specified in Figure 2 of the applicable service bulletin.

(1) Before each MLG retraction actuator has been in service 36 months.

(2) Within 1,400 flight hours, 250 flight cycles, or 4 months after the effective date of this AD, whichever is first.

Note 2: Airbus Service Bulletins A330–32–3173, Revision 01; and A340–32–4212, Revision 01; reference Messier-Dowty Service Bulletin A33/34–32–222, including Appendices A and B, dated December 6, 2003, as an additional source of service information for doing the detailed and ultrasonic inspections.

(i) Repeat the ultrasonic inspection thereafter at intervals not to exceed 1,400 flight hours, 250 flight cycles, or 4 months after the most recent ultrasonic inspection, whichever is first.

Reporting Requirement

(j) Submit a report of the results (both positive and negative) for any ultrasonic inspection required by paragraph (h) of this AD, and only negative findings for any detailed inspection required by paragraph (f) of this AD. Submit the report to Airbus Customer Services Directorate, Attention: SDC32 Technical Data and Documentation Services, fax +33+ 5 61 93 28 06, or via your resident customer support office. Submit the report at the applicable time specified in paragraph (j)(1) or (j)(2) of this AD. The report must include the inspection results, a description of any discrepancies found, the airplane serial number, and the period of time the affected piston rod has been in service. Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056.

(1) If the inspection is done after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

Parts Installation

(k) As of the effective date of this AD, no person may install a piston rod, part number (P/N) 114256309 or 114256321, for the main landing gear (MLG) retraction actuators, on any airplane, unless the part has been inspected in accordance with paragraphs (f) and (h) of this AD and found free of cracking.

Ultrasonic Inspections Done Per Airbus All Operator's Telex (AOT)

(l) Ultrasonic inspections done in accordance with Airbus AOT A330–32A3172 (for Model A330 series airplanes); or A340–32A4211 (for Model A340–200 and -300 series airplanes); both dated May 22, 2003; are acceptable for compliance with the initial ultrasonic inspection required by paragraph (h) of this AD.

Alternative Methods of Compliance (AMOCs)

(m) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(n) French airworthiness directives F–2004–086 and F–2004–087, both dated June 23, 2004, also address the subject of this AD.

Material Incorporated by Reference

(o) You must use Airbus Service Bulletin A330–32–3173, Revision 01, dated June 16, 2004; or Airbus Service Bulletin A340–32–4212, Revision 01, dated June 16, 2004; as applicable; to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approves the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. For copies of the documents contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. You can review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, Nassif Building, Washington, DC; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on July 23, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–17623 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9146]

RIN 1545–BD35

Section 179 Elections

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains temporary regulations relating to the election to expense the cost of property subject to section 179 of the Internal Revenue Code. The regulations reflect changes to the law made by section 202 of the Jobs and Growth Tax Relief Reconciliation Act of 2003. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Dates:* These regulations are effective August 4, 2004.

Applicability Dates: For dates of applicability, *see* § 1.179–6T.

FOR FURTHER INFORMATION CONTACT: Winston H. Douglas, (202) 622–3110 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These temporary regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545–1201. Responses to this collection of information are required to obtain a benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

For further information concerning this collection of information, where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, Federal tax returns and tax return information are confidential pursuant to 26 U.S.C. 6103.

Background

This document contains amendments to 26 CFR part 1 to provide regulations under section 179 of the Internal Revenue Code (Code). These amendments reflect the changes to the law made by section 202 of the Jobs and Growth Tax Relief Reconciliation Act of 2003, Public Law 108–27 (117 Stat. 752).

Prior to the enactment of the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA) (117 Stat. 752), section 179 provided that, in lieu of depreciation under section 168 (MACRS depreciation) for taxable years beginning in 2003 and thereafter, a taxpayer with a sufficiently small amount of current year investment in section 179 property could elect to deduct up to $25,000 of the cost of section 179 property placed in service by the taxpayer for the taxable year. In general, section 179 property was defined as depreciable tangible personal property that was purchased for use in the active conduct of a trade or business. The $25,000 amount was reduced (but not below zero) by the amount by which the cost of section 179 property placed in service by the taxpayer during the taxable year exceeded $200,000. The election under section 179 generally was made on the taxpayer's original Federal tax return for the taxable year to which the election related, required specific information to be provided at the time the election was made, and could only be revoked with the consent of the Commissioner of Internal Revenue.

The changes made to section 179 by section 202 of JGTRRA are applicable for section 179 property placed in service by a taxpayer in taxable years beginning after 2002 and before 2006. Section 202 of JGTRRA expands the definition of section 179 property to include off-the-shelf computer software (a category of intangible property) and increases the $25,000 and $200,000 amounts to $100,000 and $400,000, respectively. In addition, the $100,000 and $400,000 amounts are indexed annually for inflation for taxable years beginning after 2003 and before 2006. JGTRRA also modifies section 179 to provide that any election or specification for taxable years beginning after 2002 and before 2006 may be revoked by the taxpayer with respect to any section 179 property, and that such revocation, once made, shall be irrevocable. The conference agreement (H.R. Conf. Rep. No. 108–126, at 35 (2003)) states that a taxpayer may make or revoke an expensing election on an amended Federal tax return without the consent of the Commissioner.

Explanation of Provisions

For taxable years beginning after 2002 and before 2006, the regulations reflect the change to section 179(d)(1) by including off-the-shelf computer software in the definition of section 179 property, and the changes to sections 179(b)(1) and (2) by increasing the respective amounts to $100,000 and $400,000. The regulations also provide guidance for making and revoking elections under section 179 for those taxable years. Several examples are provided to illustrate how taxpayers may make and revoke their section 179 elections. Additionally, each year the IRS will publish the annual inflation indexed amounts for sections 179(b)(1) and (2). For the inflation indexed amounts for taxable years beginning in 2004, *see* Rev. Proc. 2003–85, 2003–49 I.R.B. 1184.

Making or Revoking Section 179 Elections on Amended Federal Tax Returns

Prior to the enactment of JGTRRA, an election to expense the cost of property under section 179 generally was made on the taxpayer's original federal tax return for the taxable year to which the election applied. An election could only be revoked with the consent of the Commissioner. The section 179 regulations (pre-JGTRRA) provided that a revocation of an election would only be granted in extraordinary circumstances.

Small business taxpayers are often unaware of the advantages or disadvantages of section 179 expensing. Some taxpayers may not have been aware of the section 179 election until after filing an original Federal tax return. In addition, making the section 179 election is not always to a taxpayer's advantage. For example, the section 179 election may prevent the taxpayer from fully using exemptions and deductions, reduce a taxpayer's coverage under the social security system, and make various tax credits unusable. *See* Internal Revenue Service, Publication 946, ''How to Depreciate Property (For use in preparing 2003 Returns)'', p. 14, and ''General Explanations of the Administration's Fiscal Year 2004 Revenue Proposals'', Department of the Treasury, p. 23 (February 2003).

Permitting taxpayers to make or revoke section 179 elections on amended Federal tax returns without the consent of the Commissioner reflects Congress's intent ''that the process of making and revoking section 179 elections should be made simpler and more efficient for taxpayers.'' H.R. Rep. No. 108–94, at 25 and 26 (2003) and S. Prt. No. 108–26, at 10 (2003). Such a process will provide flexibility to small business taxpayers in determining whether the section 179 election is to their advantage or disadvantage.

Section 1.179–5T(c)(1) establishes the time period during which a taxpayer may make or revoke a section 179 election on an amended Federal tax return.

Section 1.179–5T(c)(2) provides that a section 179 election made on an amended Federal tax return must specify the item of section 179 property to which the election applies and the portion of the cost of each such item to be taken into account under section 179. Further, if a taxpayer elected to expense only a portion of the cost basis of an item of section 179 property for a particular taxable year (or did not elect to expense any portion of the cost basis of an item of section 179 property), § 1.179–5T(c)(2) allows the taxpayer to file an amended Federal tax return and expense any portion of the cost basis of an item of section 179 property that was not expensed pursuant to a prior section 179 election. Any such increase in the amount expensed under section 179 is not deemed to be a revocation of the prior election for that particular taxable year.

Section 1.179–5T(c)(3) provides that any election under section 179, or specification of such election, for any taxable year beginning after 2002 and before 2006 for any item of section 179 property may be revoked by the taxpayer on an amended Federal tax return without the Commissioner's consent and that such revocation, once made, is irrevocable. For this purpose, a specification refers to both the selected specific item of section 179 property subject to a section 179 election and a selected dollar amount allocable to the specific item of section 179 property. In addition, § 1.179–5T(c)(3) describes the circumstances under which partial and entire revocations of elections and specifications occur. Section 1.179–5T(c)(3) also discusses the effect of a revocation of an election under section 179 or a revocation of any specification of such election.

Section 1.179–5T(c)(4) sets forth examples illustrating the rules of paragraphs (c)(1), (2), and (3).

Section 1.179–6T provides the applicability dates for the provisions of §§ 1.179–2T, 1.179–4T, and 1.179–5T.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in the proposed rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Winston H. Douglas, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.179–0 is amended as follows:

■ 1. Paragraphs (b)(1) and (b)(2) of § 1.179–2 are revised.
■ 2. Section 1.179–2T is added.
■ 3. Paragraph (a) of § 1.179–4 is revised.
■ 4. Section 1.179–4T is added.
■ 5. Paragraph (c) of § 1.179–5 is added.
■ 6. Section 1.179–5T is added.
■ 7. Section 1.179–6T is added.

The revisions and additions read as follows:

§ 1.179–0 Table of contents for section 179 expensing rules.

* * * * *

§ 1.179–2 Limitations on amount subject to section 179 election.

* * * * *
(b) * * *
(1) [Reserved].
(2) [Reserved].
* * * * *

§ 1.179–2T Limitations on amount subject to section 179 election (temporary).

(a) [Reserved].
(b) Dollar Limitation.
(1) In general.
(2) Excess section 179 property.
(3) through (d) [Reserved].
* * * * *

§ 1.179–4 Definitions.

(a) Section 179 property [Reserved].
* * * * *

§ 1.179–4T Definitions.

(a) Section 179 property.
(b) through (f) [Reserved].

§ 1.179–5 Time and manner of making election.

* * * * *

(c) Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.

§ 1.179–5T Time and manner of making election.

(a) and (b) [Reserved].
(c) Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.
* * * * *

§ 1.179–6T Effective dates.

(a) In general.
(b) Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.

■ **Par. 3.** Section 1.179–2 is amended by revising paragraphs (b)(1) and (b)(2)(ii) to read as follows:

§ 1.179–2 Limitations on amount subject to section 179 election.

* * * * *
(b) * * *
(1) [Reserved]. For further guidance, *see* § 1.179–2T(b)(1).
(2) * * *
(i) * * *
(ii) [Reserved]. For further guidance, see § 1.179–2T(b)(2)(ii).
* * * * *

■ **Par. 4.** Section 1.179–2T is added to read as follows:

§ 1.179–2T Limitations on amount subject to section 179 election (temporary).

(a) [Reserved]. For further guidance, *see* § 1.179–2(a).

(b) *Dollar limitation*—(1) *In general.* The aggregate cost of section 179 property that a taxpayer may elect to expense under section 179 for any taxable year beginning in 2003 and thereafter is $25,000 ($100,000 in the case of taxable years beginning after 2002 and before 2006 under section 179(b)(1), indexed annually for inflation under section179(b)(5) for taxable years beginning after 2003 and before 2006), reduced (but not below zero) by the amount of any excess section 179 property (described in paragraph (b)(2) of this section) placed in service during the taxable year.

(b)(2) and (b)(2)(i) [Reserved]. For further guidance, *see* § 1.179–2(b)(2) and (b)(2)(i).

(ii) $200,000 ($400,000 in the case of taxable years beginning after 2002 and before 2006 under section 179(b)(2), indexed annually for inflation under section 179(b)(5) for taxable years beginning after 2003 and before 2006).

(b)(3) through (d) [Reserved]. For further guidance, *see* § 1.179–2(b)(3) through (d).

■ **Par. 5.** Section 1.179–4 is amended by revising paragraph (a) to reads as follows:

§ 1.179–4 Definitions.

* * * * *

(a) [Reserved]. For further guidance, *see* § 1.179–4T(a).

* * * * *

■ **Par. 6.** Section 1.179–4T is added to read as follows:

§ 1.179–4T Definitions (temporary).

The following definitions apply for purposes of section 179, §§ 1.179–1 through 1.179–6, and § 1.179–2T, 5T, and 6T:

(a) *Section 179 property.* The term *section 179 property* means any tangible property described in section 179(d)(1) that is acquired by purchase for use in the active conduct of the taxpayer's trade or business (as described in § 1.179–2(c)(6)). For taxable years beginning after 2002 and before 2006, the term *section 179 property* includes computer software described in section 179(d)(1) that is placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006 and is acquired by purchase for use in the active conduct of the taxpayer's trade or business (as described in § 1.179–2(c)(6)). For purposes of this paragraph (a), the term *trade or business* has the same meaning as in section 162 and the regulations thereunder.

(b) through (f) [Reserved]. For further guidance, *see* § 1.179–4(b) through (f).

■ **Par. 7.** Section 1.179–5 is amended by adding paragraph (c) to read as follows:

§ 1.179–5 Time and manner of making election.

* * * * *

(c) *Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.* [Reserved]. For further guidance, see § 1.179–5T(c).

■ **Par. 8.** Section 1.179–5T is added to read as follows:

§ 1.179–5T Time and manner of making election (temporary).

(a)and (b) [Reserved]. For further guidance, see § 1.179–5(a) and (b).

(c) *Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006*—(1) *In general.* For any taxable year beginning after 2002 and before 2006, a taxpayer is permitted to make or revoke an election under section 179 without the consent of the Commissioner on an amended Federal tax return for that taxable year. This amended return must be filed within the time prescribed by law for filing an amended return for such taxable year.

(2) *Election*—(i) *In general.* For any taxable year beginning after 2002 and before 2006, a taxpayer is permitted to make an election under section 179 on an amended Federal tax return for that taxable year without the consent of the Commissioner. Thus, the election under section 179 and § 1.179–1 to claim a section 179 expense deduction for section 179 property may be made on an amended Federal tax return for the taxable year to which the election applies. The amended Federal tax return must include the adjustment to taxable income for the section 179 election and any collateral adjustments to taxable income or to the tax liability (for example, the amount of depreciation allowed or allowable in that taxable year for the item of section 179 property to which the election pertains). Such adjustments must also be made on amended Federal tax returns for any affected succeeding taxable years.

(ii) *Specifications of election.* Any election under section 179 must specify the items of section 179 property and the portion of the cost of each such item to be taken into account under section 179(a). Any election under section 179 must comply with the specification requirements of section 179(c)(1)(A), § 1.179–1(b), and § 1.179–5(a). If a taxpayer elects to expense only a portion of the cost basis of an item of section 179 property for a taxable year beginning after 2002 and before 2006 (or did not elect to expense any portion of the cost basis of the item of section 179 property), the taxpayer is permitted to file an amended Federal tax return for that particular taxable year and increase the portion of the cost of the item of section 179 property to be taken into account under section 179(a) (or elect to expense any portion of the cost basis of the item of section 179 property if no prior election was made) without the consent of the Commissioner. Any such increase in the amount expensed under section 179 is not deemed to be a revocation of the prior election for that particular taxable year.

(3) *Revocation*—(i) *In general.* Section 179(c)(2) permits the revocation of an entire election or specification, or a portion of the selected dollar amount of a specification. The term *specification* in section 179(c)(2) refers to both the selected specific item of section 179 property subject to a section 179 election and the selected dollar amount allocable to the specific item of section 179 property. Any portion of the cost basis of an item of section 179 property subject to an election under section 179 for a taxable year beginning after 2002 and before 2006 may be revoked by the taxpayer without the consent of the Commissioner by filing an amended Federal tax return for that particular taxable year. The amended Federal tax return must include the adjustment to taxable income for the section 179 revocation and any collateral adjustments to taxable income or to the tax liability (for example, allowable depreciation in that taxable year for the item of section 179 property to which the revocation pertains). Such adjustments must also be made on amended Federal tax returns for any affected succeeding taxable years. Reducing or eliminating a specified dollar amount for any item of section 179 property with respect to any taxable year beginning after 2002 and before 2006 results in a revocation of that specified dollar amount.

(ii) *Effect of revocation.* Such revocation, once made, shall be irrevocable. If the selected dollar amount reflects the entire cost of the item of section 179 property subject to the section 179 election, a revocation of the entire selected dollar amount is treated as a revocation of the section 179 election for that item of section 179 property and the taxpayer is unable to make a new section 179 election with respect to that item of property. If the selected dollar amount is a portion of the cost of the item of section 179 property, revocation of a selected dollar amount shall be treated as a revocation of only that selected dollar amount. The revoked dollars cannot be the subject of a new section 179 election for the same item of property.

(4) *Examples.* The following examples illustrate the rules of this paragraph (c):

Example 1. Taxpayer, a sole proprietor, owns and operates a jewelry store. During 2003, Taxpayer purchased and placed in service two items of section 179 property—a cash register costing $4,000 (5-year MACRS property) and office furniture costing $10,000 (7-year MACRS property). On his 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 the full cost of the cash register and, with respect to the office furniture, claimed the depreciation allowable. In November 2004, Taxpayer determines it would have been more advantageous to have made an election under section 179 to expense the full cost of the office furniture rather than the cash register. Pursuant to paragraph (c)(1) of this section, Taxpayer is permitted to file an amended Federal tax return for 2003 revoking the section 179 election for the cash register, claiming the depreciation allowable in 2003 for the cash register, and making an election to expense under section 179 the cost of the office furniture. The amended return must include an adjustment for the depreciation previously claimed in 2003 for the office furniture, an adjustment for the depreciation allowable in 2003 for the cash register, and any other collateral adjustments to taxable income or to the tax liability. In addition, once Taxpayer revokes the section 179 election for the entire cost basis of the cash register, Taxpayer can no longer expense under section 179 any portion of the cost of the cash register.

Example 2. Taxpayer, a sole proprietor, owns and operates a machine shop that does specialized repair work on industrial equipment. During 2003, Taxpayer purchased and placed in service one item of section 179 property—a milling machine costing $135,000. On Taxpayer's 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 $5,000 of the cost of the milling machine and claimed allowable depreciation on the remaining cost. Subsequently, Taxpayer determines it would have been to Taxpayer's advantage to have elected to expense $100,000 of the cost of the milling machine on Taxpayer's 2003 Federal tax return. In November 2004, Taxpayer files an amended Federal tax return for 2003, increasing the amount of the cost of the milling machine that is to be taken into account under section 179(a) to $100,000, decreasing the depreciation allowable in 2003 for the milling machine, and making any other collateral adjustments to taxable income or to the tax liability. Pursuant to paragraph (c)(2)(ii) of this section, increasing the amount of the cost of the milling machine to be taken into account under section 179(a) supplements the portion of the cost of the milling machine that was already taken into account by the original section 179 election made on the 2003 Federal tax return and no revocation of any specification with respect to the milling machine has occurred.

Example 3. Taxpayer, a sole proprietor, owns and operates a real estate brokerage business located in a rented storefront office. During 2003, Taxpayer purchases and places in service two items of section 179 property—a laptop computer costing $2,500 and a desktop computer costing $1,500. On Taxpayer's 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 the full cost of the laptop computer and the full cost of the desktop computer. Subsequently, Taxpayer determines it would have been to Taxpayer's advantage to have originally elected to expense under section 179 only $1,500 of the cost of the laptop computer on Taxpayer's 2003 Federal tax return. In November 2004, Taxpayer files an amended Federal tax return for 2003 reducing the amount of the cost of the laptop computer that was taken into account under section 179(a) to $1,500, claiming the depreciation allowable in 2003 on the remaining cost of $1,000 for that item, and making any other collateral adjustments to taxable income or to the tax liability. Pursuant to paragraph (c)(3)(ii) of this section, the $1,000 reduction represents a revocation of a portion of the selected dollar amount and no portion of those revoked dollars may be the subject of a new section 179 election for the laptop computer.

Example 4. Taxpayer, a sole proprietor, owns and operates a furniture making business. During 2003, Taxpayer purchases and places in service one item of section 179 property—an industrial-grade cabinet table saw costing $5,000. On Taxpayer's 2003 Federal tax return filed on April 15, 2004, Taxpayer elected to expense under section 179 $3,000 of the cost of the saw and, with respect to the remaining $2,000 of the cost of the saw, claimed the depreciation allowable. In November 2004, Taxpayer files an amended Federal tax return for 2003 revoking the selected $3,000 amount for the saw, claiming the depreciation allowable in 2003 on the $3,000 cost of the saw, and making any other collateral adjustments to taxable income or to the tax liability. Subsequently, in December 2004, Taxpayer files a second amended Federal tax return for 2003 selecting a new dollar amount of $2,000 for the saw, including an adjustment for the depreciation previously claimed in 2003 on the $2,000, and making any other collateral adjustments to taxable income or to the tax liability. Pursuant to paragraph (c)(2)(ii) of this section, Taxpayer is permitted to select a new selected dollar amount to expense under section 179 encompassing all or a part of the initially non-elected portion of the cost of the elected item of section 179 property. However, no portion of the revoked $3,000 may be the subject of a new section 179 dollar amount selection for the saw. In December 2005, Taxpayer files a third amended Federal tax return for 2003 revoking the entire selected $2,000 amount with respect to the saw, claiming the depreciation allowable in 2003 for the $2,000, and making any other collateral adjustments to taxable income or to the tax liability. Because Taxpayer elected to expense, and subsequently revoke, the entire cost basis of the saw, the section 179 election for the saw has been revoked and Taxpayer is unable to make a new section 179 election with respect to the saw.

■ **Par. 9.** Section 1.179–6T is added to read as follows:

§ 1.179–6T Effective dates.

(a) *In general.* Except as provided in paragraph (b) of this section, the provisions of §§ 1.179–1 through 1.179–5 apply for property placed in service by the taxpayer in taxable years ending after January 25, 1993. However, a taxpayer may apply the provisions of §§ 1.179–1 through 1.179–5 to property placed in service by the taxpayer after December 31, 1986, in taxable years ending on or before January 25, 1993. Otherwise, for property placed in service by the taxpayer after December 31, 1986, in taxable years ending on or before January 25, 1993, the final regulations under section 179 as in effect for the year the property was placed in service apply, except to the extent modified by the changes made to section 179 by the Tax Reform Act of 1986 (100 Stat. 2085), the Technical and Miscellaneous Revenue Act of 1988 (102 Stat. 3342) and the Revenue Reconciliation Act of 1990 (104 Stat. 1388–400). For that property, a taxpayer may apply any reasonable method that clearly reflects income in applying the changes to section 179, provided the taxpayer consistently applies the method to the property.

(b) *Section 179 property placed in service by the taxpayer in a taxable year beginning after 2002 and before 2006.* The provisions of § 1.179–2T, 1.179–4T, and 1.179–5T, reflecting changes made to section 179 by the Jobs and Growth Tax Relief Reconciliation Act of 2003 (117 Stat. 752), apply for property placed in service in taxable years beginning after 2002 and before 2006.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 10.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 11.** In § 602.101, paragraph (b) is amended by adding the following entries in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * *	*
1.179–2T	1545–1201
* * * *	*
1.179–5T	1545–1201
* * * *	*

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 21, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 04–17539 Filed 8–3–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H–049D]

RIN 1218–AC05

Controlled Negative Pressure REDON Fit Testing Protocol

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Final rule.

SUMMARY: In this rulemaking, OSHA is approving an additional quantitative fit testing protocol, the controlled negative pressure (CNP) REDON fit testing protocol, for inclusion in Appendix A of its Respiratory Protection Standard. The protocol affects, in addition to general industry, OSHA respiratory protection standards for shipyard employment and construction. The Agency is adopting this protocol under the provisions contained in the Respiratory Protection Standard that allow individuals to submit evidence for including additional fit testing protocols in this standard.

The CNP REDON protocol requires the performance of three different test exercises followed by two redonnings of the respirator, while the CNP protocol approved previously by OSHA specifies eight test exercises, including one redonning of the respirator. In addition to amending the Standard to include the CNP REDON protocol, this rulemaking makes several editorial and non-substantive technical revisions to the Standard associated with the CNP REDON protocol and the previously approved CNP protocol.

DATES: The final rule becomes effective September 3, 2004.

ADDRESSES: In compliance with 28 U.S.C. 2212(a), the Agency designates the Associate Solicitor for Occupational Safety and Health, Office of the Solicitor, Room S–4004, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210, as the recipient of petitions for review of this rulemaking.

FOR FURTHER INFORMATION CONTACT: For technical inquiries, contact Mr. John E. Steelnack, Directorate of Standards and Guidance, Room N–3718, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 693–2289 or by facsimile (202) 693–1678. Copies of this **Federal Register** notice are available from the OSHA Office of Publications, Room N–3101, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington DC 20210; telephone (202) 693–1888. For an electronic copy of this notice, go to OSHA's Web site (*http://www.osha.gov*), and select ''**Federal Register**,'' ''Date of Publication,'' and then ''2004.''

SUPPLEMENTARY INFORMATION:

I. Background

The Respiratory Protection Standard includes the following three quantitative fit testing protocols: Generated-aerosol; ambient-aerosol condensation nuclei counter; and controlled negative pressure (CNP). Part II of Appendix A of the Respiratory Protection Standard specifies, in part, the procedure individuals must follow to submit new fit testing protocols for the Agency's consideration. The criteria OSHA uses for determining whether to propose adding a fit testing protocol to the Respiratory Protection Standard include: (1) A test report prepared by an independent government research laboratory (*e.g.*, Lawrence Livermore National Laboratory, Los Alamos National Laboratory, the National Institute for Standards and Technology) stating that the laboratory tested the protocol and found it to be accurate and reliable; or (2) an article published in a peer-reviewed industrial-hygiene journal describing the protocol, and explaining how test data support the accuracy and reliability of the protocol. When a protocol meets one of these criteria, the Agency conducts a notice-and-comment rulemaking under Section 6(b)(7) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655). As OSHA noted in the proposal, the CNP REDON protocol met the second of these criteria (68 FR 33887; June 6, 2003).

II. Summary and Explanation of the Final Standard

A. Introduction

With his letter submitting the CNP REDON protocol for review, Dr. Clifton D. Crutchfield included copies of two peer-reviewed articles from industrial-hygiene journals describing the accuracy and reliability of the proposed protocol (Exs. 2 and 3). In this submission, Dr. Crutchfield also described in detail the equipment and procedures required to administer the proposed protocol. According to this description, the proposed protocol is a variation of the CNP protocol developed by Dr. Crutchfield in the early 1990s, and which OSHA approved for inclusion in paragraphs (a) and (d) of Part I.C.4 of Appendix A when the Agency revised its Respiratory Protection Standard (63 FR 1152; January 8, 1998). Although the proposed protocol has the same fit-test requirements and uses the same test equipment as the CNP protocol previously approved by OSHA, it includes only three test exercises followed by two redonnings of the respirator instead of the eight test exercises and one respirator redonning required by the previously approved CNP protocol. The three test exercises, listed in order of administration, are normal breathing, bending over, and head shaking. The procedures for administering these three test exercises and the two respirator donnings to an employee, and for measuring respirator leakage during each test, are described below:

- Facing forward. In a normal standing position, without talking, the test subject must breathe normally for 30 seconds; then, while facing forward, he or she must hold his or her breath for 10 seconds for test measurement.
- Bending over. The test subject (*i.e.*, employee) must bend at the waist for 30 seconds as if he or she is going to touch his or her toes; then, while facing parallel to the floor, he or she must hold his or her breath for 10 seconds for test measurement.
- Head shaking. The test subject must shake his or her head back and forth vigorously several times while shouting for approximately three seconds; then, while facing forward, he or she must hold his or her breath for 10 seconds for test measurement.
- First redonning (REDON–1). The test subject must remove the respirator, loosen all facepiece straps, and then redon the respirator mask; after redonning the mask, he or she must face forward and hold his or her breath for 10 seconds for test measurement.
- Second redonning (REDON–2). The test subject must remove the respirator, loosen all facepiece straps, and then redon the respirator mask again; after redonning the mask, he or she must face forward and hold his or her breath for 10 seconds for test measurement. As noted earlier, Dr. Crutchfield submitted two peer-reviewed journal articles that

provided information on the accuracy and reliability of the proposed CNP REDON protocol. In the first of these articles, the most important conclusion made by the authors was that the protocol results in substantially lower respirator fit factors overall than the most commonly used ambient-aerosol protocol. Lower fit factors indicate that the CNP REDON protocol detects more respirator leaks than the ambient-aerosol protocol, thereby providing employees with an increased margin of safety when they select respirators. The main conclusion reached by the authors in the second article was that the overall fit factors obtained from the three exercises and two redonnings required by the CNP REDON protocol are the same as the overall fit factors found when using the previously approved CNP protocol described in the Respiratory Protection Standard. Therefore, compared to the previously approved CNP protocol, the CNP REDON protocol submitted by Dr. Crutchfield obtains at least the same overall fit factors with fewer exercises and in less time.

OSHA found that the information submitted by Dr. Crutchfield in support of the CNP REDON protocol met the criteria for proposing to add new fit testing protocols to Part I of Appendix A of the Respiratory Protection Standard. Therefore, the Agency initiated a rulemaking proposing to approve the CNP REDON protocol for inclusion in Appendix A of the Respiratory Protection Standard. However, because the only difference between the proposed CNP REDON protocol and the previously approved CNP protocol is the exercise procedure used during fit testing, the Agency proposed to limit the regulatory text revisions to a description of the proposed CNP REDON exercise procedure, and to refer instead to the previously approved CNP protocol described in paragraphs (a) and (c) of Part I.C.4 for information on CNP fit testing requirements and the CNP test instrument.

B. Editorial and Technical Revisions to the Respiratory Protection Standard

In the proposal, OSHA also included several editorial and technical revisions to the language describing the two CNP fit testing protocols. The first proposed editorial revision added the CNP REDON protocol to the exception already specified for the previously approved CNP protocol under paragraph 14(a) of Part I.A in Appendix A of the Respiratory Protection Standard. Accordingly, paragraph 14(a) would exempt both the previously approved CNP protocol, as well as the proposed CNP REDON protocol, from the test exercises specified for the other approved fit testing protocols listed in the appendix. OSHA believed that this revision is necessary because the CNP REDON protocol consists of a test exercise procedure that differs substantially from the procedure required for the other OSHA-approved fit testing protocols.

The second editorial revision included in the proposal involved the introductory paragraph describing the previously approved CNP protocol in Part I.C.4 of Appendix A of the Respiratory Protection Standard. The eighth sentence in this paragraph refers to the CNP instrument manufacturer as ''Dynatech Nevada.'' However, the instrument manufacturer now is Occupational Health Dynamics of Birmingham, Alabama. OSHA proposed to revise this sentence to identify the current manufacturer of this instrument.

As noted in the proposal, Dr. Crutchfield stated that test administrators use either an auditory warning device or the screen tracing currently provided on the CNP test instrument to detect participants' failure to hold their breath for the required 10-second period when measuring respirator fit (Ex. 14). While using the screen tracing for this purpose was not part of the previously approved CNP protocol, the Agency believed that such a visual warning device would be a useful adjunct in measuring respirator fit under both the previously approved CNP protocol and the proposed CNP REDON protocol. Therefore, the Agency proposed to revise paragraph (c) of the previously approved CNP protocol (under Part I.A.4 of the Respiratory Protection Standard) to include the screen tracing currently provided on the CNP test instrument as a visual warning device to detect test subjects' non-compliance with the breath-hold procedure.

In a 1998 journal article entitled ''CNP Fit Testing Under OSHA's Updated Respiratory Protection Standard,'' published in *Respiratory Protection Update,* Dr. Crutchfield indicated that the Agency's description of the CNP fit-test requirements in paragraph (a)(5) of the previously approved CNP protocol contained an error (Ex. 8). Specifically, he noted the breath-hold requirement in paragraph (a)(5) should be 10 (not 20) seconds. OSHA agreed. Accordingly, the Agency proposed to revise this requirement because implementing correct fit-test procedures would improve the assessment of respirator fit factors using the previously approved CNP protocol, as well as the proposed CNP REDON protocol.

C. Comments to the Proposal

In the proposal, OSHA requested the public to submit comments and data regarding the accuracy and reliability of the CNP REDON protocol, as well as its effectiveness in detecting respirator leakage and its usefulness in selecting respirators that protect employees from airborne contaminants in the workplace (68 FR 33887; June 6, 2003). Specifically, the Agency invited public comment on the following issues:

- Were the studies described in the peer-reviewed articles well controlled, and conducted according to accepted experimental design practices and principles?
- Were the results of the studies described in the peer-reviewed articles properly, fully, and fairly presented and interpreted?
- Will the proposed protocol reliably identify respirators with unacceptable fit as effectively as the quantitative fit testing protocols already listed in Part I.C of Appendix A of the Respiratory Protection Standard?
- Will the proposed protocol generate reproducible fit testing results?
- Should OSHA expand application of the proposed protocol fit-test exercises to other quantitative fit tests (*e.g.*, ambient aerosol tests)?
- Will the proposed editorial and technical revisions to Part I of Appendix A improve proper implementation of the approved CNP protocol and the proposed CNP REDON protocol?

The Agency received 66 written comments and 116 electronic comments in response to its request for comments in the proposal (Exs. 3–1 to 3–66 and 4–1 to 4–116, respectively). The following paragraphs in this section address the comments made on each of the six issues described previously.

1. Were the Studies Described in the Peer-Reviewed Articles Well Controlled, and Conducted According to Accepted Experimental Design Practices and Principles?

Dr. Kent Oestenstad of the University of Alabama at Birmingham emphasized the high quality of the research studies supporting the CNP REDON protocol. In doing so, he stated that the research studies ''were well controlled and conducted according to established and accepted experimental design'' (Ex. 4–88), a judgment confirmed by their acceptance for publication in peer-reviewed journals.

Several commenters questioned the research underlying the proposed protocol. One commenter stated that it

was inappropriate to validate the protocol based on ambient-aerosol concentrations measured using PortaCount equipment (Ex. 4–102). Another commenter asserted that the underlying research studies did not adequately support the accuracy and reliability of the proposed protocol, and cited problems with each of the articles (Ex. 3–32). In his view, the first article was deficient because only three test exercises (and no redonning exercises) from the proposed protocol were used, poor-fitting masks were not included, the numbers of test subjects were statistically inadequate, data from half-mask and full-facepiece respirators were mixed inappropriately, a mixture of fit factors for the minimum pass-fail criterion was used, data from two different ambient-aerosol protocols were combined, paired t-tests were not used when comparing each test subject's performance on the two protocols, and statistical sensitivity was poor (see, also, Exs. 3–60 and 4–84). The same commenter found the second article inadequate in that poor-fitting masks were not included and the criteria for evaluating new fit-test protocols specified in ANSI Z88.10–2001 were not met. Two commenters claimed that the proposed protocol cannot be evaluated using pass-fail fit factors derived using an aerosol challenge agent because a low correlation exists between fit factors assessed using the previously approved CNP protocol and an aerosol-based protocol (Exs. 4–92 and 4–102).

Regarding these comments, a review of the first study shows that redonning was performed between each of the fit tests, while the second study used the full CNP REDON protocol, including two redonning exercises. In addition, the pass-fail distributions for the studies indicate that respirator fit varied substantially among the test subjects. While the Agency agrees that inaccurate and unreliable measurements and combining results for different respirator types may lead to inconsistent results with large statistical variations, the peer-reviewed studies showed that the results were consistent and that large statistical variations did not occur. For example, these studies showed clearly that fit factors from the CNP REDON protocol were consistently lower than fit factors from the ambient-aerosol protocol and the CNP protocol previously approved by OSHA. Additionally, to be accepted for publication in peer-reviewed journals, the studies had to conform with the experimental-design and statistical procedures and practices used by the industrial-hygiene research community to collect and analyze data.

As for the observation that the studies used an insufficient number of test subjects, the industrial-hygiene research community does not use a specified number of test subjects to assess fit testing protocols. Moreover, specifying a minimum number of test subjects for fit testing research would be arbitrary. Finally, had the sample sizes been too small to produce reliable results, the studies would not have been accepted for publication in peer-reviewed journals.

The commenters who addressed fit factors based on aerosol challenge agents provided no data or additional information to support their position and, thus, were not able to negate the results of the first study submitted by Dr. Crutchfield, which showed a close correspondence between the results of the CNP REDON and ambient-aerosol protocols.

In summary, the Agency finds that these comments did not identify any shortcoming in the research underlying the proposed protocol that would offset the criteria used to evaluate that research under the peer-review process. Furthermore, OSHA considers the results described in these articles to be reliable and valid. Therefore, the Agency has concluded that these results provide robust scientific support for the CNP REDON protocol as described in the proposal.

2. Were the Results of the Studies Described in the Peer-Reviewed Articles Properly, Fully, and Fairly Presented and Interpreted?

Dr. Oestenstad observed that ''[s]tatements in the conclusions and results were fairly reported and interpreted'' (Ex. 4–88). However, another commenter observed that ''virtually all studies showing favorable performance by the CNP method were authored or co-authored by the inventor/developer of that method,'' an observation made by other commenters as well (Exs. 3–32, 3–58, 4–84, and 4–91).

The Agency finds Dr. Oestenstad's comments convincing because, as noted in his responses to the third issue (see below), his laboratory has performed independent research on the CNP protocol previously approved by OSHA. Therefore, Dr Oestenstad is in an ideal position to know whether the results of the peer-reviewed articles were properly, fully, and fairly presented and interpreted, and whether the CNP protocol provides equivalent protection to workers. Additionally, the peer-review process specifically removes effects that may have been due to bias on the part of the authors.[1] The Agency finds that the observations made by the other commenters simply oppose the supporting studies without presenting information or data that contradict the results.

3. Will the Proposed Protocol Reliably Identify Respirators With Unacceptable Fit as Effectively as the Quantitative Fit Testing Protocols Already Listed in Part I.C of Appendix A of the Respiratory Protection Standard?

In his comments, Dr. Crutchfield described the two peer-reviewed studies that he submitted to OSHA in support of the proposed CNP REDON protocol, and stated that these studies showed that fit factors obtained using this protocol were significantly lower than fit factors obtained using the ambient-aerosol fit test previously approved by OSHA (Ex 4–13). He noted that the first study assessed the impact of fit-test exercises and donning on respirator fit; consequently, he questioned the current practice of basing determinations of respirator fit on a single donning of a respirator mask.[2] The second study involved fit testing Tucson firefighters using both the previously approved CNP protocol and the proposed CNP REDON protocol. Dr. Crutchfield observed that this study demonstrated that fit factors obtained using the proposed protocol were lower than fit factors achieved with the previously approved CNP protocol, although this difference was not significant statistically.

Dr. Crutchfield also submitted, with his comments, a paper that he drafted (Ex. 4–13–1). This paper described two studies in which a hypodermic needle was used to allow air to leak into the facepiece of a respirator in a predictable manner (*i.e.*, to simulate poor respirator fit). The first study measured this leakage in half-mask respirators worn by five test subjects who each performed six fit-test exercises while being assessed using either the FitTester 3000 or the PortaCount Plus.[3] The second

[1] To ensure minimal bias on the part of both authors and peer reviewers, the journal *Applied Occupational and Environmental Hygiene* (the journal in which Dr. Crutchfield published the first article submitted in support of the CNP REDON protocol) requires a double-blind review (*i.e.*, both the authors and the reviewers remain anonymous to each other).

[2] In the first study, multiple donnings consisted of removing and redonning the respirator between each fit test.

[3] The exercises used for the CNP protocol were facing forward, moving the head left, moving the head right, moving the head up, moving the head down, and facing forward, while the six exercises used for the ambient-aerosol protocol were normal breathing, deep breathing, moving the head side to

study evaluated this leakage at three locations in a half-mask or full-facepiece respirator mounted on a head form; this study also used the FitTester 3000 and the PortaCount Plus to assess the leakage. The results of these two studies showed that the CNP fit testing system produced substantially less variability, and detected more respirator leakage, than the ambient-aerosol fit testing system.

This paper also described a meta-analysis of six published studies, each of which compared fit factors obtained for the CNP and ambient-aerosol fit-test systems. Consistent with the results of the previous two studies, the meta-analysis found that the CNP fit tests produced consistently and substantially lower fit factors than the ambient-aerosol fit tests.

OSHA believes the three studies described in Dr. Crutchfield's unpublished paper deserve serious consideration. The first two studies warrant consideration because the hypodermic-needle methodology has been demonstrated to be a reliable and valid measure of respirator leakage in at least two peer-reviewed journals,[4] and the methodology also is described in Annex A2 of the ANSI Z88.10–2001 consensus standard as a research methodology for use in validating fit testing protocols. The third study did not involve collecting independent data, but used meta-analysis for the purpose of determining the overall strength of the protocol differences obtained in studies already published in peer-reviewed journals. The Agency also notes that while it is possible that differences between the exercises used in the CNP and ambient-aerosol protocols in the first study may account for some of the differences observed between the protocols, it is clear that the direction of these differences (*i.e.*, the CNP protocol being more conservative than the ambient-aerosol protocol) is consistent with the findings of the second and third studies, as well as the peer-reviewed articles submitted by Dr. Crutchfield in support of the proposed CNP REDON protocol.

Dr. Oestenstad noted that, in the second peer-reviewed study submitted by Dr. Crutchfield in support of the proposed protocol, ''[t]he distributions of fit factors [measured] by the two methods were shown to be almost identical, and fit factors [measured] by the [proposed CNP REDON protocol] were lower than those [measured] by the [previously approved CNP protocol] at low levels of fit'' (Ex. 4–88). He stated further that ''[s]tudies by my students have found that the negative pressure method produced a significantly lower geometric standard deviation than the aerosol method for a series of fit tests on the same subjects wearing the same mask.''

OSHA finds that Drs. Crutchfield and Oestenstad have demonstrated the reliability and effectiveness of the CNP REDON protocol in detecting respirator leaks, and that this and similar CNP protocols consistently produce fit factors that are substantially lower than fit factors obtained using the ambient-aerosol fit testing protocol. The Agency considers their comments especially significant because they are based on data collected under controlled laboratory conditions.

Several commenters who currently use the previously approved CNP protocol endorsed the proposed protocol because they believed it would increase the effectiveness of the fit testing by improving the ability of employees to detect leaks while donning and doffing a respirator, enhancing confidence among employees and employers that the respirators fit properly, and yielding fit factors that do not differ substantially from fit factors obtained using the previously approved CNP protocol (Exs. 3–5, 3–7, 3–25, and 3–46). One commenter, who used the PortaCount protocol, disagreed with these comments, claiming that both CNP fit testing protocols would diminish effectiveness by interfering with training employees in the capabilities and limitations of their respirators (Ex. 4–84). However, this commenter did not elaborate on the supposed interference, provide any data, or present evidence of experience in administering either of the CNP protocols. One commenter believed that existing quantitative fit tests would detect respirator leakage more effectively that the proposed protocol (Ex. 4–99). However, this commenter provided no evidence on which to base this claim, which the Agency finds to be unsupported by other evidence in the record, including the peer-reviewed studies submitted by Dr. Crutchfield.

The remaining comments lend strong support to the proposed CNP REDON protocol in that they generally found that the proposed protocol would assess respirator fit effectively, and also would train employees to detect leakage while donning and doffing a respirator (Exs. 3–5, 3–7, 3–25, and 3–46). The Agency agrees that the CNP REDON protocol, through effective fit testing and training, also will improve employee confidence that their respirators fit properly.

Several commenters asserted that the redonning exercises were not valid (Exs. 3–32, 4–6, and 4–66). Two commenters took issue with the elimination of the head side-to-side, head up-and-down, and talking exercises from the proposed protocol, which the first of these commenters asserted had a history of exposing poor respirator fit (Exs. 3–32 and 3–61). One commenter questioned the validity of the head-shake exercise, while another commenter stated that the two articles submitted in support of the proposed protocol failed to demonstrate that the head-shake or multiple-donning exercises would expose the same leaks as the head-movement exercises (Exs. 3–60 and 3–32). This second commenter stated further that the first peer-reviewed article submitted by Dr. Crutchfield in support of the proposed protocol showed that ''the talking exercise produces consistently lower fit factors than other exercises for fit test methods [*e.g.*, the ambient-aerosol and generated-aerosol protocols],'' but noted this exercise was impossible to perform under the proposed or previously approved CNP protocols (Ex. 3–32). Two commenters questioned the validity of the breath-hold requirement (Exs. 3–28 and 3–61).

OSHA notes that none of the criticisms addressing specific test exercises were substantiated by any data or other evidence. Additionally, these comments did not take into consideration the evidence in the record showing that the proposed protocol, even after eliminating these test exercises, still yields reliable and accurate fit factors that are consistently below (*i.e.*, more conservative than) the fit factors obtained using the ambient-aerosol protocol. The comments regarding the validity of the redonning exercises ignore the important contribution these exercises make in detecting respirator leaks, as described in the results of the second peer-reviewed study submitted by Dr. Crutchfield. One of these commenters, despite criticizing the redonning exercise, stated elsewhere in his comments that he ''has no disagreement with the concept of multiple mask donnings as part of a respirator fit test'' (Ex. 3–32). Moreover, the breath-hold requirement has been validated in the studies described in Dr. Crutchfield's peer-reviewed articles, and is a fundamental part of both the proposed and previously approved CNP protocols

side, moving the head up and down, reciting the Rainbow Passage, and normal breathing.

[4] Crutchfield, C. D., Park, D. L., Henshel, J. L., *et al.* (1995). Determinations of known respirator leakage using controlled negative pressure and ambient aerosol QNFT systems. *American Industrial Hygiene Association Journal*, vol. 56, pp. 16–23; and Crutchfield, C. D. and Park, D. L. (1997). Effect of leak location on measured respirator fit. *American Industrial Hygiene Association Journal*, vol. 58, pp. 413–417.

(*i.e.*, test subjects must maintain negative pressure inside the respirator for the equipment to detect leakage during the various exercises).

In a general criticism of the proposed protocol, several commenters referred to a NIOSH study in which the previously approved CNP protocol (and, by implication, the proposed CNP REDON protocol) performed poorly when test subjects were exposed to Freon as a challenge agent during fit testing (Exs. 3–32, 3–45, 4–91, and 4–92).[5] However, in explaining the poor results obtained using the CNP protocol, NIOSH stated, ''[T]he possibility of changes in fit during the Freon–113 exposure in the chamber may have placed the * * * CNP method[s] at a disadvantage; any change in fit during the Freon–113 exposure would tend to decrease the observed correlation'' (Ex. 3–32–1, p. 866).

4. Will the Proposed Protocol Generate Reproducible Fit Testing Results?

OSHA received no comments on this issue, which suggests that reproducibility of the fit testing results was not a critical concern to the regulated community. In addition, the Agency believes that the consistency of results between the two peer-reviewed studies demonstrates that fit factors obtained using the CNP REDON protocol would be highly reproducible.

5. Should OSHA Expand Application of the Proposed Protocol Fit-Test Exercises to Other Quantitative Fit Tests (*e.g.*, Ambient Aerosol Tests)?

Dr. Oestenstad concluded that ''no studies * * * have validated the measurement of respirator leakage using the ambient aerosol method and the proposed exercise protocol,'' and cautioned that ''[a]pplication of the proposed exercise protocol to the ambient aerosol method would be scientifically inappropriate if no studies have been conducted'' (Ex. 4–88). Another commenter, who opposed OSHA's acceptance of the previously approved and proposed CNP protocols, also recommended that ''OSHA * * * accept all * * * fit testing protocols [approved under ANSI Z88.10–2001] including those for generated aerosol and particle counting (ambient aerosol) methods'' (Ex. 3–32). An additional 65 commenters endorsed the recommendation that OSHA should approve all of the protocols specified by this ANSI standard, including the abbreviated PortaCount ambient-aerosol protocol and the ANSI provision that allows a 30-second exercise duration. Several commenters urged the Agency to reduce each of the exercises in the PortaCount ambient-aerosol protocol to 30 seconds, while other commenters asserted that such a reduction would have no adverse affect on fit factors obtained using the PortaCount ambient-aerosol protocol (Exs. 3–34, 3–37, 3–47, 4–18, 4–45, 4–47, 4–51, 4–53, 4–93, 4–101, and 4–112). Some commenters noted that the existing Canadian respirator fit testing standard (CSA Z94.4–02) permits 30–second fit testing exercises for the PortaCount ambient-aerosol protocol (Exs. 3–32, 3–62, 4–62, 4–72, and 4–114). Two commenters wanted to shorten the PortaCount ambient-aerosol protocol by removing the grimace exercise (Exs. 3–23 and 3–53).

The Agency concurs with Dr. Oestenstad's conclusion that no studies are available demonstrating that the exercises developed for the proposed CNP REDON protocol would determine a valid fit factor if used in another quantitative fit testing protocol. No other commenter provided evidence to refute this conclusion. Regarding the remaining comments in the previous paragraph, the proposal did not address using ANSI Z88.10–2001 to justify adopting any fit testing protocol. In section IV.G of the proposal (''Applicability of Existing Consensus Standards''), OSHA referred to ANSI Z88.10–2001 for the purpose of comparing the proposed fit test to the CNP REDON protocol described in the ANSI standard; OSHA did not use this reference to substantiate the accuracy, reliability, or validity of the proposed protocol or any other fit testing protocol. The Agency uses only the criteria specified in Part II of Appendix A of the Respiratory Protection Standard to determine whether to propose a new fit testing protocol or to modify protocols previously approved by OSHA (*e.g.*, reducing exercise times or eliminating an exercise). OSHA's Respiratory Protection Standard is clear on the appropriate criteria and the method for assessing a new protocol. The Agency cannot consider any new fit testing protocol for approval that does not meet these criteria, regardless of its acceptance under ANSI Z88.10–2001 or any other standard (*e.g.*, the Canadian respirator fit testing standard (CSA Z94.4–02)).

6. Will the Proposed Editorial and Technical Revisions to Part I of Appendix A Improve Proper Implementation of the Approved CNP Protocol and the Proposed CNP REDON Protocol?

Two commenters questioned the efficacy of the two types of breath-hold warning devices (*i.e.*, auditory or visual), noting that the test operator could continue repeating the same exercise until achieving a passing fit factor (Exs. 3–32 and 3–60). In addition, one of these commenters recommended clarifying the CNP REDON instructions to ensure that test subjects: do not adjust their respirator masks during fit testing (to increase test validity); remove their respirator masks completely before redonning them (to provide two distinct measurements); and perform a five-minute comfort-assessment period prior to beginning the exercises (Ex. 3–32). This commenter also noted that the proposal required calculating the harmonic mean of the fit testing results in determining a final fit factor for an employee's respirator; the commenter stated, ''There are very few people who know what a harmonic mean is. Please provide the exact equation'' (Ex. 3–32). The commenter also asserted that the validity of the proposed protocol would be improved if employees had to pass both redonning exercises (*i.e.*, so that high fit factors achieved on the other exercises would not offset poor fit factors obtained on the redonning exercises) (Ex. 3–32).

OSHA agrees with the observations made by the two commenters that continuing a fit-test exercise after activating the breath-hold warning device could invalidate the fit test, which may compromise proper respirator selection and employee protection. Accordingly, the Agency has added the phrase ''and restarted from the beginning'' to the paragraph describing the breath-hold warning devices. The Agency believes that requiring operators to repeat a failed fit test (as indicated by activation of the breath-hold warning device) from the beginning will enhance the validity of the fit test and increase the likelihood that employees will select the correct respirator.

In response to the comment that permitting employees to adjust respirators during fit testing can invalidate the results, the Agency is adding language to paragraph C.4(a)(6) of the CNP REDON protocol prohibiting respirator adjustments once the fit-test exercises begin. This language is consistent with the existing requirement in Appendix A Part I.A.14(b) for the

[5] Exs. 3–32–1 and 3–32–2 in the docket are copies of articles describing these NIOSH studies.

other fit testing protocols. OSHA concludes that this revision will increase the validity of fit testing results and the protection afforded to the employee by a properly fitting respirator.

OSHA also agrees with the recommendation to clarify the instructions so that test subjects perform two complete redonnings. The revised instructions now require test subjects to remove their respirator masks, loosen the straps, and then redon their respirators. The Agency believes that this revision will ensure that each redonning exercise contributes independently to the overall fit-test score, thereby enhancing proper respirator selection. However, OSHA is not including in the revised instructions a description of the five-minute comfort-assessment period because the general instructions for administering fit tests, including the CNP protocol, already require employers to implement a comfort-assessment period prior to fit testing.[6] Therefore, repeating these instructions under the section that describes the CNP protocols is redundant.

The Agency agrees with the commenter who recommended that delineating a specific method for calculating a harmonic mean would be useful in accurately calculating fit factors from the results of the CNP REDON protocol. OSHA believes that using such a method would save time in making these calculations and, additionally, would reduce errors in determining fit factors. While the commenter did not identify in his comments a procedure for calculating a harmonic mean, the Agency has selected for this purpose a method similar to the one described in the ANSI Z88.10–2001 standard. The ANSI calculation method is accepted generally by the industrial-hygiene community, and it also is the method required in Appendix A of OSHA's Respiratory Protection Standard for determining fit factors using the results of the ambient-aerosol protocol.

OSHA is not persuaded that test subjects need to pass both redonning exercises so that the contribution of these exercises would not be offset by the other exercises, including the head-shaking and bending-over exercises. As is true for all quantitative fit testing protocols including the CNP REDON protocol, it is the fit factor obtained by averaging all of the fit-test scores obtained during fit testing that is important in assessing respirator fit, not the test score obtained from individual fit tests. OSHA currently does not impose a requirement that other quantitative fit tests listed in Appendix A of the Respiratory Protection Standard must have test subjects pass every fit testing exercise, and no evidence was submitted by the commenter to suggest that such a revision is necessary for the CNP REDON protocol.

D. Conclusions

After reviewing the comments submitted to the record, the Agency finds that the proposed CNP REDON protocol is supported by peer-reviewed studies that were well controlled, conducted according to accepted experimental design practices and principles, and that produced results that were properly, fully, and fairly presented and interpreted. In addition, based on the studies and the comments in the record, the Agency concludes that the proposed protocol will effectively and reliably identify respirators with unacceptable fit as well as other quantitative fit tests previously approved by OSHA, and also will generate reproducible fit testing results. Moreover, the proposed fit testing exercises are specific to the CNP REDON protocol, and no evidence is available in the rulemaking record to support applying the exercises to other quantitative fit tests previously approved by OSHA. The record also indicates that the editorial and technical revisions described in the proposal are appropriate. Additionally, the Agency adopted several other technical and editorial revisions recommended by commenters; OSHA believes these revisions will ensure proper selection of respirators for employee use.

III. Procedural Determinations

A. Legal Considerations

OSHA's Respiratory Protection Standard is based on evidence that fit testing is necessary to ensure proper respirator fit for employees; proper respirator fit, in turn, protects employees against excessive exposure to airborne contaminants in the workplace. Employers covered by this revision already must comply with the fit testing requirements specified in paragraph (f) of OSHA's Respiratory Protection Standard at 29 CFR 1910.134. Accordingly, these fit testing provisions currently are protecting their employees from the significant risk that results from poorly fitting respirators. For this final standard, the Agency has determined that the new CNP REDON fit testing protocol provides employees with protection that is comparable to the protection afforded to them by the existing fit testing provisions. In this regard, the CNP REDON protocol is not expected to replace existing fit testing protocols, but instead is an alternative to them. Therefore, OSHA finds that the final standard does not directly increase or decrease the protection afforded to employees, nor does it increase employers' compliance burdens.

B. Economic Analysis and Regulatory Flexibility Certification

The final standard is not a significant rulemaking under Executive Order 12866, or a ''major rule'' under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501) or Section 801 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 601). The final standard imposes no additional costs on any private or public sector entity, and does not meet any of the criteria for a significant or major rule specified by the Executive Order or relevant statutes.

The CNP REDON protocol offers employers an additional option to fit test their employees for respirator use. In addition to the CNP protocol previously approved by OSHA, which continues to be an option, the Agency is adding the CNP REDON protocol. According to a recent NIOSH–BLS survey of respirator use, approximately 25,000 of 282,000 establishments currently use the previously approved CNP protocol (see Ex. 6–3, Docket H–049C). With this final rule, employers now have a choice between the previously approved CNP protocol consisting of eight exercises, including one redonning of the respirator, or the new CNP REDON protocol, which involves three exercises and two redonnings of the respirator.

By providing regulatory flexibility to employers, the addition of the CNP REDON protocol may reduce their costs in terms of decreasing the time required to fit test their employees for respirator use. In this regard, OSHA assumes that some employers who now use the previously approved CNP protocol will adopt the CNP REDON protocol. A number of employers who are purchasing new or replacement equipment for administering fit tests also will select the CNP REDON protocol because it consists of fewer exercises than the previously approved CNP and ambient-aerosol protocols, thereby decreasing the time and cost required for them to fit test their employees. However, the Agency believes that the CNP REDON protocol approved under this rulemaking is unlikely to be adopted by employers who currently use the ambient-aerosol

[6] See Appendix A, Part I, A., paragraph 14(b) of the Respiratory Protection Standard.

protocols because these employers already have made an equipment and training investment to administer these fit testing protocols. Finally, OSHA has included the screen tracing in the previously approved CNP and CNP REDON protocols as a visual warning device to detect non-compliance by employees being fit tested with the breath-hold procedure required by these protocols. The Agency concludes that this tracing adds no cost burden to employers who use these protocols because, as noted earlier, the manufacturer already provides this capability on the CNP test equipment.

In summary, OSHA concludes that this rulemaking imposes no additional costs on employers. Accordingly, OSHA certifies that this rulemaking has no significant impact on a substantial number of small businesses. Therefore, the Agency has not prepared a Final Regulatory Flexibility Analysis.

C. Paperwork Reduction Act

After analyzing the fit testing provisions of this final rule in terms of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.* and 5 CFR part 1320), OSHA determined that these provisions do not add to the existing collection-of-information (*i.e.*, paperwork) requirements regarding fit testing employees for respirator use. The paperwork requirement specified in paragraph (m)(2) of the existing Respiratory Protection Standard at 29 CFR 1910.134 specifies that employers must document and maintain the following information on quantitative fit tests administered to employees: The name or identification of the employee tested; the type of fit test performed; the specific make, model, style, and size of respirator tested; the date of the test; and the strip chart recording or other recording of the test results. The employer must maintain this record until the next fit test is administered. However, this paperwork requirement remains the same whether employers use the other fit testing protocols already listed in Part I of Appendix A of the Respiratory Protection Standard, or implement the CNP REDON fit testing protocol instead. Therefore, use of the CNP REDON protocol in the context of the existing fit testing protocols does not require an additional paperwork-burden determination because OSHA already accounted for this burden during the final rulemaking for the Respiratory Protection Standard (see 63 FR 1152–1154; OMB Control Number 1218–0099).

OSHA solicited comments on this determination in the June 6, 2003 **Federal Register** (68 FR 33891). The Agency did not receive any public comments questioning this determination. Therefore, OSHA concludes that the final rule does not add any burden hours to the existing collection-of-information requirements associated with fit testing for employees for respirator use.

D. Federalism

The Agency reviewed the final standard revision according to the most recent Executive Order on Federalism (Executive Order 13132, 64 FR 43225, August 10, 1999). This Executive Order requires that Federal agencies, to the extent possible, refrain from limiting state policy options, consult with states before taking actions that restrict their policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. The Executive Order allows Federal agencies to preempt state law only with the expressed consent of Congress. In such cases, Federal agencies must limit preemption of state law to the extent possible.

Under section 18 of the Occupational Safety and Health Act of 1970 (OSH Act), Congress expressly provides OSHA with authority to preempt state occupational safety and health standards to the extent that the Agency promulgates a Federal standard under section 6 of the OSH Act. Accordingly, section 18 of the OSH Act authorizes the Agency to preempt state promulgation and enforcement of requirements dealing with occupational safety and health issues covered by OSHA standards unless the state has an OSHA-approved occupational safety and health plan (*i.e.*, is a State-plan State). (See *Gade* v. *National Solid Wastes Management Association,* 112 S. Ct. 2374 (1992).) Therefore, with respect to states that do not have OSHA-approved plans, the Agency concludes that this revision conforms to the preemption provisions of the OSH Act. Additionally, section 18 of the OSH Act prohibits states without approved plans from issuing citations for violations of OSHA standards; the Agency finds that the final rulemaking does not expand this limitation.

OSHA has authority under Executive Order 13132 to add the CNP REDON fit testing protocol to its Respiratory Protection Standard at 29 CFR 1910.134 because the problems addressed by these requirements are national in scope. In this regard, the revision offers hundreds of thousands of employers across the nation an opportunity to adopt an additional protocol to use in assessing respirator fit among their employees. Therefore, the revision would provide employers in every state with an alternative means of complying with the fit testing requirements specified in paragraph (f) of OSHA's Respiratory Protection Standard.

E. State Plans

Section 18(c)(2) of the OSH Act (29 U.S.C. 667(c)(2)) requires State-plan States to adopt mandatory standards promulgated by OSHA. However, compliance with the CNP REDON protocol provides employers with an alternative to the existing requirements for fit testing protocols specified in its Respiratory Protection Standard; therefore, the alternative is not, itself, a mandatory standard. Accordingly, State-plan States are not obligated to adopt the final provisions that result from this rulemaking. Nevertheless, OSHA strongly encourages the 24 states and two territories with their own State plans to revise their current Respiratory Protection Standard to adopt the CNP REDON fit testing protocol based on this final rulemaking.

OSHA believes that adopting this revision would provide employers in the State-plan states and territories with economic benefits that may accrue from its enactment, while protecting the safety and health of employees who use respirators against airborne hazardous substances in the workplace. These State-plan states and territories are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to state and local government employees only.

F. Unfunded Mandates

OSHA reviewed the revision according to the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. As discussed above in section IV.B (Preliminary Economic Analysis and Regulatory Flexibility Certification) of this preamble, the Agency has made a determination that the revision imposes no additional costs on any private or public sector entity. The substantive content of the revision applies only to employers whose employees use respirators for protection against airborne workplace contaminants, and compliance with the revision would be strictly optional for these employers. Accordingly, the revision would require no additional

expenditures by either public or private employers.

The Agency's standards do not apply to state and local governments, except in states that have voluntarily elected to adopt a State Plan approved by the Agency. Consequently, the revision does not meet the definition of a ''Federal intergovernmental mandate'' (see section 421(5) of the UMRA (2 U.S.C. 658(5)). In conclusion, the revision does not mandate that state, local, and tribal governments adopt new, unfunded regulatory obligations.

G. Applicability of Existing Consensus Standards

When OSHA promulgated its original respirator fit testing protocols on January 8, 1998, under Appendix A of its final Respiratory Protection Standard (29 CFR 1910.134), no national consensus standards addressed these protocols. However, the American National Standards Institute (ANSI) subsequently developed a national consensus standard on fit testing protocols as an adjunct to its respiratory-protection program, ANSI Z88.2–1992. ANSI approved this national consensus standard, entitled ''Respirator Fit Testing Methods,'' on June 8, 2001 as ANSI Z88.10–2001.

Paragraph 7.3 of ANSI Z88.10–2001 provides the requirements for conducting the CNP fit test, including requirements for test instrumentation and administering the fit test; these requirements are consistent with the CNP fit testing requirements specified in 1998 by OSHA in Part I.C.4 of its Respiratory Protection Standard. In addition, section 9 and Table 1 of ANSI Z88.10–2001 describe the exercises required during CNP fit testing; these required exercises duplicate the exercises described in the CNP REDON protocol, except that the second respirator redonning is optional under the ANSI standard.[7] However, paragraph 9.2 of the ANSI standard specifies that one optional exercise must be included with the required exercises.

OSHA concludes that the CNP REDON protocol adopted in this rulemaking closely matches the requirements of the recent ANSI Z88.10–2001 standard. The CNP REDON protocol relies on the CNP test procedures and instrumentation described in paragraphs (a) and (c) of Part I.C.4 in Appendix A of the Respiratory Protection Standard, which are similar to requirements specified in paragraph 7.3 of the ANSI standard. Any differences between these OSHA requirements and the provisions of the ANSI standard appear to be minor. Additionally, the fit testing exercises in the CNP REDON protocol are the same exercises described in the ANSI standard when a second respirator redonning is selected as the optional exercise. OSHA also is requiring employers who use the CNP REDON protocol to calculate fit factors using the harmonic-mean equation provided in the final rule; this equation is consistent with the equation described for the ambient-aerosol protocol in Appendix A of OSHA's Respiratory Protection Standard.

H. List of Subjects in 29 CFR Part 1910

Hazardous substances; Health; Occupational safety and health; Quantitative fit testing; Respirators; Respirator selection.

I. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, directed the preparation of this notice. Accordingly, the Agency issues this final rule under the following authorities: Sections 4, 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Section 107, Contract Work Hours and Safety Standards Act (Construction Safety Act; 40 U.S.C. 333); Section 41, Longshore and Harbor Worker's Compensation Act (33 U.S.C. 941); Secretary of Labor's Order No. 5–2002 (67 FR 65008); and 29 CFR part 1911.

Signed at Washington, DC on July 29, 2004.

John L. Henshaw,

Assistant Secretary of Labor.

IV. Amendments to the Standard

■ For the reasons stated in the preamble, the Agency amends 29 CFR part 1910 as follows:

PART 1910—[AMENDED]

Subpart I—[Amended]

■ 1. Revise the authority citation for subpart I of part 1910 to read as follows:

Authority: Sections 4, 6 and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Section 107, Contract Work Hours and Safety Standards Act (the Construction Safety Act; 40 U.S.C. 333); Section 41, Longshore and Harbor Worker's Compensation Act (33 U.S.C. 941); and Secretary of Labor's Order Nos. 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), or 5–2002 (67 FR 65008), as applicable.

Sections 29 CFR 1910.132, 1910.134, and 1910.138 also issued under 29 CFR part 1911.

Sections 29 CFR 1910.133, 1910.135, and 1910.136 also issued under 29 CFR part 1911 and 5 U.S.C. 553.

■ 2. Amend Part I in Appendix A to § 1910.134 as follows:

■ A. In Section A, revise the introductory text of paragraph 14(a).

■ B. In Section C, paragraph 4, 8th sentence, remove the name ''Dynatech Nevada'' and add, in its place, ''Occupational Health Dynamics of Birmingham, Alabama.''

■ C. In Section C, revise paragraphs 4(a)(5) and (6).

■ D. In Section C, revise paragraph 4(c)(1).

■ E. In Section C, add paragraph 5 at the end of Part I.

The revised and added text reads as follows:

§ 1910.134 Respiratory protection.

* * * * *

Appendix A to § 1910.134: Fit Testing Procedures (Mandatory)

* * * * *

Part I. OSHA—Accepted Fit Testing Protocols

A. Fit Testing Procedures—General Requirements

* * * * *

14. Test Exercises. (a) Employers must perform the following test exercises for all fit testing methods prescribed in this appendix, except for the CNP quantitative fit testing protocol and the CNP REDON quantitative fit testing protocol. For these two protocols, employers must ensure that the test subjects (*i.e.*, employees) perform the exercise procedure specified in Part I.C.4(b) of this appendix for the CNP quantitative fit testing protocol, or the exercise procedure described in Part I.C.5(b) of this appendix for the CNP REDON quantitative fit-testing protocol. For the remaining fit testing methods, employers must ensure that employees perform the test exercises in the appropriate test environment in the following manner:

* * * * *

C. * * *

* * * * *

(4) * * *

(a) * * *

* * * * *

(5) The employer must train the test subject to hold his or her breath for at least 10 seconds.

(6) The test subject must don the test respirator without any assistance from the test administrator who is conducting the CNP fit test. The respirator must not be adjusted once the fit-test exercises begin. Any adjustment voids the test, and the test subject must repeat the fit test.

* * * * *

[7] Other optional exercises include deep breathing, side-to-side head movement, up-and-down head movement, stepping up and down, a second normal breathing exercise, grimacing followed by normal breathing, painter or sand-blaster movements, and other job-specific movements.

(c) * * *

(1) The test instrument must have an effective audio-warning device, or a visual-warning device in the form of a screen tracing, that indicates when the test subject fails to hold his or her breath during the test. The test must be terminated and restarted from the beginning when the test subject fails to hold his or her breath during the test. The test subject then may be refitted and retested.

* * * * *

5. Controlled negative pressure (CNP) REDON quantitative fit testing protocol.

(a) When administering this protocol to test subjects, employers must comply with the requirements specified in paragraphs (a) and (c) of Part I.C.4 of this appendix (''Controlled negative pressure (CNP) quantitative fit testing protocol''), as well as use the test exercises described below in paragraph (b) of this protocol instead of the test exercises specified in paragraph (b) of Part I.C.4 of this appendix.

(b) Employers must ensure that each test subject being fit tested using this protocol follows the exercise and measurement procedures, including the order of administration, described below in Table A–1 of this appendix.

TABLE A–1.—CNP REDON QUANTITATIVE FIT TESTING PROTOCOL

Exercises[1]	Exercise procedure	Measurement procedure
Facing Forward	Stand and breathe normally, without talking, for 30 seconds	Face forward, while holding breath for 10 seconds.
Bending Over	Bend at the waist, as if going to touch his or her toes, for 30 seconds	Face parallel to the floor, while holding breath for 10 seconds
Head Shaking	For about three seconds, shake head back and forth vigorously several times while shouting.	Face forward, while holding breath for 10 seconds
REDON 1	Remove the respirator mask, loosen all facepiece straps, and then redon the respirator mask.	Face forward, while holding breath for 10 seconds.
REDON 2	Remove the respirator mask, loosen all facepiece straps, and then redon the respirator mask again.	Face forward, while holding breath for 10 seconds.

[1] Exercises are listed in the order in which they are to be administered.

(c) After completing the test exercises, the test administrator must question each test subject regarding the comfort of the respirator. When a test subject states that the respirator is unacceptable, the employer must ensure that the test administrator repeats the protocol using another respirator model.

(d) Employers must determine the overall fit factor for each test subject by calculating the harmonic mean of the fit testing exercises as follows:

$$\text{Overall Fit Factor} = \frac{N}{\left[1/FF_1 + 1/FF_2 + \ldots\ 1/FF_N\right]}$$

Where:

N = The number of exercises;

FF_1 = The fit factor for the first exercise;

FF_2 = The fit factor for the second exercise; and

FF_N = The fit factor for the nth exercise.

[FR Doc. 04–17765 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–04–139]

RIN 1625–AA08

Special Local Regulations for Marine Events; Manasquan River, Manasquan Inlet and Atlantic Ocean, Point Pleasant Beach to Bay Head, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary special local regulations for the ''Point Pleasant OPA/NJ Offshore Grand Prix'', a marine event to be held on the waters of the Manasquan River, Manasquan Inlet and Atlantic Ocean between Point Pleasant Beach and Bay Head, New Jersey. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in the regulated area during the event.

DATES: This rule is effective from 9:30 a.m. to 3:30 p.m. on August 13, 2004.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket CGD05–04–139 and are available for inspection or copying at Commander (Aoax), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: S. L. Phillips, Project Manager, Auxiliary and Recreational Boating Safety Section, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing an NPRM would be impracticable. The event will take place on August 13, 2004. There is not sufficient time to allow for a notice and comment period, prior to the event. Immediate action is needed to protect the safety of life at sea from the danger posed by high-speed powerboats racing in a closed circuit.

Under 5 U.S.C. 553(d)(B)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, spectator craft and other vessels transiting the event area. However advance notifications will be made to affected waterway users via marine information broadcasts and area newspapers.

Background and Purpose

On August 13, 2004, the Offshore Performance Association and the New Jersey Offshore Racing Association will sponsor the ''Point Pleasant OPA/NJ Offshore Grand Prix''. The event will consist of approximately 35 offshore powerboats racing along an oval course on the waters of the Atlantic Ocean. A fleet of spectator vessels is expected to gather in the Atlantic Ocean near the event site to view the competition. To provide for the safety of participants, spectators and other transiting vessels, the Coast Guard will temporarily restrict vessel traffic in the event area during the races.

Discussion of Rule

The Coast Guard is establishing temporary special local regulations on specified waters of the Manasquan

River, Manasquan Inlet and the Atlantic Ocean. The temporary special local regulations will be in effect from 9:30 a.m. until 3:30 p.m. on August 13, 2004. The effect will be to restrict general navigation in the regulated area during the event. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area. The Patrol Commander will allow non-participants to transit the regulated area between races. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866 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 temporary rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Although this regulation prevents traffic from transiting a portion of the Manasquan River, Manasquan Inlet and the Atlantic Ocean during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts and area newspapers so mariners can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit the Manasquan River, Manasquan Inlet or Atlantic Ocean during the event.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for only a short period, from 9:30 a.m. to 3:30 pm. on August 13, 2004. Vessel traffic will be allowed to pass through the regulated area between races when the Coast Guard Patrol Commander determines it safe to do so. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule 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 rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will 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 rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial and direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these

standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

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 (34)(h), of the Instruction, from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine parade permit are specifically excluded from further analysis and documentation under those sections. Under figure 2–1, paragraph (34)(h), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233, Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a temporary § 100.35–T05–139 to read as follows:

§ 100.35–T05–139: Manasquan River, Manasquan Inlet and Atlantic Ocean, Point Pleasant Beach to Bay Head, NJ.

(a) *Regulated area.* The regulated area is established for the waters of the Manasquan River from the New York and Long Branch Railroad to Manasquan Inlet, together with all waters of the Atlantic Ocean bounded by a line drawn from the end of the South Manasquan Inlet Jetty, easterly to Manasquan Inlet Lighted Buoy ''2M'', then southerly to a position at latitude 40°04′26″ N, longitude 074°01′30″ W, then westerly to the shoreline. All coordinates reference Datum NAD 1983.

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Group Atlantic City.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Group Atlantic City with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Sponsor* means an officer or agent of Offshore Performance Association, P.O. Box H385, Brick, NJ 08723.

(c) *Special local regulations.* (1) No person or vessel may enter or remain in the regulated area unless participating in the event or authorized by the sponsor or Official Patrol. The Patrol Commander may intermittently authorize general navigation to pass through the regulated area. Notice of these opportunities will be given via Marine Safety Radio Broadcast on VHF–FM marine band radio, Channel 22 (157.1 MHz).

(2) All persons or vessels not registered with the sponsor as participants or not part of the Official Patrol are considered spectators.

(3) The spectator fleet shall be held in a spectator anchorage area north of the regulated area, which shall be marked by sponsor provided patrol vessels flying pennants to aid in their identification.

(4) No spectator vessel shall proceed at a speed greater than six (6) knots while in the regulated area during the effective period.

(5) All persons and vessels shall comply with the instructions of the Official Patrol. The operator of a vessel in the regulated area shall stop the vessel immediately when instructed to do so by the Official Patrol and then proceed as directed.

(d) *Effective period.* This section is effective from 9:30 a.m. to 3:30 p.m. on August 13, 2004.

Dated: July 26, 2004.

Sally Brice-O'Hara,

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

[FR Doc. 04–17683 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–04–133]

RIN 1625–AA08

Special Local Regulations for Marine Events; Pamlico River, Washington, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary special local regulations for the ''SBIP—Fountain Powerboats Kilo Run and Super Boat Pro-Am Race'', a marine event to be held August 6 and August 8, 2004, on the waters of the Pamlico River, near Washington, North Carolina. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in portions of the Pamlico River during the event.

DATES: This rule is effective from 6:30 a.m. on August 6, 2004 through 5 p.m. on August 9, 2004.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket CGD05–04–133 and are available for inspection or copying at Commander (oax), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: S. L. Phillips, Project Manager, Auxiliary and Recreational Boating Safety Branch, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) the Coast Guard finds that good cause exists for not publishing an NPRM. Publishing an NPRM would be impracticable. The event will begin on August 6, 2004. There is not sufficient time to allow for a notice and comment period prior to the event. Because of the danger posed by high-speed powerboats racing in a closed circuit, special local regulations are necessary to provide for the safety of event participants, spectator craft and other vessels transiting the event area. For the safety concerns noted, it is in the public interest to have these regulations in effect during the event.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, spectator craft and other vessels transiting the event area in the Pamlico River. However, advance notifications will be made to affected users of the river via marine information broadcasts and area newspapers.

Background and Purpose

On August 6 and August 8, 2004, Super Boat International Productions will sponsor the ''SBIP—Fountain Powerboats Kilo Run and Super Boat Pro-Am Race'', on the Pamlico River, near Washington, North Carolina. The event will consist of approximately 40 high-speed powerboats racing in heats along a 5-mile oval course on August 8, 2004. Preliminary speed trials along a straight one-kilometer course will be conducted on August 6, 2004. Approximately 20 boats will participate in the speed trials. Approximately 100 spectator vessels will gather nearby to view the speed trials and the race. If either the speed trials or races are postponed due to weather, they will be held the next day. During the speed trials and the races, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels.

Discussion of Rule

The Coast Guard is establishing temporary special local regulations on specified waters of the Pamlico River near Washington, North Carolina. The temporary special local regulations will be enforced from 6:30 a.m. to 12:30 p.m. on August 6, 2004, and from 11:30 a.m. to 5 p.m. on August 8, 2004. If either the speed trials or races are postponed due to weather, then the temporary special local regulations will be enforced during the same time period the next day. The effect of the temporary special local regulations will be to restrict general navigation in the regulated area during the speed trials and races. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area. Non-participating vessels will be allowed to transit the regulated area between races, when the Coast Guard Patrol Commander determines it is safe to do so. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

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 (DHS).

We expect the economic impact of this temporary final rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

Although this regulation prevents traffic from transiting a portion of the Pamlico River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts and area newspapers so mariners can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the effected portion of the Pamlico River during the event.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for only a short period. The Patrol Commander will allow non-participating vessels to transit the event area between races. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

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 the rule so that 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 address listed under **ADDRESSES.**

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not 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 rule meets applicable standards in sections 3 (a) and 3 (b) (2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial and direct effect on one or more Indian tribes, on the relationship between the Federal Governments and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. 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.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

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 (34)(h), of the Instruction, from further environmental documentation. Special local regulations issued in conjunction with a regatta or marine parade permit are specifically excluded from further analysis and documentation under those sections. Under figure 2–1, paragraph (34)(h), of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233, Department of Homeland Security Delegation No. 0170.1

■ 2. Add a temporary § 100.35-T05–133 to read as follows:

§ 100.35–T05–133 Pamlico River, Washington, NC.

(a) *Regulated area.* The regulated area is established for the waters of the Pamlico River including Chocowinity Bay, from shoreline to shoreline, bounded on the south by a line running northeasterly from Camp Hardee at latitude 35°28′23″ North, longitude 076°59′23″ West, to Broad Creek Point at latitude 35°29′04″ North, longitude 076°58′44″ West, and bounded on the north by the Norfolk Southern Railroad Bridge. All coordinates reference Datum NAD 1983.

(b) *Definitions.*

(1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Group Fort Macon.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Group Fort Macon with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:*

(1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area shall:

(i) Stop the vessel immediately when directed to do so by any Official Patrol.

(ii) Proceed as directed by any Official Patrol.

(c) *Enforcement period.* This section will be enforced from 6:30 a.m. to 12:30 p.m. on August 6, 2004, and from 11:30 a.m. to 5 p.m. on August 8, 2004. If either the speed trials or the races are postponed due to weather, then the temporary special local regulations will be enforced during the same time period the next day.

Dated: July 26, 2004.

Sally Brice-O'Hara,

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

[FR Doc. 04–17682 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–04–030]

RIN 1625–AA09

Drawbridge Operation Regulation; Berwick Bay—Atchafalaya River—Gulf Intracoastal Waterway (Morgan City to Port Allen Alternate Route), LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander Eighth Coast Guard District is issuing a temporary deviation from the regulation governing the operation of the Burlington Northern & Santa Fe (BNSF) Railway Vertical Lift Span Railroad Bridge across Berwick Bay—Atchafalaya River, mile 17.5 and the Gulf Intracoastal Waterway (Morgan City to Port Allen Alternate Route, mile 0.4), at Morgan City, St. Mary Parish, Louisiana. This deviation will allow the Burlington Northern & Santa Fe Railway Company to close the bridge to navigation from 8 a.m. until 2 p.m. each

day from Monday, August 16, 2004, through Wednesday, August 18, 2004, to conduct necessary maintenance on the bridge.

DATES: This temporary deviation is effective from 8 a.m. on Monday, August 16, 2004, until 2 p.m. on Wednesday, August 18, 2004.

ADDRESSES: Materials referred to in this temporary deviation are available for inspection or copying at the office of the Eighth Coast Guard District, Bridge Administration Branch, Hale Boggs Federal Building, room 1313, 500 Poydras Street, New Orleans, Louisiana 70130–3310, between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (504) 589–2965. The Eighth District Bridge Administration Branch maintains the public docket for this temporary deviation.

FOR FURTHER INFORMATION CONTACT: Phil Johnson, Bridge Administration Branch, telephone (504) 589–2965.

SUPPLEMENTARY INFORMATION: The BNSF Railway Company requested a temporary deviation from the normal operation of the drawbridge in order to replace railroad rails on the lift span of the bridge. This maintenance is essential for the continued safe transit of trains across the bridge. This temporary deviation will allow the bridge to remain in the closed-to-navigation position from 8 a.m. until 2 p.m. each day from Monday, August 16, 2004, through Wednesday, August 18, 2004. In the event of an approaching tropical storm or hurricane, the work will be rescheduled and the bridge will continue to operate normally.

The bridge has a vertical clearance of 4 feet above high water in the closed-to-navigation position and 73 feet above high water in the open-to-navigation position. Navigation on the waterway consists of tugs with tows, oil industry related work boats and crew boats, commercial fishing vessels and some recreational craft. Since the lift span of the bridge will only be closed for six hours per day for three days, ample time will be allowed for commercial and recreational vessels to schedule transits. For this reason, as well as considering prior experience with similar closures of this bridge, it has been determined that this closure will not have a significant effect on these vessels. The Intracoastal Waterway—Morgan City to Port Allen Route and the Landside Route, including Bayou Boeuf is an alternate route for vessels not requiring greater than a 12-foot draft. The bridge will not be able to open for emergencies during the 6-hour per day closure periods.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: July 22, 2004.

Marcus Redford,

Bridge Administrator.

[FR Doc. 04–17688 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

Subsistence Management Regulations for Public Lands in Alaska, Subpart D; Seasonal Adjustments—Unalakleet River Adjustment

AGENCIES: Forest Service, USDA; Fish and Wildlife Service, Interior.

ACTION: Seasonal adjustments.

SUMMARY: This provides notice of the Federal Subsistence Board's in-season management actions to protect chinook salmon escapement in the Unalakleet River, while still providing subsistence harvest opportunities for other fish. The fishing method restrictions will provide an exception to the Subsistence Management Regulations for Public Lands in Alaska, published in the **Federal Register** on February 3, 2004. Those regulations established seasons, harvest limits, methods, and means relating to the taking of fish and shellfish for subsistence uses during the 2004 regulatory year.

DATES: The fishing method change for the Unalakleet River, Norton Sound District, Subdistrict 6, is effective July 10, 2004, through August 1, 2004.

FOR FURTHER INFORMATION CONTACT: Thomas H. Boyd, Office of Subsistence Management, U.S. Fish and Wildlife Service, telephone (907) 786–3888. For questions specific to National Forest System lands, contact Steve Kessler, Subsistence Program Manager, USDA—Forest Service, Alaska Region, telephone (907) 786–3592.

SUPPLEMENTARY INFORMATION:

Background

Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111–3126) requires that the Secretary of the Interior and the Secretary of Agriculture (Secretaries) implement a joint program to grant a preference for subsistence uses of fish and wildlife resources on public lands in Alaska, unless the State of Alaska enacts and implements laws of general applicability that are consistent with ANILCA and that provide for the subsistence definition, preference, and participation specified in Sections 803, 804, and 805 of ANILCA. In December 1989, the Alaska Supreme Court ruled that the rural preference in the State subsistence statute violated the Alaska Constitution and, therefore, negated State compliance with ANILCA.

The Department of the Interior and the Department of Agriculture (Departments) assumed, on July 1, 1990, responsibility for implementation of Title VIII of ANILCA on public lands. The Departments administer Title VIII through regulations at Title 50, Part 100 and Title 36, Part 242 of the Code of Federal Regulations (CFR). Consistent with Subparts A, B, and C of these regulations, as revised January 8, 1999, (64 FR 1276), the Departments established a Federal Subsistence Board to administer the Federal Subsistence Management Program. The Board's composition includes a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, National Park Service; the Alaska State Director, Bureau of Land Management; the Alaska Regional Director, Bureau of Indian Affairs; and the Alaska Regional Forester, USDA Forest Service. Through the Board, these agencies participate in the development of regulations for Subparts A, B, and C, which establish the program structure and determine which Alaska residents are eligible to take specific species for subsistence uses, and the annual Subpart D regulations, which establish seasons, harvest limits, and methods and means for subsistence take of species in specific areas. Subpart D regulations for the 2004 fishing seasons, harvest limits, and methods and means were published on February 3, 2004, (69 FR 5018).

Because this action relates to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, identical closures and adjustments would apply to 36 CFR part 242 and 50 CFR part 100.

The Alaska Department of Fish and Game (ADF&G), under the direction of the Alaska Board of Fisheries (BOF), manages sport, commercial, personal use, and State subsistence harvest on all lands and waters throughout Alaska. However, on Federal lands and waters, the Federal Subsistence Board implements a subsistence priority for rural residents as provided by Title VIII of ANILCA. In providing this priority, the Board may, when necessary, preempt State harvest regulations for fish or wildlife on Federal lands and waters.

These adjustments are necessary because of the need to maintain the viability of chinook salmon stocks in the Unalakleet River based on in-season run assessments. These actions are authorized and in accordance with 50 CFR 100.19(d–e) and 36 CFR 242.19(d–e).

Unalakleet River—Norton Sound District, Subdistrict 6

This seasonal adjustment closes the Federal Waters of the Unalakleet River to the use of all subsistence fishing methods except for beach seining. The retention of chinook salmon is prohibited. If chinook salmon are incidentally taken by beach seine while subsistence users are harvesting other species, they must be immediately released unharmed to the water.

Salmon migrations in to the Norton Sound rivers began early this season. Chinook salmon at the Unalakleet River have now been entering the river for over three weeks. The passage rate at both the Unalakleet Test Net and at the North River Tower has been slow and unsteady. Other salmon species have shown advanced migration timing as well. This raises the likelihood of the escapement attaining less than 60% of the lower end of the escapement goal range. Given the historical record of the migration passage at both the test net and the tower, the migration past the tower is now at the 75th percentile point. The total passage at the tower would have to double in the next few days to reach the midpoint of the escapement goal range.

The pink salmon return is quite strong, currently on track as the third strongest since statehood. Chum salmon are expected to reach the lower limit of their escapement goal range. These stocks can support harvest and will help to offset this conservation closure that prohibits the retention of chinook salmon. The special action will be lifted when coho salmon reach the Federal Waters and the chinook salmon harvest is no longer a concern.

Federally qualified users of the Unalakleet River are not expected to be significantly impacted by this action because this action will allow the favored method of subsistence pink salmon harvest, beach seining, to continue while closing the subsistence harvest methods most likely to cause chinook salmon mortality.

The Board finds that additional public notice and comment requirements under the Administrative Procedure Act (APA) for these adjustments are impracticable, unnecessary, and contrary to the public interest. Lack of appropriate and immediate conservation measures could seriously affect the continued viability of fish populations, adversely impact future subsistence opportunities for rural Alaskans, and would generally fail to serve the overall public interest. Therefore, the Board finds good cause pursuant to 5 U.S.C. 553(b)(3)(B) to waive additional public notice and comment procedures prior to implementation of these actions and pursuant to 5 U.S.C. 553(d)(3) to make this rule effective as indicated in the **DATES** section.

Conformance With Statutory and Regulatory Authorities

National Environmental Policy Act Compliance

A Final Environmental Impact Statement (FEIS) was published on February 28, 1992, and a Record of Decision on Subsistence Management for Federal Public Lands in Alaska (ROD) was signed April 6, 1992. The final rule for Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C (57 FR 22940–22964, published May 29, 1992) implemented the Federal Subsistence Management Program and included a framework for an annual cycle for subsistence hunting and fishing regulations. A final rule that redefined the jurisdiction of the Federal Subsistence Management Program to include waters subject to the subsistence priority was published on January 8, 1999, (64 FR 1276).

Compliance With Section 810 of ANILCA

The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless restriction is necessary to conserve healthy fish and wildlife populations. A section 810 analysis was completed as part of the FEIS process. The final section 810 analysis determination appeared in the April 6, 1992, ROD, which concluded that the Federal Subsistence Management Program, under Alternative IV with an annual process for setting hunting and fishing regulations, may have some local impacts on subsistence uses, but the program is not likely to significantly restrict subsistence uses.

Paperwork Reduction Act

The adjustment and emergency closures do not contain any information collections for which Office of Management and Budget (OMB) approval is required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Federal agencies 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.

Other Requirements

The adjustments have been exempted from OMB review under Executive Order 12866.

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation of flexibility analyses for rules that will have a significant effect on a substantial number of small entities, which include small businesses, organizations, or governmental jurisdictions. The exact number of businesses and the amount of trade that will result from this Federal land related activity is unknown. The aggregate effect is an insignificant economic effect (both positive and negative) on a small number of small entities supporting subsistence activities, such as boat, fishing gear, and gasoline dealers. The number of small entities affected is unknown, but the effects will be seasonally and geographically-limited in nature and will likely not be significant. The Departments certify that the adjustments will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*), this rule is not a major rule. It does not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Title VIII of ANILCA requires the Secretaries to administer a subsistence preference on public lands. The scope of this program is limited by definition to

certain public lands. Likewise, the adjustments have no potential takings of private property implications as defined by Executive Order 12630.

The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that the adjustments will not impose a cost of $100 million or more in any given year on local or State governments or private entities. The implementation is by Federal agencies, and no cost is involved to any State or local entities or Tribal governments.

The Service has determined that the adjustments meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988, regarding civil justice reform.

In accordance with Executive Order 13132, the adjustments do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Title VIII of ANILCA precludes the State from exercising subsistence management authority over fish and wildlife resources on Federal lands. Cooperative salmon run assessment efforts with ADF&G will continue.

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects. The Bureau of Indian Affairs is a participating agency in this rulemaking.

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As these actions are not expected to significantly affect energy supply, distribution, or use, they are not significant energy actions and no Statement of Energy Effects is required.

Drafting Information

Theodore Matuskowitz drafted this document under the guidance of Thomas H. Boyd, of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Taylor Brelsford, Alaska State Office, Bureau of Land Management; Rod Simmons, Alaska Regional Office, U.S. Fish and Wildlife Service; Bob Gerhard, Alaska Regional Office, National Park Service; Dr. Glenn Chen, Alaska Regional Office, Bureau of Indian Affairs; and Steve Kessler, USDA'Forest Service, provided additional guidance.

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101–3126; 18 U.S.C. 3551–3586; 43 U.S.C. 1733.

Dated: July 26, 2004.

Thomas H. Boyd,

Acting Chair, Federal Subsistence Board, Fish and Wildlife Service.

Dated: July 22, 2004.

Steve Kessler,

Subsistence Program Leader, USDA—Forest Service.

[FR Doc. 04–17753 Filed 8–3–04; 8:45 am]

BILLING CODE 3410–11–P; 4310–55–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2003–0014; FRL–7797–6]

RIN 2060–AM29

National Emission Standards for Hazardous Air Pollutants: Printing, Coating, and Dyeing of Fabrics and Other Textiles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; amendment.

SUMMARY: On May 29, 2003 (68 FR 32172), EPA issued national emission standards for hazardous air pollutants for printing, coating, and dyeing of fabrics and other textiles (Fabric NESHAP) under section 112 of the Clean Air Act (CAA). This action amends the standards to clarify the applicability of the Fabric NESHAP to coating, slashing, dyeing, or finishing operations at synthetic fiber manufacturing facilities where the fibers are the final product of the facility. The printing, coating, and dyeing of fabrics and other textiles source category does not include any synthetic fiber manufacturing operations, and we did not intend to impose any requirements on such operations in the final Fabric NESHAP. We are making the amendment by direct final rule, without prior proposal, because we view the revision as noncontroversial and anticipate no adverse comments.

DATES: The direct final rule is effective on October 4, 2004 without further notice, unless EPA receives relevant adverse written comment by September 3, 2004 or if a public hearing is requested by August 16, 2004. If EPA receives such comments, it will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn due to adverse comment. The EPA will then proceed to take final action on the parallel proposed rule appearing in the Proposed Rule section of this **Federal Register**.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. OAR–2003–0014 (formerly Docket No. A–97–51), by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Agency Web site: *http://www.epa.gov/edocket.* EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.
- E-mail: *http://www.epa.gov/edocket* and *almodovar.paul@epa.gov*
- Fax: (202) 566–1741 and (919) 541–5689.
- Mail: U.S. Postal Service, send comments to: HQ EPA Docket Center (6102T), Attention Docket Number OAR–2003–0014, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. (Please include a total of 2 copies.)
- Hand Delivery: In person or by courier, deliver comments to: HQ EPA Docket Center (6102T), Attention Docket ID Number OAR–2003–0014, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20460. (Please include a total of 2 copies.)

We request that a separate copy of each public comment also be sent to the contact person listed below (*see* **FOR FURTHER INFORMATION CONTACT**).

Instructions: Direct your comments to Docket ID No. OAR–2003–0014. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or other wise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the

comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. (For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102). For additional instructions on submitting comments, go to Unit I.B. of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the HQ EPA Docket Center, Docket ID Number OAR–2003–0014, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Almodóvar, Coatings and Consumer Products Group (C539–03), Emission Standards Division, U.S. EPA, Research Triangle Park, NC 27711; telephone number (919) 541–0283; facsimile number (919) 541–5689; electronic mail (e-mail) address: *almodovar.paul@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

The source category definition includes sources that engage in the coating, printing, slashing, dyeing, or finishing of any fabric or other textile. In general, such sources are covered under the North American Industrial Classification System (NAICS) codes listed below. However, sources classified under other NAICS codes may be subject to the final standards if they meet the applicability criteria. Not all sources classified under the NAICS codes in the following table are subject to the final rule because some of the classifications cover products outside the scope of the Fabric NESHAP.

Categories and entities potentially regulated by this action include:

Category	NAICS code	Examples of regulated entities
Industry	31321	Broadwoven fabric mills.
	31322	Narrow fabric mills and Schiffli machine embroidery.
	313241	Weft knit fabric mills.
	313311	Broadwoven fabric finishing mills.
	313312	Textile and fabric finishing (except broadwoven fabric) mills.
	313320	Fabric coating mills.
	314110	Carpet and rug mills.
	326220	Rubber and plastics hoses and belting and manufacturing.
	339991	Gasket, packing, and sealing device manufacturing.
Federal government	.....	Not affected.
State/local/tribal government	.....	Not affected.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your operation is regulated by this action, you should examine the applicability criteria of the final rule (§ 63.4281). If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, *regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information cleimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow direction—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* A reasonable fee may be charged for copying docket materials.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of the direct final rule will also be available on the WWW through EPA's Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of the

direct final rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Comments. We are publishing the direct final rule without prior proposal because we view the amendment as noncontroversial and do not anticipate adverse comments. We consider the changes to be noncontroversial because the only effect is to clarify that the Fabric NESHAP does not apply to coating, slashing, dyeing, or finishing operations at synthetic fiber manufacturing facilities where the fibers are the final product of the facility. As discussed in detail below, this was our intent when publishing the original final rule. In the Proposed Rules section of this **Federal Register**, we are publishing a separate document that will serve as the proposal in the event that timely and significant adverse comments are received.

If we receive any relevant adverse comments on the proposed amendment, we will publish a timely withdrawal in the **Federal Register** informing the public which provisions will become effective and which provisions are being withdrawn due to adverse comment. We will address all public comments in a subsequent final rule based on the proposed rule. Any of the distinct amendment in the direct final rule for which we do not receive adverse comment will become effective on the date set out above. We will not institute a second comment period on the direct final rule. Any parties interested in commenting must do so at this time.

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of the direct final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by October 4, 2004. Under section 307(d)(7)(B) of the CAA, only an objection to the direct final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the direct final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Outline. The following outline is provided to aid in reading the preamble to the direct final rule.

I. Background
II. Technical Amendment to the Fabric NESHAP
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
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 Risks and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Congressional Review Act

I. Background

On May 29, 2003 (68 FR 32172), EPA issued the Fabric NESHAP under section 112 of the CAA. In response to public comments from the American Fiber Manufacturers Association and two other commenters on the proposed Fabric NESHAP (67 FR 46028, July 11, 2002), we attempted to make clear in the final rule that coating, slashing, dyeing, and finishing operations that are part of a synthetic fiber manufacturing process at a facility where the fibers are the final product are not subject to the requirements of the Fabric NESHAP. We intended for this exclusion to be unambiguous. However, the inclusion of language referencing the affected sources of 40 CFR part 63, subparts JJJ (NESHAP: Group IV Polymers and Resins) and F (NESHAP: Synthetic Organic Chemical Manufacturing Industry), in § 63.4281(d)(3) created an ambiguity in this regard. The printing, coating and dyeing of fabrics and other textiles source category does not include any synthetic fiber manufacturing operations, and we did not intend to impose any requirements on such operations in the Fabric NESHAP. Hazardous air pollutant emissions from finishing steps such as coating, slashing, dyeing, and finishing operations in the synthetic fiber manufacturing process were addressed during the development of 40 CFR part 63, subparts JJJ and F and, therefore, were intentionally not included in the Fabric NESHAP.

II. Technical Amendment to the Fabric NESHAP

The direct final rule amendment corrects § 63.4281(d)(3) by removing the reference to the affected sources of 40 CFR part 63, subparts JJJ and F, in order to make it clear that the requirements of the final Fabric NESHAP do not apply to coating, slashing, dyeing, or finishing operations at synthetic fiber manufacturing facilities where the fibers are the final product of the facility.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive 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.

It has been determined that the amendment is not a ''significant regulatory action'' under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

The action does not impose any new information collection burden. Today's action consists primarily of clarifications to the final rule that impose no new information collection requirements on industry or EPA. For that reason, we have not revised the ICR for the existing rule. However, OMB has previously approved the information collection requirements contained in the existing (68 FR 32172, May 29, 2003) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, et seq and has assigned OMB control number 2060–0522, EPA information collection request (ICR) number 2071.02. A copy of the OMB approved ICR may be obtained from Susan Auby, Collection Strategies Division (2822T), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by e-mail at *auby.susan@epa.gov,* or by calling (202) 566–1672. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr.*

C. Regulatory Flexibility Act

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with the direct final rule.

For purposes of assessing the impacts of today's direct final rule on small entities, small entity is defined as: (1) A small business according to Small Business Administration size standards by NAICS code ranging from 500 to 1,000 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's direct final rule on small entities, EPA has concluded that this action will not have a significant impact on a substantial number of small entities. The direct final rule amendment will not impose any new requirements on small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995, Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of 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 the 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.

The EPA has determined that the direct final rule does 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, nor does the rule significantly or uniquely impact small governments, because it contains no requirements that apply to such governments or impose obligations upon them. Thus, the requirements of the UMRA do not apply to the direct final rule.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

The direct final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The direct final rule will change only the applicability section of the final rule with respect to synthetic fiber manufacturing facilities and does not modify existing or create new responsibilities among EPA Regional Offices, States, or local enforcement agencies. Thus, Executive Order 13132 does not apply to the direct final rule amendment.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Government

Executive Order 13175 (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.'' The direct final rule does not have tribal implications as specified in Executive Order 13175. It will change only the applicability section of the final rule with respect to synthetic fiber manufacturing facilities. The direct final rule would not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to the direct final rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe 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.

The 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 Executive Order has the potential to influence the regulation. The direct final rule is not subject to Executive Order 13045 because it is based on technology performance and not on health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy, Supply, Distribution, or Use

The direct final rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

The technical correction of the direct final rule does not involve technical standards. The EPA's compliance with section 12(d) of the National Technology Transfer and Advancement Act of 1995 (Pub. L. No. 104–113, section 12(d) (15 U.S.C. 272 note)) has been addressed in the preamble of the

underlying final rule (68 FR 32172, May 29, 2003).

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801, *et seq*., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The direct final rule is not a ''major rule'' as defined by 5 U.S.C. 804 (2).

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, and Reporting and recordkeeping requirements.

Dated: July 29, 2004.

Michael O. Leavitt,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of Federal Regulations is amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart OOOO—[Amended]

■ 2. Section 63.4281 is amended by revising paragraph (d)(3) to read as follows:

§ 63.4281 Am I subject to this subpart?

* * * * *

(d) * * *

(3) Coating, slashing, dyeing, or finishing operations at a synthetic fiber manufacturing facility where the fibers are the final product of the facility.

* * * * *

[FR Doc. 04–17778 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0086; FRL–7352–1]

Propiconazole; Time-Limited Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for combined residues of propiconazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on corn, field, forage; corn, field, grain; corn, field, stover; corn, sweet, kernel plus cob with husks removed; peanut; peanut, hay; pineapple; and pineapple, fodder. Syngenta Crop Protection, Inc. requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA). The tolerances will expire on November 30, 2008.

DATES: This regulation is effective August 4, 2004. Objections and requests for hearings must be received on or before October 4, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket ID number OPP–2004–0086. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Mary L. Waller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9354; e-mail address: *waller.mary@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Animal production (NAICS 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

II. Background and Statutory Findings

In the **Federal Register** of February 27, 2004 (69 FR 9315) (FRL–7346–7), EPA issued a notice pursuant to section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (PP 8F3654 and 8F3674) by Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300. This notice included a summary of the petition prepared by Syngenta Crop Protection, Inc., the

registrant. There were no comments received in response to the notice of filing.

The petition requested that 40 CFR 180.434 be amended by establishing tolerances for combined residues of the fungicide propiconazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on corn, field, forage at 12 parts per million (ppm); corn, field, grain at 0.1 ppm; corn, field, stover at 12 ppm; corn, sweet, kernel plus cob with husks removed at 0.1 ppm; peanut at 0.2 ppm; peanut, hay at 20 ppm (8F3654); pineapple at 0.1 ppm; and pineapple, fodder at 0.1 ppm (8F3674).

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of the FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of the FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 of the FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of the FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of the FFDCA , for a tolerance for combined residues of propiconazole on corn, field, forage at 12 ppm; corn, field, grain at 0.1 ppm; corn, field stover at 12 ppm; corn, sweet, kernel plus cob with husks removed at 0.1 ppm; peanut at 0.2 ppm; peanut, hay at 20 ppm; pineapple at 0.1 ppm; and pineapple, fodder at 0.1 ppm. EPA's assessment of exposures and risks associated with establishing these tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by propiconazole are discussed in this unit as well as the no observed adverse effect level (NOAEL) and the lowest observed adverse effect level (LOAEL) from the toxicity studies reviewed.

1. Acute toxicity data were as follows: Acute oral lethal dose $(LD)_{50}$ = 1,517 milligrams/kilogram (mg/kg) (toxicity category III); acute dermal LD_{50} > 4,000 mg/kg (toxicity category III); acute inhalation lethal concentration $(LC)_{50}$ 1.26 mg/liter (L); primary eye irritation - clear by 72 hours (toxicity category III); primary skin irritation - slight irritation (toxicity category IV); and dermal sensitization - negative.

2. A developmental toxicity study with rats which were gavaged with doses of 0, 30, 90 or 360/300 mg/kg/day. The developmental NOAEL was 30 mg/kg/day. Evidence of developmental toxicity observed at the 90 mg/kg/day level LOAEL included increased incidence of unossified sternebrae, rudimentary ribs, shortened or absent renal papillae, and increased cleft palate. The maternal NOAEL was 90 mg/kg/day and the maternal LOAEL was 300 mg/kg/day based on severe clinical toxicity.

3. A development toxicity study with rabbits which were gavaged with doses of 0, 30, 90, or 180 mg/kg/day with no evidence of maternal or developmental toxicity observed under the conditions of the study.

4. A developmental toxicity study with rabbits which were gavaged with doses of 0, 100, 250, or 400 mg/kg/day on gestation days 7 through 19 with no developmental toxicity observed under the conditions of the study. The maternal NOAEL was 100 mg/kg/day and the maternal LOAEL was 250 mg/kg/day based on decreased food consumption, weight gain, and an increase in the number of resorptions at the higher dose levels. The developmental NOAEL was 250 mg/kg/day. The developmental LOAEL was 400 mg/kg/day based on increased incidence of fetuses/litters with 13^{th} rib and increased abortions.

5. A 2-generation reproduction study with rats fed diets containing 0, 100, 500, or 2,500 ppm showed no reproductive effects under the conditions of the study. The offspring NOAEL was 500 ppm (equivalent to 43–52 mg/kg/day), and the offspring LOAEL was 2,500 ppm (equivalent to 192–263 mg/kg/day) based on decreased offspring survival, body weight depression, and increased incidence of hepatic lesions in rats. The parental NOAEL was 100 ppm (equivalent to 8 mg/kg/day) and the parental LOAEL was 500 ppm (equivalent to 42 mg/kg/day) based on increased incidence of hepatic cell change.

6. A 1-year feeding study with dogs fed diets containing 0, 5, 50, or 250 ppm with a NOAEL of 50 ppm (equivalent to 1.25 mg/kg/day). The LOAEL was 250 ppm (equivalent to 6.25 mg/kg/day based on mild irritation of stomach mucosa.

7. A 2-year chronic feeding/carcinogenicity study with rats fed diets containing 0, 100, 500, or 2,500 ppm with a systemic NOAEL of 500 ppm (equivalent to 18 mg/kg/day) based on liver lesions and reduced body weight gain at the 2,500 ppm level (96 mg/kg/day). There were no carcinogenic effects observed under the conditions of the study.

8. A 2-year chronic feeding/carcinogenicity study with mice fed diets containing 0, 100, 500, or 2,500 ppm with a systemic NOAEL of 100 ppm (equivalent to 10 mg/kg/day) based on increased liver lesions and liver weight in males. There was a statistically significant increase in combined adenomas and carcinomas of the liver in male mice at the 2,500 ppm level (equivalent to 340 mg/kg/day).

9. An 18-month oncogenicity study with male mice fed diets containing 0, 100, 500, or 850 ppm with a NOAEL of 100 ppm (11 mg/kg/day) based on hepatoxicity and body weight gain effects at the LOAEL of 500 ppm (59 mg/kg/day). There was a treatment related increase in the incidence of hepatocellular (liver) adenoma and combined liver adenomas and carcinomas at the 850 ppm level when compared to controls.

10. A battery of mutagenicity studies to determine the potential of propiconazole to induce gene mutation, chromosomal aberrations, and other genotoxic effects were all negative.

B. Toxicological Endpoints

The dose at which no adverse effects are observed (the NOAEL) from the toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological level of concern (LOC). However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences. The Agency retained a 3X database uncertainty factor for acute (single dose) and short-term exposure scenarios to account for the lack of an acute neurotoxicity study. These missing data are not expected to have an impact on longer duration exposure scenarios.

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by the appropriate UF (RfD = NOAEL/UF). Where an additional safety factor is retained due to concerns unique to the FQPA, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of FQPA Safety Factor (SF).

For non-dietary risk assessments (other than cancer) the UF is used to determine the LOC. For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk is expressed as1×10^{-6} or one in a million). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a ''point of departure'' is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated. A summary of the toxicological endpoints for propiconazole used for human risk assessment is shown in Table 1 of this unit:

TABLE 1.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR PROPICONAZOLE FOR USE IN HUMAN RISK ASSESSMENT

Exposure Scenario	Dose Used in Risk Assessment, UF	Special FQPA SF* and Level of Concern for Risk Assessment	Study and Toxicological Effects
Acute Dietary (Females 13–50 years of age)	NOAEL = 30 mg/kg/day UF = 300 Acute RfD = 0.1 mg/kg/day	Special FQPA SF = 1X aPAD = acute RfD ÷ FQPA SF = 0.1 mg/kg/day	Developmental Toxicity Study - Rats LOAEL = 90 mg/kg/day based on developmental toxicity manifested by increased incidence of rudimentary ribs, cleft palate malformations (0.3%), unossified sternebrae, as well as increased incidence of shortened and absent renal papillae
Acute Dietary (General population including infants and children)	NOAEL = 90 mg/kg/day UF = 300 Acute RfD = 0.3 mg/kg/day	Special FQPA SF = 1X aPAD = acute RfD ÷ FQPA SF = 0.3 mg/kg/day	Developmental Toxicity Study - Rats LOAEL = 300 mg/kg/day based on severe maternal toxicity: Ataxia, coma, lethargy, prostration, audible and labored respiration, salivation and lacrimation
Chronic Dietary (All populations)	NOAEL = 10 mg/kg/day UF = 100 Chronic RfD = 0.1 mg/kg/day	Special FQPA SF = 1X cPAD = chronic RfD ÷ FQPA SF = 0.1 mg/kg/day	24 Month Oncogenicity Study - Mice LOAEL = 50 mg/kg/day based on liver toxicity (increased liver weight in males and increases in liver lesions (masses/raised areas/swellings/nodular areas mainly
Short-Term - Incidental Oral (1–30 days) (Residential)	Maternal NOAEL = 90 mg/kg/day	LOC for MOE = 300 (Residential)	Developmental Toxicity Study LOAEL = 300 mg/kg/day based on severe clinical signs
Short-Term (1–30 days) Dermal (Females 13–50 years old)	Oral Developmental NOAEL = 30 mg ai/kg/day (dermal absorption rate = 1%)	LOC for MOE = 300	Developmental Toxicity Study - Rats LOAEL = 90 mg/kg/day based on developmental toxicity: Increased incidence of rudimentary ribs, unossified sternebrae, shortened and absent renal papillae, and cleft palate
Cancer	N/A	N/A	Group C - possible human carcinogen, nonquantifiable

* The reference to the FQPA SF refers to any additional safety factor retained due to concerns unique to the FQPA.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. Tolerances have been established (40 CFR 180.434) for the combined residues of propiconazole, in or on a variety of raw agricultural commodities. The commodities and/or crops are as follows: Bananas; barley; celery; corn; cranberry; dry beans; stone fruits; mint; mushrooms; oats; peanuts; pecans; pineapples; rice; rye; sorghum; wheat; wild rice; eggs, kidney, liver and meat and meat by products of poultry; and milk, meat, fat, kidney, liver, meat and meat by products of cattle, goats, hogs, horses and sheep. Risk assessments were conducted by EPA to assess dietary exposures from propiconazole in food as follows:

i. *Acute exposure*. Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one day or single exposure. The Dietary Exposure Evaluation Model (DEEM™) analysis evaluated the individual food consumption as reported by respondents in the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the acute exposure assessments: Tolerance level residues were used for all food commodities and it was assumed that 100% of all crops were treated.

ii. *Chronic exposure*. In conducting this chronic dietary risk assessment the Dietary Exposure Evaluation Model (DEEM™) analysis evaluated the individual food consumption as reported by respondents in the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII) and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: Tolerance level residues were used for all food commodities and it was assumed that 100% of all crops were treated.

iii. *Cancer*. A quantitative risk assessment using a cancer endpoint was not performed. The chronic risk assessment is adequately protective for cancer risk as well as other chronic effects.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for propiconazole in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of propiconazole.

The Agency uses the First Index Reservoir Screening Tool (FIRST) or the Pesticide Root Zone/Exposure Analysis Modeling System (PRZM/EXAMS), to produce estimates of pesticide concentrations in an index reservoir. The SCI-GROW model is used to predict pesticide concentrations in shallow groundwater. For a screening-level assessment for surface water EPA will use FIRST (a tier 1 model) before using PRZM/EXAMS (a tier 2 model). The FIRST model is a subset of the PRZM/EXAMS model that uses a specific high-end runoff scenario for pesticides. While both FIRST and PRZM/EXAMS incorporate an index reservoir environment, the PRZM/EXAMS model includes a percent crop area factor as an adjustment to account for the maximum percent crop coverage within a watershed or drainage basin.

None of these models include consideration of the impact processing (mixing, dilution, or treatment) of raw water for distribution as drinking water would likely have on the removal of pesticides from the source water. The primary use of these models by the Agency at this stage is to provide a coarse screen for sorting out pesticides for which it is highly unlikely that drinking water concentrations would ever exceed human health levels of concern.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs) from these models to quantify drinking water exposure and risk as a %RfD or %PAD. Instead drinking water levels of comparison (DWLOCs) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to propiconazole they are further discussed in the aggregate risk sections in unit III.

Based on the FIRST and SCI-GROW models the estimated EECs of propiconazole for acute exposures are estimated to be 264 parts per billion (ppb) for surface water and 1.5 ppb for ground water. The EECs for chronic exposures are estimated to be 80 ppb for surface water and 1.5 ppb for ground water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Propiconazole is currently registered for use on the following residential non-dietary site: Residential lawns. The risk assessment was conducted using the following residential exposure assumptions: For adults treating residential lawns, it was assumed there was a possibility of short-term dermal exposure, and for infants and small children playing on treated lawns, it was assumed there was a possibility of incidental oral and dermal exposure.

4. *Cumulative exposure to substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of the FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not made a common mechanism of toxicity finding as to propiconazole and any other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that propiconazole has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the final rule for Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

The Agency does have concern about potential toxicity to 1,2,4-triazole and two conjugates, triazolylalanine and triazolyl acetic acid, metabolites common to most of the triazole fungicides. To support the extension of existing parent triazole-derivative fungicide tolerances, EPA conducted an interim human health assessment for aggregate exposure to 1,2,4-triazole. The exposure and risk estimates presented in this assessment are overestimates of actual likely exposures and therefore, should be considered to be highly conservative. Based on this assessment EPA concluded that for all exposure durations and population subgroups, aggregate exposures to 1,2,4-triazole are not expected to exceed its level of concern. This assessment should be considered interim due to the ongoing series of studies being conducted by the

U.S. Triazole Task Force (USTTF). Those studies are designed to provide the Agency with more complete toxicological and residue information for free triazole and are expected to be submitted to the Agency in late 2004. Upon completion of the review of these data, EPA will prepare a more sophisticated assessment based on the revised toxicological and exposure databases.

i. *Toxicology*. The toxicological database for 1,2,4-triazole is incomplete. Preliminary summary data presented by the USTTF to EPA indicate that the most conservative endpoint currently available for use in a risk assessment for 1,2,4-triazole is a LOAEL of 15 mg/kg/day, based on body weight decreases in male rats in the reproductive toxicity study (currently underway). This endpoint, with an uncertainty factor of 1,000 was used for both acute and chronic dietary risk, resulting in an RfD of 0.015 mg/kg/day. The uncertainty factor of 1,000 addresses aspects of the toxicology of 1,2,4-triazole related to potential enhanced susceptibility of infants and children. The resulting PAD is 0.015 mg/kg/day.

ii. *Dietary exposure*. The USTTF conducted an acute dietary exposure assessment based on the highest triazole-derivative fungicide tolerance level combined with worst-case molecular weight and plant/livestock metabolic conversion factors. This approach provides a conservative estimate of all sources for 1,2,4-triazole except the *in vivo* conversion of parent compounds to free-triazole following dietary exposure. The degree of animal *in vivo* conversion is dependent on the identity of the parent fungicide. In rats, this conversion ranges from 0 to 77%—the *in vivo* conversion for propiconazole is 5%. For purposes of this interim assessment, EPA used the dietary exposure estimates provided by the USTTF adjusted based on the highest rate of conversion observed for any of the parent triazole-derivative fungicides to account for this metabolic conversion. The assessment includes residue estimates for all food commodities with either existing or pending triazole-derivative fungicide registrations. The resulting acute dietary exposure estimates are extremely conservative and range from 0.0032 mg/kg/day for males 20+ years old to 0.014 mg/kg/day for children 1 to 6 years old. Estimated risks range from 22 to 93% of the PAD. In order to estimate chronic exposures via food, EPA used the 70th percentile of exposures from the acute assessment. Estimated risks range from 10 to 47% of the PAD. The dietary assessment does not include potential exposure via residues in water. It is emphasized that the use of both highest-tolerance-level residues and the highest *in vivo* conversion factor results in dietary risk estimates that far exceed the likely actual risk.

iii. *Non-dietary exposure*. Triazole-derivative fungicides are registered for use on turf, resulting in the potential for residues of free triazole in grass and/or soil. Thus, dermal and incidental oral exposures to children may occur. It is believed that residues of free triazole occur within the plant matrices and are not available as surface residues. Therefore, direct dermal exposure to 1,2,4-triazole due to contact with plants is not likely to occur. However, dermal exposure to parent fungicide and subsequent *in vivo* conversion to 1,2,4-triazole may occur. In order to account for this indirect exposure to free triazole, EPA used a conversion factor of 10%, which is the highest rate of *in vivo* conversion observed in rats for any of the triazole-derivative fungicides with registrations on turf. Incidental oral exposure may occur by direct and indirect routes. To assess direct exposure, EPA used a conversion factor of 17%, which is the highest rate of conversion to free triazole observed in any of the plant metabolism studies. As with indirect dermal exposure, EPA used a conversion factor of 10% in its assessment of indirect oral exposure. Based on residential exposure values estimated for propiconazole (0.0005 mg/kg/day via the dermal route and 0.03 mg/kg/day via the oral route) and the conversion factors described in Unit III.C.4.ii., combined direct and indirect dermal exposures are estimated to be less than 0.0001 mg/kg/day and combined oral exposures are estimated to be less than 0.0019 mg/kg/day. The overall residential exposure is likely to be less than 0.0020 mg/kg/day. Relative to the 15 mg/kg/day point of departure, this gives an MOE of approximately 7,500 for children. Based on the current set of uncertainty factors, the target MOE is 1,000, indicating that the risk associated with residential exposure to 1,2,4-triazole for children is below EPA's level of concern. The adult dermal exposure estimate is slightly less than that of children. Incidental oral exposure is not expected to occur with adults.

iv. *Drinking water*. Modeled estimates of 1,2,4-triazole residues in surface and ground water, as reported by the USTTF, and the DWLOC approach were used to address exposure to free triazole in drinking water. EECs of free triazole in groundwater were obtained from the SCI-GROW model and range from 0.0 to 0.026 ppb, with the higher concentrations associated with uses on turf. Surface water EECs were obtained using the FIRST model. Acute surface water EECs ranged from 0.29 to 4.64 ppb for agricultural uses and up to 32.1 ppb from use on golf course turf. EPA notes that ground water monitoring studies in New Jersey and California showed maximum residues of 16.7 and 0.46 ppb, respectively, which exceed the SCI-GROW estimates significantly. Contrariwise, preliminary monitoring data from USDA's Pesticide Data Program for 2004 show no detectable residues of 1,2,4-triazole in any drinking water samples, either treated or untreated (maximum limit of detection (LOD) = 0.73 ppb, n=40 each).

v. *Aggregate exposure*. In estimating aggregate exposure, EPA combined potential dietary and non-dietary sources of 1,2,4-triazole. To account for the drinking water component of dietary exposure, EPA used the DWLOC approach, as noted in Unit III.C.2. The DWLOC represents a maximum concentration of a chemical in drinking water at or below which aggregate exposure will not exceed EPA's level of concern. In considering non-dietary exposure, EPA used the residential exposure estimate for children and applied it to all population subgroups. As previously noted, this estimate is considered to be highly conservative for children. Since adults are not expected to have non-dietary oral exposure to 1,2,4-triazole and that pathway makes up the majority of the residential exposure estimate for children, application of that exposure estimate to adults is considered to be extremely conservative. Residential exposure is expected to occur for short- and/or intermediate-term durations, and therefore is not a component in the acute or chronic aggregate exposure assessment. In order to assess aggregate short- and intermediate-term exposure, EPA combined the residential exposure estimate and the chronic dietary exposure estimate. The chronic dietary exposure estimate serves as a background level of exposure to free triazole via food. Less than 1% of lawns in the U.S. are expected to be treated with triazole fungicides, so the likelihood of co-occurring dietary and residential exposures is very low.

With the exception of the acute DWLOCs for infants and children 1–6, all DWLOCs are greater than the largest EEC (surface water estimate from use on turf), indicating that aggregate exposures are not likely to exceed EPA's level of concern. Although the acute DWLOCs for infants and children 1–6 indicate that aggregate exposure may exceed 0.015 mg/kg/day, EPA does not believe

this to be the case due to the extremely conservative nature of the overall assessment (highest-tolerance level residues, 100% crop treated, 77% *in vivo* conversion factor). Furthermore, the drinking water monitoring data from the Pesticide Data Program found no detectable residues of either free triazole or parent triazole-derivative fungicide in its preliminary 2004 dataset, indicating that neither parent compounds nor 1,2,4-triazole are likely to occur in drinking water. For all exposure durations and population subgroups, EPA does not expect aggregate exposures to 1,2,4-triazole to exceed its level of concern.

The Agency is planning to conduct a more sophisticated human health assessment in early 2005 following submission and review of the ongoing toxicology and residue chemistry studies for 1,2,4-triazole.

D. Safety Factor for Infants and Children

1. *In general.* Section 408 of the FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans.

2. *Prenatal and postnatal sensitivity.* The pre-natal and post-natal toxicology database for propiconazole is complete with respect to current FQPA-relevant toxicological data requirements. Propiconazole is not developmentally toxic in the rabbit. There is evidence that propiconazole is developmentally toxic in the rat. As noted in the developmental toxicity study in rats, quantitative susceptibility was evidenced by increased incidence of rudimentary ribs, unossified sternebrae, as well as increased incidence of shortened and absent renal papillae and increased cleft palate at 90 mg/kg/day, a dose lower than that evoking maternal toxicity (severe clinical toxicity at 300 mg/kg/day). Considering the overall toxicity profile and the doses and endpoints selected for risk assessment for propiconazole, the Agency characterized the degree of concern for the effects observed in this study as low, noting that there is a clear NOAEL and well-characterized dose response for the developmental effects observed. No residual uncertainties were identified, and no special FQPA safety factor is needed.

Although there is no evidence of neurotoxicity, neuropathology, or abnormalities in the development of the fetal nervous system based on available data, neurotoxic effects (ataxia, lethargy, salivation, rales) were noted in pregnant rats administered high doses (360 mg/kg/day) during the gestation period. Therefore, the Agency has determined that an acute neurotoxicity study is required, and that the need for a developmental neurotoxicity study will be reconsidered upon review of the acute neurotoxicity study. The Agency has determined that for acute (single dose) and short-term exposure scenarios a 3X database uncertainty factor is adequate to account for the lack of the acute neurotoxicity study based on the following considerations:

- It is assumed that an acute neurotoxicity study will be conducted at dose levels similar to those used in the rat developmental study wherein neurotoxic effects including ataxia, lethargy, salivation, and rales were observed in pregnant rats at 360 mg/kg/day (the highest dose tested for the first 5 days of dosing in the study). The NOAEL for the observed neurotoxic effects was 300 mg/kg/day.

- The results of the acute neurotoxicity study are not expected to impact the current acute RfD (or endpoints selected for short-term exposure scenarios) by more than 3X since the NOAELs used for the these risk assessment endpoints (e.g., 90 mg/kg/day for acute RfD for the general populations and 30 mg/kg/day for acute females 13–50 and short-term incidental oral, dermal, and inhalation) are already 3 to 10-fold lower than the NOAEL for neurotoxic effects in the developmental rate study conducted with propiconazole (300 mg/kg/day).

3. *Conclusion.* Although EPA has required that an acute neurotoxicity study be submitted on propiconazole, EPA has concluded that a 3X (acute) and a 1X (chronic) additional safety factor will be sufficient to protect infants and children given the results seen in the existing data bearing on neurotoxicity, which is discussed in Unit III.D.2. This FQPA safety factor of 3X will be applied in the form of a database uncertainty factor and thus used in deriving the aRfD.

As noted previously, an additional FQPA safety factor of 10X is being used in assessing the risk of 1,2,4-triazole.

E. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against the model estimates of a pesticide's concentration in water (EECs). DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water [e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average food + residential exposure)]. This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the USEPA Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and groundwater are less than the calculated DWLOCs, OPP concludes with reasonable certainty that exposures to the pesticide in drinking water (when considered along with other sources of exposure for which OPP has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because OPP considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, OPP will reassess the potential impacts of residues of the pesticide in drinking water as a part of the aggregate risk assessment process.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food to propiconazole will occupy 2% of the aPAD for the U.S. population, 4% of the aPAD for females 13 years and older, 4% of the aPAD for

all infants < 1 year old and 4% of the aPAD for children 1–2 years old. In addition, there is potential for acute dietary exposure to propiconazole in drinking water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD, as shown in Table 2 of this unit:

TABLE 2.—AGGREGATE RISK ASSESSMENT FOR ACUTE EXPOSURE TO PROPICONAZOLE

Population Subgroup	aPAD (mg/kg)	% aPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Acute DWLOC (ppb)
General U.S. population	0.3	2	264	1.5	10,000
All infants (< 1 year old)	0.3	4	264	1.5	2,900
Children 1–2 years old	0.3	4	264	1.5	2,900
Females 13–49 years old	0.1	4	264	1.5	2,900

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to propiconazole from food will utilize 2% of the cPAD for the U.S. population, 4% of the cPAD for all infants (< 1 year old) and 6% of the cPAD for children 1–2 years old. Based the use pattern, chronic residential exposure to residues of propiconazole is not expected. In addition, there is potential for chronic dietary exposure to propiconazole in drinking water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in Table 3 of this unit:

TABLE 3.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO PROPICONAZOLE

Population Subgroup	cPAD mg/kg/day	% cPAD (Food)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Chronic DWLOC (ppb)
General U.S. population	0.1	2	80	1.5	3,400
All infants (< 1 year old)	0.1	4	80	1.5	960
Children 1–2 years old	0.1	6	80	1.5	940

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

Propiconazole is currently registered for use that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic food and water and short-term exposures for propiconazole. Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded that food and residential exposures aggregated result in an aggregate MOE of 2,400 for food, incidental oral and dermal exposure for infants and small children. Only infants and small children were assessed as they represent the worse case scenario because they have higher food exposure plus two routes of exposure to turf residues. In addition, the MOE's for adults exposed to turf residues are high (13,000 - lowest MOE calculated from data from three locations. These aggregate MOEs do not exceed the Agency's level of concern for aggregate exposure to food and residential uses. In addition, short-term DWLOCs were calculated and compared to the EECs for chronic exposure of propiconazole in ground and surface water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect short-term aggregate exposure to exceed the Agency's level of concern, as shown in Table 4 of this unit:

TABLE 4.—AGGREGATE RISK ASSESSMENT FOR SHORT-TERM EXPOSURE TO PROPICONZOLE

Population Subgroup	Aggregate MOE (Food + Residential)	Aggregate Level of Concern (LOC)	Surface Water EEC (ppb)	Ground Water EEC (ppb)	Short-Term DWLOC (ppb)
Infants and small children	2,400	300	264	1.5	2,600

4. *Aggregate cancer risk for U.S. population*. EPA classified propiconazole as a Group C, possible human carcinogen. Risk concerns for carcinogenicity due to long-term consumption of propiconazole residues are adequately addressed by the aggregate chronic exposure analysis using the chronic PAD. Therefore, EPA concludes that there is reasonable certainty that no harm will result from aggregate exposure to propiconazole residues.

5. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general

population, and to infants and children from aggregate exposure to propiconazole residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

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

B. International Residue Limits

International CODEX maximum residue limits are established for almond, animal products, bananas, barley, coffee, eggs, grapes, mango, meat, milk, oat, peanut-whole, peanut grains, pecans, rape, rye, stone fruit, sugar cane, sugar beets, sugar beet tops, and wheat. The U.S. residue definition includes both propiconazole and metabolites determined as 2,4 dichlorobenzoic acid (DCBA), and the CODEX definition is for propiconazole, per se, i.e. parent only. This difference results in unique tolerance expressions with the U.S. definition resulting in the higher tolerance levels (0.2 ppm versus CODEX 0.1 ppm for peanuts). EPA includes the metabolites in its assessment because they also raise hazard concerns.

C. Conditions

An acute neurotoxicity study will be required. The requirement for a developmental neurotoxicity study will be held in reserve pending receipt and review of the acute neurotoxicity study.

V. Conclusion

Therefore, the tolerance is established for combined residues of propiconazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound in or on corn, field, forage at 12 ppm; corn, field, grain at 0.1 ppm; corn, field stover at 12 ppm; corn, sweet, kernel plus cob with husks removed at 0.1 ppm; peanut at 0.2 ppm; peanut, hay at 20 ppm; pineapple at 0.1 ppm; and pineapple, fodder at 0.1 ppm.

VI. Objections and Hearing Requests

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to the FFDCA by the FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of the FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d), as was provided in the old sections 408 and 409 of the FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0086 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before October 4, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

2. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–0086, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of the FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any

enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of the FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 26, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.434 is amended as follows:

■ a. By revising the expiration date for several commodities in the table in paragraph (a).

■ b. By removing the commodity Corn, stover in the table in paragraph (a).

■ c. By removing the commodity Raspberry in the table in paragraph (b).

§ 180.434 Propiconazole; tolerances for residues.

(a) * * *

Commodity	Parts per million	Expiration Date
* *	*	* *
Corn, field, forage	12	11/30/08
Corn, field, grain	0.1	11/30/08
Corn, field, stover	12	11/30/08
Corn, sweet, kernel plus cob with husks removed	0.1	11/30/08
* *	*	* *
Peanut	0.2	11/30/08
Peanut, hay	20	11/30/08
* *	*	* *
Pineapple	0.1	11/30/08
Pineapple, fodder	0.1	11/30/08
* *	*	* *

* * * * *

[FR Doc. 04–17509 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0100; FRL–7368–8]

Propamocarb hydrochloride; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of propamocarb hydrochloride in or on lettuce, leaf; lettuce, head; vegetable, cucurbit, group 9; vegetable, fruiting, group 8; and tomato paste. Bayer CropScience requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective August 4, 2004. Objections and requests for hearings must be received on or before October 4, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VI. of the **SUPPLEMENTARY INFORMATION**. EPA has established a docket for this action under Docket identification (ID) number OPP–2004–100. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Mary Waller, Registration Division 7505C, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001; telephone number: (703) 308–9354; e-mail address: *waller.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at*http://www.epa.gpo/opptsfrs/home/guidelin.htm/*.

II. Background and Statutory Findings

In the **Federal Register** of March 10, 2004 (69 FR 11426–11431) (FRL–7340–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0F6123) by Bayer CropScience, 2TW Alexander Drive, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.499 be amended by establishing a tolerance for residues of the fungicide propyl [3-(dimethylamino) propyl] carbamate mono-hydrochloride, also known as propamocarb hydrochloride, in or on the raw agricultural commodities (RACs) lettuce, leaf, at 65 parts per million (ppm), lettuce, head, at 50 ppm, wheat, grain, at 0.05 ppm, wheat, straw, at 0.10 ppm, wheat, forage, at 0.30 ppm, wheat, hay, at 0.30 ppm, vegetable, cucurbit, group 9, at 1.5 ppm, vegetable, fruiting, group 8, at 2.0 ppm, and tomato, paste, at 5.0 ppm. That notice included a summary of the petition prepared by Bayer CropScience, the registrant. There were no comments received in response to the notice of filing.

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. For further discussion of the regulatory requirements of section 408 of FFDCA and a complete description of the risk assessment process, see the final rule on Bifenthrin Pesticide Tolerances (62 FR 62961, November 26, 1997) (FRL–5754–7).

III. Aggregate Risk Assessment and Determination of Safety

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure, consistent with section 408(b)(2) of FFDCA, for tolerances for residues of propamocarb hydrochloride on vegetable, cucurbit, group 9 at 1.5 ppm; lettuce, head at 50 ppm; lettuce, leaf at 90 ppm; vegetable, fruiting, group 8 at 2.0 ppm and tomato, paste at 5.0 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by propamocarb hydrochloride are discussed in Table 1 of this unit as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies reviewed.

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY

Guideline No.	Study Type	Results
870.3100	90–day oral toxicity in rodents	NOAEL = 363 mg/kg/day in females and 646 mg/kg/day in males LOAEL = 716 mg/kg/day in females, based on decreased body weight and body weight gain and decreased food efficiency. LOAEL in males is 1,363 mg/kg/day based on decreased food efficiency
870.3150	90–day oral toxicity in nonrodents	NOAEL was not achieved LOAEL = 22.75 mg/kg/day based upon body weight gain depression, decreased food efficiency and focal or multi-focal chronic erosive gastritis
870.3200	21/28–day dermal toxicity in rabbits	NOAEL ≥150 mg/kg/day for both sexes LOAEL = 525 mg/kg/day based on dose-related skin irritation and depressed body weight gain
870.3700	Prenatal developmental toxicity in rats	Maternal NOAEL = 221 mg/kg/day Maternal LOAEL = 740 mg/kg/day based on mortality Developmental NOAEL = 221 mg/kg/day Developmental LOAEL = 740mg/kg/day based on GD 20 fetal death and a possible increase in minor skeletal anomalies
870.3700	Prenatal developmental toxicity in rabbits	Maternal NOAEL = 150 mg /kg/day Maternal LOAEL = 300 mg /kg/day based on decreased body weight gains for GD 6–18 and possible increased abortions Developmental NOAEL = 150 mg/kg/day Developmental LOAEL = 300 mg/kg/day based on increased post-implantation loss
870.3800	Reproduction and fertility effects in rats	Parental/Systemic NOAEL = 65.41 mg/kg/day for males and 76.78 mg/kg/day for females Parental/Systemic LOAEL = 406.69 mg/kg/day for males and 467.13 mg/kg/day for females based on decreased body weights Reproductive/Offspring NOAEL = 65.41 mg/kg/day for males and 76.78 mg/kg/day for females Reproductive/Offspring LOAEL = 406.69 mg/kg/day for males and 467.13 mg/kg/day for females based on reduced pup weights
870.4100	Chronic toxicity in rodents	NOAEL = ≥25.6 mg/kg/day LOAEL = >25.6 mg/kg/day. There were no signs of toxicity attributable to treatment at any dose level
870.4100	Chronic toxicity in dogs	NOAEL was not achieved. LOAEL = 22.75 mg/kg/day based upon body weight gain depression, decreased food efficiency and focal or multi-focal chronic erosive gastritis
870.4200	Carcinogenicity in rats	NOAEL = 84 mg/kg/day in males, 112 mg/kg/day in females LOAEL = 682 mg/kg/day in males, 871 mg/kg/day in females based on decreased body weight and body weight gain, decreased food consumption, and an increased incidence of vacuolation of choroid plexus ependymal cells in the brain in both sexes and decreased water consumption in the females no evidence of carcinogenicity
870.4200	Carcinogenicity in mice	NOAEL = 12 mg/kg/day in females and ≥690.0 mg/kg/day in males LOAEL = 95 mg/kg/day in females based on decreased body weight and body weight gains no evidence of carcinogenicity
870.5100	Reverse gene mutation assay in bacteria	No evidence of induced mutant colonies over background
870.5375	Cytogenetics *in vitro* mammalian cytogenetics assay	Increases in aberrant metaphases were within the historical control range
870.5395	Bone marrow micronucleus assay	No significant increase in the frequency of micronucleated polychromatic erythrocytes in bone marrow at any dose tested
870.5395	Bone marrow micronucleus assay	No significant increase in the frequency of micronucleated polychromatic erythrocytes in bone marrow after any treatment time

TABLE 1.—SUBCHRONIC, CHRONIC, AND OTHER TOXICITY—Continued

Guideline No.	Study Type	Results
870.5575	Other Genotoxicity *Saccharomyces cerevisiae*, mitotic recombination, gene conversion assay	No evidence of gene conversion in the tested strains with activation
870.5575	*Saccharomyces cerevisiae*, mitotic recombination, gene conversion assay	No evidence of gene conversion in the tested strains without activation
870.5575	*Saccharomyces cerevisiae*, mitotic recombination, gene conversion assay	Under the conditions of the study, no evidence of gene conversion
870.6200	Acute neurotoxicity screening battery in rats	NOAEL = 200 mg/kg/day LOAEL =2,000 mg/kg/day based on soiled fur coat (both sexes) and decreased motor activity 8 hours post-dosing (females only)
870.6200	Subchronic neurotoxicity screening battery in rats	NOAEL = 1,320.8 mg/kg/day in males and 1485.6 mg/kg/day in females LOAEL = not observed
870.7485	Metabolism in rats	A higher dose (at least equivalent to levels of human exposure) should have been tested, and the metabolites should have been identified
N/A	Special Study - cholinesterase inhibition study	One male and one female died within 43 min; exhibited tremors, convulsions, respiratory, standstill, and death. ChE inhibition dead animals, plasma - no effect; RBC - 19 - 54%, and brain decrease 10 X the controls. No appreciable decrease in ChE in the surviving dog Conclusion: The cholinesterase inhibition studies were of questionable quality. The chemical does not cause any appreciable inhibition of cholinesterase

B. Toxicological Endpoints

The dose at which no adverse effects are observed (the NOAEL) fromthe toxicology study identified as appropriate for use in risk assessment is used to estimate the toxicological level of concern (LOC). However, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment if no NOAEL was achieved in the toxicology study selected. An uncertainty factor (UF) is applied to reflect uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. An UF of 100 is routinely used, 10X to account for interspecies differences and 10X for intraspecies differences.

Three other types of safety or uncertainty factors may be used: ''Traditional uncertainty factors;'' the ''special FQPA safety factor;'' and the ''default FQPA safety factor.'' By the term ''traditional uncertainty factor,'' EPA is referring to those additional uncertainty factors used prior to FQPA passage to account for database deficiencies. These traditional uncertainty factors have been incorporated by the FQPA into the additional safety factor for the protection of infants and children. The term ''special FQPA safety factor'' refers to those safety factors that are deemed necessary for the protection of infants and children primarily as a result of the FQPA. The ''default FQPA safety factor'' is the additional 10X safety factor that is mandated by the statute unless it is decided that there are reliable data to choose a different additional factor (potentially a traditional uncertainty factor or a special FQPA safety factor).

For dietary risk assessment (other than cancer) the Agency uses the UF to calculate an acute or chronic reference dose (acute RfD or chronic RfD) where the RfD is equal to the NOAEL divided by an UF of 100 to account for interspecies and intraspecies differences and any traditional uncertainty factors deemed appropriate (RfD = NOAEL/UF). Where a special FQPA safety factor or the default FQPA safety factor is used, this additional factor is applied to the RfD by dividing the RfD by such additional factor. The acute or chronic Population Adjusted Dose (aPAD or cPAD) is a modification of the RfD to accommodate this type of safety factor.

For non-dietary risk assessments (other than cancer) the UF is used to determine the LOC. For example, when 100 is the appropriate UF (10X to account for interspecies differences and 10X for intraspecies differences) the LOC is 100. To estimate risk, a ratio of the NOAEL to exposures (margin of exposure (MOE) = NOAEL/exposure) is calculated and compared to the LOC.

The linear default risk methodology (Q*) is the primary method currently used by the Agency to quantify carcinogenic risk. The Q* approach assumes that any amount of exposure will lead to some degree of cancer risk. A Q* is calculated and used to estimate risk which represents a probability of occurrence of additional cancer cases (e.g., risk). An example of how such a probability risk is expressed would be to describe the risk as one in one hundred thousand (1×10^{-5}), one in a million (1×10^{-6}), or one in ten million (1×10^{-7}). Under certain specific circumstances, MOE calculations will be used for the carcinogenic risk assessment. In this non-linear approach, a ''point of departure'' is identified below which carcinogenic effects are not expected. The point of departure is typically a NOAEL based on an endpoint related to cancer effects though it may be a different value derived from the dose response curve. To estimate risk, a ratio of the point of departure to exposure (MOE_{cancer} = point of departure/exposures) is calculated.

A summary of the toxicological endpoints for propamocarb hydrochloride used for human risk assessment is shown in Table 2 of this unit:

TABLE 2.—SUMMARY OF TOXICOLOGICAL DOSE AND ENDPOINTS FOR PROPAMOCARB HYDROCHLORIDE FOR USE IN HUMAN RISK ASSESSMENT

Exposure Scenario	Dose Used in Risk Assessment, Interspecies and Intraspecies and any Traditional UF	Special FQPA SF and Level of Concern for Risk Assessment	Study and Toxicological Effects
Acute dietary (females 13–50 years of age)	NOAEL = 150 mg/kg/day UF = 100 Acute RfD = 1.5 mg ai/kg/day	FQPA SF = 1X aPAD = acute RfD ÷ FQPA SF = 1.5 mg/kg/day	Developmental toxicity study - rabbit developmental LOAEL = 300 mg/kg/day based on increased post-implantation loss
Acute dietary general population including infants and children	NOAEL= 200 mg/kg/day UF = 100 Acute RfD = 2.0 mg/kg/day	FQPA SF = 1X aPAD = acute RfD ÷ FQPA SF = 2.0 mg/kg/day	Acute neurotoxicity screening battery - rat LOAEL = 2000 mg ai/kg/day, based on decreased body weight gain and decreased motor activity
Chronic dietary all populations	NOAEL= 12 mg/kg/day UF = 100 Chronic RfD = 0.12 mg/kg/day	FQPA SF = 1X cPAD = chronic RfD ÷ FQPA SF = 0.12 mg/kg/day	Carcinogenicity study - mouse LOAEL = 95 mg/kg/day, based on decreased body weight and body weight gain in females
Short-term oral (1 – 30 days) (Residential)	NOAEL = 65.41 mg/kg/day	Residential LOC for MOE = 100	2-generation reproduction toxicity study - rat Offspring LOAEL = 406.7 mg/kg/day, based on reduced pup weights in F_0 and F_1 during Day 14 – 21 of lactation
Intermediate-term oral (1 – 6 months)(Residential)	NOAEL = 65.41 mg/kg/day	Residential LOC for MOE = 100	2-Generation reproduction toxicity study - rat Offspring LOAEL = 406.7 mg/kg/day, based on reduced pup weights in F_0 and F_1 during Day 14 – 21 of lactation
Cancer (oral, dermal, inhalation)	''not likely to be carcinogenic to humans''		

UF = uncertainty factor, FQPA SF = FQPA safety factor, NOAEL = no observed adverse effect level, LOAEL = lowest observed adverse effect level, PAD = population adjusted dose (a = acute, c = chronic) RfD = reference dose, MOE = margin of exposure.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* Tolerances have been established (40 CFR 180.499(a)) for the residues of propamocarb hydrochloride, on potatoes. Risk assessments were conducted by EPA to assess dietary exposures from propamocarb hydrochloride in food as follows:

i. *Acute exposure.* Acute dietary risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a one-day or single exposure.

In conducting the acute dietary risk assessment EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID™), which incorporates food consumption data as reported by respondents in the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII), and accumulated exposure to the chemical for each commodity. The following assumptions were made for the acute exposure assessments: Tolerance-level residues of propamocarb hydrochloride were assumed for all plant commodities with current or proposed propamocarb hydrochloride tolerances. The following residues of propamocarb hydrochloride and the metabolites of concern in livestock *N*-oxide propamocarb, 2-hydroxypropamocarb, and oxazolidine were assumed to be present in livestock commodities: 0.15 ppm in meat, 0.60 ppm in liver, 0.20 ppm in kidney, 0.15 ppm in meat by-products excluding liver and kidney, 0.05 ppm in fat and 0.85 ppm in milk. EPA assumed that all of the crops included in the analysis were treated. Percent crop treated (PCT) and anticipated residue values were not used in the acute risk assessment.

ii. *Chronic exposure.* In conducting the chronic dietary risk assessment EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM-FCID™), which incorporates food consumption data as reported by respondents in the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII), and accumulated exposure to the chemical for each commodity. The following assumptions were made for the chronic exposure assessments: Tolerance-level residues of propamocarb hydrochloride were assumed for all plant commodities with current or proposed propamocarb hydrochloride tolerances. The following residues of propamocarb hydrochloride and the metabolites of concern in livestock *N*-oxide propamocarb, 2-hydroxy propamocarb, and oxazolidine were assumed to be present in livestock commodities: 0.15 ppm in meat, 0.60 ppm in liver, 0.20 ppm in kidney, 0.15 ppm in meat by-products excluding liver and kidney, 0.05 ppm in fat and 0.85 ppm in milk. It was assumed that all of the crops included in the analysis were treated. Percent crop treated (PCT) and anticipated residue values were not used in the chronic risk assessment.

2. *Dietary exposure from drinking water.* The Agency lacks sufficient monitoring exposure data to complete a comprehensive dietary exposure analysis and risk assessment for propamocarb hydrochloride in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the physical characteristics of propamocarb hydrochloride.

The Agency uses the FQPA Index Reservoir Screening Tool (FIRST) or the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS), to produce estimates of pesticide concentrations in an index reservoir. The SCI-GROW model is used to predict pesticide concentrations in shallow ground water. For a screening-level assessment for surface water EPA will use FIRST (a tier 1 model) before using PRZM/EXAMS (a tier 2 model). The FIRST model is a subset of the PRZM/EXAMS model that uses a specific high-end runoff scenario for pesticides. Both FIRST and PRZM/EXAMS incorporate an index reservoir environment, and both models include a percent crop area factor as an adjustment to account for the maximum percent crop coverage within a watershed or drainage basin.

None of these models include consideration of the impact processing (mixing, dilution, or treatment) of raw water for distribution as drinking water would likely have on the removal of pesticides from the source water. The primary use of these models by the Agency at this stage is to provide a screen for sorting out pesticides for which it is unlikely that drinking water concentrations would exceed human health levels of concern.

Since the models used are considered to be screening tools in the risk assessment process, the Agency does not use estimated environmental concentrations (EECs), which are the model estimates of a pesticide's concentration in water. EECs derived from these models are used to quantify drinking water exposure and risk as a %RfD or %PAD. Instead, drinking water levels of comparison (DWLOCs) are calculated and used as a point of comparison against the model estimates of a pesticide's concentration in water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food, and from residential uses. Since DWLOCs address total aggregate exposure to propamocarb hydrochloride they are further discussed in the aggregate risk sections in Unit E., *Aggregate Risks and Determination of Safety*, below.

Based on the FIRST and SCI-GROW models, the EECs of propamocarb hydrochloride for acute exposures are estimated to be 972 parts per billion (ppb) for surface water and 2.99 ppb for ground water. The EECs for chronic exposures are estimated to be 77 ppb for surface water and 2.99 ppb for ground water. These EEC's are based on application rates on turf which yield higher projected surfacewater and groundwater concentrations than the proposed application rates on cucurbit vegetables; fruiting vegetables and lettuce.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Propamocarb hydrochloride is currently registered for use on the following residential non-dietary sites: commercial sod farms, greenhouses growing plants for sale, plant nurseries and golf courses. There are two end-use products registered for these uses: Banol (EPA Registration Number 432–942, contains 66.5% propamocarb hydrochloride) and Banol C (EPA Registration Number 432–961, contains 30.5% propamocarb hydrochloride and 30.5% chlorothalonil). An MOE of 100 is assumed to adequately ensure protection from propamocarb hydrochloride via the dermal and inhalation routes for residential exposures. The high-end scenario for residential post-application exposure is to golfers on a course treated with propamocarb hydrochloride. The post-application risk assessment is based on generic assumptions as specified by the newly proposed Residential Standard Operating Procedures (SOPs) and recommended approaches by the Health Effects Division's (HED's) Exposure Science Advisory Committee. Short-term post-application exposures are expected for the adult and adolescent golfer (high end exposure scenario). Golfer exposure is expected through minimal hand contact with the golf ball and dermal contact to the lower legs from treated plant surfaces. Since it is assumed that the adolescent golfer would have a proportionally similar exposure to adults, a dermal post-application assessment was performed for the adult golfer only. The calculated MOE for the golfer is 980 and, therefore, does not exceed EPA's level of concern. Since the short- and intermediate-term toxicological endpoints are the same, the golfer post-application exposure assessment is expected to provide adequate exposure estimates for both the short- and intermediate-term exposure scenarios. In the event of intermediate-term exposure, propamocarb hydrochloride residues are expected to dissipate over time. Therefore, this assessment is expected to present a high-end conservative estimate of actual exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to propamocarb hydrochloride and any other substances and propamocarb hydrochloride does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that propamocarb hydrochloride has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs (OPP) concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's web site at *http://www.epa.gov/pesticides/cumulative/*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. Margins of safety are incorporated into EPA risk assessments either directly through use of a MOE analysis or through using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk to humans. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional safety factor value based on the use of traditional uncertainty factors and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. EPA determined that there are no residual concerns for propamocarb for prenatal and postnatal toxicology based on the following:

• There is no quantitative or qualitative evidence of increased susceptibility of rat and rabbit fetuses to *in utero* exposure to propamocarb hydrochloride in developmental toxicity studies. There is no quantitative or qualitative evidence of increased susceptibility to propamocarb hydrochloride following prenatal/postnatal exposure to a 2-generation reproduction study.

• There is no concern for developmental neurotoxicity resulting from exposure to propamocarb hydrochloride. A developmental neurotoxicity study (DNT) is not required.

3. *Conclusion*. There is a complete toxicity data base for propamocarb hydrochloride and exposure data are complete or are estimated based on data that reasonably accounts for potential exposures. Given the completeness of the data base and the lack of concern for prenatal and postnatal toxicity, EPA concluded that reliable data shows an additional safety factor of 10X is not needed for the protection of infants and children.

E. Aggregate Risks and Determination of Safety

To estimate total aggregate exposure to a pesticide from food, drinking water, and residential uses, the Agency calculates DWLOCs which are used as a point of comparison against EECs. DWLOC values are not regulatory standards for drinking water. DWLOCs are theoretical upper limits on a pesticide's concentration in drinking water in light of total aggregate exposure to a pesticide in food and residential uses. In calculating a DWLOC, the Agency determines how much of the acceptable exposure (i.e., the PAD) is available for exposure through drinking water e.g., allowable chronic water exposure (mg/kg/day) = cPAD - (average food + residential exposure). This allowable exposure through drinking water is used to calculate a DWLOC.

A DWLOC will vary depending on the toxic endpoint, drinking water consumption, and body weights. Default body weights and consumption values as used by the EPA's Office of Water are used to calculate DWLOCs: 2 liter (L)/70 kg (adult male), 2L/60 kg (adult female), and 1L/10 kg (child). Default body weights and drinking water consumption values vary on an individual basis. This variation will be taken into account in more refined screening-level and quantitative drinking water exposure assessments. Different populations will have different DWLOCs. Generally, a DWLOC is calculated for each type of risk assessment used: Acute, short-term, intermediate-term, chronic, and cancer.

When EECs for surface water and ground water are less than the calculated DWLOCs, OPP concludes with reasonable certainty that exposures to the pesticide in drinking water (when considered along with other sources of exposure for which OPP has reliable data) would not result in unacceptable levels of aggregate human health risk at this time. Because OPP considers the aggregate risk resulting from multiple exposure pathways associated with a pesticide's uses, levels of comparison in drinking water may vary as those uses change. If new uses are added in the future, OPP will reassess the potential impacts of residues of the pesticide in drinking water as a part of the aggregate risk assessment process.

1. *Acute risk*. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food to propamocarb hydrochloride will occupy 4% of the aPAD for the U.S. population, 6% of the aPAD for females 13 years and older, 2% of the aPAD for infants < 1 year old, and 5% of the aPAD for children between 1 and 2 years of age. In addition, there is potential for acute dietary exposure to propamocarb hydrochloride in drinking water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the aPAD, as shown in Table 3 of this unit:

TABLE 3.—AGGREGATE RISK ASSESSMENT FOR ACUTE EXPOSURE TO PROPAMOCARB HYDROCHLORIDE

Population Subgroup	aPAD (mg/kg/day)	%aPAD (food)	Ground Water EEC (µg/L)	Surface Water EEC (µg/L)	Acute DWLOC (µg/L)
U.S. Population	2.0	4	2.99	972	67,000
All infants (<1 year old)	2.0	2	2.99	972	19,000
Children (1–2 years old)	2.0	5	2.99	972	19,000
Children (3–5 years old)	2.0	5	2.99	972	19,000
Children (6–12 years old)	2.0	4	2.99	972	19,000
Youth (13–19 years old)	2.0	4	2.99	972	67,000
Adults (20–49 years old)	2.0	4	2.99	972	67,000
Adults (50+ years old)	2.0	4	2.99	972	67,000
Females (13–49 years old)	1.5	6	2.99	972	42,000

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to propamocarbhydrochloride from food will utilize 18% of the cPAD for the U.S. population, 11% of the cPAD for infants less than 1 year old, 36% of the cPAD for children between 1 and 2 years of age and 30% of the cPAD for children between 3 and 5 years of age. Based on the use pattern, chronic residential exposure to residues of propamocarb hydrochloride is not expected. In addition, there is potential for chronic dietary exposure to propamocarb hydrochloride in drinking water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect the aggregate exposure to exceed 100% of the cPAD, as shown in Table 4 of this unit:

TABLE 4.—AGGREGATE RISK ASSESSMENT FOR CHRONIC (NON-CANCER) EXPOSURE TO PROPAMOCARB HYDROCHLORIDE

Population Subgroup	cPAD (mg/kg/day)	%cPAD (Food)	Ground Water EEC (µg/L)	Surface Water EEC (µg/L)	Chronic DWLOC (µg/L)
U.S. Population	0.12	18	2.99	77	3,500
All infants (< 1 year old)	0.12	11	2.99	77	1,100
Children (1–2 years old)	0.12	36	2.99	77	760
Children (3–5 years old)	0.12	30	2.99	77	840
Children (6–12 years old)	0.12	22	2.99	77	930
Youth (13–19 years old)	0.12	16	2.99	77	3,500
Adults (20–49 years old)	0.12	16	2.99	77	3,500
Females (13–49 years old)	0.12	17	2.99	77	3,000
Adults (50+ years old)	0.12	14	2.99	77	3,600

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

Propamocarb hydrochloride is currently registered for use on golf courses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic food and water and short-term exposures for propamocarb hydrochloride.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded that food and residential exposures aggregated result in aggregate MOEs of 870 for females 13–50 years old, 1,000 for youth 13–19 years old and 980 for the general U.S. population. The short-term aggregate risk assessment estimates risks likely to result from 1–7 day exposure to propamocarb hydrochloride residues in food, drinking water, and residential pesticide uses. High-end estimates of the residential exposure are used in the short-term assessment. Average values are used for food and drinking water exposure. For short-term aggregate exposure risk, the oral and dermal exposures can be combined since both are based on the same toxicity endpoint (decreased body weight). An MOE of 100 is adequate to ensure protection from propamocarb hydrochloride via the dermal route for residential exposures. According to the 1995 RED for propamocarb hydrochloride (Estimated Usage of Pesticide, p. 3), ''almost all usage of propamocarb hydrochloride in the United States is concentrated on golf courses with approximately 100,000 to 200,000 lbs ai applied per year.'' The labels for Banol (EPA Registration Number 432–942) and Banol C (EPA Registration Number 432–961) both state that only protected handlers may be present in the treated area during application. For these reasons, it is assumed that this product will be used by commercial applicators, mainly on golf courses. The high-end scenario for residential post-application exposure is the golf course use of Banol. Therefore, in aggregating short-term risk, the Agency considered background chronic dietary exposure (food and drinking water) and short-term golfer dermal exposure.

These aggregate MOEs do not exceed the Agency's level of concern for aggregate exposure to food and residential uses. In addition, short-term DWLOCs were calculated and compared to the EECs for chronic exposure of propamocarb hydrochloride in ground and surface water. After calculating DWLOCs and comparing them to the EECs for surface and ground water, EPA does not expect short-term aggregate exposure to exceed the Agency's level of concern, as shown in Table 5 of this unit:

TABLE 5.—AGGREGATE RISK ASSESSMENT FOR SHORT-TERM EXPOSURE TO PROPAMOCARB HYDROCHLORIDE

Population Subgroup	Aggregate MOE (Food + Residential)	Aggregate Level of Concern (LOC)	Surface Water EEC (ppb)	Ground/ Water EEC (ppb)	Short-Term DWLOC (ppb)
General US Population	980	100	2.99	77	47,000
Females 13–49 years old	870	100	2.99	77	40,000
Youth 13–19 years old	1,000	100	2.99	77	48,000

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). The short-term aggregate assessment adequately addresses both the short- and intermediate-term golfer dermal exposures. The short- and intermediate-term dermal endpoints were chosen from the 21–day dermal rabbit toxicity study. The short-term golfer exposure was calculated assuming 1 to 7 days exposure to propamocarb hydrochloride. The intermediate-term aggregate risk assessment estimates risks likely to result from 7 days to 3 months of exposure. In the event of intermediate-term exposure, propamocarb hydrochloride residues are

expected to dissipate over time. Therefore, the short-term aggregate assessment is expected to present a high-end conservative estimate of intermediate-term risk. As the short-term aggregate risk assessment represents the high-end scenario, an intermediate-term assessment was not performed.

5. *Aggregate cancer risk for U.S. population*. A quantitative cancer risk analysis was not performed since there is no concern for mutagenic potential and there is no evidence of carcinogenic potential in either the rat or mouse. Propamocarb has been classified as ''not likely to be carcinogenic in humans.''

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, and to infants and children from aggregate exposure to propamocarb hydrochloride residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

An adequate gas chromatography/nitrogen-phosphorus detection (GC/NPD) method (Xenos Report Number: XEN97–37) has been submitted. This method has undergone a successful independent laboratory validation (ILV) and petition method validation (PMV). The GC/NPD has been sent to the Food and Drug Administration (FDA) and is currently listed in the Pesticide Analytical Manual (PAM) Vol. II for determining residues of propamocarb hydrochloride in plant commodities.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

The Codex Alimentarius Commission (Codex) has established tolerances (maximum residue levels) for propamocarb hydrochloride in the following raw agricultural commodities: Beetroot at 0.2 ppm, brussel sprouts at 1.0 ppm, cabbage (head) at 0.1 ppm, cauliflower at 0.2 ppm, celery at 0.2 ppm, cucumber at 2.0 ppm, lettuce (head) at 10 ppm, pepper (sweet) at 1.0 ppm, radish at 5.0 ppm, strawberry at 0.1 ppm and tomato at 1.0 ppm.

Proposed tolerances for vegetable, cucurbit, Group 9, lettuce head; vegetables, fruiting, group 8; and tomato paste vary from established Codex MRL's due to varying agricultural practices and environmental conditions.

V. Conclusion

Therefore, tolerances are established for residues of propamocarb hydrochloride on vegetable, cucurbit, group 9 at 1.5 ppm; lettuce, head at 50 ppm; lettuce, leaf at 90 ppm; vegetable, fruiting, group 8 at 2.0 ppm; tomato, paste at 5.0 ppm.

VI. Objections and Hearing Requests

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to FFDCA by FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of FFDCA, as was provided in the old sections 408 and 409 of FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2004–0100 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before October 4, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

2. *Copies for the Docket*. In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in **ADDRESSES**. Mail your copies, identified by docket ID number OPP–2004–100, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in **ADDRESSES**. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in

response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104– 4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 19, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.499 is amended by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.499 Propamocarb Hydrochloride; tolerances for residues.

(a) * * *

Commodity	Parts per million
Lettuce, head	50
Lettuce, leaf	90
* * * *	*
Vegetable, cucurbit, group 9	1.5
Vegetable, fruiting, group 8	2.0
Tomato, paste	5.0

* * * * *

[FR Doc. 04–17510 Filed 8–3–04; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2003–0283; FRL–7358–4]

Propanoic Acid; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of propanoic acid, and its calcium and sodium salts on all raw agricultural commodities; changes the chemical name from propionic acid to propanoic acid; reorganizes the existing tolerance exemptions; and reorganizes the current tolerance exemptions when used as an inert ingredient. Nayfa Industries, Inc. requested an exemption from the requirement of tolerances for sugar beets, potatoes, and sweet potatoes under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective August 4, 2004. Objections and requests for hearings must be received on or before October 4, 2004.

ADDRESSES: To submit a written objection or hearing request follow the detailed instructions as provided in Unit VIII. of the **SUPPLEMENTARY INFORMATION.** EPA has established a docket for this action under Docket ID number OPP–2003–0283. All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket.* Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Cynthia Giles-Parker, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW.,Washington, DC 20460–0001; telephone number: (703) 305–7740; e-mail address: *giles-parker.cynthia@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

II. Background and Statutory Findings

In the **Federal Register** of February 12, 1997 (62 FR 6228) (FRL–5583–9), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 6F4770) by Nayfa Industries, Inc., c/o 1625 K St., NW., Suite 501, Washington, DC 20006. That notice included a summary of the petition prepared by Nayfa Industries, Inc., the registrant. The petition requested that 40 CFR 180 be amended by establishing an exemption from the requirement of a tolerance for residues of the fungicide propionic acid, in or on the raw agricultural commodities sugar beets, potatoes, and sweet potatoes. There were no comments received in response to the notice of filing.

In the **Federal Register** of January 13, 2003 (68 FR 1575) (FRL–7285–5), EPA published a proposed rule pursuant to section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, as amended by the Food Quality Protection Act (FQPA) (Public Law 104–170), to amend 40 CFR 180 to reorganizeing the existing tolerance exemptions for propionic acid; change the chemical name from propionic acid to propanoic acid; to reorganize tolerances for propionic acid and sodium propionate when used as an inert ingredient; and establish an exemption from the requirement of a tolerance for the residues of the fungicide propanoic acid (CAS Reg. No 79–09–4) and its calcium and sodium salts on all crops, when used as either an inert or active ingredient in pesticide formulations applied to growing crops before and after harvest. There were no comments received in response to the proposed rule.

Based on a review and evaluation of the available data, the Agency believes that an exemption from the requirement of tolerances can be expanded to include raw agricultural commodities beyond those requested by Nayfa Industries. Therefore, the Agency proposed to expand the tolerance exemption request to include all raw agricultural commodities.

Tolerance exemptions have been established (40 CFR 180.1023) for the residues of propionic acid in or on a variety of raw agricultural commodities. In addition exemptions from the requirement of tolerances from residues of propionic acid have been established in or on meat and meat by-products of cattle, sheep, hogs, goats, horses, and poultry, milk, and eggs when propionic acid is applied as a bactericide/fungicide to livestock drinking water, poultry litter, and storage areas for silage and grain. Exemptions from the requirement of a tolerance have been established in 40 CFR 180.1001(c) for sodium propionate when used as a preservative and for propionic acid when used as a catalyst in the pesticide formulation.

Throughout the rest of this document this chemical will be referred to as propanoic acid.

Based on the reasons set forth in the preamble (the low potential toxicity of propanoic acid and its calcium and sodium salts for the oral rate of exposure, that humans of all ages are highly exposed to propanoic acid from natural sources, and that the human body has a known pathway for metabolizing propanoic acid), EPA concludes that there is a reasonable certainty of no harm from aggregate exposure to residues. Accordingly, EPA finds that exempting propanoic acid, and its calcium and sodium salts from the requirement of a tolerance will be safe for the general public, including infants and children.

III. Objections and Hearing Requests

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. Although the procedures in those regulations require some modification to reflect the amendments made to FFDCA

by FQPA, EPA will continue to use those procedures, with appropriate adjustments, until the necessary modifications can be made. The new section 408(g) of FFDCA provides essentially the same process for persons to ''object'' to a regulation for an exemption from the requirement of a tolerance issued by EPA under new section 408(d) of FFDCA, as was provided in the old sections 408 and 409 of FFDCA. However, the period for filing objections is now 60 days, rather than 30 days.

A. What Do I Need to Do to File an Objection or Request a Hearing?

You must file your objection or request a hearing on this regulation in accordance with the instructions provided in this unit and in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number OPP–2003–0283 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before October 4, 2004.

1. *Filing the request.* Your objection must specify the specific provisions in the regulation that you object to, and the grounds for the objections (40 CFR 178.25). If a hearing is requested, the objections must include a statement of the factual issues(s) on which a hearing is requested, the requestor's contentions on such issues, and a summary of any evidence relied upon by the objector (40 CFR 178.27). Information submitted in connection with an objection or hearing request may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the information that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice.

Mail your written request to: Office of the Hearing Clerk (1900L), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. You may also deliver your request to the Office of the Hearing Clerk in Suite 350, 1099 14th St., NW., Washington, DC 20005. The Office of the Hearing Clerk is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Office of the Hearing Clerk is (202) 564–6255.

2. *Tolerance fee payment.* If you file an objection or request a hearing, you must also pay the fee prescribed by 40 CFR 180.33(i) or request a waiver of that fee pursuant to 40 CFR 180.33(m). You must mail the fee to: EPA Headquarters Accounting Operations Branch, Office of Pesticide Programs, P.O. Box 360277M, Pittsburgh, PA 15251. Please identify the fee submission by labeling it ''Tolerance Petition Fees.''

EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding the waiver of these fees, you may contact James Tompkins by phone at (703) 305–5697, by e-mail at *tompkins.jim@epa.gov*, or by mailing a request for information to Mr. Tompkins at Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

If you would like to request a waiver of the tolerance objection fees, you must mail your request for such a waiver to: James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

3. *Copies for the Docket.* In addition to filing an objection or hearing request with the Hearing Clerk as described in Unit VI.A., you should also send a copy of your request to the PIRIB for its inclusion in the official record that is described in Unit I.B.1. Mail your copies, identified by docket ID number OPP–2003–0283, to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. In person or by courier, bring a copy to the location of the PIRIB described in Unit I.B.1. You may also send an electronic copy of your request via e-mail to: *opp-docket@epa.gov*. Please use an ASCII file format and avoid the use of special characters and any form of encryption. Copies of electronic objections and hearing requests will also be accepted on disks in WordPerfect 6.1/8.0 or ASCII file format. Do not include any CBI in your electronic copy. You may also submit an electronic copy of your request at many Federal Depository Libraries.

B. When Will the Agency Grant a Request for a Hearing?

A request for a hearing will be granted if the Administrator determines that the material submitted shows the following: There is a genuine and substantial issue of fact; there is a reasonable possibility that available evidence identified by the requestor would, if established resolve one or more of such issues in favor of the requestor, taking into account uncontested claims or facts to the contrary; and resolution of the factual issues(s) in the manner sought by the requestor would be adequate to justify the action requested (40 CFR 178.32).

IV. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–-113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism*(64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

V. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 19, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346a and 371.

§ 180.910 [Amended]

■ 2. Section 180.910 is amended by removing in the table the entries for ''propionic acid'' and ''sodium propionate''.

§ 180.1023 [Amended]

■ 3. Section 180.1023 is is revised to read as follows.

§ 180.1023 Propanoic acid; exemptions from the requirement of a tolerance.

(a) Postharvest application of propanoic acid or a mixture of methylene bispropionate and oxy(bismethylene) bisproprionate when used as a fungicide is exempted from the requirement of a tolerance for residues in or on the following raw agricultural commodities: Alfalfa, barley grain, Bermuda grass, bluegrass, brome grass, clover, corn grain, cowpea hay, fescue, lespedeza, lupines, oat grain, orchard grass, peanut hay, peavine hay, rye grass, sorghum grain, soybean hay, sudan grass, timothy, vetch, and wheat grain.

(b) Propanoic acid is exempt from the requirement of a tolerance forresidues in or on meat and meat byproducts of cattle, sheep, hogs, goats,horses, and poultry, milk, and eggs when applied as a bactericide/fungicide to livestock drinking water, poultry litter, and storage areas for silage and grain.

(c) Preharvest and postharvest application of propanoic acid (CAS Reg. No. 79–09–4), propanioc acid, calcium salt (CAS Reg. No. 4075–81–4), and propanioc sodium salt (CAS Reg. No. 137–40–6) are exempted from the requirement of a tolerance on all crops when used as either an active or inert ingredient in accordance with good agricultural practice in pesticide formulations applied to growing crops, to raw agricultural commodities before and after harvest and to animals.

[FR Doc. 04–17799 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031125292–4061–02; I.D. 072804C]

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

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

ACTION: Prohibition of retention.

SUMMARY: NMFS is prohibiting retention of Pacific ocean perch in the West Yakutat District of the Gulf of Alaska (GOA). NMFS is requiring that catch of Pacific ocean perch in this area be treated in the same manner as prohibited species and discarded at sea with a minimum of injury. This action is necessary because the Pacific ocean perch 2004 total allowable catch (TAC) in this area has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 30, 2004, until 2400 hrs, A.l.t., December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and CFR part 679.

The 2004 TAC of Pacific ocean perch in the West Yakutat District of the GOA was established as 830 metric tons by the final 2004 harvest specifications for groundfish in the GOA (69 FR 9261, February 27, 2004).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS, has determined that the Pacific ocean perch TAC in the West Yakutat District of the GOA has been reached. Therefore, NMFS is requiring that further catches of Pacific ocean perch in the West Yakutat District of the GOA be treated as prohibited species in accordance with § 679.21(b).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the prohibition of retention of Pacific ocean perch in the West Yakutat District of the GOA.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 30, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–17769 Filed 7–30–04; 1:45 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031125292–4061–02; I.D. 072804D]

Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Gulf of Alaska

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

ACTION: Prohibition of retention.

SUMMARY: NMFS is prohibiting retention of Atka mackerel in the Gulf of Alaska (GOA). NMFS is requiring that catch of Atka mackerel in this area be treated in the same manner as prohibited species and discarded at sea with a minimum of injury. This action is necessary because the Atka mackerel 2004 total allowable catch (TAC) in this area has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 30, 2004, until 2400 hrs, A.l.t., December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and CFR part 679.

The 2004 TAC of Atka mackerel in the GOA was established as 600 metric tons by the final 2004 harvest specifications for groundfish in the GOA (69 FR 9261, February 27, 2004).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS, has determined that the Atka mackerel TAC in the GOA has been reached. Therefore, NMFS is requiring that further catches of Atka mackerel in the GOA be treated as prohibited species in accordance with § 679.21(b).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the prohibition of retention of Atka mackerel in the GOA.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Alan D. Risenhoover,

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

[FR Doc. 04–17768 Filed 7–30–04; 2:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031124287–4060–02; I.D. 072904B]

Fisheries of the Exclusive Economic Zone Off Alaska; Flathead Sole in the Bering Sea and Aleutian Islands

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for flathead sole in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2004 total allowable catch (TAC) of flathead sole in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 31, 2004, until 2400 hrs, A.l.t., December 31, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2004 TAC specified for flathead sole in the BSAI is 16,150 metric tons (mt) as established by the 2004 harvest specifications for groundfish of the BSAI (69 FR 9242, February 27, 2004).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2004 TAC specified for flathead sole will be reached. Therefore, the Regional Administrator is

establishing a directed fishing allowance of 15,150 mt, and is setting aside the remaining 1,000 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for flathead sole in the BSAI.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of the flathead sole fishery in the BSAI.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 30, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–17767 Filed 7–30–04; 1:45 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 149
Wednesday, August 4, 2004

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–91–AD]

RIN 2120–AA64

Airworthiness Directives; Various Transport Category Airplanes on Which Cargo Restraint Strap Assemblies Have Been Installed per Supplemental Type Certificate (STC) ST01004NY

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to various transport category airplanes on which cargo restraint strap assemblies have been installed per STC ST01004NY. That action would have required revising the airplane flight manual to include a procedure for discontinuing the use of certain cargo restraint strap assemblies installed per STC ST01004NY, if used as the only cargo restraint. This new action revises the proposed rule by adding a requirement to revise the airplane weight and balance manual to include the same procedure described previously. The actions specified by this new proposed AD are intended to prevent shifting or unrestrained cargo in the cargo compartment, which could cause an unexpected change in the airplane's center of gravity, damage to the airplane structure and/or flight control system, a hazard to the flightcrew, and/or possible loss of controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by August 30, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–91–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–91–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.

FOR FURTHER INFORMATION CONTACT: Jon Hjelm, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stuart Ave., suite 410, Westbury, New York 11590; telephone (516) 228–7323; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NM–91–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–91–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to various transport category airplanes on which cargo restraint strap assemblies have been installed per Supplemental Type Certificate (STC) ST01004NY, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on July 29, 2003 (68 FR 44495). That NPRM proposed to require revising the airplane flight manual (AFM) to include a procedure for discontinuing the use of certain cargo restraint strap assemblies installed per STC ST01004NY, if used as the only cargo restraint. That NPRM was prompted by reports of incorrect installation of cargo restraint strap assemblies having part number (P/N) 1519–MCIDS. The reports also indicate the use of incorrect pallet and strap combinations, and the use of straps inappropriate for the type of cargo being restrained. Shifting or unrestrained cargo due to improper installation of cargo straps could cause an unexpected change in the airplane's center of gravity, damage to the airplane structure and/or flight control system, a hazard to the flightcrew, and/or possible loss of controllability of the airplane.

Comments Received

Due consideration has been given to the comments received in response to the original NPRM.

Support for the Original NPRM

Several commenters generally support the original NPRM.

Request To Clarify the Intent of the Original NPRM

Several commenters state that the wording of the original NPRM is confusing. The commenters indicate that they misinterpreted the intent of the original NPRM and concluded that the NPRM prohibits the use of cargo restraint strap assemblies having P/N 1519–MCIDS. The commenters suggest that the original NPRM be revised to clarify that the cargo restraint straps listed in the STC are not the cause of the unsafe condition, and that these straps may be used in accordance with the airplane manufacturers' weight and balance manuals (WBM), when strap installations are appropriate.

We agree that the straps listed in the STC are not the cause of the unsafe condition. The actual intent of the original NPRM is to prohibit the use of supplemental type certificate (STC) ST01004NY to install cargo restraint strap assemblies. We also agree with the commenters' request to allow use of the straps per the WBM under certain conditions. Paragraph (a) of this supplemental NPRM has been revised to clarify that the use of STC ST01004NY shall be discontinued as the only means of installing certain cargo restraint straps, and that these straps may be used if they are installed per the airplane manufacturers' WBMs, and within the strap rated load (5,000 lbs.).

Request To Require Revising the Airplane WBM

Two commenters request a change to the original NPRM to require revising the airplane WBM. (The original NPRM requires revising the Limitations Section of the AFM to include information to discontinue the use of certain cargo restraint straps as the only means of securing cargo.) The commenters note that cargo-loading personnel do not refer to the AFM, but they do look at the cargo loading guidelines included in the airplane WBM.

We agree with the commenters' request for the reason given by the commenters. Paragraph (a) of this supplemental NPRM has been revised to require revising both the AFM and the WBM by inserting text that prohibits the use of STC ST01004NY to install cargo restraint strap assemblies having P/N 1519–MCIDS, if the strap assemblies are the only means of cargo restraint.

Request To Address Another Unsafe Condition

Two commenters note the original NPRM allows continued use of the cargo restraint straps listed in STC ST01004NY as supplemental cargo restraints in conjunction with TSO C90c nets. The commenters state that this could create another unsafe condition because of the relative stiffness of the straps compared to the cargo nets; the straps would carry most of the cargo load. The commenters suggest that the original NPRM be changed to eliminate this potentially unsafe combination of cargo restraint straps and cargo nets.

We agree with the commenters' request. We find that combining the cargo restraint straps listed in STC ST01004NY with cargo nets could create a potentially unsafe condition. Therefore, we have removed the provision allowing the use of the subject cargo restraint straps in conjunction with cargo nets from paragraph (a) of this supplemental NPRM.

Request To Address Cargo Restrained to the Airplane Floor

Several commenters note that the original NPRM does not address cargo that is directly restrained to the structure of the airplane floor. They suggest that the original NPRM be revised to address this situation.

We agree with the commenters' request. We have changed paragraph (a) of this supplemental NPRM to allow continued use of cargo restraint straps as supplemental restraints to secure cargo to TSO C90c/NAS3610 pallets, or to the cargo restraint fittings in the airplane floor, per the WBM, and within the strap rated load (5,000 lbs.).

Request for Alternative Cargo Restraint Procedures

One commenter notes that the original NPRM prohibits further use of STC ST01004NY, but does not provide instructions for alternative cargo restraint procedures. We infer that the commenter is requesting that additional information be included in the original NPRM to address alternative procedures for restraining cargo.

We do not agree. The supplemental NPRM does not include alternative procedures for restraining cargo in lieu of using STC ST01004NY as the intent of this action is to prohibit further use of STC ST01004NY to install certain cargo restraint straps, not to provide alternative cargo restraint procedures. After appropriate installation instructions are developed in cooperation with the STC holder, the STC may be amended. Operators should follow the existing cargo loading and restraint guidelines in the applicable airplane WBM. We have not changed this supplemental NPRM regarding this issue.

Request To Create New Technical Standard Order (TSO)

Several commenters suggest that there is a larger problem regarding cargo restraint straps and installation of the straps within the air transport industry. The commenters state that a new TSO should be issued regarding cargo restraint straps. The commenters also suggest that an industry standard for acceptable strap installation be created to ensure safety in cargo loading/restraint operations. The commenters did not request any specific changes to the original NPRM.

We acknowledge the commenters' concerns. We have been working with the Society of Automotive Engineers (SAE) to create a new TSO for cargo restraint straps based on SAE design criteria. The straps may be installed per the airplane manufacturers' cargo-loading instructions, which are contained in the applicable airplane WBM. Until the new TSO becomes available, we will consider issuing a new special airworthiness information bulletin to emphasize the need for operators to follow the existing approved cargo loading and restraint guidelines. We have not changed this supplemental NPRM regarding this issue.

Request To Withdraw Original NPRM

One commenter states that STC ST01004NY is not an appropriate method for approving the use of certain cargo restraint straps because there is no type design or type certificate for cargo straps; therefore, an NPRM to prohibit the use of the STC is not necessary. We infer that the commenter requests we withdraw the original NPRM.

We do not agree with the commenter's request. An unsafe condition has been identified and an AD is the appropriate vehicle for mandating action to correct the unsafe condition. Further, the STC is the type design approval for the installation of P/N 1519–MCIDS strap assemblies, and was issued to provide specific instructions for installation of those strap assemblies. We have not changed this supplemental NPRM regarding this issue.

Request To Clarify Applicability of Original NPRM

One commenter, an airplane manufacturer, states that at some point in the future the applicability of the original NPRM may be expanded to

include airplanes that do not have STC ST01004NY installed. Another commenter states that the applicability of the original NPRM is vague and requests clarification of airplanes affected by the original NPRM.

We agree that clarification of the applicability should be provided. The basis of the applicability for this supplemental NPRM is the approved model list (AML) attached to STC ST01004NY. Only the airplane models currently listed in the AML are allowed to install STC ST01004NY, and those are the only airplanes subject to this supplemental NPRM. If we need to expand the applicability of this supplemental NPRM in the future, another AD action will be published in the **Federal Register** notifying the public of the proposed change. We have not changed this supplemental NPRM regarding this issue.

Request To Revise Cost Impact

One commenter states that the cost impact section of the original NPRM addresses only the cost of the AFM revision, and fails to take into consideration the financial impact of the consequences of the change, specifically the effect on cargo shippers and carriers. The same commenter also states that the cost impact fails to address passenger-carrying narrow-bodied and wide-bodied airplanes that also use the specified cargo restraint straps to secure cargo or baggage to tie-down locations or contoured pallets. Another commenter mentions the economic impact to operators when cargo has to be tied down to the airplane floor, which results in the adjacent cargo pallet positions remaining empty. That same commenter also states that tied-down cargo results in longer ground time, which also costs money. We infer that the commenters request a revision to the cost impact section of the original NPRM.

We acknowledge these commenters' concerns regarding the larger scale economic impact of the supplemental NPRM. However, as stated in the Cost Impact section, only costs associated with accomplishment of the actions required by the AD are addressed in an AD. We do not include an estimate of the long-term financial impact to operators. ADs require specific actions to address specific unsafe conditions and consequently may appear to impose costs that would not otherwise be borne by operators. However, because operators have a general obligation to maintain their airplanes in an airworthy condition, this appearance is deceptive. Attributing those costs solely to this AD is unrealistic because, in the interest of maintaining safe airplanes, prudent operators would accomplish these actions even if they were not required by the AD.

In regard to the passenger-carrying airplanes, the Cost Impact section does address those airplanes because they are included in the applicability of the supplemental NPRM. The applicability is not limited to cargo airplanes, but includes various transport category airplanes on which cargo restraint strap assemblies have been installed per STC ST01004NY. We have not changed this supplemental NPRM in regard to the larger scale economic impact of the NPRM. We have changed this supplemental NPRM to include the estimated cost of revising the WBM.

Request To Correct Referenced Part Number

One commenter states that P/N 1519–MCIDS, as cited in the original NPRM, is incorrect and should be cited as P/N 1519–MC1DS (the 7th character should be the numeral ''1'' and not the capital letter ''I''). The commenter states that the mistake probably originated from STC ST01004NY, which listed the 7th character of the P/N as an ''I.''

We do not agree with the commenter's request. During the STC application process, the STC holder for STC ST01004NY submitted a data package to the FAA. The drawing included in the data package references the 7th character of the P/N as an ''I'' not a ''1.'' The P/N referenced in the original NPRM is correct. We have not changed this supplemental NPRM regarding this issue.

Conclusion

Since certain changes described above expand the scope of the original NPRM, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Changes to 14 CFR Part 39/Effect on the Original NPRM

On July 10, 2002, the FAA issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's airworthiness directives system. The regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance (AMOCs). Because we have now included this material in part 39, we no longer need to include it in each individual AD. In this supplemental NPRM, paragraph (c) of the original NPRM has been removed, and paragraph (b) of the original NPRM has been revised to only identify the office authorized to approve AMOCs.

Cost Impact

There are approximately 1,150 transport category airplanes of the affected design in the worldwide fleet. We estimate that 735 airplanes of U.S. registry would be affected by this supplemental NPRM.

It would take approximately 1 work hour per airplane to accomplish the proposed AFM revision, at an average labor rate of $65 per work hour. Based on this figure, the cost impact of the proposed AFM revision is estimated to be $47,775, or $65 per airplane.

It would take approximately 1 work hour per airplane to accomplish the proposed WBM revision, at an average labor rate of $65 per work hour. Based on this figure, the cost impact of the proposed WBM revision is estimated to be $47,775, 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 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:

Transport Category Airplanes: Docket 2002–NM–91–AD.

Applicability: The following transport category airplanes, certificated in any category, on which cargo restraint strap assemblies part number (P/N) 1519–MCIDS have been installed per Supplemental Type Certificate (STC) ST01004NY.

TABLE 1.—MANUFACTURERS/AIRPLANE MODELS

Manufacturer	Airplane model
Aerospatiale	ATR42 and ATR72 series airplanes.
Airbus	A300 B2 and A300 B4 series airplanes; A300 B4–600, A300 B4–600R, and A300 F4–600R (collectively called A300–600) series airplanes; A310, A320, A321, A330, and A340 series airplanes.
Boeing	707–100, 707–200, 707–100B, and 707–100B series airplanes; 727, 737, 747, 757, and 767 series airplanes.
British Aerospace	BAe 146 series airplanes and Avro 146–RJ series airplanes.
Fokker	F27 and F.28 series airplanes.
Lockheed	188A and 188C airplanes, and L–1011 series airplanes.
Maryland Air Industries, Inc.	F–27 series airplanes and FH–227 series airplanes.
McDonnell Douglas	DC–7, DC–7B, and DC–7C airplanes; DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, and DC–8–43 airplanes; DC–8–51, DC–8–52, DC–8–53, and DC–8–55 airplanes; DC–8F–54 and DC–8F–55 airplanes; DC–8–61, DC–8–62, and DC–8–63 airplanes; DC–8–61F, DC–8–62F, and DC–8–63F airplanes; DC–8–71, DC–8–72, and DC–8–73 airplanes; DC–8–71F, DC–8–72F, and DC–8–73F airplanes; DC–9–11, DC–9–12, DC–9–13, DC–9–14, DC–9–15, and DC–9–15F airplanes; DC–9–21 airplanes; DC–9–31, DC–9–32, DC–9–32 (VC–9C), DC–9–32F, DC–9–33F, DC–9–34, DC–9–34F, DC–9–41, DC–9–51, DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87) airplanes; MD–88 airplanes; MD–90–30 airplanes; 717–200 airplanes; DC–10–10 and DC–10–10F airplanes; DC–10–15 airplanes; DC–10–30 and DC–10–30F (KDC–10) airplanes; DC–10–40 and DC–10–40F airplanes; MD–10–10F and MD–10–30F airplanes; and MD–11 and MD–11F airplanes.

Compliance: Required as indicated, unless accomplished previously.

To prevent shifting or unrestrained cargo in the cargo compartment, which could cause an unexpected change in the airplane's center of gravity, damage to the airplane structure and/or flight control system, a hazard to the flightcrew, and/or possible loss of controllability of the airplane, accomplish the following:

Revisions to Airplane Flight Manual (AFM) and Weight and Balance Manual (WBM)

(a) Within 14 days after the effective date of this AD, revise the Limitations Section of the applicable AFM, and the cargo-loading procedures in the applicable WBM, to include the following information (this may be accomplished by inserting a copy of this AD into the AFM and the WBM):

''Discontinue the use of Supplemental Type Certificate (STC) ST01004NY to install Airline Container Manufacturing Company, Inc., cargo restraint straps, part number 1519–MCIDS, as the only means of securing cargo to Technical Standard Order (TSO) C90c/NAS3610 pallets. Such cargo restraint straps may continue to be used as supplemental restraints to secure cargo to TSO C90c/NAS3610 pallets, or to the cargo restraint fittings in the airplane floor, per the airplane manufacturer's weight and balance manuals, and within the strap rated load (5,000 lbs.).''

Note 1: If the statement in paragraph (a) of this AD has been incorporated into the general revisions of the AFM and the WBM, the general revisions may be incorporated into the AFM and the WBM, and the copy of this AD may then be removed from the AFM and the WBM.

Alternative Methods of Compliance

(b) In accordance with 14 CFR 39.19, the Manager, New York Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance (AMOCs) for this AD.

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

Kyle L. Olsen,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–17764 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18759; Directorate Identifier 2003–NM–280–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 707–100, –100B, –300, –300B (–320B Variant), –300C, and –E3A (Military) Series Airplanes; Model 720 and 720B Series Airplanes; Model 737–100, –200, –200C, –300, –400, and –500 Series Airplanes; and Model 747 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing transport category airplanes. This proposed AD would require repetitive tests of the overwing fuel fill ports for certain wing tanks; an electrical bonding resistance test between the bulkhead fittings of the

engine fuel feed tube and the front spar inside the fuel tank of the wings; other specified actions; and applicable corrective actions if necessary. This proposed AD is prompted by our determination that this AD is necessary to reduce the potential for ignition sources inside fuel tanks. We are proposing this AD to prevent arcing or sparking at the interface between the bulkhead fittings of the engine fuel feed tube and the front spar inside the fuel tank of the wings and between the overwing fuel fill ports and the airplane structure during a lightning strike. Such arcing or sparking could provide a possible ignition source for the fuel vapor inside the fuel tank and cause consequent fuel tank explosions.

DATES: We must receive comments on this proposed AD by September 20, 2004.

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

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC 20590.
- By fax: (202) 493–2251.
- 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.

You can get the service information identified in this proposed AD from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

You may examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Sulmo Mariano, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6501; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Docket Management System (DMS)

The FAA has implemented new procedures for maintaining AD dockets electronically. As of May 17, 2004, new AD actions are posted on DMS and assigned a docket number. We track each action and assign a corresponding directorate identifier. The DMS AD docket number is in the form ''Docket No. FAA–2004–99999.'' The Transport Airplane Directorate identifier is in the form ''Directorate Identifier 2004–NM–999–AD.'' Each DMS AD docket also lists the directorate identifier (''Old Docket Number'') as a cross-reference for searching purposes.

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2004–18759; Directorate Identifier 2003–NM–280–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that website, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications that affect you. You can get more information about plain language at *http://www.faa.gov/language* and *http://www.plainlanguage.gov.*

Examining the Docket

You may examine the AD docket in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

We have examined the underlying safety issues involved in recent fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (67 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (*i.e.*, type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with another latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

Based on this process, we have determined that the actions identified in this proposed AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result

in fuel tank explosions and consequent loss of the airplane.

In addition, we have received a report indicating that, during an electrical bonding and grounding test of 747 wing fuel tank penetrations, the bulkhead fittings of the engine fuel feed tube were not electrically bonded to the front spar. The same condition is found on some Model 707 series airplanes; on all Model 737–100, –200, –300, –400, and –500 series airplanes; and on all Model 747 series airplanes. We also received a report indicating that a lightning test showed a higher-than-expected electrical current in the engine fuel feed tubes inside the wing fuel tank on Model 747 series airplanes.

If the bulkhead fittings of the engine fuel feed tubes are not electrically bonded, there is a potential for arcing or sparking at the interface between the bulkhead fittings of the engine fuel feed tube and the wing front spar during a lightning strike. This event, in turn, could provide a possible ignition source for the fuel vapor inside the fuel tank and result in fuel tank explosions.

We also received a report that an inspection of the overwing fuel fill port showed that the overwing filler adapter may not be bonded to the upper wing skin on Model 707 and 720 series airplanes. The improper bonding has been attributed to incorrect installation or missing electrical bond data in the airplane maintenance manual or installation drawings. Also, an inspection done for SFAR 88 revealed that overwing fuel fill ports for wing tanks No. 1 and No. 4 and the center wing tank on Boeing Model 707 and 720 series airplanes can be lightning ignition sources because of their location. The overwing fuel fill ports for wing tanks No. 1 and No. 4 are located in an area where lightning, after initially attaching to the engine cowls or nose of the airplane, remains attached to the airplane and sweeps back as the airplane moves forward through the lightning channel. This creates a series of attachment points behind the initial attachment point. The overwing fuel fill ports are located either behind the engine nacelles or behind the nose of the airplane and are subject to these subsequent lightning attachments.

If the overwing fuel fill ports for wing tanks No. 1 and No. 4 and the center wing tank are not electrically bonded correctly, there is a potential for arcing or sparking at the interface between the ports and the airplane structure during a lightning strike. This event, in turn, could provide a possible ignition source for the fuel vapor inside the fuel tank and cause consequent fuel tank explosions.

Relevant Service Information

We have reviewed and approved the following service bulletins:

REFERENCED SERVICE BULLETINS

For model	Boeing
707–E3A (military), –100, –100B, –300, –300B (–320B variant), and –300C series airplanes; and 720 series airplanes.	Alert Service Bulletin A3505, dated November 1, 2001.
707–100, –100B, –300, –300B, and –300C series airplanes; and 720 and 720B series airplanes.	Service Bulletin 3513, dated November 6, 2003.
737–100, –200, –200C, –300, –400, and –500 series airplanes	Service Bulletin 737–28A1174, Revision 1, dated July 18, 2002.
747–100, –100B, –100B SUD, –200B, –200C, –200F, –300, –400, –400D, and –400F series airplanes; and 747SP and 747SR series airplanes.	Alert Service Bulletin 747–28A2239, Revision 1, dated October 17, 2002.
747–400 and –400F series airplanes	Alert Service Bulletin 747–28A2245, Revision 1, dated August 21, 2003.

Boeing Service Bulletin 3513 describes procedures for repetitive electrical bonding resistance tests of the overwing fuel fill ports for wing tanks No. 1 and No. 4 and the center wing tank, and applicable corrective actions. The applicable corrective actions include:

- Cleaning certain surfaces;
- Applying certain sealants, chemical film coating, and an aero smoother;
- Installing the filler adapter and electrically bonding it; and
- Testing the fuel feed system for leaks.

The remaining service bulletins describe procedures for an electrical bonding resistance test between the bulkhead fittings of the engine fuel feed tube and the front spar inside the fuel tank of the wings, other specified actions, and applicable corrective actions. The other specified actions include the following:

- Draining the fuel tanks;
- Removing the fuel feed tubes, fuel manifold, and the bulkhead fittings; and
- Cleaning the fittings and front spar areas.

The applicable corrective actions include:

- Cleaning certain surfaces;
- Applying certain sealants;
- Installing certain parts; and
- Testing the fuel feed system for leaks.

We have determined that accomplishment of the actions specified in the applicable service bulletin will adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. Therefore, we are proposing this AD, which would require, for certain airplanes, repetitive electrical bonding resistance tests of the overwing fuel fill ports for wing tanks No. 1 and No. 4 and the center wing tank, and applicable corrective actions. The proposed AD also would require, for certain other airplanes, an electrical bonding resistance test between the bulkhead fittings of the engine fuel feed tube and the front spar inside the fuel tank of the wings, other specified actions, and applicable corrective actions. The proposed AD would require using the service information described previously to perform these actions, except as discussed under ''Difference Between the Proposed AD and the Service Bulletins.''

Difference Between the Proposed AD and Certain Service Bulletins

Although certain service bulletins recommend accomplishing the electrical bonding resistance test ''at the earliest opportunity where manpower, materials and facilities are available,'' we have determined that this imprecise compliance time would not address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for this proposed AD, we 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 test. In light of all of these factors, we find a compliance time of 5 years for completing the proposed actions to be warranted, in that it represents an appropriate interval of time for affected airplanes to continue to operate without compromising safety.

Costs of Compliance

This proposed AD would affect about 4,303 series airplanes worldwide. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

For model	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
707–E3A (military), –100, –100B, –300, –300B (including –320B variant), and –300C series airplanes; and 720 series airplanes.	16	$65	$1,040	41	$42,640
707–100, –100B, –300, –300B, and –300C series airplanes; and 720 and 720B series airplanes.	Between 4 and 6.	65	Between 260 and 390.	73	Between 18,980 and 28,470
737–100, –200, –200C, –300, –400, and –500 series airplanes.	8	65	520	1,095	569,400
747–100, –100B, –100B SUD, –200B, –200C, –200F, –300, –400, –400D, and –400F series airplanes; and 747SP and 747SR series airplanes.	70	65	4,550	257	1,169,350
747–400 and –400F series airplanes	18	65	1,170	1	1,170

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed 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. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2004–18759; Directorate Identifier 2003–NM–280–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this AD action by September 20, 2004.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the airplanes listed in Table 1 of this AD, certificated in any category.

TABLE 1.—APPLICABILITY

Model	As listed in
707–E3A (military), –100, –100B, –300, –300B (–320B variant), and –300C series airplanes; and 720 series airplanes	Boeing Alert Service Bulletin A3505, dated November 1, 2001.
707–100, –100B, –300, –300B, and –300C series airplanes; and 720 and 720B series airplanes.	Boeing Service Bulletin 3513, dated November 6, 2003.
737–100, –200, –200C, –300, –400, and –500 series airplanes	Boeing Service Bulletin 737–28A1174, Revision 1, dated July 18, 2002.
747–100, –100B, –100B SUD, –200B, –200C, –200F, –300, 400, –400D, and –400F series airplanes; and 747SP and 747SR series airplanes.	Boeing Alert Service Bulletin 747–28A2239, Revision 1, dated October 17, 2002.
747–400 and –400F series airplanes	Boeing Alert Service Bulletin 747–28A2245, Revision 1, dated August 21, 2003.

Unsafe Condition

(d) This AD was prompted by our determination that this AD is necessary to reduce the potential for ignition sources inside fuel tanks. We are issuing this AD to prevent arcing or sparking at the interface between the bulkhead fittings of the engine fuel feed tube and the front spar of the wings and between the overwing fuel fill ports and the airplane structure during a lightning strike. Such arcing or sparking could provide a possible ignition source for the fuel vapor inside the fuel tank and cause consequent fuel tank explosions.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Service Bulletins

(f) The term ''service bulletin,'' as used in this AD, means the Work Instructions of the applicable service bulletins specified in the ''As Listed In'' column of Table 1 of this AD.

(g) Actions specified in paragraphs (h) through (i) of this AD that were done before the effective date of this AD in accordance with the applicable service information listed in Table 2 of this AD are acceptable for compliance with the applicable requirements of this AD.

TABLE 2.—ACCEPTABLE ORIGINAL ISSUES OF SERVICE BULLETINS

For model	Boeing
(1) 737–100, –200, –200C, –300, –400, and –500 series airplanes	Service Bulletin 737–28A1174, dated December 20, 2001.
(2) 747–100, –100B, –100B SUD, –200B, –200C, –200F, –300, –400, –400D, and –400F series airplanes; and 747SP and 747SR series airplanes.	Alert Service Bulletin 747–28A2239, dated November 29, 2001.
(3) 747–400 and –400F series airplanes	Alert Service Bulletin 747–28A2245, dated November 26, 2002.

Resistance Test, Other Specified Actions, and Corrective Actions

(h) For the airplanes identified in paragraphs (h)(1) through (h)(4) of this AD: Within 5 years after the effective date of this AD, do an electrical bonding resistance test between the bulkhead fittings of the engine fuel feed tube and the front spar inside the fuel tank of the wings to determine the resistance, and do other specified actions and applicable corrective actions, by accomplishing all the actions specified in paragraph 3.B. of the applicable service bulletin. Do the actions in accordance with the service bulletin. Do the applicable corrective actions before further flight.

(1) Model 707–E3A (military), –100, –100B, –300, –300B (–320B variant), and –300C series airplanes; and Model 720 series airplanes.

(2) Model 737–100, –200, –200C, –300, –400, and –500 series airplanes.

(3) Model 747–100, –100B, –100B SUD, –200B, –200C, –200F, –300, –400, –400D, and –400F series airplanes; and Model 747SP and 747SR series airplanes.

(4) Model 747–400 and –400F series airplanes.

(i) For Model 707–100, –100B, –300, –300B, and –300C series airplanes; and Model 720 and 720B series airplanes: Within 5 years after the effective date of this AD, do an electrical bonding resistance test of the over-wing fuel fill ports for the wing tanks No. 1 and No. 4 and the center wing tank to determine the resistance, and do applicable corrective actions, by accomplishing all the actions specified in paragraph 3.B. of the applicable service bulletin. Do the actions in accordance with the service bulletin. Do the applicable corrective actions before further flight. Repeat the electrical bonding resistance test at intervals not to exceed 14,000 flight hours.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Issued in Renton, Washington, on July 15, 2004.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–17763 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–211–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300 B4 Series Airplanes and Model A300 B4–600, A300 B4–600R, and A300 F4–600R (Collectively Called A300–600) Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to all Airbus Model A300 B4 series airplanes and all Airbus Model A300–600 series airplanes, that would have superseded an existing AD that currently requires a one-time high frequency eddy current inspection to detect cracking of the splice fitting at fuselage frame (FR) 47 between stringers 24 and 25; and corrective actions if necessary. The original NPRM proposed to require new repetitive inspections of an expanded area, and would have added airplanes to the applicability in the existing AD. This new action revises the original NPRM by adding airplanes to the applicability. The actions specified by this new proposed AD are intended to detect and correct cracking of the splice fitting at fuselage FR 47, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by August 30, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–211–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–211–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 Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

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–211–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–211–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to all Airbus Model A300 B4 series airplanes and all Airbus Model A300–600 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on December 17, 2003 (68 FR 70206). That NPRM proposed to supersede AD 2001–03–14, amendment 39–12118 (66 FR 10957, February 21, 2001), which is applicable to certain Airbus Model A300 series airplanes and all Airbus Model A300–600 series airplanes. That NPRM would have added new repetitive inspections of an expanded area of the splice fitting at fuselage frame (FR) 47, and would have added airplanes to the applicability of the existing AD. That NPRM was prompted by cracks found on airplanes on which the modification required by the existing AD had been done. That condition, if not corrected, could result in reduced structural integrity of the airplane.

Comments

Due consideration has been given to the comments received in response to the original NPRM. One commenter has no technical objection.

Request To Reference Latest Revisions of Service Information

One commenter asks that Airbus Service Bulletin A300–53–6123, Revision 02, dated November 12, 2002, be added to the original NPRM. (Revision 01 of that service bulletin was referenced in the original NPRM for accomplishment of certain actions.) The commenter states that Revision 02 adds improvements after the service bulletin kits specified in Revision 01 were validated on an airplane, and notes that adding Revision 02 will eliminate requests for approval of alternative methods of compliance. The commenter also notes that Revision 02 adds nine airplanes to the effectivity of the service bulletin.

Another commenter asks that Airbus Service Bulletin A300–53–0350, Revision 02, dated November 12, 2002, be added to the original NPRM. (Revision 01 of that service bulletin was referenced in the original NPRM for accomplishment of certain actions.)

The FAA agrees with the commenters' requests. The procedures in Revision 02 of both service bulletins are essentially the same as those in Revision 01 of the referenced service bulletins. However, Revision 02 of the service bulletins adds nine U.S. airplanes to the effectivity of the service bulletins. Accordingly, the Cost Impact section of this supplemental NPRM has been changed to include the additional airplanes. We also have revised paragraphs (a), (b), and (c) of this supplemental NPRM to refer to Revision 02 of the Airbus service bulletins as the appropriate sources of service information for accomplishment of the required actions. We have added a new paragraph (d) (and reidentified subsequent paragraphs accordingly) to state that inspections and repairs accomplished before the effective date of this AD per Revision 01 of the service bulletins are acceptable for compliance with the requirements of this supplemental NPRM.

Request To Remove Interim Action

One commenter, the manufacturer, states that the repetitive inspections should not be considered as an interim action. The commenter adds that, ''Due to the fact that, in this specific location, the splice is considered as a ''fuse part'' (to be replaced when found cracked, the residual strength analysis has shown that the structure is able to sustain ultimate loads with the complete failure of splices—both sides—and able to sustain limit loads with the complete failure of frame and splices) * * *'' The commenter states that the Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, agrees that the repetitive inspections required by French airworthiness directive 2002–184(B), dated April 3, 2002 (referenced in the original NPRM), are the final fix.

We agree. In light of the data provided by the commenter, and consistent with the findings of the DGAC, we will not retain the Interim Action section in this supplemental NPRM. In making this determination, we consider that long-term continued operational safety in this case will be adequately ensured by repetitive inspections to detect cracking before it represents a hazard to the airplane, and by repair within the specified time limits. Accordingly, the Interim Action section has been removed from this supplemental NPRM.

Conclusion

Since the addition of airplanes to the applicability of this supplemental NPRM expands the scope of the originally proposed rule, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Cost Impact

This supplemental NPRM would affect about 92 airplanes of U.S. registry.

The inspection of an expanded area that is proposed in this AD action would take approximately 29 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the proposed inspection on U.S. operators is estimated to be $173,420, or $1,885 per airplane, per inspection cycle.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD

rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–12118 (66 FR 10957, February 21, 2001), and by adding a new airworthiness directive (AD), to read as follows:

Airbus: Docket 2002–NM–211–AD. Supersedes AD 2001–03–14, Amendment 39–12118.

Applicability: All Model A300 B4–600, B4–600R, and F4–600R (Collectively Called A300–600) series airplanes; and all Model A300 B4 series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct cracking of the splice fitting at fuselage frame (FR) 47, which could result in reduced structural integrity of the airplane, accomplish the following:

Repetitive Inspections

(a) For airplanes defined in Airbus Service Bulletin A300–53–0350, Revision 02, dated November 12, 2002: Do a high frequency eddy current (HFEC) inspection to detect cracking of the splice fitting at fuselage FR 47 between stringers 24 and 26 (left- and right-hand sides), at the applicable times specified in paragraph (a)(1) or (a)(2) of this AD. Repeat the inspection thereafter at the earlier of the flight-cycle/flight-hour intervals specified in the applicable column in Table 2 of Figure 1 and Sheet 1 of the Accomplishment Instructions of the service bulletin. Do the inspections in accordance with the service bulletin, excluding Appendix 01.

(1) For airplanes that have accumulated 20,000 or more total flight cycles as of the effective date of this AD: Do the initial inspection at the later of the times specified in paragraphs (a)(1)(i) and (a)(1)(ii) of this AD:

(i) At the earlier of the flight-cycle/flight-hour intervals after the effective date of this AD, as specified in the applicable column in Table 1 of Figure 1 and Sheet 1 of the Accomplishment Instructions of the service bulletin.

(ii) Within 750 flight cycles or 1,500 flight hours after the effective date of this AD, whichever is first.

(2) For airplanes that have accumulated fewer than 20,000 total flight cycles as of the effective date of this AD: Do the initial inspection at the later of the times specified in paragraphs (a)(2)(i) and (a)(2)(ii) of this AD.

(i) At the earlier of the flight-cycle/flight-hour intervals after the effective date of this AD, as specified in the applicable column in Table 1 of Figure 1 and Sheet 1 of the Accomplishment Instructions of the service bulletin.

(ii) Within 1,800 flight cycles or 3,000 flight hours after the effective date of this AD, whichever is first.

(b) For airplanes defined in Airbus Service Bulletin A300–53–6123, Revision 01, dated December 18, 2001: Do the HFEC inspection required by paragraph (a) of this AD at the applicable times specified in paragraph (b)(1) or (b)(2) of this AD. Repeat the inspection thereafter at the earlier of the flight-cycle/flight-hour intervals specified in the applicable column in Table 2 of Figure 1 and Sheet 1 of the Accomplishment Instructions of the service bulletin. Do the inspections in accordance with the service bulletin, excluding Appendix 01.

(1) For airplanes that have accumulated 10,000 or more total flight cycles as of the effective date of this AD: Do the initial inspection within 750 flight cycles or 1,900 flight hours after the effective date of this AD, whichever is first.

(2) For airplanes that have accumulated fewer than 10,000 total flight cycles as of the effective date of this AD: Do the initial inspection at the later of the times specified in paragraphs (b)(2)(i) and (b)(2)(ii) of this AD.

(i) At the earlier of the flight-cycle/flight-hour intervals after the effective date of this AD, as specified in the applicable column in Table 1 of Figure 1 and Sheet 1 of the Accomplishment Instructions of the service bulletin.

(ii) Within 1,500 flight cycles or 3,800 flight hours after the effective date of this AD, whichever is first.

Repair

(c) Repair any cracking found during any inspection required by this AD before further flight, in accordance with Airbus Service Bulletin A300–53–0350 or A300–53–6123, both Revision 02, both excluding Appendix 01, both dated November 12, 2002; as applicable. Where the service bulletins specify to contact Airbus in case of certain crack findings, this AD requires that a repair be accomplished before further flight in accordance with a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Direction Generale de l'Aviation Civile (DGAC) (or its delegated agent).

Credit for Previous Issues of Airbus Service Bulletin

(d) Accomplishment of the actions before the effective date of this AD in accordance with Airbus Service Bulletin A300–53–0350 or A300–53–6123, Revision 01, dated December 18, 2001; is considered acceptable for compliance with the corresponding actions specified in this AD.

Alternative Methods of Compliance

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

Note 1: The subject of this AD is addressed in French airworthiness directive 2002–184(B), dated April 3, 2002.

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

Kyle L. Olsen,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–17762 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–18752; Directorate Identifier 2004–NM–107–AD]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) for certain EMBRAER Model EMB–135 and EMB–145 series airplanes. That AD currently requires replacing the nose landing gear wheel nuts and associated inner and outer seals, and reidentifying the landing gear strut. This proposed AD would add an airplane to the applicability and revise a part number for a replacement part. This proposed AD is prompted by a report of an invalid part number for the new nose landing gear wheel nut. We are proposing this AD to prevent separation of the wheels from the nose landing gear due to the failure of the outer wheel bearings, and consequent loss of control of the airplane during takeoff and landing.

DATES: We must receive comments on this proposed AD by September 3, 2004.

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

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- *Fax:* (202) 493–2251.
- *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.

You can get the service information identified in this proposed AD from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

You may examine the contents of this AD docket on the Internet at *http://dms.dot.gov*, or at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC.

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

SUPPLEMENTARY INFORMATION:

Docket Management System (DMS)

The FAA has implemented new procedures for maintaining AD dockets electronically. As of May 17, 2004, new AD actions are posted on DMS and assigned a docket number. We track each action and assign a corresponding directorate identifier. The DMS AD docket number is in the form ''Docket No. FAA–2004–99999.'' The Transport Airplane Directorate identifier is in the form ''Directorate Identifier 2004–NM–999–AD.'' Each DMS AD docket also lists the directorate identifier (''Old Docket Number'') as a cross-reference for searching purposes.

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2004–18752; Directorate Identifier 2004–NM–107–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of our docket Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov*.

We are reviewing the writing style we currently use in regulatory documents. We are interested in your comments on whether the style of this document is clear, and your suggestions to improve the clarity of our communications that affect you. You can get more information about plain language at *http://www.faa.gov/language* and *http://www.plainlanguage.gov*.

Examining the Docket

You may examine the AD docket in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

On April 26, 2004, we issued AD 2004–09–15, amendment 39–13604 (69 FR 24940, May 5, 2004), for certain EMBRAER Model EMB–135 and EMB–145 series airplanes. That AD requires replacing the nose landing gear wheel nuts and associated inner and outer seals, and reidentifying the landing gear strut. That AD was prompted by reports that the outer wheel bearings of certain nose landing gear wheels have failed. We issued that AD to prevent separation of the wheels from the nose landing gear due to the failure of the outer wheel bearings, and consequent loss of control of the airplane during takeoff and landing.

Actions Since Existing AD Was Issued

Since we issued AD 2004–09–15, we received a report indicating that a part number (P/N) in the AD was invalid. Due to a typographical error, paragraph (a) of that AD (specified as paragraph (f) of this proposed AD) specifies to replace the nose landing gear wheel nuts ''with new wheel nuts, P/N 170–0082.'' P/N 170–0082 does not exist; the correct P/N is 1170–0082.

In addition, there is a typographical error in the applicability of AD 2004–09–15. Serial number (S/N) 146375 does not exist; the correct S/N is 145375.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in Brazil and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DAC has

kept the FAA informed of the situation described above. We have examined the DAC's findings, evaluated all pertinent information, and determined that AD action is necessary for airplanes of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would supersede AD 2004–09–15 to continue to require replacing the nose landing gear wheel nuts and associated inner and outer seals, and reidentifying the landing gear strut. This proposed AD also would add an airplane to the applicability and revise a part number for a replacement part. The proposed AD would require you to use the service information described in AD 2004–09–15 to perform these actions.

Change to Existing AD

This proposed AD would retain certain requirements of AD 2004–09–15. Since AD 2004–09–15 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2004–09–15	Corresponding requirement in this proposed AD
Paragraph (a)	Paragraph (f).
Paragraph (b)	Paragraph (g).
Paragraph (c)	Paragraph (h).

Costs of Compliance

This proposed AD would affect about 365 airplanes of U.S. registry.

The actions that are required by AD 2004–09–15 and retained in this proposed AD take about 1 work hour per airplane, at an average labor rate of $65 per work hour. Required parts will be provided free of charge by the airplane manufacturer. Based on these figures, the estimated cost of the currently required actions for U.S. operators is $23,725, or $65 per airplane.

Regulatory Findings

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

For the reasons discussed above, I certify that the proposed 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. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. *See* the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing amendment 39–13604 (69 FR 24940, May 5, 2004) and adding the following new airworthiness directive (AD):

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket No. FAA–2004–18752; Directorate Identifier 2004-NM–107-AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by September 3, 2004.

Affected ADs

(b) This AD supersedes AD 2004–09–15, amendment 39–13604.

Applicability

(c) This AD applies to Model EMB–135 and –145 series airplanes having serial numbers (S/N) 145003 through 145373 inclusive, 145375, 145377 through 145391 inclusive, and 145393 through 145408 inclusive; certificated in any category; equipped with nose landing gear struts, part number (P/N) 1170C0000–01 (including all modifications), P/N 1170C0000–02, or P/N 1170C0000–03.

Unsafe Condition

(d) This AD was prompted by a report of an invalid part number for the new nose landing gear wheel nut. We are issuing this AD to prevent separation of the wheels from the nose landing gear due to the failure of the outer wheel bearings, and consequent loss of control of the airplane during takeoff and landing.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Replacement and Reidentification

(f) At the applicable time specified in paragraph (f)(1) or (f)(2) of this AD, replace the nose landing gear wheel nuts, P/N 1170–0007, with new wheel nuts, P/N 1170–0082; replace the associated inner and outer seals, P/N 68–1157 or P/N 72–290, with new seals, P/N 68–1498; and reidentify the struts. Do the actions in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 145–32–0068, Change 04, dated January 20, 2003; or EMBRAER Service Bulletin 145LEG–32–0006, Change 01, dated January 20, 2003; as applicable.

(1) For Model EMB–135 and –145 series airplanes having serial numbers (S/N) 145003 through 145373 inclusive, 145377 through 145391 inclusive, and 145393 through 145408 inclusive: Within 12 months after June 9, 2004 (the effective date of AD 2004–09–15).

(2) For Model EMB–145 series airplane having S/N 145375: Within 12 months after the effective date of this AD.

(g) Actions accomplished before the effective date of this AD per the EMBRAER Service Bulletins listed in Table 1 of this AD are considered acceptable for compliance with the corresponding actions specified in this AD:

TABLE 1.—SERVICE BULLETINS CONSIDERED ACCEPTABLE FOR COMPLIANCE

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

Parts Installation

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

Alternative Methods of Compliance (AMOC)

(i) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(j) Brazilian airworthiness directive 2002–03–01R2, dated April 22, 2003, also addresses the subject of this AD.

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

Kyle L. Olsen,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–17761 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–SW–37–AD]

RIN 2120–AA64

Airworthiness Directives; MD Helicopters, Inc. Model 369A, 369D, 369E, 369F, 369FF, 369H, 369HE, 369HS, 369HM, 500N, and OH–6A Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for the specified MD Helicopters, Inc. (MDHI) model helicopters. The AD would require replacing or reworking certain forward (fwd) and aft landing gear assemblies. This proposal is prompted by five reports of landing gear strut (strut) failures. The actions specified by the proposed AD are intended to prevent cracking of the fwd and aft struts, failure of a strut, and subsequent loss of control of the helicopter during landing.

DATES: Comments must be received on or before October 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2003–SW–37–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.* Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John Cecil, Aviation Safety Engineer, FAA, Los Angeles Aircraft Certification Office, Airframe Branch, 3960 Paramount Blvd., Lakewood, California 90712–4137, telephone (562) 627–5228, fax (562) 627–5210.

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 should 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 will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed 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 mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2003–SW–37–AD.'' The postcard will be date stamped and returned to the commenter.

Discussion

This document proposes adopting a new AD for MDHI Model 369A, 369D, 369E, 369F, 369FF, 369H, 369HE, 369HS, 369HM, 500N, and OH–6A helicopters. The AD would require removing all landing gear fairings; determining the number and location of rivets that attach the landing gear fairing support assembly to the landing gear strut; and if three rivets (fwd, aft and inboard) are present, replacing or reworking the landing gear assembly. If only the fwd and aft rivets are present, no rework would be required by the proposed AD. This proposal is prompted by five reports of strut failures. Operators of the helicopters with failed struts do not fall into any clear category of service. For example, one was a tour operator in Niagara Falls, New York and another was a police department operator in Calgary, Canada. In its original design, the fairing support was attached to the strut with three rivets. In 1994 the manufacturer released a design change to attach the fairing support assembly with only forward and aft rivets because of the possibility of reduced service life of the strut with the additional inboard rivet hole present. Some landing gear struts entered service with an additional rivet hole drilled on the inboard side of the strut. This additional rivet hole is resulting in decreased strength of the strut and subsequent cracking. The actions specified by the proposed AD are intended to prevent cracking of the fwd and aft struts, failure of a strut, and subsequent loss of control of the helicopter during landing.

The FAA has reviewed MD Helicopters Service Bulletin SB369H–244, SB369E–094, SB500N–022, SB369D–200, and SB369F–078, dated April 7, 2000 (SB), which describes procedures for determining the number and location of rivets attaching the landing gear fairing support assembly to the landing gear strut. Where three rivets are present, instructions are provided to rework the landing gear assembly and replace any cracked strut assembly.

This unsafe condition is likely to exist or develop on other helicopters of the same type design. Therefore, the proposed AD would require removing all landing gear fairings; determining the number and location of rivets that attach the landing gear fairing support assembly to the landing gear strut; and if three rivets (fwd, aft and inboard) are present, replacing or reworking the landing gear assembly. If only two rivets are present, no rework is required by this AD. Although this action does not propose to require that access holes be drilled through the fairings to facilitate future inspections as described in the manufacturer's SB, that action may be part of a future AD if additional repetitive inspections become necessary. The actions would be required to be accomplished in accordance with the service bulletin described previously.

The FAA estimates that this proposed AD would affect 651 helicopters of U.S. registry, and determining the number of rivets would take approximately 7 work hours, reworking an affected ''3-hole'' strut would take approximately 1 work hour, and installing a new strut would take approximately 1.5 work hours. The average labor rate is $65 per work hour. Required parts (new struts) would cost approximately $9,937 each. Assuming all 651 helicopters will require inspection, 325 helicopters will need two struts reworked, and 5 aircraft will need two new struts installed, the total cost of the proposed AD on U.S. operators would be $438,800.

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 economic 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 a new airworthiness directive to read as follows:

MD Helicopters, Inc.: Docket No. 2003–SW–37–AD.

Applicability: Model 369A, 369D, 369E, 369F, 369FF, 369H, 369HE, 369HS, 369HM, 500N, and OH–6A helicopters, with any of the following components installed, certificated in any category:

Component name	Component part number (P/N)
Mid Aft Fairing Assembly	369H6200–61, –62, standard gear.
Aft Support Assembly	369H6200–23, –24 (–23 to be reinstalled on the right-hand side and –24 to be reinstalled on the left-hand side, all configurations).
Aft Fairing Assembly	369H92113–91, –92, extended gear.
Aft Filler Assembly	369H92113–131, –132, extended gear.
Aft Fillet Assembly	369A6200–45, –46, standard gear.
Aft Fillet Assembly	369H92113–111, –112, extended gear.
Mid Fwd Fairing Assembly	369H6200–41, –42, standard gear.
Fwd Fairing Assembly	369H92113–81, –82, extended gear.
Fwd Support Assembly	369H6200–23, –24 (–23 becomes right-hand side and –24 becomes left-hand side).
Fwd Filler Assembly	369H92113–121, –122, extended gear.
Fwd Fillet Assembly	369A6200–57, –58, standard gear.
Fwd Fillet Assembly	369H92113–101, –102, extended gear.

Compliance: Within the next 4 months, unless accomplished previously.

To prevent cracking of the fwd and aft struts, failure of a strut, and subsequent loss of control of the helicopter during landing, accomplish the following:

(a) Remove all landing gear fairings (fairings) and inspect each landing gear fairing support assembly (support assembly) to determine the number and location of the rivets attaching the support assembly to the landing gear strut assembly (strut assembly).

(1) If three rivets (forward, aft and inboard) are used to attach the support assembly to the strut assembly,

(i) for each FORWARD landing gear assembly, remove the landing gear fillet assembly (fillet assembly), the three rivets, and the support assembly, and clean and dye-penetrant inspect the 0.125 (3.18mm) diameter hole in the inboard surface of the strut assembly.

(A) If the strut assembly is cracked, replace the cracked strut assembly with an airworthy strut assembly and install the other landing gear components in accordance with steps (8) through (11) of paragraph C of the Accomplishment Instructions of MD Helicopters Service Bulletin SB369H–244, SB369E–094, SB500N–022, SB369D–200, and SB369F–078, dated April 7, 2000 (SB).

(B) If the strut assembly is *not* cracked, rework the landing gear assembly and install the other landing gear components in accordance with steps (5) and (8) through (11) of paragraph C of the Accomplishment Instructions of the SB.

(ii) for each AFT landing gear assembly, remove the fillet assembly, the three rivets, and the support assembly, and clean and dye-penetrant inspect the 0.125 (3.18mm) diameter hole in the inboard surface of the strut assembly.

(A) If the strut assembly is cracked, replace the cracked strut assembly with an airworthy strut assembly and install the other landing gear components in accordance with steps (8) through (13) of paragraph B of the Accomplishment Instructions of the SB.

(B) If the strut assembly is not cracked, rework the landing gear assembly and install the other landing gear components in accordance with steps (5) and (8) through (13) of Paragraph B of the Accomplishment Instructions of the SB.

(2) If only two rivets (forward and aft) are used to attach the support assembly to the strut assembly, neither the inspection of the strut assembly nor the rework of those landing gear assemblies is required by this AD.

Note: Creating an access hole to facilitate inspections is described in steps (6) and (7) of Paragraphs B and C of the SB, but is not required by this AD.

(b) 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 Los Angeles Aircraft Certification Office, Transport Airplane Directorate, FAA, for information about previously approved alternative methods of compliance.

Issued in Fort Worth, Texas, on July 28, 2004.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–17794 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–SW–07–AD]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada Model 407 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for Bell Helicopter Textron Canada (Bell) Model 407 helicopters. This proposal would require creating a component history card or equivalent record for each crosstube assembly,

converting accumulated run-on landings to an accumulated Retirement Index Number (RIN) count, and establishing a maximum accumulated RIN for certain crosstube assemblies. This proposal is prompted by fatigue testing, analysis, and evaluation by the manufacturer that determined that run-on landings impose a high stress on landing gear or crosstubes and may cause cracking in the area above the skid tube saddle. The actions specified by this proposed AD are intended to prevent fatigue failure in a crosstube assembly due to excessive stress during run-on landings and subsequent loss of control of the helicopter.

DATES: Comments must be received on or before October 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2004–SW–07–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*. Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sharon Miles, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Policy Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5122, fax (817) 222–5961.

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 should 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 will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed 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 mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2004–SW–07–AD.'' The postcard will be date stamped and returned to the commenter.

Discussion

Transport Canada, the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on Bell Model 407 helicopters. Transport Canada advises that run-on landings impose high stress on landing gear crosstubes, and to prevent possible crosstube failure, the manufacturer has introduced the life limitation of 5,000 RIN. Further evaluation has confirmed the possibility that an extensive training environment with run-on landings may impose high stress on crosstubes. The same condition may result from repetitive landings with forward travel with rotorcraft weight on the skids.

Bell has issued Alert Service Bulletin No. 407–03–59, dated October 15, 2003, which specifies assigning a RIN count to forward and aft crosstube assemblies on Model 407 helicopters. Transport Canada classified this alert service bulletin as mandatory and issued AD No. CF–2004–03, dated February 11, 2004, to ensure the continued airworthiness of these helicopters in Canada.

This helicopter model is manufactured in Canada and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, Transport Canada has kept the FAA informed of the situation described above. The FAA has examined the findings of Transport Canada reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

This previously described unsafe condition is likely to exist or develop on other helicopters of the same type design registered in the United States. Therefore, the proposed AD would require, before further flight, creating a component history card or equivalent record for each crosstube assembly, converting accumulated run-on landings to an accumulated RIN count, and establishing a retirement life of 5,000 accumulated RIN for the affected crosstube assemblies.

The FAA estimates that 319 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately 4 work hours per helicopter to replace the forward and aft crosstube assemblies, and that the average labor rate is $65 per work hour. Required parts would cost approximately $6,670 per helicopter for both forward and aft low gear crosstube assemblies or $8,450 per helicopter for both forward and aft high gear crosstube assemblies. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $2,210,670 to replace the low gear crosstube assemblies on the entire fleet or $2,778,490 to replace the high-gear crosstube assemblies on the entire fleet and assuming the costs associated with creating and updating the historical component card are negligible.

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 economic 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 a new airworthiness directive to read as follows:

Bell Helicopter Textron Canada (Bell):

Docket No. 2004–SW–07–AD.

Applicability: Model 407 helicopters, with landing gear crosstube assemblies, part number (P/N) 407–050–101–101 and –103; P/N 407–050–102–101 and –103; P/N 407–050–201–101 and –103; P/N 407–050–202–101 and –103; P/N 407–704–007–119; P/N 407–722–101; P/N 407–723–104; P/N 407–724–101; or P/N 407–725–104, installed, certificated in any category.

Note 1: This AD applicability includes both Bell crosstube assemblies and Bell's approved production and spare alternate crosstube assemblies from Aeronautical Accessories Incorporated (AAI).

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue failure of the crosstube assembly and subsequent loss of control of the helicopter, accomplish the following:

(a) Before further flight, create a component history card or equivalent record for each crosstube assembly.

(b) Before further flight, determine and record the accumulated Retirement Index Number (RIN) for each crosstube assembly as follows:

(1) For each crosstube assembly, record one (1) RIN for every run-on landing.

(2) For any crosstube assembly with an unknown number of run-on landings, assume and record ten (10) RINs for each 100 hours TIS since the crosstube assembly was installed (for example, 5,000 hours of time-in-service equals 500 RIN).

(c) Replace any crosstube assembly on or before reaching 5,000 RIN.

Note 2: Bell Helicopter Textron Alert Service Bulletin No. 407–03–59, dated October 15, 2003, pertains to the subject of this AD.

(d) This AD revises the Airworthiness Limitations section of the maintenance manual by establishing a retirement life of 5,000 RIN for the affected crosstube assemblies.

(e) 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 Regulations and Policy Group, Rotorcraft Directorate, FAA, for information about previously approved alternative methods of compliance.

Note 3: The subject of this AD is addressed in Transport Canada (Canada) AD No. CF–2004–03, dated February 11, 2004.

Issued in Fort Worth, Texas, on July 28, 2004.

David A. Downey,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–17795 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–152549–03]

RIN 1545–BC69

Section 179 Elections

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations under section 179 of the Internal Revenue Code relating to the election to expense the cost of property subject to section 179. The temporary regulations reflect changes to the law made by the Jobs and Growth Tax Relief Reconciliation Act of 2003. The text of those temporary regulations also serves as the text of these proposed regulations. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by November 2, 2004. Requests to speak with outlines of topics to be discussed at the public hearing scheduled for Tuesday, November 30, 2004, at 10 a.m., must be received by November 9, 2004.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–152549–03), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC, 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–152549–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the IRS Internet site at: *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS—REG–152549–03). The public hearing will be held in room 4718, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Winston Douglas, (202) 622–3110; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Robin Jones, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by October 4, 2004. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collections of information in this proposed regulation are in §§ 1.179–2T and 1.179–5T. This information is required by § 1.179–2T to insure that married individuals filing separate returns properly allocate the cost of section 179 property elected to be expensed in a taxable year and that the dollar limitation is properly allocated among the component members of a controlled group. Also, this information is required by § 1.179–5T to insure the specific identification of each piece of acquired section 179 property and reflect how and from whom such property was placed in service. This information will be used for audit and examination purposes. The collection of information is required to obtain a benefit. The likely respondents and/or recordkeepers are individuals, farms, and small businesses.

Estimated total annual reporting and/or recordkeeping burden: 3,015,000 hours.

The estimated annual burden per respondent/recordkeeper varies from .50 to 1 hour, depending on individual circumstances, with an estimated average of .75 hour.

Estimated number of respondents and/or recordkeepers: 4,025,000.

Estimated frequency of responses: Annually.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend 26 CFR part 1 relating to section 179 of the Internal Revenue Code (Code). The temporary regulations provide guidance under section 179 for making and revoking elections to expense the cost of property subject to section 179. The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact, as discussed earlier in this preamble, that the amount of time necessary to record and retain the required information will be minimal for those taxpayers electing to expense the cost of section 179 property. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for November 30, 2004, beginning at 10 a.m., in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by November 9, 2004. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Winston H. Douglas, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 reads as follows:

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

Par. 2. Section 1.179–2 is amended by revising paragraphs (b)(1) and (b)(2)(ii) to read as follows:

§ 1.179–2 Limitations on amount subject to section 179 election.

* * * * *

(b) * * *

(1) [The text of the proposed amendment to § 1.179–2(b)(1) is the same as the text of § 1.179–2T(b)(1) published elsewhere in this issue of the **Federal Register**].

(2) * * *

(i) * * *

(ii) [The text of the proposed amendment to § 1.179–2(b)(2)(ii) is the same as the text of § 1.179–2T(b)(2)(ii) published elsewhere in this issue of the **Federal Register**].

Par. 3. Section 1.179–4 is amended by revising paragraph (a) to read as follows:

§ 1.179–4 Definitions.

* * * * *

(a) [The text of the proposed amendment to § 1.179–4(a) is the same as the text of § 1.179–4T(a) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 4. Section 1.179–5 is amended by adding paragraph (c) to read as follows:

§ 1.179–5 Time and manner of making election.

* * * * *

(c) [The text of the proposed amendment of § 1.179–5(c) is the same as the text of § 1.179–5T(c) published elsewhere in this issue of the **Federal Register**].

Par. 5. Section 1.179–6 is revised to read as follows:

§ 1.179–6 Effective date.

[The text of the proposed amendment to § 1.179–6 is the same as the text of § 1.179–6T published elsewhere in this issue of the **Federal Register**].

Approved: July 21, 2004.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–17540 Filed 8–3–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD05–04–120]

RIN 1625–AA09

Drawbridge Operation Regulations; Northeast Cape Fear River, Wilmington, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to change the regulations that govern the operation of the CSX Transportation (CSX) Hilton Railroad Bridge across the Northeast Cape Fear River, at mile 1.5, in Wilmington, NC. The proposed rule would eliminate the need for a bridge tender by allowing the bridge to be operated from a remote location. This proposed change would maintain the bridge's current level of operational capabilities and continue providing for the reasonable needs of rail transportation and vessel navigation.

DATES: Comments and related material must reach the Coast Guard on or before October 4, 2004.

ADDRESSES: You may mail comments and related material to Commander (obr), 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 Commander (obr), 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: Terrance Knowles, Environmental Protection Specialist, Fifth Coast Guard District, at (757) 398–6587.

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 CGD05–04–120, 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 those comments.

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

CSX, who owns and operates this movable (bascule type) bridge, requested changes to the operating procedures for the drawbridge located at mile 1.5 across the Northeast Cape Fear River, in Wilmington, NC. The vertical clearance under CSX Hilton Railroad Bridge in the closed position to vessels is 9 feet at mean low water and 6 feet at mean high water. The existing regulation listed at 33 CFR 117.5 requires the bridge to open on signal.

CSX will remotely operate the opening and closing of the CSX Hilton Railroad Bridge across Northeast Cape Fear River in Wilmington, NC, from the nearby CSX Navassa Railroad Bridge located on the Cape Fear River. CSX has installed motion sensors, laser scanners and high-resolution video cameras on the bridge to enhance the remote operator's ability to monitor and control the equipment. The CSX Navassa Railroad Bridge is also equipped with an amplified open-mike from the bridge to enable the remote operator to hear boat horns that may signal for an opening. CSX has also installed additional safety warning lights to the bridge for the remote operation. This rule proposes to allow the bridge to be untended and operated from a remote location at the CSX Navassa Railroad Bridge. The CSX Hilton Railroad Bridge will normally be left in the fully open position displaying flashing green channel lights indicating that vessels may pass through.

This change is being requested to make the closure process of the Hilton Railroad Bridge more efficient. It will save operational costs by eliminating bridge tenders, and is expected to decrease maintenance costs. In addition, the draw being left in the open position most of the time will provide for greater flow of vessel traffic than the current regulation.

Discussion of Proposed Rule

The Coast Guard proposes to revise 33 CFR 117.829 by redesignating paragraph (b) and inserting a new paragraph (c).

Paragraph (b) would contain the proposed rule for the CSX Hilton Railroad Bridge, mile 1.5, in Wilmington, NC. The rule would allow the draw of the bridge to be operated by the controller at the CSX Navassa Railroad Bridge.

In the event of failure or obstruction of the motion sensors, laser scanners, video cameras or marine-radio communications, the CSX Hilton Railroad Bridge shall not be operated from the remote location. In these situations, a bridge tender must be called to operate the bridge on-site.

The draw shall remain in the open position for navigation and shall only be closed for train crossings or periodic maintenance. When rail traffic has cleared, the horn will automatically sound one prolonged blast followed by one short blast to indicate that the CSX Hilton Railroad Bridge is moving to the full open position to vessels. During open span movement, the channel traffic lights will flash red, until the bridge is in the full open position to vessels. In the full open position to vessels, the bridge channel traffic lights will flash green. After the train has cleared the bridge by leaving the track circuit, the opening of the draw to vessels shall not exceed ten minutes except as provided in 33 CFR 117.31(b).

During closing span movement, the channel traffic lights will flash red, the horn will sound five short blasts, an audio voice warning device will announce bridge movement. Five short blasts of the horn will continue until the bridge is seated and locked down. When the bridge is seated and locked down to vessels, the channel traffic lights will continue to flash red.

Paragraph (c) would contain the existing regulations for the Seaboard System Railroad Bridge across the Northeast Cape Fear River, mile 27.0 at Castle Hayne, North Carolina.

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. We reached this conclusion based on the fact that the proposed changes have only a minimal impact on maritime traffic transiting the bridge. Although the CSX Hilton Railroad Bridge will be untended and operated from a remote location, mariners can continue their transits because the bridge will remain open to mariners, only to be closed for train crossing or periodic maintenance.

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 proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons. The rule allows the CSX Hilton Railroad Bridge to operate remotely and requires the bridge to remain in open position to vessels the majority of the time, only closing for train crossing or periodic maintenance.

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.

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.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed 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 because it has been determined that the promulgation of

operating regulations for drawbridges are categorically excluded.

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. In § 117.829, redesignate paragraph (b) as paragraph (c) and add a new paragraph (b) to read as follows:

§ 117.829 Northeast Cape Fear River.

(a) * * *

(b) The CSX Hilton Railroad Bridge, mile 1.5 in Wilmington, NC shall operate as follows:

(1) The draw of the bridge to be remotely operated by the controller at the Navassa Railroad Bridge mile 34.0 across the Cape Fear River.

(2) 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.

(3) 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).

(4) The CSX Hilton Railroad Bridge shall not be operated by the controller at the CSX Navassa Railroad in the event of failure or obstruction of the motion sensors, laser scanners, video cameras or marine-radio communications. In these situations, a bridge tender must be called to operate the bridge on-site.

(5) When rail traffic has cleared, the horn will automatically sound one prolonged blast followed by one short blast to indicate that the CSX Hilton Railroad Bridge is moving to the full open position to vessels. During open span movement, the channel traffic lights will flash red, until the bridge is in the full open position to vessels. In the full open position to vessels, the bridge channel traffic lights will flash green, allowing vessels to pass safely.

(6) During closing span movement, the channel traffic lights will flash red, the horn will sound five short blasts, and an audio voice-warning device will announce bridge movement. Five short blasts of the horn will continue until the bridge is seated and locked down. When the bridge is seated and in the locked down position to vessels, the channel traffic lights will continue to flash red.

* * * * *

Dated: July 12, 2004.

Sally Brice-O'Hara,

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

[FR Doc. 04–17685 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–04–020]

RIN 2115–AA87

Security Zone; Captain of the Port Chicago Zone, Lake Michigan

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to remove the security zone around the Byron Nuclear Power Plant and add a security zone around the Hammond Intake Crib on Lake Michigan. It has been determined that the removal of the security zone for the Byron Nuclear Power Plant would not increase the plant's vulnerability. The Hammond Intake Crib Security Zone is necessary to protect the fresh water supply from possible sabotage or other subversive acts, accidents, or possible acts of terrorism. The new zone is intended to restrict vessel traffic from a portion of Lake Michigan.

DATES: Comments and related material must reach the Coast Guard on or before October 4, 2004.

ADDRESSES: You may mail comments and related material to U.S. Coast Guard Marine Safety Office (MSO) Chicago, 215 West 83rd Street, Suite D, Burr Ridge, IL 60527. MSO Chicago 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 MSO Chicago between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: ENS Christopher Brunclik, MSO Chicago, at (630) 986–2155.

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 (CGD09–04–020), 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 U.S. Coast Guard Marine Safety Office Chicago 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

On September 11, 2001, the United States was the target of coordinated attacks by international terrorists resulting in catastrophic loss of life, the destruction of the World Trade Center, and significant damage to the Pentagon. Current events indicate that significant threats still exist for this type of attack. In fact, National security and intelligence officials warn that future terrorists attacks are likely. The Coast Guard is responding by, amongst many other things, establishing security zones around critical infrastructure.

We propose to remove the Byron Nuclear Power Plant security zone and add a security zone around the Hammond Intake Crib. It has been determined the removal of the security zone for the Byron Nuclear Power Plant would not increase its vulnerability. The proposed Hammond Intake Crib security zone is necessary to protect the public, facilities, and the surrounding area from possible sabotage or other subversive acts. All persons other than those approved by the Captain of the Port Chicago, or his on-scene representative, are prohibited from entering or moving within the zone. The Captain of the Port Chicago may be contacted via phone at the above contact number.

Discussion of Proposed Rule

On August 16, 2002, the Coast Guard published a final rule establishing a permanent security zone on the waters of the Rock River within a 100-yard radius of the Byron Nuclear Power Plant (67 FR 53501). The CFR section number for this security zone was corrected on October 23, 2002 (67 FR 65041). This rulemaking proposes to remove this security zone for the Byron Nuclear Power plant and to create one for the Hammond Intake Crib.

The need for a security zone at Byron was discussed during security planning meetings with the Byron Nuclear Training Facility Chief of Security, Ogle County Sheriff's Department and the United States Coast Guard. The current security zone encompasses the cooling water intake on the Rock River located over 1 mile away from the facility. If the intake were to be made inoperable the facility would experience an ''inconvenience'' rather than a detrimental consequence. In addition, there would be enough time to shut down the plant before the lack of cooling water would be an issue. Thus, the Coast Guard has determined that the security zone for Byron Nuclear Facility is no longer needed.

Because of new and additional security concerns, the Coast Guard wishes to create a permanent security zone around the Hammond Intake Crib to protect this fresh water supply. Through this rulemaking, we propose to establish a security zone for the following location: All waters encompassed by the arc of a circle with a 100-yard radius with its center in approximate position 41°42′15″ N, 087°29′49″ W (Hammond Intake Crib). These coordinates are based upon North American Datum 1983 (NAD 83).

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. Since this security zone is not located near commercial vessel shipping lanes, there will be no impact on commercial vessel traffic as a result of this security zone.

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 security zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will not obstruct the regular flow of traffic and will allow vessel traffic to pass around the security zone.

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. 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 office listed in Addresses in this preamble.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This 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, if is 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 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 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.

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.

Under figure 2–1, paragraph (34)(g) of the Instruction, an ''Environmental Analysis Check List'' and a ''Categorical Exclusion Determination'' are not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule 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. In § 165.910, revise paragraph (a)(5) to read as follows:

§ 165.910 Security Zones; Captain of the Port Chicago, Zone, Lake Michigan.

* * * * *

(5) *Hammond Intake Crib.* All navigable waters bounded by the arc of a circle with a 100-yard radius with its center in approximate position 41°42′15″ N, 087°29′49″ W (NAD 83).

* * * * *

Dated: June 21, 2004.

T.W. Carter,

Captain, U.S. Coast Guard, Captain of the Port Chicago.

[FR Doc. 04–17741 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[OAR–2003–0014; FRL–7797–7]

RIN 2060–AM29

National Emission Standards for Hazardous Air Pollutants: Printing, Coating, and Dyeing of Fabrics and Other Textiles

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; amendment.

SUMMARY: On May 29, 2003 (68 FR 32172), EPA issued national emission standards for hazardous air pollutants for printing, coating, and dyeing of fabrics and other textiles (Fabric NESHAP) under section 112 of the Clean Air Act (CAA). This action would amend the standards to clarify the applicability of the Fabric NESHAP to coating, slashing, dyeing, or finishing operations at synthetic fiber manufacturing facilities where the fibers are the final product of the facility. The printing, coating, and dyeing of fabrics and other textiles source category does not include any synthetic fiber manufacturing operations, and we did not intend to impose any requirements on such operations in the final Fabric NESHAP.

In the Rules and Regulations section of this **Federal Register**, we are taking direct final action on the proposed amendment because we view the amendment as noncontroversial and anticipate no adverse comments. We have explained our reasons for the amendment in the direct final rule. If we receive no significant adverse comments, we will take no further action on the proposed amendment. If we receive significant adverse comments, we will withdraw only those provisions of the direct final rule on which we received significant adverse comments. We will publish a timely withdrawal in the **Federal Register** indicating which provisions will become effective and which provisions are being withdrawn. If part or all of the direct final rule in the Rules and Regulations section of today's **Federal Register** is withdrawn, all comments pertaining to those provisions will be addressed in a subsequent final rule based on the proposed amendment. We will not institute a second comment period on the subsequent final action. Any parties interested in commenting must do so at this time.

DATES: We must receive written comments on or before September 3, 2004, unless a hearing is requested by August 16, 2004. If a timely hearing request is submitted, we must receive written comments on or before September 20, 2004.

ADDRESSES: *Comments.* Submit your comments, identified by Docket ID No. OAR–2003–0014 (formerly Docket No. A–97–51), by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Agency Web site: http://www.epa.gov/edocket*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the online instructions for submitting comments.
- *E-mail: http://www.epa.gov/edocket* and *almodovar.paul@epa.gov*.
- *Fax:* (202) 566–1741 and (919) 541–5689.
- *Mail:* U.S. Postal Service, send comments to: HQ EPA Docket Center (6102T), Attention Docket Number OAR–2003–0014, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. (Please include a total of 2 copies.)
- *Hand Delivery:* In person or by courier, deliver comments to: HQ EPA Docket Center (6102T), Attention Docket ID Number OAR–2003–0014, 1301 Constitution Avenue, NW., Room B–108, Washington, DC 20460. (Please include a total of 2 copies.)

We request that a separate copy of each public comment also be sent to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

Instructions: Direct your comments to Docket ID No. OAR–2003–0014. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the comment includes information claimed to be Confidential Business

Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or other wise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the Federal regulations.gov Web sites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. (For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102).) For additional instructions on submitting comments, go to Unit I.B. of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the HQ EPA Docket Center, Docket ID Number OAR–2003–0014, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. This docket facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (202) 566–1742. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Almodóvar, Coatings and Consumer Products Group (C539–03), Emission Standards Division, U.S. EPA, Research Triangle Park, NC 27711; telephone number (919) 541–0283; facsimile number (919) 541–5689; electronic mail (e-mail) address: *almodovar.paul@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

The source category definition includes sources that engage in the coating, printing, slashing, dyeing, or finishing of any fabric or other textile. In general, such sources are covered under the North American Industrial Classification System (NAICS) codes listed below. However, sources classified under other NAICS codes may be subject to the final standard if they meet the applicability criteria. Not all sources classified under the NAICS codes in the following table are subject to the final rule because some of the classifications cover products outside the scope of the Fabric NESHAP.

Categories and entities potentially regulated by this action include:

Category	NAICS code	Examples of regulated entities
Industry	31321	Broadwoven fabric mills.
	31322	Narrow fabric mills and Schiffli machine embroidery.
	313241	Weft knit fabric mills.
	313311	Broadwoven fabric finishing mills.
	313312	Textile and fabric finishing (except broadwoven fabric) mills.
	313320	Fabric coating mills.
	314110	Carpet and rug mills.
	326220	Rubber and plastics hoses and belting and manufacturing.
	339991	Gasket, packing, and sealing device manufacturing.
Federal government	.....	Not affected.
State/local/tribal government	.....	Not affected.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your operation is regulated by this action, you should examine the applicability criteria of the final rule (§ 63.4281). If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare my Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through EDOCKET, regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).

ii. Follow direction—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Docket Copying Costs.* A reasonable fee may be charged for copying docket materials.

Public Hearing. If a public hearing is held, it will be held at 10 a.m. at the EPA's Environmental Research Center Auditorium, Research Triangle Park, North Carolina, or at an alternate site nearby.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of the proposed rule will also be available on the WWW through EPA's Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of the proposed rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

Direct Final Rule. A direct final rule identical to the proposal is published in the Rules and Regulations section of today's **Federal Register**. If we receive any significant adverse comment pertaining to the amendment in the proposal, we will publish a timely notice in the **Federal Register** informing the public that the amendment are being withdrawn due to adverse comment. We will address all public comments concerning the withdrawn amendment in a subsequent final rule. If no relevant adverse comments are received, no further action will be taken on the proposal and the direct final rule will become effective as provided in that action.

The regulatory text for the proposal is identical to that for the direct final rule published in the Rules and Regulations section of today's **Federal Register**. For further supplementary information, the detailed rationale for the proposal and regulatory revisions, see the direct final rule published in a separate part of this **Federal Register**.

Statutory and Executive Order Reviews. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 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 proposed rule amendment on small entities, a small entity is defined as: (1) A small business according to Small Business Administration size standards by NAICS code ranging from 500 to 1,000 employees; (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; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impact of today's proposed rule amendment on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. We believe there will be little or no impact on small entities because the purpose of today's proposed amendment is to clarify the applicability of the Fabric NESHAP to coating, slashing, dyeing, or finishing operations at synthetic fiber manufacturing facilities where the fibers are the final product of the facility.

For information regarding other administrative requirements for this action, please see the direct final rule located in the Rules and Regulations section of today's **Federal Register**.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, and Reporting and recordkeeping requirements.

Dated: July 29, 2004.

Michael O. Leavitt,

Administrator.

[FR Doc. 04–17779 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–2004–0154; FRL–7368–7]

Bromoxynil, Diclofop–methyl, Dicofol, Diquat, Etridiazole, et al.; Proposed Tolerance Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to revoke certain tolerances for the herbicides bromoxynil, diclofop-methyl, and paraquat; the fungicides etridiazole (terrazole) and iprodione; the miticides dicofol and propargite; and the plant growth regulator and herbicide diquat. Also, EPA is proposing to remove duplicate tolerances for the herbicides bromoxynil and picloram; the fumigant phosphine; the fungicide iprodione; the miticides dicofol and propargite; and the insecticides fenbutatin-oxide and hydramethylnon. In addition, EPA is proposing to modify certain tolerances for the insecticide hydramethylnon; the herbicides bromoxynil, paraquat, and triclopyr; the fungicides etridiazole, folpet, iprodione, and triphenyltin hydroxide (TPTH); the miticides dicofol and propargite; and the plant growth regulator and herbicide diquat. Moreover, EPA is proposing to establish new tolerances for the herbicides bromoxynil, paraquat, and picloram; the fungicides etridiazole, folpet, and TPTH; the miticides dicofol and propargite; the insecticide fenbutatin-oxide; and the plant growth regulator and herbicide diquat. The regulatory actions proposed in this document are part of the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the tolerance reassessment requirements of the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(q), as amended by the Food Quality Protection Act (FQPA) of 1996. By law, EPA is required by August 2006 to reassess the tolerances in existence on August 2, 1996. No tolerance reassessments will be counted at the time of a final rule because tolerances in existence at FQPA that are associated with actions proposed herein were previously counted as reassessed at the time of the completed Registration Eligibility Decision (RED), Report on FQPA Tolerance Reassessment Progress and Interim Risk Management Decision (TRED), or **Federal Register** action.

DATES: Comments must be received on or before October 4, 2004.

ADDRESSES: Submit your comments, identified by docket ID number OPP–2004–0154, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.
- *Agency Website*: *http://www.epa.gov/edocket/*. EDOCKET, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow

the on-line instructions for submitting comments.

- *E-mail*: Comments may be sent by e-mail to opp-docket@epa.gov, Attention: Docket ID Number OPP–2004–0154.
- *Mail*: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0154.
- *Hand Delivery*: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA, Attention: Docket ID Number OPP–2004–0154. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number OPP–2004–0154. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through EDOCKET, regulations.gov, or e-mail. The EPA EDOCKET and the regulations.gov websites are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through EDOCKET or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EDOCKET on-line or see the **Federal Register** of May 31, 2002 (67 FR 38102) (FRL–7181–7).

Docket: All documents in the docket are listed in the EDOCKET index at *http://www.epa.gov/edocket/*. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in EDOCKET or in hard copy at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Joseph Nevola, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave, NW., Washington, DC 20460–0001; telephone number: (703) 308–8037; e-mail address:*nevola.joseph@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in Unit IIA. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of This Document and Other Related Information?

In addition to using EDOCKET *(http://www.epa.gov/edocket/)*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*. A frequently updated electronic version of 40 CFR part 180 is available at E-CFR Beta Site Two at *http://www.gpoaccess.gov/ecfr/*.

C. What Should I Consider as I Prepare My Comments for EPA?

Submitting CBI. Do not submit this information to EPA through EDOCKET, regulations.gov, or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

Tips for preparing your comments. When submitting comments, remember to:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).

ii. Follow directions. The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

D. What Can I do if I Wish the Agency to Maintain a Tolerance That the Agency Proposes to Revoke?

This proposed rule provides a comment period of 60 days for any person to state an interest in retaining a tolerance proposed for revocation. If EPA receives a comment within the 60–day period to that effect, EPA will not proceed to revoke the tolerance immediately. However, EPA will take steps to ensure the submission of any needed supporting data and will issue an order in the **Federal Register** under FFDCA section 408(f) if needed. The order would specify data needed and the time frames for its submission, and would require that within 90 days some person or persons notify EPA that they will submit the data. If the data are not submitted as required in the order, EPA will take appropriate action under FFDCA.

EPA issues a final rule after considering comments that are submitted in response to this proposed rule. In addition to submitting comments in response to this proposal, you may also submit an objection at the time of the final rule. If you fail to file an objection to the final rule within the time period specified, you will have waived the right to raise any issues resolved in the final rule. After the specified time, issues resolved in the final rule cannot be raised again in any subsequent proceedings.

II. Background

A. What Action is the Agency Taking?

EPA is proposing to revoke, remove, modify, and establish specific tolerances for residues of the insecticides fenbutatin-oxide and hydramethylnon, the herbicides bromoxynil, diclofop-methyl, paraquat, picloram, and triclopyr; the fumigant phosphine; the fungicides etridiazole, folpet, iprodione, and triphenyltin hydroxide (TPTH); the miticides dicofol and propargite, and the plant growth regulator and herbicide diquat in or on commodities listed in the regulatory text.

EPA is proposing these tolerance actions to implement the tolerance recommendations made during the reregistration and tolerance reassessment processes (including follow-up on canceled or additional uses of pesticides). As part of the reregistration and tolerance reassessment processes, EPA is required to determine whether each of the amended tolerances meets the safety standards under the FQPA. The safety finding determination of ''reasonable certainty of no harm'' is found in detail in each RED and Report on FQPA Tolerance Reassessment Progress and Interim Risk Management Decision (TRED) for the active ingredient. REDs and TREDs propose certain tolerance actions to be implemented to reflect current use patterns, to meet safety findings and change commodity names and groupings in accordance with new EPA policy. Printed copies of the REDs and TREDs may be obtained from EPA's National Service Center for Environmental Publications (EPA/NSCEP), P.O. Box 42419, Cincinnati, OH 45242–2419, telephone 1–800–490–9198; fax 1–513–489–8695; internet at *http://www.epa.gov/ncepihom/* and from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, telephone 1–800–553–6847 or 703–605–6000; internet at *http://www.ntis.gov/*. Electronic copies of REDs and TREDs are available on the internet at *http://www.epa.gov/pesticides/reregistration/status.htm*.

Explanations for proposed modifications in tolerances can be found in the RED and TRED document and in more detail in the Residue Chemistry Chapter document which supports the RED and TRED. Copies of the Residue Chemistry Chapter documents are found in the Administrative Record and hard copies are available in the public docket for this rule, while electronic copies are available through EPA's electronic public docket and comment system, EPA Dockets at *http://www.epa.gov/edocket/*. You may search for docket number OPP–2004–0154 then click on that docket number to view its contents.

EPA has determined that the aggregate acute exposure and risk and the aggregate chronic exposure and risk are not of concern for the above mentioned pesticide active ingredients based upon the target data base required for reregistration, the current guidelines for conducting acceptable studies to generate such data, published scientific literature, and the data identified in the RED or TRED which lists the submitted studies that the Agency found acceptable.

With respect to the tolerances that are proposed in this document to be raised, EPA has found that these tolerances are safe in accordance with FFDCA section 408(b)(2)(A), and that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residues, in accordance with section 408(b)(2)(C). These findings are found in detail in each RED. The references are available for inspection as described in this document under **SUPPLEMENTARY INFORMATION.**

In addition, EPA is proposing to revoke certain tolerances because these pesticides are not registered under FIFRA for uses on the commodities. The registrations for these pesticide chemicals were canceled because the registrant failed to pay the required maintenance fee and/or the registrant voluntarily canceled one or more registered uses of the pesticide. It is EPA's general practice to propose revocation of those tolerances for residues of pesticide active ingredients on crop uses for which there are no active registrations under FIFRA, unless any person in comments on the proposal indicates a need for the tolerance to cover residues in or on imported commodities or domestic commodities legally treated.

1. *Bromoxynil*. Because flax straw is no longer a regulated feed item, the tolerance for bromoxynil residue is no longer needed. Therefore, EPA is proposing to revoke the tolerance in 40 CFR 180.324(a)(1) for ''flax, straw.'' Also, EPA is proposing to remove the commodity tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''corn, stover'' which was previously termed corn, fodder (dry) in the RED; ''corn, fodder (green);'' and ''corn, grain'' because these tolerances are no longer needed since their uses are covered by the existing tolerances for corn, field, stover and corn, grain, field. In addition, EPA is proposing to remove the duplicate tolerance for ''corn, field, stover'' because that use is covered by the remaining tolerance for corn, field, stover. Further, based on field trial data that indicate residues of bromoxynil as high as 0.14 ppm in or on corn stover, the Agency determined that the tolerance for corn, field, stover should be increased to 0.2 ppm and a tolerance should be established for corn, pop, stover at 0.2 ppm. Therefore, EPA is also proposing in 40 CFR 180.324(a)(1) to increase the tolerance for ''corn, field, stover'' from 0.1 to 0.2 ppm and establish a tolerance for residues of bromoxynil in or on ''corn, pop, stover'' at 0.2 ppm.

Because the time-limited tolerances in 40 CFR 180.324(b) for timothy, hay and timothy, forage have expiration/revocation dates that have since passed, EPA is proposing to remove the existing paragraph and table, and reserve the section.

Based on field trial data that indicate residues of bromoxynil in or on alfalfa hay as high as 0.38 ppm, the Agency determined that the tolerance for alfalfa hay should be increased to 0.5 ppm. Therefore, EPA is proposing to revise the commodity tolerance ''alfalfa, seedling''in 40 CFR 180.324(a)(1) at 0.1

parts per million (ppm) to ''alfalfa, forage,'' and ''alfalfa, hay'' and maintain the tolerance for alfalfa, forage at 0.1 ppm, while increasing the tolerance for alfalfa, hay to 0.5 ppm.

Based on field trial data that indicate residues of bromoxynil in or on grass forage and hay as high as 2.9 and 2.4 ppm, respectively, the Agency determined that the tolerances for grass forage and hay should be increased to 3.0 ppm. Therefore, EPA is proposing to revise the commodity terminologies ''canarygrass, annual, seed'' and ''grass, canary, annual, straw'' in 40 CFR 180.324(a)(1) to ''grass, forage'' and ''grass, hay,'' respectively, and increase the tolerance for each from 0.1 ppm to 3.0 ppm.

Based on field trial data that indicate residues of bromoxynil in or on barley straw as high as 3.9 ppm, and translating barley data to oat straw, the Agency determined that the tolerances for barley straw and oat straw should be increased to 4.0 ppm. Therefore, EPA is proposing to increase the tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''barley, straw'' from 0.1 to 4.0 ppm, and ''oat, straw'' from 0.1 to 4.0 ppm.

Based on field trial data that indicate residues of bromoxynil in or on wheat forage and straw as high as 0.6 and 1.2 ppm, respectively, and translating wheat data to rye, the Agency determined that the tolerances for both rye and wheat forage should be increased to 1.0 ppm, and both rye and wheat straw should be increased to 2.0 ppm. Therefore, EPA is proposing to increase the tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''rye, forage'' from 0.1 to 1.0 ppm; ''rye, straw'' from 0.1 to 2.0 ppm; ''wheat, forage'' from 0.1 to 1.0 ppm; and ''wheat, straw'' from 0.1 to 2.0 ppm.

Based on field trial data that indicate residues of bromoxynil in or on barley forage, and translating barley data to oat, the Agency determined that the tolerance for oat forage should be increased to 0.3 ppm. Therefore, EPA is proposing to increase the tolerance in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''oat, forage'' from 0.1 to 0.3 ppm.

Based on field trial data that indicate residues of bromoxynil in or on sorghum forage and stover as high as 0.29 and 0.14 ppm, respectively, the Agency determined that the tolerances for sorghum forage and stover should be increased to 0.5 and 0.2 ppm, respectively. Therefore, EPA is proposing to increase the tolerance in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on''sorghum, forage'' from 0.1 to 0.5 ppm and revise the commodity terminology to ''sorghum, grain, forage;''and ''sorghum, grain, stover'' from 0.1 to 0.2 ppm.

Based on field trial data that indicate residues of bromoxynil in or on grain of barley, corn, sorghum, and wheat at <0.02 ppm and translating barley data to oat grain and rye grain, the Agency determined that the grain tolerances for barley, field corn; oat; rye; sorghum; and wheat should be decreased to 0.05 ppm and a tolerance should be established for corn, pop, grain at 0.05 ppm. Therefore, EPA is proposing to decrease the tolerances in 40 CFR 180.324(a)(1) from 0.1 to 0.05 ppm, for the following: ''barley, grain;'' ''oat, grain;'' ''rye, grain;'' ''sorghum, grain;'' ''wheat, grain;'' ''corn, grain, field'' and to revise the commodity terminology for ''corn, grain, field'' to read ''corn, field, grain.'' Also in 40 CFR 180.324(a)(1), EPA is proposing to establish a tolerance for residues of bromoxynil in or on ''corn, pop, grain'' at 0.05 ppm.

Because residues of bromoxynil are detectable in aspirated grain fractions of wheat (highest), corn, and sorghum, the Agency determined that a tolerance should be established at 0.3 ppm. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''grain, aspirated fractions'' at 0.3 ppm.

Based on residue data for hay of wheat and barley that indicate residues of bromoxynil as high as 3.2 ppm for wheat, but not exceeding 9.0 ppm for barley, and translating barley data to oat hay, the Agency determined that tolerances should be established for wheat hay at 4.0 ppm, barley hay at 9.0 ppm, and oat, hay at 9.0 ppm. Therefore, EPA is proposing to establish tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''barley, hay'' at 9.0 ppm, ''oat, hay'' at 9.0 ppm, and ''wheat, hay'' at 4.0 ppm.

The 1998 Bromoxynil RED recommended that the commodity terminology for corn, forage, field (green) be revised to read corn, field, forage and the tolerance be increased from 0.1 to 0.3 ppm based on residue data for corn forage. However, at that time, no tolerance for corn, forage, field (green) existed in 40 CFR 180.324(a)(1). Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.324(a)(1) for ''corn, field, forage'' at 0.3 ppm.

In addition, EPA is proposing to revise commodity terminology in 40 CFR 180.324 to conform to current Agency practice as follows: ''mint hay'' to ''peppermint, hay'' and ''spearmint, hay.''

2. *Diclofop-methyl.* As noted in the September 2000 RED, uses of diclofop-methyl on lentils and dry peas have been deleted from registered labels. The use on lentils may have been canceled since 1985. On October 26, 1998 (63 FR 57067)(FRL–6035–6), EPA responded in a final rule to a comment from the European Union (EU) which requested that the tolerances for lentils (now termed lentil, seed) and pea seeds (dry) not be revoked because at that time they believed that EPA had not clarified in general what data are necessary to support tolerances for import purposes. At that time, EPA did not revoke these tolerances. However, since then, EPA has published a guidance concerning submissions for pesticide import tolerance support and residue data for imported food as described in Unit III. Now that data requirements for import tolerances have been clearly stated and the EU's request for information has been satisfied, EPA is proposing to revoke the tolerances in 40 CFR 180.385 for lentil, seed and pea seeds (dry). This proposed rule will again give interested persons the opportunity to come forward to support the maintenance of tolerances which are proposed herein for revocation and submit any data so that EPA can make safety findings under FFDCA.

Also, in support of tolerance reassessment, the registrant developed a new enforcement method (HRAV-14 GLC/ECD) and subjected a ruminant metabolism study to independent laboratory validation. However, EPA has not yet determined that the newly submitted method is valid. The current FDA enforcement method for diclofop-methyl is the Pesticide Analytical Manual (PAM)-Volume II, which does not detect a metabolite of concern, diclofop acid. Therefore, at this time, EPA will not propose to establish any new tolerances that are recommended in the diclofop-methyl RED. The Agency will address establishing such tolerances in a future document in the **Federal Register.**

3. *Dicofol.* EPA is proposing to redesignate the dicofol tolerance expression for plant commodities in 40 CFR 180.163(a) to (a)(1), separately from the animal tolerances, and to revise the expression in terms of the combined residues of 1,1-bis(4-chlorophenyl) 2,2,2-trichloroethanol and 1-(2-chlorophenyl) -1-(4-chlorophenyl)-2,2,2-trichloroethanol. Because dicofol metabolites are the residues of concern for animals, EPA is proposing to redesignate animal tolerances separately from plant tolerances, from 40 CFR 180.163(a) to (a)(2) and for tolerances to be expressed in terms of the combined residues of 1,1-bis(4-chlorophenyl)-2,2,2- trichloroethanol and its metabolites, 1-(2-chlorophenyl)-1-(4-

chlorophenyl) -2,2,2-trichloroethanol, 1,1-bis(4-chlorophenyl)-2,2-dichloroethanol, and 1-2(-chlorophenyl)-1- (4-chlorophenyl)-2,2-dichloroethanol.

EPA is proposing to revoke the commodity tolerances in 40 CFR 180.163(a)(1) for residues of dicofol in or on ''fig'' because the registration for that use was canceled in October 1989 due to non-payment of annual registration maintenance fees. Also, EPA is proposing to remove ''hazelnuts'' because this tolerance is covered by the tolerance on filbert, and to remove ''hay, spearmint'' because this tolerance is covered by the tolerance on spearmint, hay.

Based on field trial data show that residues of dicofol were as high as 6.7 ppm in apples and in one duplicate sample 10.8 ppm in pears (6.8 ppm in pears for the other duplicate sample), the Agency determined that a crop group tolerance of 10.0 ppm is appropriate. Therefore, EPA is proposing to combine the commodity tolerances for ''apple,'' ''crabapple,'' ''pear,'' and ''quince,'' each at 5 ppm in 40 CFR 180.163(a)(1) under the crop group terminology ''fruit, pome, group 11'' and increase the tolerance to 10.0 ppm.

Based on field trial data show that residues of dicofol were as high as 0.84 ppm in plums, 3.08 ppm in cherries, and 3.79 ppm in peaches, the Agency determined that a crop group tolerance of 5.0 ppm is appropriate. Therefore, EPA is proposing to combine the commodity tolerances for ''apricot'' at 10 ppm; ''cherry'' at 5 ppm, ''nectarine'' at 10 ppm, ''peach'' at 10 ppm, and ''plum, prune, fresh'' at 5 ppm, in 40 CFR 180.163(a)(1) under the crop group terminology ''fruit, stone, group 12'' and decrease the tolerance to 5.0 ppm.

EPA is proposing to combine the commodity tolerances for ''blackberry,'' ''boysenberry,'' ''dewberry,'' ''loganberry,'' and ''raspberry,''each at 5 ppm in 40 CFR 180.163(a)(1) under the crop subgroup terminology ''caneberry subgroup 13A'' and maintain the tolerance at 5 ppm, based on new field trials.

Based on field trial data show that residues of dicofol were as high as 0.35 ppm in melons, 0.45 ppm in cucumbers, and 1.05 ppm in summer squash, the Agency determined that a crop group tolerance of 2.0 ppm is appropriate. Therefore, EPA is proposing to combine the commodity tolerances for ''cantaloups,'' ''cucumber,'' ''melon,'' ''muskmelon,'' ''pumpkin,'' ''squash, summer;'' ''squash, winter;'' and ''watermelon,'' each at 5 ppm in 40 CFR 180.163(a)(1) under the crop group terminology ''vegetable, cucurbit, group 9'' and decrease the tolerance to 2.0 ppm.

Based on field trial data show that residues of dicofol were as high as 1.34 ppm in lemon, 3.55 ppm in oranges, and 5.26 ppm in grapefruit, the Agency determined that a crop group tolerance of 6.0 ppm is appropriate. Therefore, EPA is proposing to combine the commodity tolerances for ''grapefruit,'' ''kumquat,'' ''lemon,'' ''lime,'' ''orange, sweet'' and ''tangerine'' in 40 CFR 180.163(a)(1), each at 10 ppm, under the commodity terminology ''fruit, citrus, group 10'' and decrease the tolerance to 6.0 ppm.

Based on field trial data show that residues of dicofol were as high as 0.46 ppm in tomatoes and 1.15 ppm in peppers, the Agency determined that a crop group tolerance of 2.0 ppm is appropriate. Therefore, EPA is proposing to combine the commodity tolerances for ''eggplant,'' ''pepper,'' ''pimento,'' and ''tomato'' in 40 CFR 180.163(a)(1), each at 5 ppm, under the crop group terminology ''vegetable, fruiting, group 8'' and decrease the tolerance to 2.0 ppm, based on new field trials.

Based on field trial data that indicate residues of dicofol as high as 0.46 ppm in dry beans and 2.09 ppm in succulent beans, the Agency has determined that the appropriate tolerances are 0.5 ppm for dry beans and 3.0 ppm for succulent beans. Therefore, EPA is proposing in 40 CFR 180.163(a)(1) to decrease the tolerances for ''bean (dry form)'' from 5 to 0.5 ppm and revise the commodity name to ''bean, dry, seed;'' and replace ''bean, snap, succulent'' and ''bean, lima, succulent'' with ''bean, succulent'' and decrease the tolerance from 5 to 3.0 ppm.

Pecan and walnut field trial data show that residues of dicofol were non-detectable. The Agency determined that the data translated to other nuts and that the tolerances for butternut, chestnut, filbert, hickory nut, macadamia nut, pecan, and walnut should be at 0.1 ppm. Therefore, EPA is proposing in 40 CFR 180.163(a)(1) to decrease the tolerances for ''nut, macadamia'' from 5 to 0.1 ppm;''''butternut''from 5 to 0.1 ppm, ''chestnut'' from 5 to 0.1 ppm, ''filbert'' from 5 to 0.1 ppm, ''nut, hickory'' from 5 to 0.1 ppm, ''pecans'' from 5 to 0.1 ppm and revise the commodity name to ''pecan;'' and ''walnut'' from 5 to 0.1 ppm, all based on available data.

Based on field trial data that indicate residues of dicofol as high as 64.3 ppm on dried hops, the Agency has determined that the tolerance should be for dried hops at 65.0 ppm. Therefore, EPA is proposing to increase the tolerance in 40 CFR 180.163(a)(1) for ''hop'' from 30 to 65.0 ppm and revise the commodity tolerance to ''hop, dried cones'' because the raw agricultural commodity (RAC) is redefined.

Because available data show that residues of dicofol were as high as 9.8 ppm on strawberries, the Agency determined that the tolerance should be at 10.0 ppm. Therefore, EPA is proposing to increase the tolerance in 40 CFR 180.163(a)(1) for ''strawberry'' from 5 to 10.0 ppm.

Based on highest average field trial (HAFT) residues of 5.54 ppm on apples, 3.16 ppm on oranges, 0.06 ppm on cotton, 3.02 ppm on grapes, and 17.6 ppm on mint, 29.1 ppm on plucked tea leaves, and available processing data showing average concentration factors of 6.6x in wet apple pomace, 3.7x in dried orange pulp, 62.8x in orange oil, 4.9x in refined cotton oil, 6.6x in raisins, 1.6x in mint oil, and 1.6x in dried tea, the Agency determined that tolerances for dicofol are warranted as follows: wet apple pomace at 38 ppm, dried citrus pulp at 12 ppm, citrus oil at 200 ppm, refined cotton oil at 0.5 ppm, raisins at 20.0 ppm, peppermint oil at 30 ppm, spearmint oil at 30 ppm, tea, plucked tea leaves at 30.0 ppm, and dried tea at 50 ppm. Therefore, EPA is proposing to increase the tolerance in 40 CFR 180.163(a)(1) for ''tea, dried'' from 45 ppm to 50.0 ppm and establish tolerances in 40 CFR 180.163(a)(1) for ''apple, wet pomace'' at 38.0 ppm, ''citrus, dried pulp'' at 12.0 ppm, ''citrus, oil'' at 200.0 ppm, ''cotton, refined oil'' at 0.5 ppm, ''grape, raisin'' at 20.0 ppm, ''peppermint, oil'' at 30.0 ppm, ''spearmint, oil'' at 30.0 ppm, and ''tea, plucked leaves'' at 30.0 ppm.

A new tolerance for the processed commodity prunes as ''plum, prune, dried'' at 3.0 ppm is not needed because that use is covered by the proposed combination of stone fruits into a group tolerance at 5.0 ppm, as described above.

Based on hen metabolism and feeding data and on residues in cottonseed meal (20% diet X 0.1 ppm residue), the Agency has determined that tolerances should be established at 0.1 ppm for poultry fat, meat, and meat byproducts. The tolerance for eggs should be decreased to 0.05 ppm for compatibility with Codex. Therefore, EPA is proposing to establish tolerances in 40 CFR 180.163(a)(2) for ''poultry, fat;'' ''poultry, meat;'' and ''poultry, meat byproducts;'' each at 0.1 ppm and ''egg'' at 0.05 ppm.

Based on ruminant metabolism and feeding data, the Agency determined that tolerances for fat of cattle, goats,

hogs, horses and sheep should be established at 50.0 ppm; meat and meat byproducts, except liver of cattle, goats, hogs, horses and sheep should be established at 3.0 ppm; and liver of cattle, goats, hogs, horses and sheep should be established at 5.0 ppm. Also, the Agency determined that the tolerance for milk should reflect dicofol residues of 0.75 ppm in whole milk corrected by a factor of 30x to account for concentration in milk such that 22.0 ppm is appropriate. Therefore, EPA is proposing to establish tolerances in 40 CFR 180.163(a)(2) for the following: ''cattle, meat;'' ''cattle, meat byproducts, except liver;'' ''goat, meat;'' ''goat, meat byproducts, except liver;'' ''hog, meat;'' ''hog, meat byproducts, except liver;'' ''horse, meat;'' ''horse, meat byproducts, except liver;'' ''sheep, meat;'' and ''sheep, meat byproducts, except liver;'' each at 3.0 ppm; ''cattle, liver;'' ''goat, liver;'' ''hog, liver;'' ''horse, liver;'' and ''sheep, liver;'' each at 5.0 ppm; ''cattle, fat;'' ''goat, fat;'' ''hog, fat;'' ''horse, fat;'' and ''sheep, fat;'' each at 50.0 ppm; and ''milk'' at 22.0 ppm.

EPA is proposing to revise commodity terminology in 40 CFR 180.163 to conform to current Agency practice as follows: ''hay, peppermint'' to ''peppermint, hay.''

4. *Diquat dibromide*. The Diquat dibromide RED was completed in July 1995 and the existing tolerances were reassessed according to the FQPA standard in the April 2002 TRED. EPA has determined that the tolerance expression in 40 CFR 180.226(a)(1) should be amended by defining diquat as both a plant growth regulator and herbicide, and correcting the chemical name. Therefore, EPA is proposing in 40 CFR 180.226(a)(1) to amend the tolerance expression to read ''. . . residues of the plant growth regulator and herbicide diquat, [6,7-dihydrodipyrido (1,2-a:2′,1′-c) pyrazinediium] . . .'' .

On July 1, 2003, (68 FR 39427) (FRL–7308–9) EPA revised potato, waste, dried in 40 CFR 180.226(a)(1) to potato, processed potato waste, but should have revised it to potato, processed potato waste, dried. Processed, dried potato waste is no longer a significant animal feed item. Therefore, EPA is proposing to revoke the tolerances for potato, processed potato waste in § 180.226(a)(1) and processed, dried potato waste in § 180.226(a)(6) because the associated commodities are no longer significant animal feed items and these tolerances are therefore no longer needed.

In order to achieve compatibility with CODEX (see Unit III., below), EPA is proposing to increase the tolerances in 40 CFR 180.226(a)(1) for egg and fat, meat, and meat byproducts of cattle, goats, hogs, horses, poultry, and sheep, from 0.02 to 0.05 ppm.

Available data indicate that residues of diquat in fish and shellfish will exceed the established tolerances at current maximum registered use patterns. In order to cover all residues of diquat which may occur as a result of the currently registered uses, increasing the tolerances to 2.0 ppm for fish and 20.0 ppm for shellfish is appropriate. Therefore, EPA is proposing in 40 CFR 180.226(a)(2)(i) to increase the tolerances for residues of diquat on ''fish'' from 0.1 to 2.0 ppm and ''shellfish'' from 0.1 to 20.0 ppm.

The available data concerning diquat residues following irrigation indicate that residues in/on blackberry, cowpea, orange, strawberry, mustard greens, pasture grass, and tomato may exceed the current tolerances for the respective crop groups and that tolerances should be increased to 0.05 ppm for citrus fruits, small fruits, fruiting vegetables, legume vegetables, and Brassica leafy vegetables, and to 0.20 ppm for grass forage. Therefore, EPA is proposing in 40 CFR 180.226(a)(2)(i) to increase the tolerances for residues of diquat on ''fruit, citrus, group 10'' from 0.02 to 0.05 ppm; ''fruit, small'' from 0.02 to 0.05 ppm and revise the terminology to ''fruit, small and berry group;'' ''vegetable, fruiting, group 8'' from 0.02 to 0.05 ppm; ''vegetables, leafy'' from 0.02 to 0.05 ppm and revise the terminology to ''vegetable, leafy, except brassica, group 4'' and ''vegetable, brassica, leafy, group 5;'' and ''vegetables, seed and pod'' from 0.02 to 0.05 ppm and revise the terminology to ''vegetable, seed and pod;'' and ''grass, forage'' from 0.1 to 0.2 ppm and revise the terminology to ''grass, forage, fodder and hay, group 17.''

While no data are available for the miscellaneous commodities avocado, cottonseed, hops, and sugarcane for which tolerances currently exist, the Agency determined that data for other crops could be translated. Based on the highest residues found in other irrigated crops resulting from irrigation with water containing diquat residues, the Agency determined that tolerances of 0.20 ppm are appropriate for avocado, cottonseed, hops, and sugarcane. Therefore, EPA is proposing in 40 CFR 180.226(a)(2)(i) to increase the tolerances for residues of diquat in or on ''avocado,'' ''cotton, undelinted seed,'' and ''sugarcane, cane;'' each from 0.02 to 0.2 ppm, and ''hop, dried cone'' from 0.02 to 0.2 ppm and revise the terminology to ''hop, dried cones.''

Because available data show that residues of diquat were as high as 1.6 ppm on sorghum grain and 0.16 ppm on soybean, the Agency determined that tolerances should be established for sorghum grain at 2.0 ppm, and both soybean and foliage of legume vegetables at 0.2 ppm. Therefore EPA is proposing to establish tolerances in 40 CFR 180.226(a)(1) for residues of diquat in or on ''sorghum, grain, grain'' at 2.0 ppm, ''soybean, seed'' at 0.2 ppm, and increase the tolerance for ''vegetable, foliage of legume, group 7'' from 0.1 to 0.2 ppm.

In addition, soybean processing data indicate that residues of diquat concentrated about 3x in soybean hulls processed from soybean bearing detectable residues. No concentration of residues was observed in other soybean processed fractions. Based on a recommended tolerance of 0.2 ppm for soybean and a concentration factor of about 3x in soybean hulls, the Agency determined that a tolerance of 0.6 ppm is appropriate for residues of diquat on soybean hulls. Therefore, EPA is proposing to establish a tolerance for residues of diquat in § 180.226(a)(3) for ''soybean, hulls'' at 0.6 ppm.

Based on field trial data on alfalfa grown for seed show that residues of diquat were as high as 2.4 ppm, the Agency determined that a tolerance of 3.0 ppm is appropriate and should be established. Therefore, EPA is proposing to establish a tolerance in § 180.226(a)(1) for ''alfalfa, seed'' at 3.0 ppm. However, a tolerance for ''clover, seed'' is not needed because clover seed is no longer considered to be a significant food or feed item.

EPA is proposing to revise commodity terminology to conform to current Agency practice as follows: in 40 CFR 180.226(a)(2)(i), ''grain, crop'' is proposed to be changed to read ''grain, cereal, group 15'' and ''grain, cereal, forage, fodder and straw, group 16;'' and in 40 CFR 180.226(a)(3), ''coffee'' is proposed to be changed to read ''coffee, bean.''

5. *5-Ethoxy-3-(trichloromethyl)-1,2,4-thiadiazole (Etridiazole or Terrazole).* Based on available data, EPA determined that there is no reasonable expectation of finite residues of etridiazole and its metabolites on or in animal livestock commodities. These tolerances are no longer needed under 40 CFR 180.6(a)(3). Therefore, EPA is proposing to revoke the commodity tolerances in 40 CFR 180.370(a) for residues of etridiazole and its monoacid metabolite in or on ''cattle, fat;'' ''cattle, meat byproducts;'' ''cattle, meat;'' ''egg;'' ''goat, fat;'' ''goat, meat byproducts;'' ''goat, meat;'' ''hog, fat;'' ''hog, meat

byproducts;'' ''hog, meat;'' ''horse, fat;'' ''horse, meat byproducts;'' ''horse, meat;'' ''milk;'' ''poultry, fat;'' ''poultry, meat byproducts;'' ''poultry, meat;'' ''sheep, fat;'' ''sheep, meat byproducts;'' and ''sheep, meat.''

EPA canceled the registrations for etridiazole use on tomatoes and strawberries. On October 26, 1998 (63 FR 57067) (FRL–6035–6) in a final rule, EPA responded to a comment received from the European Union, which requested that the tolerance for strawberry not be revoked and asked for a clarification of methodology for commitment in support of tolerance retention. At that time, EPA did not revoke the tolerance for strawberry. However, since then, EPA has published a guidance concerning submissions for pesticide import tolerance support and residue data for imported food as described in Unit III. Therefore, EPA is proposing to revoke the tolerance for strawberry in 40 CFR 180.370. However, EPA will not propose to revoke the tolerance for ''tomato'' at this time. At the time of the RED, the registrant had committed to provide additional data in order to maintain the tomato tolerance for import purposes. Since the RED, the registrant has expressed an interest in amending one or more of its existing U.S. registrations in order to add tomato for domestic use and supporting that use with data.

The Agency determined that metabolism data at exaggerated rates of etridiazole seed treatments on cotton, soybean, and wheat would support seed treatment uses on barley, beans, corn, cotton peanuts, peas, safflower, sorghum, soybeans, and wheat. Residues of etridiazole per se were non-detectable on soybeans and wheat, but as high as 0.06 ppm on cotton. Residues of the monoacid metabolite are expected not to exceed 0.04 ppm based on the metabolism data from seed treated at 1-fold amounts. Based on these data, the Agency determined that appropriate tolerances for combined residues of etridiazole and its monoacid metabolite for treated seed should be set at the combined limit of quantitation (0.1 ppm) of the available enforcement method. Therefore, EPA is proposing to increase the tolerances in 40 CFR 180.370 for ''wheat, grain'' from 0.05 to 0.1 ppm, and ''corn, field, grain'' from 0.05 to 0.1 ppm. Also, EPA is proposing to decrease the tolerance in 40 CFR 180.370 for ''cotton, undelinted seed'' from 0.20 to 0.1 ppm based on available data. In addition, based on available data, EPA is proposing to establish tolerances in 40 CFR 180.370 at 0.1 ppm for ''barley, grain;'' ''barley, hay;'' ''cotton, gin byproducts;'' ''peanut;'' ''safflower, seed;'' ''sorghum, grain, forage;'' ''sorghum, grain, grain;'' ''vegetable, foliage of legume, group 7;'' and ''vegetable, legume, group 6.'' However, because peanut hay is no longer considered to be a significant livestock feed commodity, the establishment of a peanut hay tolerance is no longer needed.

In order to conform to current Agency practice, in 40 CFR 180.370, EPA is proposing to revise ''corn, forage'' to ''corn, field, forage'' and ''corn, sweet, forage,'' and ''corn, stover'' to ''corn, field, stover'' and ''corn, sweet, stover.''

6. *Fenbutatin-oxide*. The Fenbutatin-oxide RED was completed in September 1994 and the existing tolerances were reassessed according to the FQPA standard in the May 2002 TRED. EPA determined that in order to better harmonize with CODEX, the fenbutatin-oxide, hexakis (2-methyl-2-phenylpropyl) distannoxane tolerance expression for plants should include the parent compound only. Therefore, EPA is proposing in 40 CFR 180.362(a) to recodify plant tolerances in § 180.362(a)(1) and animal tolerances in § 180.362(a)(2). Moreover, EPA is proposing to revise the tolerance expression such that tolerances in § 180.362(a)(1) are established for residues of hexakis (2-methyl-2-phenylpropyl) distannoxane and tolerances in § 180.362(a)(2) are established for the combined residues of hexakis (2-methyl-2-phenylpropyl) distannoxane and its organotin metabolites dihydroxybis(2-methyl-2-phenylpropyl)stannane, and 2-methyl-2-phenylpropylstannoic acid.

Also, EPA is proposing to remove the tolerance in 40 CFR 180.362 for ''plum, prune'' because that tolerance is no longer needed since that use is covered by the plum tolerance. In addition, EPA is proposing to revise the commodity tolerance terminology ''plum'' to ''plum, prune, fresh.''

Because available data for almond, pecan, and walnut support a crop group tolerance; EPA is proposing in 40 CFR 180.362 to reassign their individual tolerances into a group tolerance ''nut, tree, group 14'' and maintain the tolerance at 0.5 ppm.

The Agency determined that a tolerance on apple wet pomace should be established at 100 ppm because available apple processing data indicate that combined fenbutatin-oxide residues of concern concentrate 1.7x in wet pomace. Based on that processing data, EPA is proposing to establish a tolerance in 40 CFR 180.362(a)(1) for ''apple, wet pomace'' at 100.0 ppm.

In addition, EPA is proposing to revise commodity terminology in 40 CFR 180.362 to conform to current Agency practice as follows: ''fruit, citrus'' to ''fruit, citrus, group 10;'' and ''milk fat'' to ''milk, fat.''

7. *Folpet*. EPA is proposing to recodify the tolerance for ''avocado''at 25 ppm from 40 CFR 180.191(a) into § 180.191(c) as a tolerance with regional registration because the use of folpet on avocados is limited to the state of Florida, and there is no need for a national tolerance. Additional data would be required to establish a tolerance for folpet use on avocados outside the state of Florida.

With the exception of ''avocado,''the registrant is supporting the remaining folpet tolerances for import purposes only and EPA is proposing to designate them as import tolerances with no U.S. registrations. For some commodities, the import tolerances should be lower than the old tolerance with a U.S. registration because the import tolerances are based on different use information than that on which the previous tolerances were based. Because the registrant has committed to provide the Agency with amended foreign labels for folpet which specify the recommended use patterns in the near future, EPA is proposing modifications to certain tolerances.

Available data indicate that folpet residues ranged up to 3.67 ppm in/on apples harvested 7–10 days following the last of several applications (14 day retreatment interval) at 0.8 to 3.59 kilograms of active ingredient per hectare (kg ai/ha). The submitted international labels, however, permit higher application rates and/or shorter pre-harvest intervals (PHIs) than those represented by the data reviewed here. Based on the tested application scenarios, the Agency determined that a tolerance of 5 ppm on apple is appropriate provided that the international labels are changed so that use directions do not exceed a maximum single application rate of 3.6 kg ai/ha and a maximum seasonal application rate of 10.8 kg ai/ha. These labels should also reflect a minimum PHI of 10 days and a treatment interval of 14 days. Therefore, EPA is proposing to decrease the tolerance in 40 CFR 180.191(a) for ''apple''from 25.0 to 5.0 ppm.

Foreign field trial data on cranberries indicate that folpet residues ranged up to 11.2 ppm in/on cranberries harvested 30 days following the last of three broadcast applications (separated by a 12– to 14–day retreatment interval) at 5.0 kg a.i./ha/application. Although the submitted data do not reflect the maximum label use pattern of folpet on cranberries (which is limited to only two applications and not three

applications as tested here), the Agency accepted the current field trial data and determined that a tolerance of 15 ppm is appropriate on cranberries. Therefore, EPA is proposing to decrease the tolerance in 40 CFR 180.191(a) for ''cranberry''from 25.0 to 15.0 ppm.

Foreign field trial data on onions indicate that folpet residues ranged up to 0.406 ppm in/on dry bulb onions harvested 7 days following the last of either three or four applications (7–day retreatment interval) of folpet at either 1.5– or 1.95 kg ai/ha per application. The submitted international labels, however, permit higher application rates and/or shorter PHIs than those represented by this data and should be amended. Based on the tested application scenarios, the Agency determined that a tolerance of 2.0 ppm is appropriate on dry bulb onions. Therefore, EPA is proposing to decrease the tolerance in 40 CFR 180.191(a) for ''onion, dry bulb'' from 15.0 to 2.0 ppm.

Foreign field trial data on strawberries indicate that folpet residues ranged up to 2.56 ppm in/on strawberries harvested 2 days following the last of four applications at 1.25 kg ai/ha each. The submitted international labels, however, permit higher application rates and/or shorter PHIs than those represented by the data reviewed here. Based on the tested application scenarios, the Agency determined that a tolerance of 5 ppm on strawberries is appropriate provided the use directions on the international labels do not exceed a maximum of four applications per season at up to 1.25 kg ai/application, and specify a retreatment interval of 7 days and a preharvest interval of 2 days. Therefore, EPA is proposing to decrease the tolerance in 40 CFR 180.191(a) for ''strawberry''from 25.0 to 5.0 ppm.

Foreign field trial data on grapes indicate that folpet residues ranged up to 38.3 ppm in/on grapes harvested 14 days following the last of five applications (separated by a 5–7 day retreatment interval) at 1.49 kg ai/ha/application. The submitted international labels, however, permit higher application rates and/or shorter PHIs than those represented by this data. Based on the tested application scenarios, the Agency determined that a tolerance of 50 ppm on grape is appropriate provided that the international labels are amended so that use rates do not exceed a maximum single application rate of 1.5 kg ai/ha and a maximum seasonal rate of 8.0 kg ai/ha. These labels should also reflect a minimum PHI and retreatment interval of 7 days each. The registrant has committed to provide the foreign labels in the near future. Therefore, EPA is proposing to increase the tolerance in 40 CFR 180.191(a) for ''grape'' from 25 to 50.0 ppm.

No U.S. registration exists for use of folpet on raisins. However, grape processing data show that the average concentration factor from grapes to raisins for folpet residues is 1.9x. Based on an average concentration factor of 1.9x and a highest average field trial (HAFT) of 38.3 ppm, the Agency determined that for import purposes a tolerance of 80.0 ppm should be established for grape, raisin. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.191(a) for ''grape, raisin'' at 80.0 ppm.

The reassessment decision regarding the import tolerances for ''lettuce'' and ''tomato'' is to maintain each at its current level of 50.0 and 25.0 ppm, respectively.

EPA is considering the registrant's waiver request for additional cucumber and melon storage stability data provided the foreign labels are amended to specify the recommended use pattern. Foreign field trials for cucumbers harvested 3–7 days following the last of several applications indicate residues of folpet up to 0.699 ppm at up to 1.75 kg/ai/ha. Foreign labels need to be amended for cucumber to include a maximum single application rate of 1.75 kg ai/ha, a maximum seasonal application rate of 8.0 kg ai/ha, a minimum preharvest interval of at least 3 days, and a minimum retreatment interval of at least 7 days. Also, foreign field trials for melons harvested 7 days following the last of up to six applications (with a 5 to 7–day retreatment interval) indicate residues of folpet up to 2.3 ppm at up to 1.75 kg/ai/ha. Foreign labels need to be amended for melons to include a maximum single application rate of 1.75 kg ai/ha, a maximum seasonal application rate of 10.5 kg ai/ha, a minimum preharvest interval of at least 7 days, and a minimum retreatment interval of at least 7 days.

Based on the tested application scenarios, the tolerances for ''cucumber'' and ''melon'' should be decreased to 2.0 and 3.0 ppm, respectively. Therefore, EPA is proposing in 40 CFR 180.191(a) to decrease the tolerances for cucumber from 15.0 to 2.0 ppm, and melon from 15.0 to 3.0 ppm.

Since the folpet RED was completed in 1999, a tolerance for the purpose of importation was established in 40 CFR 180.191(a) for ''hop, dried cones'' (68 FR 10377, March 5, 2003)(FRL–7296–2).

8. *Hydramethylnon (pyrimidinone).* EPA is proposing to increase the tolerance in 40 CFR 180.395(a) on ''grass (pasture and rangeland)'' from 0.05 to 2.0 ppm and revise the terminology to ''grass, forage'' and ''grass, hay;'' based on available field trial data which show residues of hydramethylnon above the current tolerance level and label amendments which reflect parameters of use patterns for which field trials are available; i.e., reflect a zero day post harvest interval since that the Agency no longer allows a PHI restriction on grass. The tolerance for ''grass hay (pasture and rangeland)'' was recommended to be increased from 0.05 to 0.1 ppm, based on available field trial data previously discussed and label amendments which reflect a zero day post harvest interval. However, because the terminology should be revised to ''grass, hay,'' that tolerance at 0.1 ppm is no longer needed since it would be a duplicate covered by the proposed tolerance at 2.0 ppm. Therefore, EPA is proposing to remove the tolerance in 40 CFR 180.395(a) for grass hay (pasture and rangeland).

Since the hydramethylnon RED was completed in 1998, a tolerance was established in 40 CFR 180.395(a) for ''pineapple'' (68 FR 48302, August 13, 2003)(FRL–7319–5).

9. *Iprodione.* EPA is proposing to revoke the tolerances in 40 CFR 180.399(a)(1) for combined residues of iprodione and its metabolites in or on ''bean, forage;'' ''peanut, hay'' (previously termed peanut forage); and ''peanut hay'' because they are no longer considered to be significant livestock feed commodities. Further, label amendments prohibit the feeding of iprodione-treated peanut hay to livestock. Therefore, these tolerances are no longer needed. The Agency is also proposing to revoke the commodity tolerances in 40 CFR 180.399(a)(1) for residues of iprodione in or on ''ginseng, dried root'' because there are no processed commodities associated with ginseng, and ''bean, dried, vine hay'' because labels have been amended such that iprodione use on cowpeas is prohibited.

EPA is proposing to remove the individual commodity tolerances on ''boysenberry'' and ''raspberry'' in 40 CFR 180.399(a)(1) because the uses are covered by the existing tolerance on caneberries, and revise the terminology to ''caneberry subgroup 13A.''

The drying of ginseng roots is a routine practice and is considered part of the harvesting process. Therefore, the dried root should be considered the raw agricultural commodity. Ginseng field trial data show combined iprodione regulated residues above the current tolerance, but below 4.0 ppm. EPA is

proposing in 40 CFR 180.399(a)(1) to increase the tolerance on ''ginseng, root'' from 2.0 to 4.0 ppm, based on available data.

Based on grape field trials reflecting application with commercial sprayer equipment, the combined iprodione regulated residues ranged as high as 4.7 ppm with a highest average field trial (HAFT) of 4.1 ppm. However, a Codex MRL of 10.0 ppm is established for iprodione per se on grapes. Although the current U.S. tolerances includes combined residues for iprodione, its isomer, and its metabolite, data indicate that the majority of residue in/on grape consists of the parent compound. (Two samples showed detectable residues of the metabolite and none had detectable residues of the isomer). Therefore, the agency determined that a tolerance of 10.0 ppm is appropriate. Based on available residue data, EPA is proposing in 40 CFR 180.399(a)(1) to decrease the tolerance on grape from 60.0 to 10.0 ppm.

Available grape processing data are sufficient to conclude that the average concentration factor from grapes to raisins for combined iprodione regulated residues is 3.56x. Multiplication of the average concentration factor (3.56x) with a HAFT of 4.1 ppm for grapes yields an expected combined residue level of about 14.6 ppm after processing. Based on the calculated level, the Agency has determined that a tolerance of 15.0 ppm is warranted for grape, raisin. Therefore, EPA is proposing in 40 CFR 180.399(a)(1) to decrease the tolerance on ''grape, raisin'' from 300 to 15.0 ppm.

OPPTS Guideline 860.1500 lists cherries (sweet or sour), peach, and plum (or fresh prune) as the representative commodities for the stone fruit crop group. Peach and plum field trial data show that combined iprodione regulated residues were below the limit of quantitation (LOQ) of 0.05 ppm. Cherry field trial data show that combined iprodione regulated residues ranged from non-detectable to 0.14 ppm. In addition, label amendments restrict applications to all stone fruits to no later than last petal fall, and reduce the number of applications per season on cherries and plums from four to two. Therefore, EPA is proposing to decrease commodity tolerances in 40 CFR 180.399(a)(1) as follows: ''apricot'' from 20.0 to 0.2 ppm; ''cherry, tart'' from 20.0 to 0.2 ppm; ''cherry (sweet), postharvest'' from 20.0 to 0.2 ppm and revise the terminology to ''cherry, sweet;'' ''nectarine, postharvest'' from 20.0 to 0.2 ppm and revise the terminology to ''nectarine;'' ''peach, postharvest'' from 20.0 to 0.05 ppm and revise the terminology to ''peach;'' ''plum, postharvest'' from 20.0 to 0.2 ppm and revise the terminology to ''plum;'' and ''plum, prune'' from 20.0 to 0.2 ppm and revise the terminology to ''plum, prune, fresh.''

Strawberry field trial data show that combined iprodione regulated residues ranged from non-detectable to a high of 0.41 ppm. In addition, label amendments reduce the number of applications per season on strawberries from four to two and the PHI was increased from zero days to no later than first flower (ca. 20 days). Therefore, EPA is proposing to amend 40 CFR 180.399(a)(1) to decrease the tolerance on strawberry from 15.0 to 0.5 ppm.

Cattle feeding data show that combined iprodione regulated residues were highest in kidney (<2.9 ppm) and liver (<2.0 ppm) at an exaggerated 7.2x feeding level, and therefore, those tolerances should be maintained at 3.0 ppm. Also, the tolerance for meat byproducts should be equivalent to the level which is highest for either meat or any individual organ for which residues were measured; *i.e.*, increased to 3.0 ppm. Based on the available feeding data, the tolerances for meat byproducts, except kidney and liver of cattle, goats, hogs, horses, and sheep should each be increased from 0.5 to 3.0 ppm. Separate tolerances for ''cattle, kidney;'' ''cattle, liver;'' ''goat, kidney;'' ''goat, liver;'' ''hog, kidney;'' ''hog, liver;'' ''horse, kidney;'' ''horse, liver;'' ''sheep, kidney'' and ''sheep, liver,'' which currently exist in 40 CFR 180.399(a)(2) at 3.0 ppm, are no longer needed. Therefore, EPA is proposing to combine the three meat byproduct tolerances for each animal commodity by revising the terminologies to ''cattle, meat byproducts;'' ''goat, meat byproducts;'' ''hog, meat byproducts;'' ''horse, meat byproducts;'' and ''sheep, meat byproducts;'' and increasing each tolerance to 3.0 ppm.

Hen feeding data show that combined iprodione regulated residues were highest in liver (<7.2 ppm at a 1.27x feeding level), and therefore, the poultry, liver tolerance should be increased to 7.0 ppm. Because the tolerance for meat byproducts should be equivalent to the level which is highest for either meat or any individual organ for which residues were measured, ''poultry, meat byproducts, except liver'' should be increased to 7.0 ppm and revised to ''poultry, meat byproducts.'' Therefore, EPA is proposing in 40 CFR 180.399(a)(2) to increase the tolerances for ''poultry, liver'' from 5.0 to 7.0 ppm and ''poultry, meat byproducts, except liver'' from 1.0 to 7.0 ppm. Because separate liver and meat byproduct tolerances for poultry are no longer needed, EPA is proposing to combine them into the commodity terminology ''poultry, meat byproducts'' at 7.0 ppm. Also, because the hen feeding data evaluated residues for skin/fat rather than for the tolerance commodity fat, the tolerance for poultry fat will be based on data in liver. Therefore, EPA is proposing in 40 CFR 180.399(a)(2) to increase the tolerance for ''poultry, fat'' from 3.5 to 7.0 ppm.

10. *Paraquat.* EPA is proposing to revoke the tolerances in 40 CFR 180.205(a) for ''mint, hay'' and ''mint, hay, spent'' because they are no longer recognized as raw agricultural commodities, and for ''peanut, hay'' because it is no longer considered to be a significant livestock feed commodity, and therefore these tolerances are no longer needed. Also, EPA is proposing to remove the ''(N)'' designation from all entries to conform to current Agency administrative practice (''N'' designation means negligible residues), and to revise the commodity terminology ''coffee bean'' to ''coffee, bean;'' ''fruit, citrus'' to ''fruit, citrus, group 10;'' ''vegetable, fruiting'' to ''vegetable, fruiting, group 8;'' and redefine the commodity terminology for ''bean, forage'' to ''cowpea, forage'' and ''bean, hay'' to ''cowpea, hay.''

Based on field trial data that indicate residues of paraquat as high as 60, 59, and 74 ppm in or on alfalfa forage, birdsfoot trefoil forage, and clover forage, respectively, and 93, 206, and 148 ppm in or on alfalfa hay, birdsfoot trefoil hay, and clover hay, respectively, the Agency determined that the crop animal feed, non-grass group tolerances should be increased to 75.0 ppm for forage and 210.0 ppm for hay. Therefore, EPA is proposing in 40 CFR 180.205(a) to combine the commodity tolerances for ''alfalfa,'' ''birdsfoot trefoil,'' and ''clover,'' each at 5 ppm, under the crop group terminologies ''animal feed, nongrass, group 18, forage'' and ''animal feed, nongrass, group 18, hay'' and increase the tolerances to 75.0 and 210.0 ppm, respectively.

Based on field trial data that indicate residues of paraquat as high as 90 ppm in or on rangeland grass forage (which should be revised to grass, forage) and 40 ppm in or on pasture grass hay (which should be revised to grass, hay), the Agency determined that the tolerances should be increased to 90 ppm for grass forage and 40 ppm for grass hay. Therefore, EPA is proposing in 40 CFR 180.205(a) to revise the commodity terminology ''grass, pasture'' to read ''grass, forage'' and increase the tolerance from 5 to 90.0 ppm; and revise

''grass, range'' to read ''grass, hay'' and increase the tolerance from 5 to 40.0 ppm.

Although ruminant feeding data indicate residues of paraquat as high as only 0.31 ppm in kidney, the Agency determined that in the interest of CODEX harmonization that it is appropriate to increase the tolerance equal to the maximum residue limit (MRL) of CODEX at 0.5 ppm for the kidney of cattle, goats, hogs, horses, and sheep. Therefore, EPA is proposing in 40 CFR 180.205(a) to increase the tolerances for ''cattle, kidney;'' ''goat, kidney;'' ''hog, kidney;'' ''horse, kidney;'' and ''sheep, kidney;'' each from 0.3 to 0.5 ppm.

Based on field trial data indicating residues exceeding the current tolerance of 0.2 ppm, the Agency determined that the tolerance for dried hops should be increased to 0.5 ppm. Therefore, EPA is proposing in 40 CFR 180.205(a) to increase the tolerances for ''hop, dried cone'' from 0.2 to 0.5 ppm and revise the terminology to ''hop, dried cones.''

Based on field trial data that indicate residues of paraquat as high as 0.06 ppm in or on sorghum forage, the Agency determined that the tolerance should be increased to 0.1 ppm. Therefore, EPA is proposing in 40 CFR 180.205(a) to increase the tolerance for ''sorghum, forage'' from 0.05 to 0.1 ppm.

Based on field trial data, the Agency determined that residues of paraquat in or on soybeans would not exceed 0.25 ppm and should be increased. Therefore, EPA is proposing in 40 CFR 180.205(a) to increase the tolerance for ''soybean'' from 0.05 to 0.25 ppm.

Based on field trial data that indicate residues of paraquat in or on sugar beet tops are non-detectable (<0.025 ppm), the Agency determined that the tolerance should be decreased to 0.05 ppm. Therefore, EPA is proposing in 40 CFR 180.205(a) to decrease the tolerances for ''beet, sugar, tops'' from 0.5 to 0.05 ppm.

Based on label restrictions against the grazing or harvesting for treated soybean forage and hay following postemergence or harvest aid use, the Agency determined that the tolerance in or on soybean forage should be decreased to 0.03 ppm and a tolerance for soybean hay should be established at 0.05 ppm. Therefore, EPA is proposing in 40 CFR 180.205(a) to decrease the tolerance for ''soybean forage'' from 0.05 to 0.03 ppm and revise the commodity terminology to read ''soybean, forage;'' and to establish a tolerance in 40 CFR 180.205(a) for ''soybean, hay'' at 0.05 ppm.

EPA is proposing in 40 CFR 180.205(a) to combine the commodity tolerances for ''apple'' and ''pear'' under the crop group terminology ''fruit, pome, group 11'' and maintain the tolerance at 0.05 ppm.

EPA is proposing in 40 CFR 180.205(a) to combine the commodity tolerances for ''apricot,'' ''cherry,'' ''nectarine,'' ''peach,'' and ''plum, prune, fresh'' under the crop group terminology ''fruit, stone, group 12'' and maintain the tolerance at 0.05 ppm based on label amendments.

EPA is proposing in 40 CFR 180.205(a) to combine the commodity tolerances for ''broccoli,'' ''cabbage,'' ''cabbage, chinese,'' ''cauliflower,'' and ''collards'' under the crop group terminology ''vegetable, brassica, leafy, group 5'' and maintain the tolerance at 0.05 ppm.

EPA is proposing in 40 CFR 180.205(a) to revise the crop group tolerance for ''small fruit'' into individual commodity tolerances for ''cranberry'' and ''grape'' and maintain the tolerances at 0.05 ppm.

Based on a reassessed pineapple tolerance of 0.05 ppm and pineapple processing data showing an average concentration factor of 4.5x in dried bran, the Agency determined that a tolerance should be established for pineapple process residue (a wet-waste byproduct from the fresh cut product line, which usually contains pineapple bran) at 0.25 ppm. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.205(a) for ''pineapple, process residue'' at 0.25 ppm.

Based on a reassessed soybean tolerance of 0.25 ppm and soybean processing data showing an average concentration factor of 6.1x in hulls, the Agency determined that a tolerance should be established for soybean hulls at 2.0 ppm. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.205(a) for ''soybean, hulls'' at 2.0 ppm.

Based on a reassessed sugarcane tolerance of 0.5 ppm and sugarcane processing data showing an average concentration factor of 5.5x in blackstrap molasses, the Agency determined that a tolerance should be established for sugarcane molasses at 3.0 ppm. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.205(a) for ''sugarcane, molasses'' at 3.0 ppm.

Based on field trial data that indicate residues of paraquat as high as 0.46 ppm in or on wheat straw, the Agency determined that a tolerance should be established at 1.0 ppm for wheat straw and because the data can translate to barley, there should also be a tolerance established at 1.0 ppm for barley straw. In addition, based on wheat data that indicate residues of paraquat in or on wheat forage will not exceed 0.5 ppm, the Agency determined that a tolerance should be established for wheat forage at 0.5 ppm. Therefore, EPA is proposing to establish tolerances in 40 CFR 180.205(a) for ''barley, straw'' at 1.0 ppm; ''wheat, forage'' at 0.5 ppm; and ''wheat, straw'' at 1.0 ppm.

On September 21, 2001 (66 FR48593) (FRL–6799–2), EPA published a final rule in the **Federal Register** which in 40 CFR 180.205(a) established tolerances for ''corn, field, stover'' and ''corn, pop, stover'' at 10.0 ppm; ''corn, field, grain'' and ''corn, pop, grain'' at 0.1 ppm; and ''corn, field, forage'' at 3.0 ppm; based on proposed tolerances in pesticide petition PP 5F1625 submitted by Zeneca Ag. Products and to harmonize corn, field, grain and corn, pop, grain with the Codex maximum residue limit (MRL) of 0.1 ppm for maize. In the September 2001 final rule, EPA also stated that in the food additive petition 5H5088, Zeneca had proposed a food additive tolerance for ''corn flour'' at 0.1 ppm which was subsequently withdrawn since EPA determined that the tolerance for corn, field, grain at 0.1 ppm is adequate to cover residues in corn flour.

EPA is proposing in 40 CFR 180.205(a) to revise the commodity terminology for ''corn, fresh (inc. sweet corn), kernel plus cob with husks removed'' to read ''corn, sweet, kernel plus cob with husks removed;'' ''guar bean'' to read ''guar,'' and ''pea (succulent)'' to read ''pea, succulent.''

11. *Phosphine.* EPA is proposing to remove the commodity tolerance in 40 CFR 180.225(a)(1) for residues of phospine in or on ''pimento;'' because this tolerance is covered by the existing tolerance for pepper.

12. *Picloram.* The Picloram RED was completed in March 1995 and the existing tolerances were reassessed according to the FQPA standard when new tolerances were established on January 5, 1999 (64 FR 418)(FRL–6039–4). Because the tolerances at 3.0 ppm in 40 CFR 180.292(a)(3) for residues of picloram in or on barley, milled fractions (exc flour); oat, milled fractions (exc flour); and wheat, milled fractions (exc flour) are duplicates covered by the tolerances at 3.0 ppm in § 180.292(a)(2), there is no longer a need for them and therefore, EPA is proposing to remove the tolerances in 40 CFR 180.292(a)(3) for residues of picloram in or on barley, milled fractions (exc flour); oat, milled fractions (exc flour); and wheat, milled fractions (exc flour).

Because the time-limited tolerances on aspirated grain fractions, sorghum grain, forage, and stover for indirect or

inadvertent residues in 40 CFR 180.292(d) all expired on December 31, 2000, there is no longer a need to codify them in that part. Therefore, EPA is proposing to amend 40 CFR 180.292(d) by removing the text and table of expired tolerances, and reserving the paragraph designation and heading.

Based on the concentration of picloram residues in the aspirated grain fractions of wheat, EPA is proposing to establish tolerances in 40 CFR 180.292(a)(1) for ''grain, aspirated fractions'' at 4.0 ppm.

In order to conform to current Agency practice, in 40 CFR 180.292(a)(2), EPA is proposing to revise the commodity terminology for ''barley, milled fractions (exc flour)'' to read ''barley, pearled barley;'' ''oat, milled fractions (exc flour)'' to read ''oat, groats/rolled oats;'' and ''wheat, milled fractions (exc flour)'' to read ''wheat, bran;'' ''wheat, germ;'' ''wheat, middlings;'' and ''wheat, shorts.''

EPA will not take action on the tolerance in 40 CFR 180.292(a)(1) for ''grass, forage'' or propose to establish a tolerance for ''grass, hay'' at this time due to label and data issues. However, the Agency intends to clarify these issues with the registrants.

13. *Propargite*. Based on available data, EPA determined that there is no reasonable expectation of finite residues of propargite in poultry meat and meat byproducts. These tolerances are no longer needed under 40 CFR 180.6(a)(3). Therefore, EPA is proposing to revoke the commodity tolerances in 40 CFR 180.259(a) for residues of propargite in or on ''poultry, meat'' and ''poultry, meat byproducts.'' Also, EPA is proposing to revoke the commodity tolerance in 40 CFR 180.259(a) for residues of propargite in or on ''citrus, dried pulp'' because residues do not concentrate in dried pulp based on a citrus processing study, and therefore the tolerance is no longer needed. In addition, EPA is proposing to revoke the commodity tolerances in 40 CFR 180.259 for residues of propargite in or on ''peanut, forage;'' ''peanut, hay;'' and ''peanut, hulls'' because they are no longer considered to be significant livestock feed commodities and therefore these tolerances are no longer needed.

EPA is proposing to remove the tolerance in § 180.259(a) for ''hop'' at 15 ppm because the raw agricultural commodity (RAC) for hops is dried hops, whose use is covered by the existing tolerance for ''hop, dried cone'' at 30 ppm, whose terminology the Agency is proposing to revise to read ''hop, dried cones.''

Based on field trial data that show propargite residues as high as 8.3 ppm in or on oranges and 3.8 ppm in or on sorghum grain, the Agency determined that the tolerances should be increased to 10.0 ppm for oranges and decreased to 5.0 for sorghum grain. Therefore, EPA is proposing in 40 CFR 180.259(a) to increase the tolerance for ''orange, sweet'' from 5 to 10.0 ppm and revise the terminology to read ''orange'' and decrease the tolerance for ''sorghum, grain'' from 10 to 5.0 ppm.

Based on HAFT residues of 4 ppm (residue range 1.6 to 8.3 ppm) in oranges and available processing data showing an average concentration factor of 7.0x in orange oil, the Agency determined that a tolerance should be established for propargite on citrus oil at 30 ppm. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.259(a) for residues of propargite in ''citrus, oil'' at 30.0 ppm.

Available processing data indicate that propargite residues do not concentrate in aspirated grain fractions of sorghum, but do concentrate in aspirated grain fractions of field corn as high as 0.35 ppm. The Agency determined that a tolerance should be established for aspirated grain fractions at 0.4 ppm. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.259(a) for residues of propargite in or on ''grain, aspirated fractions'' at 0.4 ppm.

In order to conform to current Agency practice, in 40 CFR 180.259(a), EPA is proposing to revise the commodity terminology for ''corn, forage'' to ''corn, field, forage'' and ''corn, sweet, forage;'' ''corn, grain'' to read ''corn, field, grain'' and ''corn, pop, grain;'' ''mint'' to ''peppermint, tops'' and ''spearmint, tops;'' and ''sorghum, forage'' to read ''sorghum, grain, forage.''

14. *Triclopyr*. EPA has determined that the residue which should be regulated in grass and rice commodities and milk, poultry, and eggs is triclopyr per se. The Agency has also determined that the residue which should be regulated in meat and meat byproducts are the combined residues of triclopyr and the metabolite 3,5,6-trichloro-2-pyridinol (TCP). Therefore, EPA is proposing in 40 CFR 180.417(a)(1) to revise the tolerance expression to include residues of triclopyr per se as a result of the application/use of butoxyethyl ester of triclopyr and triethylamine salt of triclopyr. In addition, EPA is proposing to recodify tolerances for ''egg,'' ''milk,'' ''poultry, fat;'' ''poultry, meat byproducts, except kidney;'' ''poultry, meat;'' ''rice, grain;'' and ''rice, straw;'' from 40 CFR 180.417(a)(2) to § 180.417(a)(1).

Also, EPA is proposing in 40 CFR 180.417(a)(2) to amend the tolerance expression for the combined residues of the herbicide triclopyr ((3,5,6-trichloro-2-pyridinyl)oxy) acetic acid and its metabolite 3,5,6-trichloro-2-pyridinol (TCP) as a result of the application/use of butoxyethyl ester of triclopyr or the triethylamine salt of triclopyr.

Since the time of the Triclopyr RED, the Agency has determined that a proposal by the registrant to increase the tolerance for ''grass, forage'' from 500 to 700 ppm is acceptable based on available field trial data and pending the amendment of all labels for triclopyr formulations used on pasture and rangeland to specify a maximum application rate of 2 lb. acid equivalents (ae)/A per annual growing season. The dietary risk assessment performed as part of the triclopyr RED supports this increase. The current tolerances on meat commodities are adequate to cover residues that may occur from grazing areas treated at 2 lb. ae/A. Therefore, EPA is proposing in 40 CFR 180.417(a)(1) to increase the tolerance on ''grass, forage'' to 700.0 ppm. Also, the Agency is proposing to revise the commodity terminology ''grass, forage, hay'' to read ''grass, hay'' and decrease the tolerance from 500.0 to 200.0 ppm, based on available data and label amendments.

Since the triclopyr RED was completed in 1997, tolerances were established in 40 CFR 180.417(a)(1) for ''fish'' and ''shellfish'' (67 FR 58712, September 18, 2002)(FRL–7196–7).

15. *Triphenyltin hydroxide (TPTH)*. Since TPTH residues of concern in plant and animal commodities have been determined to include TPTH and its monophenyltin (MPTH) and diphenyltin (DPTH) hydroxide and oxide metabolites, EPA is proposing to revise the tolerance definition in 40 CFR 180.236 in terms of the combined residues of TPTH and its MPTH and DPTH hydroxide and oxide metabolites, expressed in terms of parent TPTH.

Based on available ruminant feeding data that indicate combined TPTH-regulated residues as high as 1.15 ppm in kidney and 3.7 ppm in liver, the Agency determined that the appropriate tolerances for kidney and liver of cattle, goats, horses, and sheep are 2.0 and 4.0 ppm, respectively. Therefore, EPA is proposing in 40 CFR 180.236 to increase the tolerances for ''cattle, liver;'' ''goat, liver;'' ''horse, liver;'' and ''sheep, liver;'' each from 0.05 to 4.0 ppm, ''cattle, kidney;'' ''goat, kidney;'' ''horse, kidney;'' and ''sheep, kidney;'' each from 0.05 to 2.0 ppm.

Also, because available ruminant feeding data show combined TPTH-

regulated residues as high as 0.14 ppm in fat and 0.34 ppm in meat, the Agency determined that the appropriate tolerances should be established for fat and meat of cattle, goats, horses, and sheep at 0.2 ppm and 0.5 ppm, respectively. Moreover, based on non-detectable levels and combined Limit of quantitation (LOQs) of 0.02 ppm for each metabolite, the Agency determined that a tolerance should be established for milk at 0.06 ppm. Therefore, EPA is proposing to establish tolerances in 40 CFR 180.236 for ''cattle, fat;'' ''goat, fat;'' ''horse, fat;'' and ''sheep, fat;'' each at 0.2 ppm;''cattle, meat;'' ''goat, meat;'' ''horse, meat;'' and ''sheep, meat;'' each at 0.5 ppm, and ''milk'' at 0.06 ppm.

The ruminant feeding data was also used by the Agency to reassess tolerances for swine. EPA determined that tolerances for hog kidney and liver should be increased to 0.3 ppm (the combined LOQs of 0.1 ppm for residues in kidney, liver and fat), and that these separate tolerances should be combined as hog, meat byproducts. In addition, EPA determined that tolerances should also be established for hog fat at 0.3 ppm (the combined LOQs of 0.1 ppm for each metabolite), and in hog meat at 0.06 ppm (the combined LOQs of 0.02 ppm for each metabolite). Therefore, EPA is proposing in 40 CFR 180.236 to revise the commodity tolerances for ''hog, kidney'' and ''hog, liver'' at 0.05 ppm into the commodity tolerance ''hog, meat byproducts'' and increase the tolerance to 0.3 ppm and to establish tolerances for ''hog, fat'' at 0.3 ppm and ''hog, meat'' at 0.06 ppm.

Based on available field trial data that show combined TPTH-regulated residues as high as 9.7 ppm, the Agency determined that a tolerance should be established at 10.0 ppm for beet, sugar, tops. Therefore, EPA is proposing to establish a tolerance in 40 CFR 180.236 for ''beet, sugar, tops'' at 10.0 ppm.

Also, in order to conform to current Agency practice, EPA is proposing in 40 CFR 180.236 to revise the terminology ''pecans'' to read ''pecan.''

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

A ''tolerance'' represents the maximum level for residues of pesticide chemicals legally allowed in or on raw agricultural commodities and processed foods. Section 408 of FFDCA, 21 U.S.C. 301 *et seq.*, as amended by the FQPA of 1996, Public Law 104–170, authorizes the establishment of tolerances, exemptions from tolerance requirements, modifications in tolerances, and revocation of tolerances for residues of pesticide chemicals in or on raw agricultural commodities and processed foods (21 U.S.C. 346(a)). Without a tolerance or exemption, food containing pesticide residues is considered to be unsafe and therefore ''adulterated'' under section 402(a) of the FFDCA. Such food may not be distributed in interstate commerce (21 U.S.C. 331(a) and 342(a)). For a food-use pesticide to be sold and distributed, the pesticide must not only have appropriate tolerances under the FFDCA, but also must be registered under FIFRA (7 U.S.C. *et seq.*). Food-use pesticides not registered in the United States must have tolerances in order for commodities treated with those pesticides to be imported into the United States.

EPA is proposing these tolerance actions to implement the tolerance recommendations made during the RED and TRED processes, and as follow-up on canceled uses of pesticides. As part of the RED and TRED processes, EPA is required to determine whether each of the amended tolerances meets the safety standards under the FQPA. The safety finding determination is found in detail in each Post-FQPA RED and TRED for the active ingredient. REDs and TREDs propose certain tolerance actions to be implemented to reflect current use patterns, to meet safety findings, and change commodity names and groupings in accordance with new EPA policy. Printed and electronic copies of the REDs and TREDs are available as provided in Unit II.A.

EPA has issued Post-FQPA REDs for Bromoxynil, Diclofop-methyl, Dicofol, Etridiazole, Folpet, Hydramethylnon, Iprodione, Paraquat, Phosphine, Propargite, Triclopyr, and Triphenyltin hydroxide, and TREDs for Diquat and Fenbutatin-oxide, whose REDs were both completed prior to FQPA. EPA also issued a RED prior to FQPA for Picloram and in 1999 made a safety finding which reassessed its tolerances according to the FQPA standard, maintaining them when new tolerances were established as noted in Unit II.A. REDs and TREDs contain the Agency's evaluation of the data base for these pesticides, including requirements for additional data on the active ingredients to confirm the potential human health and environmental risk assessments associated with current product uses, and in REDs contain the Agency's decisions and conditions under which these uses and products will be eligible for reregistration. The REDs and TREDs recommended the establishment, modification, and/or revocation of specific tolerances. RED and TRED recommendations such as establishing or modifying tolerances, require assessment under the FQPA standard of ''reasonable certainty of no harm,'' and are proposed in those documents under that standard. However, tolerance revocations recommended in REDs and TREDs may be proposed in this document without such assessment when the tolerances are no longer necessary.

EPA's general practice is to propose revocation of tolerances for residues of pesticide active ingredients on crops for which FIFRA registrations no longer exist and on which the pesticide may therefore no longer be used in the United States. EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances even when corresponding domestic uses are canceled if the tolerances, which EPA refers to as ''import tolerances,'' are necessary to allow importation into the United States of food containing such pesticide residues. However, where there are no imported commodities that require these import tolerances, the Agency believes it is appropriate to revoke tolerances for unregistered pesticides in order to prevent potential misuse.

Furthermore, as a general matter, the Agency believes that retention of import tolerances not needed to cover any imported food may result in unnecessary restriction on trade of pesticides and foods. Under section 408 of the FFDCA, a tolerance may only be established or maintained if EPA determines that the tolerance is safe based on a number of factors, including an assessment of the aggregate exposure to the pesticide and an assessment of the cumulative effects of such pesticide and other substances that have a common mechanism of toxicity. In doing so, EPA must consider potential contributions to such exposure from all tolerances. If the cumulative risk is such that the tolerances in aggregate are not safe, then every one of these tolerances is potentially vulnerable to revocation. Furthermore, if unneeded tolerances are included in the aggregate and cumulative risk assessments, the estimated exposure to the pesticide would be inflated. Consequently, it may be more difficult for others to obtain needed tolerances or to register needed new uses. To avoid potential trade restrictions, the Agency is proposing to revoke tolerances for residues on crops for which FIFRA registrations no longer exist, unless someone expresses a need for such tolerances. Through this proposed rule, the Agency is inviting individuals who need these import

tolerances to identify themselves and the tolerances that are needed to cover imported commodities.

Parties interested in retention of the tolerances should be aware that additional data may be needed to support retention. These parties should be aware that, under FFDCA section 408(f), if the Agency determines that additional information is reasonably required to support the continuation of a tolerance, EPA may require that parties interested in maintaining the tolerances provide the necessary information. If the requisite information is not submitted, EPA may issue an order revoking the tolerance at issue.

C. When Do These Actions Become Effective?

EPA is proposing that revocations, modifications, establishments of tolerances, and commodity terminology revisions become effective 90 days following publication of a final rule in the **Federal Register** to ensure that all affected parties receive notice of EPA's actions. For this rule, the proposed revocations will affect tolerances for uses which have been canceled, in some cases, for many years. The Agency believes that existing stocks of pesticide products labeled for the uses associated with the tolerances proposed for revocation have been completely exhausted and that treated commodities have had sufficient time for passage through the channels of trade. However, if EPA is presented with information that existing stocks would still be available and that information is verified, the Agency will consider extending the expiration date of the tolerance. If you have comments regarding existing stocks and whether the effective date allows sufficient time for treated commodities to clear the channels of trade, please submit comments as described under **SUPPLEMENTARY INFORMATION.**

Any commodities listed in this proposal treated with the pesticides subject to this proposal, and in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by FQPA. Under this section, any residues of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of the Food and Drug Administration that:

1. The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA.

2. The residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include records that verify the dates that the pesticide was applied to such food.

D. What Is the Contribution to Tolerance Reassessment?

By law, EPA is required by August 2006 to reassess the tolerances in existence on August 2, 1996. As of July 26, 2004, EPA has reassessed over 6,740 tolerances. Regarding tolerances mentioned in this proposed rule, tolerances in existence at FQPA were previously counted as reassessed at the time of the signature completion of a Post-FQPA RED or TRED for each active ingredient, except for picloram whose tolerances were counted as reassessed via final rulemaking which published in the **Federal Register** on January 5, 1999 (64 FR 418), as described in Units II.A. and B. Therefore, no further tolerance reassessments would be counted toward the August 2006 review.

III. Are the Proposed Actions Consistent With International Obligations?

The tolerance revocations in this proposal are not discriminatory and are designed to ensure that both domestically-produced and imported foods meet the food safety standards established by the FFDCA. The same food safety standards apply to domestically produced and imported foods.

EPA is working to ensure that the U.S. tolerance reassessment program under FQPA does not disrupt international trade. EPA considers Codex Maximum Residue Limits (MRLs) in setting U.S. tolerances and in reassessing them. MRLs are established by the Codex Committee on Pesticide Residues, a committee within the Codex Alimentarius Commission, an international organization formed to promote the coordination of international food standards. It is EPA's policy to harmonize U.S. tolerances with Codex MRLs to the extent possible, provided that the MRLs achieve the level of protection required under FFDCA. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual Reregistration Eligibility Decision documents. EPA has developed guidance concerning submissions for import tolerance support (65 FR 35069, June 1, 2000) (FRL–6559–3). This guidance will be made available to interested persons. Electronic copies are available on the internet at *http://www.epa.gov/*. On the Home Page select ''Laws, Regulations, and Dockets,'' then select ''Regulations and Proposed Rules'' and then look up the entry for this document under ''**Federal Register**—Environmental Documents.'' You can also go directly to the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

IV. Statutory and Executive Order Reviews

In this proposed rule, EPA is proposing to establish specific tolerances under FFDCA section 408(e), and to modify and revoke specific tolerances established under FFDCA section 408. The Office of Management and Budget (OMB) has exempted these types of actions (*i.e.*, establishment and modification of a tolerance and tolerance revocation for which extraordinary circumstances do not exist) from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this proposed rule has been exempted from review under Executive Order 12866 due to its lack of significance, this proposed rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This proposed rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), the Agency previously assessed whether establishment of tolerances, exemptions from tolerances, raising of tolerance levels, expansion of exemptions, or revocations of tolerances might significantly impact a substantial

number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. These analyses for tolerance establishments and modifications, and for tolerance revocations were published on May 4, 1981 (46 FR 24950) and on December 17, 1997 (62 FR 66020), respectively, and were provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this rule, the Agency hereby certifies that this proposed action will not have a significant negative economic impact on a substantial number of small entities. Specifically, as per the 1997 notice, EPA has reviewed its available data on imports and foreign pesticide usage and concludes that there is a reasonable international supply of food not treated with canceled pesticides. Furthermore, for the pesticides named in this proposed rule, the Agency knows of no extraordinary circumstances that exist as to the present proposal that would change the EPA's previous analysis. Any comments about the Agency's determination should be submitted to the EPA along with comments on the proposal, and will be addressed prior to issuing a final rule. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This proposed rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this proposed rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This proposed rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

List of Subjects in 40 CFR Part 180

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

Dated: July 19, 2004.

James Jones,

Director, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR part 180 be amended as follows:

PART 180—[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346a and 371.

2. Section 180.163 is amended by revising the section heading and paragraph (a) to read as follows:

§ 180.163 1, 1-Bis(4-chlorophenyl) -2,2,2-trichloroethanol; tolerances for residues.

(a) *General.* (1) Tolerances for the combined residues of the insecticide dicofol, 1,1-bis(4-chlorophenyl) -2,2,2-trichloroethanol and 1-(2-chlorophenyl)-1- (4-chlorophenyl) -2,2,2-trichloroethanol in or on raw agricultural commodities are established as follows:

Commodity	Parts per million
Apple, wet pomace	38.0
Bean, dry, seed	0.5
Bean, succulent	3.0
Butternut	0.1
Caneberry subgroup 13A	5.0
Chestnut	0.1
Citrus, dried pulp	12.0
Citrus oil	200.0
Cotton, refined oil	0.5
Cotton, undelinted seed	0.1
Filbert	0.1
Fruit, citrus, group 10	6.0
Fruit, pome, group 11	10.0
Fruit, stone, group 12	5.0
Grape	5.0
Grape, raisin	20.0
Hop, dried cones	65.0
Nut, hickory	0.1
Nut, macadamia	0.1
Pecan	0.1
Peppermint, hay	25.0
Peppermint, oil	30.0
Spearmint, hay	25.0
Spearmint, oil	30.0
Strawberry	10.0
Tea, dried	50.0
Tea, plucked leaves	30.0
Vegetable, cucurbit, group 9	2.0
Vegetable, fruiting, group 8	2.0
Walnut	0.1

(2) Tolerances for the combined residues of the insecticide dicofol, 1,1-bis(4-chlorophenyl)-2,2,2-trichloroethanol, 1-(2-chlorophenyl)-1-(4- chlorophenyl)-2,2,2-trichloroethanol, 1,1-bis(4-chlorophenyl) -2,2-dichloroethanol, and 1-(2-chlorophenyl)-1- (4-chlorophenyl)-2,2-dichloroethanol in or on raw agricultural commodities are established as follows:

Commodity	Parts per million
Cattle, fat	50.0
Cattle, liver	5.0
Cattle, meat	3.0
Cattle, meat byproducts, except liver	3.0
Egg	0.05
Goat, fat	50.0
Goat, liver	5.0
Goat, meat	3.0
Goat, meat byproducts, except liver	3.0
Hog, fat	50.0
Hog, liver	5.0
Hog, meat	3.0
Hog, meat byproducts, except liver	3.0
Horse, fat	50.0
Horse, liver	5.0
Horse, meat	3.0
Horse, meat byproducts, except liver	3.0
Milk	22.0
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts	0.1
Sheep, fat	50.0
Sheep, liver	5.0
Sheep, meat	3.0

Commodity	Parts per million
Sheep, meat byproducts, except liver	3.0

* * * * *

3. Section 180.191 is amended by revising paragraph (a) and by adding text to paragraph (c) after the paragraph heading to read as follows:

§ 180.191 Folpet; tolerances for residues.

(a) *General.* Tolerances are established for the fungicide folpet (*N*-(trichloromethylthio) phthalimide) in or on raw agricultural commodities as follows:

Commodity	Parts per million
Apple[1]	5.0
Cranberry[1]	15.0
Cucumber[1]	2.0
Grape[1]	50.0
Grape, raisin[1]	80.0
Hop, dried cones[1]	120.0
Lettuce[1]	50.0
Melon[1]	3.0
Onion, dry bulb[1]	2.0
Strawberry[1]	5.0
Tomato[1]	25.0

[1] No U.S. registrations.

* * * * *

(c) *Tolerances with regional registration.* Tolerances with regional registrations as defined in § 180.1(n), are established for residues of the fungicide folpet (*N*-(trichloromethylthio) phthalimide) in or on the following raw agricultural commodity:

Commodity	Parts per million
Avocado	25.0

* * * * *

4. Section 180.205 is amended by revising the table in paragraph (a) to read as follows:

§ 180.205 Paraquat; tolerances for residues.

(a) * * *

Commodity	Parts per million
Acerola	0.05
Almond, hulls	0.5
Animal feed, nongrass, group 18, forage	75.0
Animal feed, nongrass, group 18, hay	210.0
Artichoke, globe	0.05
Asparagus	0.5
Avocado	0.05
Banana	0.05
Barley, grain	0.05
Barley, straw	1.0
Bean, dry, seed	0.3
Bean, lima, succulent	0.05
Bean, snap, succulent	0.05
Beet, sugar	0.5
Beet, sugar, tops	0.05
Cacao bean	0.05
Carrot, roots	0.05
Cattle, fat	0.05
Cattle, kidney	0.5
Cattle, meat	0.05
Cattle, meat byproducts, except kidney	0.05
Coffee, bean	0.05
Corn, field, forage	3.0
Corn, field, grain	0.1
Corn, field, stover	10.0
Corn, pop, grain	0.1
Corn, pop, stover	10.0
Corn, sweet, kernel plus cob with husks removed	0.05
Cotton, undelinted seed	0.5
Cowpea, forage	0.1
Cowpea, hay	0.4
Cranberry	0.05
Cucurbits	0.05
Egg	0.01
Endive	0.05
Fig	0.05
Fruit, citrus, group 10	0.05
Fruit, pome, group 11	0.05
Fruit, stone, group 12	0.05
Goat, fat	0.05
Goat, kidney	0.5
Goat, meat	0.05
Goat, meat byproducts, except kidney	0.05
Grape	0.05
Grass, forage	90.0
Grass, hay	40.0
Guar	0.5
Guava	0.05
Hog, fat	0.05
Hog, kidney	0.5
Hog, meat	0.05
Hog, meat byproducts, except kidney	0.05
Hop, dried cones	0.5
Horse, fat	0.05
Horse, kidney	0.5
Horse, meat	0.05
Horse, meat byproducts, except kidney	0.05
Kiwifruit	0.05
Lentil, seed	0.3
Lettuce	0.05
Milk	0.01
Nut	0.05
Olive	0.05
Onion, dry bulb	0.05
Onion, green	0.05
Papaya	0.05
Passionfruit	0.2
Pea, dry, seed	0.3
Pea, field, hay	0.8
Pea, field vines	0.2
Pea, succulent	0.05
Peanut	0.05
Persimmon	0.05
Pineapple	0.05
Pineapple, process residue	0.25
Pistachio	0.05
Potato	0.5
Rhubarb	0.05
Rice, grain	0.05
Rice, straw	0.06
Safflower, seed	0.05
Sheep, fat	0.05
Sheep, kidney	0.5
Sheep, meat	0.05
Sheep, meat byproducts, except kidney	0.05
Sorghum, forage	0.1
Sorghum, grain	0.05
Soybean	0.25
Soybean, forage	0.03
Soybean, hay	0.05
Soybean, hulls	2.0
Strawberry	0.25
Sugarcane, cane	0.5
Sugarcane, molasses	3.0
Sunflower, seed	2.0
Turnip, greens	0.05
Turnip, roots	0.05
Vegetable, brassica, leafy, group 5	0.05
Vegetable, fruiting, group 8	0.05
Wheat, forage	0.5
Wheat, grain	0.05
Wheat, straw	1.0

* * * * *

§ 180.225 [Amended]

5. Section 180.225 is amended by removing the entry for ''pimento'' from the table in paragraph (a)(1).

6. Section 180.226 is amended by revising paragraph (a)(1), the tables in paragraph (a)(2)(i) and (a)(3), and by removing paragraph (a)(6) to read as follows:

§ 180.226 Diquat; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of the plant growth regulator and herbicide diquat, [6,7-dihydrodipyrido (1,2-a:2′,1′-c) pyrazinediium] derived from application of the dibromide salt and calculated as the cation in or on the following food commodities:

Commodity	Parts per million
Alfalfa, seed	3.0
Cattle, fat	0.05
Cattle, meat	0.05
Cattle, meat byproducts	0.05
Egg	0.05
Goat, fat	0.05
Goat, meat	0.05
Goat, meat byproducts	0.05
Hog, fat	0.05
Hog, meat	0.05
Hog, meat byproducts	0.05
Horse, fat	0.05
Horse, meat	0.05
Horse, meat byproducts	0.05
Milk	0.02
Potato	0.1
Poultry, fat	0.05
Poultry, meat	0.05
Poultry, meat byproducts	0.05

Commodity	Parts per million
Sheep, fat	0.05
Sheep, meat	0.05
Sheep, meat byproducts	0.05
Sorghum, grain, grain	2.0
Soybean, seed	0.2

(2)(i) * * *

Commodity	Parts per million
Avocado	0.2
Cotton, undelinted seed	0.2
Fish	2.0
Fruit, citrus, group 10	0.05
Fruit, pome, group 11	0.02
Fruit, small and berry group	0.05
Fruit, stone, group 12	0.02
Grain, cereal, forage, fodder and straw, group 16	0.02
Grain, cereal, group 15	0.02
Grass, forage, fodder and hay, group 17	0.2
Hop, dried cones	0.2
Nut, tree, group 14	0.02
Shellfish	20.0
Sugarcane, cane	0.2
Vegetable, brassica, leafy, group 5	0.05
Vegetable, cucurbit, group 9	0.02
Vegetable, foliage of legume, group 7	0.2
Vegetable, fruiting, group 8	0.05
Vegetable, leafy, except brassica, group 4	0.05
Vegetable, root and tuber, group 1	0.02
Vegetable, seed and pod	0.05

* * * * *

(3) * * *

Commodity	Parts per million
Banana	0.05
Coffee, bean	0.05
Soybean, hulls	0.6

* * * * *

7. Section 180.236 is revised to read as follows:

§ 180.236 Triphenyltin hydroxide; tolerances for residues.

(a) *General.* Tolerances are established for the combined residues of the fungicide triphenyltin hydroxide (TPTH) and its monophenyltin (MPTH) and diphenyltin (DPTH) hydroxide and oxide metabolites, expressed in terms of parent TPTH, in/on the following raw agricultural commodities:

Commodity	Parts per million
Beet, sugar, roots	0.05
Beet, sugar, tops	10.0
Cattle, fat	0.2
Cattle, kidney	2.0
Cattle, liver	4.0
Cattle, meat	0.5
Goat, fat	0.2
Goat, kidney	2.0
Goat, liver	4.0
Goat, meat	0.5
Hog, fat	0.3
Hog, meat	0.06
Hog, meat byproducts	0.3
Horse, fat	0.2
Horse, kidney	2.0
Horse, liver	4.0
Horse, meat	0.5
Milk	0.06
Pecan	0.05
Potato	0.05
Sheep, fat	0.2
Sheep, kidney	2.0
Sheep, liver	4.0
Sheep, meat	0.5

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

8. Section 180.259 is amended by revising the table in paragraph (a) to read as follows:

§ 180.259 Propargite; tolerances for residues.

(a) * * *

Commodity	Parts per million
Almond	0.1
Almond, hulls	55.0
Bean, dry, seed	0.2
Cattle, fat	0.1
Cattle, meat	0.1
Cattle, meat byproducts	0.1
Citrus, oil	30.0
Corn, field, forage	10.0
Corn, field, grain	0.1
Corn, pop, grain	0.1
Corn, stover	10.0
Corn, sweet, forage	10.0
Cotton, undelinted seed	0.1
Egg	0.1
Goat, fat	0.1
Goat, meat	0.1
Goat, meat byproducts	0.1
Grain, aspirated fractions	0.4
Grapefruit	5.0
Grape	10.0
Hog, fat	0.1
Hog, meat	0.1
Hog, meat byproducts	0.1
Hop, dried cones	30.0
Horse, fat	0.1
Horse, meat	0.1
Horse, meat byproducts	0.1
Lemon	5.0
Milk, fat (0.08 ppm in milk)	2.0
Nectarine	4.0
Orange	10.0
Peanut	0.1
Peppermint, tops	50.0
Poultry, fat	0.1
Potato	0.1
Sheep, fat	0.1
Sheep, meat	0.1
Sheep, meat byproducts	0.1
Sorghum, grain	5.0
Sorghum, grain, forage	10.0
Sorghum, grain, stover	10.0
Spearmint, tops	50.0
Tea, dried	10.0
Walnut	0.1

* * * * *

9. Section 180.292 is amended by revising the tables in paragraphs (a)(1) and (2) and by removing the text from paragraph (d) and reserving the paragraph designation and heading to read as follows:

§ 180.292 Picloram; tolerances for residues.

(a) * * * (1) * * *

Commodity	Parts per million
Barley, grain	0.5
Barley, straw	1.0
Cattle, fat	0.2
Cattle, kidney	5.0
Cattle, liver	0.5
Cattle, meat	0.2
Cattle, meat byproducts, except kidney and liver	0.2
Egg	0.05
Goat, fat	0.2
Goat, kidney	5.0
Goat, liver	0.5
Goat, meat	0.2
Goat, meat byproducts, except kidney and liver	0.2
Grain, aspirated fractions	4.0
Grass, forage	80.0
Hog, fat	0.2
Hog, kidney	5.0
Hog, liver	0.5
Hog, meat	0.2
Hog, meat byproducts, except kidney and liver	0.2
Horse, fat	0.2
Horse, kidney	5.0
Horse, liver	0.5
Horse, meat	0.2
Horse, meat byproducts, except kidney and liver	0.2
Milk	0.05
Oat, forage	1.0
Oat, grain	0.5
Oat, straw	1.0
Poultry, fat	0.05
Poultry, meat	0.05
Poultry, meat byproducts	0.05
Sheep, fat	0.2
Sheep, kidney	5.0
Sheep, liver	0.5
Sheep, meat	0.2
Sheep, meat byproducts, except kidney and liver	0.2
Wheat, forage	1.0
Wheat, grain	0.5
Wheat, straw	1.0

(2) * * *

Commodity	Parts per million
Barley, pearled barley	3.0
Oat, groats/rolled oats	3.0
Wheat, bran	3.0
Wheat, germ	3.0
Wheat, middlings	3.0
Wheat, shorts	3.0

* * * * *

(d) *Indirect or inadvertent residues.* [Reserved]

10. Section 180.324 is amended by revising the table in paragraph (a)(1) and by removing the text and table from paragraph (b) and reserving the paragraph designation and heading to read as follows:

§ 180.324 Bromoxynil; tolerances for residues.

(a) * * * (1) * * *

Commodity	Parts per million
Alfalfa, forage	0.1
Alfalfa, hay	0.5
Barley, grain	0.05
Barley, hay	9.0
Barley, straw	4.0
Corn, field, forage	0.3
Corn, field, grain	0.05
Corn, field, stover	0.2
Corn, pop, grain	0.05
Corn, pop, stover	0.2
Flax, seed	0.1
Garlic	0.1
Grain, aspirated fractions	0.3
Grass, forage	3.0
Grass, hay	3.0
Oat, forage	0.3
Oat, grain	0.05
Oat, hay	9.0
Oat, straw	4.0
Onion, dry bulb	0.1
Peppermint, hay	0.1
Rye, forage	1.0
Rye, grain	0.05
Rye, straw	2.0
Sorghum, grain	0.05
Sorghum, grain, forage	0.5
Sorghum, grain, stover	0.2
Spearmint, hay	0.1
Wheat, forage	1.0
Wheat, grain	0.05
Wheat, hay	4.0
Wheat, straw	2.0

* * * * *

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

11. Section 180.362 is amended by revising paragraph (a) to read as follows:

§ 180.362 Hexakis (2-methyl-2-phenylpropyl)distannoxane; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of hexakis (2-methyl-2-phenylpropyl) distannoxane in or on the following raw agricultural commodities:

Commodity	Parts per million
Almond, hulls	80.0
Apple	15.0
Apple, wet pomace	100.0
Cherry, sweet	6.0
Cherry, tart	6.0
Citrus, dried pulp	100.0
Citrus, oil	140.0
Cucumber	4.0
Eggplant	6.0
Fruit, citrus, group 10	20.0
Grape	5.0
Grape, raisin	20.0
Nut, tree, group 14	0.5
Papaya	2.0
Peach	10.0
Pear	15.0
Plum, prune, fresh	4.0
Plum, prune, dried	20.0
Strawberry	10.0

(2) Tolerances are established for the combined residues of hexakis (2-methyl-2-phenylpropyl) distannoxane and its organotin metabolites dihydroxybis(2-methyl-2- phenylpropyl)stannane, and 2-methyl-2-phenylpropylstannoic acid in or on the following raw agricultural commodities:

Commodity	Parts per million
Cattle, fat	0.5
Cattle, meat	0.5
Cattle, meat byproducts	0.5
Egg	0.1
Goat, fat	0.5
Goat, meat	0.5
Goat, meat byproducts	0.5
Hog, fat	0.5
Hog, meat	0.5
Hog, meat byproducts	0.5
Horse, fat	0.5
Horse, meat	0.5
Horse, meat byproducts	0.5
Milk, fat	0.1
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts	0.1
Sheep, fat	0.5
Sheep, meat	0.5
Sheep, meat byproducts	0.5

* * * * *

12. Section 180.370 is amended by revising the table in paragraph (a) to read as follows:

§ 180.370 5-Ethoxy-3-(trichloromethyl)-1,2,4-thiadiazole; tolerances for residues.

(a) * * *

Commodity	Parts per million
Barley, grain	0.1
Barley, hay	0.1
Corn, field, forage	0.1
Corn, field, grain	0.1
Corn, field, stover	0.1
Corn, sweet, forage	0.1
Corn, sweet, stover	0.1
Cotton, gin byproducts	0.1
Cotton, undelinted seed	0.1
Peanut	0.1
Safflower, seed	0.1
Sorghum, grain, forage	0.1
Sorghum, grain, grain	0.1
Tomato[1]	0.15
Vegetable, foliage of legume, group 7	0.1
Vegetable, legume, group 6	0.1
Wheat, forage	0.1
Wheat, grain	0.1
Wheat, straw	0.1

[1] No U.S. registrations since the mid-1980s.

* * * * *

§ 180.385 [Amended]

13. Section 180.385 is amended by removing from the table in paragraph (a) the entries for ''lentil, seed'' and ''pea seeds (dry)''.

14. Section 180.395 is amended by revising the table in paragraph (a) to read as follows:

§ 180.395 Hydramethylnon; tolerances for residues.

* * *

Commodity	Parts per million
Grass, forage	2.0
Grass, hay	2.0
Pineapple	0.05

* * * * *

15. Section 180.399 is amended by revising the tables in paragraph (a)(1) and (a)(2) to read as follows:

§ 180.399 Iprodione; tolerances for residues.

(a) * * * (1) * * *

Commodity	Parts per million
Almond	0.3
Almond, hulls	2.0
Apricot	0.2
Bean, dry, seed	2.0
Bean, succulent	2.0
Blueberry	15.0
Broccoli	25.0
Caneberry subgroup 13A	25.0
Carrot, roots	5.0
Cherry, sweet	0.2
Cherry, tart	0.2
Cotton, undelinted seed	0.1
Currant	15.0
Garlic	0.1
Ginseng, root	4.0
Grape	10.0
Grape, raisin	15.0
Kiwifruit	10.0
Lettuce	25.0

Commodity	Parts per million
Nectarine	0.2
Onion, dry bulb	0.5
Peach	0.05
Peanut	0.5
Plum	0.2
Plum, prune, fresh	0.2
Potato	0.5
Rice, bran	30.0
Rice, grain	10.0
Rice, hulls	50.0
Rice, straw	20.0
Strawberry	0.5

(2) * * *

Commodity	Parts per million
Cattle, fat	0.5
Cattle, meat	0.5
Cattle, meat byproducts	3.0
Egg	1.5
Goat, fat	0.5
Goat, meat	0.5
Goat, meat byproducts	3.0
Hog, fat	0.5
Hog, meat	0.5
Hog, meat byproducts	3.0
Horse, fat	0.5
Horse, meat	0.5
Horse, meat byproducts	3.0
Milk	0.5
Poultry, fat	7.0
Poultry, meat	1.0
Poultry, meat byproducts	7.0
Sheep, fat	0.5
Sheep, meat	0.5
Sheep, meat byproducts	3.0

* * * * *

16. Section 180.417 is amended by revising paragraph (a) to read as follows:

§ 180.417 Triclopyr; tolerances for residues.

(a) *General.* (1) Tolerances for residues of the herbicide triclopyr per se, as a result of the application/use of butoxyethyl ester of triclopyr and triethyylamine salt of triclopyr, are established in or on the following raw agricultural commodities:

Commodity	Parts per million
Egg	0.05
Fish	3.0
Grass, forage	700.0
Grass, hay	200.0
Milk	0.01
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts, except kidney	0.1
Rice, grain	0.3
Rice, straw	10.0
Shellfish	3.5

(2) Tolerances for the combined residues of the herbicide triclopyr ((3,5,6-trichloro-2-pyridinyl) oxy) acetic acid and its metabolite 3,5,6-trichloro-2-pyridinol (TCP), as a result of the application/use of butoxyethyl ester of triclopyr or the triethylamine salt of triclopyr, are established in or on the following raw agricultural commodities:

Commodity	Parts per million
Cattle, fat	0.05
Cattle, kidney	0.5
Cattle, liver	0.5
Cattle, meat	0.05
Cattle, meat byproducts, except kidney and liver	0.05
Goat, fat	0.05
Goat, kidney	0.5
Goat, liver	0.5
Goat, meat	0.05
Goat, meat byproducts, except kidney and liver	0.05
Hog, fat	0.05
Hog, kidney	0.5
Hog, liver	0.5
Hog, meat	0.05
Hog, meat byproducts, except kidney and liver	0.05
Horse, fat	0.05
Horse, kidney	0.5
Horse, liver	0.5
Horse, meat	0.05
Horse, meat byproducts, except kidney and liver	0.05
Sheep, fat	0.05
Sheep, kidney	0.5
Sheep, liver	0.5
Sheep, meat	0.05
Sheep, meat byproducts, except kidney and liver	0.05

* * * * *

[FR Doc. 04–17508 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–7795–8]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete the Agriculture Street Landfill Superfund Site from the National Priorities List and request for comments.

SUMMARY: The U.S. Environmental Protection Agency (EPA) Region 6 announces its intent to delete the Agriculture Street Landfill Superfund Site (''the site'') from the National Priorities List (NPL) and requests public comment on this proposed action.

The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, constitutes Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA, in consultation with the State of Louisiana, through the Louisiana Department of Environmental Quality (LDEQ), has determined that the removal action for thesite has been successfully executed.

DATES: The EPA will accept comments concerning the proposed deletion of this site until September 3, 2004, and a newspaper of general circulation.

ADDRESSES: Comments may be mailed to: Ms. Janetta Coats, Community Involvement Coordinator, EPA (6SF–PO), 1445 Ross Ave., Dallas, Texas 75202–2733, (214) 665–7308 or 1–800–533–3508 (toll free).

Information Repositories: Comprehensive information on the site has been compiled in a public docket which is available for viewing at the Agriculture Street Landfill Superfund Site information repositories:

EPA Region 6, 7th Floor Reception Area, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733, (214) 665–6548, Mon.–Fri. 8 a.m. to 4 p.m.

Louisiana Department of Environmental Quality, 602 N. Fifth Street, Public Records Center—Room 127, Baton Rouge, Louisiana 70802, (225) 219–3168, Mon.–Fri. 8 a.m. to 4:30 p.m.

Norman Mayer Gentilly Library Branch, 2098 Foy Street, New Orleans, Louisiana 70122, Mr. Damian Lambert/ Branch Manager, (504) 596–2644, Mon & Wed: 10 a.m.–5 p.m., Tue & Thurs: 10 a.m.–6 p.m., Sat: 10 a.m.–5 p.m.

FOR FURTHER INFORMATION CONTACT: Ms. Ursula R. Lennox, Remedial Project Manager, EPA (6SF–LP), 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–6743 or 1–800–533–3508 (Toll Free).

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Intended Site Deletion

I. Introduction

The U.S. Environmental Protection Agency (EPA) Region 6 announces its intent to delete the Agriculture Street Landfill Superfund Site from the National Priorities List (NPL), Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), Code of Federal Regulations, title 40 (40 CFR), part 300, and requests public comments on the proposed

action. The NPL constitutes Appendix B of the NCP, which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended. EPA and the Louisiana Department of Environmental Quality (LDEQ) have determined that the removal action for the site has been successfully executed. Operable Units No. 1, 2, and 3 (OU1, OU2, and OU3, the undeveloped property, residential area, and Shirley Jefferson Community Center, respectively) are included in this proposed deletion.

The EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment and maintains the NPL as the list of those sites. As described in § 300.425(e)(3) of the NCP, sites or portions of sites deleted from the NPL remain eligible for remedial actions in the unlikely event that site conditions warrant such action.

The EPA will accept comments concerning its intent to delete the site for thirty (30) days after publication of this notice. The EPA has also published a notice of the availability of this notice of intent to delete in a major newspaper of general circulation at or near the site.

Section II of this notice explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the Agriculture Street Landfill Superfund site and demonstrates how the site meets the deletion criteria.

II. NPL Deletion Criteria

Section 300.425(e) of the NCP provides that releases may be deleted from, or recategorized on the NPL where no further response is appropriate. In making a determination to delete a release from the NPL, EPA shall consider, in consultation with the State, whether any of the following criteria have been met:

i. Responsible parties or other parties have implemented all appropriate response actions required;

ii. All appropriate Fund-financed response under CERCLA has been implemented, and no further action by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

Even if a site is deleted from the NPL, where hazardous substances, pollutants, or contaminants remain at the site above levels that allow for unlimited use and unrestricted exposure, CERCLA section 121(c), 42 U.S.C. 9621(c) requires that a subsequent review of the site be conducted at least every five years after the initiation of the remedial action at the site to ensure that the action remains protective of public health and the environment. If new information becomes available which indicates a need for further action, EPA may initiate remedial actions. Whenever there is a significant release from a site deleted from the NPL, the site may be restored to the NPL without application of the Hazard Ranking System.

In the case of this site, all appropriate Fund-financed response under CERCLA has been implemented, and no further action by responsible parties is appropriate. Consistent with the State Superfund Contract, LDEQ will conduct an annual inspection. EPA has conducted the first five-year review of the site, finding that the response actions implemented are protective of human health and the environment. The EPA may also perform future five-year reviews.

III. Deletion Procedures

The following procedures were used for the intended deletion of the site:

(1) EPA Region 6 issued a Record of Decision on April 4, 2002, which documented that no further remedial action is necessary to ensure protection of human health and the environment for the Agriculture Street Landfill site;

(2) LDEQ, on behalf of the State of Louisiana, concurred by letter dated April 2, 2002, with EPA's decision that no action was necessary for the site. LDEQ stated by letter dated May 11, 2004, that deletion from the NPL was appropriate;

(3) A notice has been published in the local newspaper and has been distributed to appropriate Federal, State, and local officials and other interested parties announcing the availability of the notice of intent to delete and the commencement of a 30-day public comment period; and,

(4) EPA placed copies of documents supporting the proposed deletion in the site information repositories identified above.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. The NPL is designed primarily for informational purposes and to assist Agency management. As mentioned in section II of this notice, section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

This **Federal Register** notice, and a concurrent notice in a newspaper of record, announce the initiation of a thirty (30) day public comment period and the availability of the notice of intent to delete. The public is asked to comment on EPA's proposal to delete the site from the NPL. All critical documents needed to evaluate EPA's decision are included in the Deletion Docket and are available for review at the information repositories.

Upon completion of the thirty (30) day public comment period, EPA will evaluate all comments received before issuing the final decision on the deletion. The EPA will prepare a Responsiveness Summary for comments received during the public comment period and will address concerns presented in the comments. The Responsiveness Summary will be made available to the public at the information repositories listed previously, and members of the public are encouraged to review it. If, after review of all public comments, EPA determines that the deletion from the NPL is appropriate, EPA will publish a final notice of deletion in the **Federal Register**. Deletion of the site does not actually occur until the final notice of deletion is published in the **Federal Register**.

IV. Basis for Intended Site Deletion

The following information provides the Agency's rationale for the proposal to delete the site from the NPL and EPA's finding that the criteria in 40 CFR 300.425(e) are satisfied.

A. Site Location

The Agriculture Street Landfill Superfund Site (site) covers approximately 95 acres and is located in the eastern section of the city of New Orleans. The site is bound on the north by Higgins Boulevard, and on the south and west by the Southern Railroad rights-of-way. The eastern site boundary extends from the cul-de-sac at the southern end of Clouet Street, near the railroad tracks, to Higgins Boulevard between Press and Montegut streets. Approximately 48 acres are undeveloped property. The other 47 acres are developed with multiple- and single-family residences, commercial properties, a community center, and a school.

To effectively investigate and develop alternatives for the remediation of the site, EPA divided the site into five operable units (OUs):

- OU1—The undeveloped (currently fenced-in) property;
- OU2—The residential development which consists of the Gordon Plaza Apartments (128 units), 7 retail businesses, 67 single family dwellings

in Gordon Plaza subdivision, and the Press Park town homes (179 properties);

- OU3—Shirley Jefferson Community Center (formerly known as Press Park Community Center);
- OU4—Moton Elementary School which includes Mugrauer Playground; and,
- OU5—Groundwater.

B. Site Background and History

The Agriculture Street Landfill was a municipal waste landfill operated by the City of New Orleans. Operations at the site began in approximately 1909 and continued until the landfill was closed in the late 1950's. The landfill was reopened for approximately one year in 1965 for use as an open burning and disposal area for debris left in the wake of Hurricane Betsy. Records indicate that during its operation the landfill received municipal waste, ash from the city's incineration of municipal waste, and debris and ash from open burning. There is no evidence that industrial or chemical wastes were ever transported to, or disposed of at, the site.

From the 1970's through the late 1980's, approximately 47 acres of the site were developed for private and public uses that included: Private single-family homes, multiple-family private and public housing units, Shirley Jefferson Community Center, a recreation center, retail businesses, the Moton Elementary School, and an electrical substation. The remaining 48 acres of the former landfill are currently undeveloped and covered with vegetation. Previous investigations on the undeveloped property have indicated the presence of hazardous substances, pollutants, or contaminants at concentrations above background and/or regulatory levels.

In 1986, EPA Region 6 conducted a Site Inspection and prepared a Hazard Ranking System (HRS) documentation record package utilizing the 1982 HRS model. The site score was not sufficient for the site to be considered for proposal and inclusion on the NPL. Pursuant to the requirements of the Superfund Amendments and Reauthorization Act of 1986 (SARA), which amended the original Superfund legislation, EPA published a revised HRS model on December 14, 1990. At the request of area community leaders, EPA initiated, in September 1993, an Expanded Site Inspection (ESI) to support the preparation of an updated HRS documentation record package that would evaluate the site's risks using the revised HRS model. Subsequently, on August 23, 1994, the site was proposed for inclusion on the NPL as part of NPL update No. 17, and on December 16, 1994, EPA placed the site on the NPL.

Prior to 1994, access to OU1, the undeveloped portion of the former landfill, was unrestricted, allowing unauthorized waste disposal and exposure to contaminants of potential concern such as lead, arsenic and carcinogenic polynuclear aromatic hydrocarbons (cPAHs) found in the surface and subsurface soils. In a time-critical removal action, initiated in March 1994, EPA installed an 8-foot-high, chain-link fence topped with barbed wire around the entire undeveloped portion of the former landfill.

Concurrent with the time-critical removal action, EPA performed a Remedial Removal Integrated Investigation (RRII) of the entire site. RRII fieldwork was conducted from April 4 through June 20, 1994. A total of 1,600 samples of surface and subsurface soil, sediment, surface water, groundwater, air, dust, tap water, garden produce, and paint chips collected during the field investigation were submitted to specialized laboratories for analysis. Aerial photographs, geophysical investigations and computer modeling were used to supplement the analytical data in defining site boundaries and evaluating migration pathways. These data were also used to prepare the Human Health Risk Assessment and the Ecological Risk Assessment.

In the 1995 Risk Assessment, risks were evaluated using current site conditions at all five operable units for four receptors: residents (adult and children), workers, and trespassers. Health risks were evaluated for the developed portions of the former landfill—the residential area (including 33 randomly selected study group residences) and the Shirley Jefferson Community Center—as well as for the undeveloped portion of the site. Current and potential future exposure route scenarios included ingestion of soil, homegrown produce, and ground water; dermal contact with soil and ground water; inhalation of contaminants in soil, and in indoor and outdoor air; and inhalation of volatile contaminants in ground water. The risk assessment was conducted for both carcinogenic and noncarcinogenic health effects, evaluating landfill-related contaminants as well as non-site related contaminants (*e.g.*, garden pesticides, chloroform in indoor air, etc.). In addition, the IEUBK model was used to evaluate the potential for health effects from lead.

The 1995 Human Health Risk Assessment for the site determined that of all the chemicals detected, lead was the only chemical of concern that exceeded the threshold levels for protectiveness of human health in a current land use scenario. The risks from all other chemicals were within the acceptable risk range or below levels of concern.

Based on information presented in the RRII report, EPA conducted a second time-critical removal action at the site in February 1995, and performed confirmational air and groundwater sampling. Through this sampling event, EPA was able to obtain a second round of analyses of the groundwater, to clarify earlier identified ambient air contaminants, and to verify composition and magnitude of indoor air contaminants. In 1995, EPA prepared an Engineering Evaluation and Cost Analysis examining response action alternatives for Operable Units 1–3.

On September 2, 1997, the EPA Region 6 signed a Record of Decision (ROD) and an Action Memorandum to achieve a comprehensive remedy for the site that was protective of public health and the environment. The ROD concluded that no further action was required at OU4 and OU5, and recommended that both operable units be deleted from the NPL. The Action Memorandum provided a permanent solution to all of the site's contamination problems found on OU1, OU2 and OU3.

A Notice of Intent for Partial Deletion of OU4 and OU5 from the NPL was published in the **Federal Register** on February 7, 2000. A 30-day public comment period on the Notice of Intent for Partial Deletion started February 7, 2000, and concluded March 17, 2000. The Notice for Partial Deletion of OU4 and OU5 was published in the **Federal Register** on June 15, 2000.

C. Response Actions

The Action Memorandum issued on September 2, 1997, authorized funding for a Non-Time Critical Removal Action on OUs l, 2, and 3. The removal action on OUl consisted generally of clearing the 48-acre area, grading it to direct storm water runoff away from the adjacent residential area, laying a permeable geotextile mat followed with orange fencing (to serve as a highly visible marker), covering the mat/marker with twelve inches of clean fill, and re-establishing a vegetative layer on the clean fill.

The removal action on OU2 and 3 consisted generally of excavating twenty-four inches of soil, placing a permeable geotextile mat/marker in the subgrade, backfilling the excavated area with clean fill, and covering the clean fill with grass sod. In certain areas,

surface features such as fences, driveways, sidewalks, etc., were removed in the course of excavation; once the basic excavation and backfill were completed, such surface features were restored or replaced. The selected response action for these operable units is consistent with soil removal and remedial actions performed at residential/industrial properties located on or near Superfund sites.

Numerous attempts were made to encourage the city of New Orleans, which is the primary potentially responsible party (PRP) for this site, to perform or finance site investigations, or provide in-kind services for the response actions planned for OUl, OU2, and OU3. Evidence of this effort is highlighted in the site's Administrative Record. The PRP asserted that it was unable to fund any of the requested actions. As a result, EPA used funds from the Hazardous Substance Superfund to finance the RRII, Engineering Evaluation/Cost Analysis, and all other investigative and response actions.

The removal action was scheduled to start in January 1998, but EPA delayed mobilization until October 1998 to address litigation and additional community concerns. Site work began on OU1, where the highest concentrations of contaminants were found, and at the Gordon Plaza Apartments on OU2. All but one of the property owners on OU1 granted access to EPA, signing standard access agreements. The City of New Orleans, which owned undeveloped street extensions in strips criss-crossing portions of OU1, refused access. After repeated attempts to secure the City's consent for access to conduct the response action, EPA issued a Unilateral Administrative Order to the City of New Orleans on February 25, 1999. The City responded by filing suit against EPA to halt the response action, and secured a temporary restraining order from the U.S. District Court. The City's lawsuit was subsequently dismissed and on April 1, 1999, the district court issued an order in aid of access in favor of EPA.

The removal action continued to completion on OU1 and OU3 and most of OU2. Specifically, within OU2, the removal action was conducted at the Gordon Plaza Apartments, the retail and business area, the Press Park Townhomes, and twenty-five of the single family residences in Gordon Plaza Subdivision. At the conclusion of Phase I site activities, a final site inspection was performed by EPA and LDEQ on February 2, 2000. Approximately 95.5% of the surface area of the site was addressed. The remaining 4.5% consisted of forty-two residential properties whose owners elected not to participate in the removal action.

In June 2000, some of the single family homeowners who had not participated in the removal action expressed concern about problems encountered with transferring contaminated property and requested that EPA consider removal action on additional properties on the site. After review of the work that had already been completed, and an initial assessment of the number of homeowners who might be interested in participating, the EPA re-mobilized to the site in August 2000 to initiate Phase II of the removal action.

As part of community relations activities at the site, EPA designated a Resident Services Manager on-site to field questions, discuss issues, and otherwise attend to residents' concerns during on-site activities. During Phase II of the removal action, EPA, through personal contacts by the Resident Services Manager and through a succession of bulletins and letters to the community, attempted to secure access to the 42 properties upon which the action had not been conducted. Access agreements were accepted at the EPA Command Post, located in the Shirley Jefferson Community Center on-site, throughout most of Phase II of the removal action. By letter of January 2001, EPA notified non-participating homeowners of the projected schedule for demobilization and afforded them one final opportunity to participate, requesting that all access agreements be signed and returned to EPA by January 22, 2001. At the conclusion of Phase II, the non-time critical removal action had been implemented at all but nine residential properties. The EPA and LDEQ performed a final site inspection on April 27, 2001.

At the conclusion of each phase, a Close Out Completion Package was provided to each owner of property in OU1, OU2 or OU3 who participated in the removal action. The package contained:

- A Close Out Letter;
- A Certificate of Completion; and
- Instructions on how to maintain the permeable cap, including instructions for any necessary excavation below the geotextile mat/marker.

Owners of properties that were not part of the response action received a letter and fact sheet from EPA stating that maintaining the surface vegetation will minimize the potential exposure to contaminants in the subsurface soils and will prevent soil erosion.

A Final Close Out Report and ROD for OU1, OU2, and OU3 were signed by EPA in April 2002. The response actions described above were found to have addressed the unacceptable risks posed by site contaminants, and EPA determined that no further action was necessary to protect public health and welfare or the environment for OU1, OU2 and OU3.

D. Cleanup Standards

For purposes of evaluating whether soils in OU1, OU2, and OU3 presented a potential risk, EPA Region 6 Risk Based Concentrations (RBCs) were used as a screening tool to identify areas that may require action. The RBCs were exceeded in many locations in OU1, OU2, and OU3. RBCs are not regulations or guidance; however, they can be used to evaluate potential remedial requirements if the following criteria are met:

- A single medium is contaminated;
- A single contaminant contributes most of the health risk;
- The exposure scenarios used in the development of RBCs are appropriate for the site;
- The fixed risk levels used in the development of RBCs are appropriate for site; and
- Risk to ecological receptors is not expected to be significant.

Although more than one contaminant (arsenic and dioxin) contributed significantly to the potential estimated excess cancer risks for residential receptors at the site, the site met the other criteria listed above. As a result, the Region 6 RBCs were used to evaluate areas requiring potential removal actions. In addition to the RBCs, the level of concern for lead was determined by using the IEUBK model to calculate the concentration of lead in soil that corresponds to a probability of 5% of exposed children exceeding a blood lead level of 10 μ/dL. Arithmetic mean concentrations of household dust samples and tap water samples collected at the study group residences were used as input parameters in the model. Standard default values were used in the model for dietary lead and lead concentrations in air. The model output indicated that a 5% probability of a child exceeding the target blood lead level of 10 μ/dL occurs at a soil lead concentration of 480 mg/kg.

The response action that was implemented at the site:

- Prevents direct and indirect contact, ingestion, and inhalation of soil and waste by a potentially exposed individual and ecological receptors that contain contaminants of potential concerns (COPCs), specifically lead and

arsenic, at concentrations that could pose unacceptable risks;

- Prevents the release of COPC-contaminated dust to the air at concentrations that could adversely affect human health and the environment;
- Is protective of human health and the environment; and
- Leaves the site in a condition that permits future use and development.

E. Operation and Maintenance

The potential risk associated with the possible exposure to surface soil contaminants was eliminated through the response action that was implemented on OU1, OU2, and OU3.

All cleanup actions and other response measures identified in the Action Memorandum dated September 2, 1997, were successfully implemented on each OU, with the exception of nine residential properties located in the Gordon Plaza Subdivision (OU2) where access was not granted. The response measures were completed in accordance with the Action Memorandum, the SOW, design documents, and Work Plans formulated to implement the Action Memorandum. The constructed action is operational and performing according to engineering design specifications. Operation and maintenance activities, including maintenance of the cap and vegetative cover, should be continued by each individual property owner with property on OU1, OU2, or OU3. In addition to advising all property owners where response actions had occurred about proper maintenance procedures, EPA coordinated with the utility companies serving the area and conducted a field demonstration of excavation and backfill procedures. Copies of maintenance procedures were provided to property owners and utility companies.

Those property owners who elected not to participate in the response action were instructed to maintain the surface vegetation to minimize the potential exposure to contaminants in the subsurface soils and prevent soil erosion.

F. Five-Year Review

Previous response actions implemented on OU1, OU2, and OU3, have eliminated the need for further remedial response on these operable units. Thus, no further remedial actions for OU1, OU2, and OU3 are necessary to ensure protection of human health and the environment. The selected remedy complies with Federal and State requirements that are applicable or relevant and appropriate to the response action, is cost-effective, and utilizes permanent solutions.

Because hazardous substances, pollutants, or contaminants remain onsite in subsurface soil (below one and two feet), above levels that allow unlimited use and unrestricted exposure, as a matter of policy, EPA conducted a five year review, to ensure that the implemented action is protective of human health and the environment. As a commitment to the community, the first policy five-year review was conducted June 2003. It concluded that the remedy selected for the site remains protective of human health and the environment.

G. Community Involvement

Public participation activities have been satisfied as required in CERCLA section 113(k), 42 U.S.C. 9613(k), and section 117, 42 U.S.C. 9617. Documents in the deletion docket which EPA relied on for recommendation of the deletion from the NPL are available to the public in the information repositories.

H. Applicable Deletion Criteria

One of the three criteria for site deletion specifies that EPA may delete a site from the NPL if ''all appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate,'' 40 CFR 300.425(e)(1)(ii). The EPA, with concurrence of the State of Louisiana (LDEQ), has determined that the Agriculture Street Landfill site poses no significant threat to public health or the environment; therefore, no further response measures are appropriate. In accordance with EPA policy on deletion of sites listed on the National Priorities List, EPA is proposing deletion of this site from the NPL. Documents supporting this action are available from the docket.

I. State Concurrence

In a letter dated May 11, 2004, the Louisiana Department of Environmental Quality concurred with the proposed deletion of the site from the NPL.

Dated: July 23, 2004.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 04–17500 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–7796–2]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete Dubose Oil Production Company site from the National Priorities List: request for comments.

SUMMARY: The Environmental Protection Agency (EPA) Region 4 announces its intent to delete the Dubose Oil Production Company Site from the National Priorities List (NPL) and requests public comment on this proposed action. The NPL constitutes Appendix B to 40 CFR Part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended. EPA and the State of Florida Department of Environmental Protection (FDEP) have determined that the Site poses no significant threat to public health or the environment and therefore, further response measures pursuant to CERCLA are not appropriate.

DATES: Comments concerning this Site may be submitted on or before: September 3, 2004.

ADDRESSES: Comments may be mailed to: Winston A. Smith, Director, Waste Management Division, U.S. Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.

Comprehensive information on this Site is available through the Region 4 public docket, which is available for viewing at the DOPC site information repositories at two locations. Locations, contacts, phone numbers and viewing hours are:

U.S. EPA Record Center, attn:Ms. Debbie Jourdan, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960, Phone: (404)562-8862, Hours: 8 a.m. to 4 p.m., Monday through Friday By Appointment Only.

University of Florida Library, 11100 University Parkway, Pensacola, Florida 32514, Phone: (850) 484–6471, Hours: 8 a.m. to 10 p.m., Monday through Thursday 8 a.m. to 6

p.m., Friday 10 a.m. to 6 p.m., Saturday. 1 p.m. to 5 p.m., Sunday.

FOR FURTHER INFORMATION CONTACT: Caroline Robinson, U.S. EPA Region 4, Mail Code: WD–SRTSB, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960, (404) 562–8930.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Intended Site Deletion

I. Introduction

The EPA Region 4 announces its intent to delete the DOPC site, Cantonment, Florida, from the NPL, which constitutes Appendix B of the NCP, 40 CFR part 300, and requests comments on this deletion. EPA identifies sites on the NPL that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund Trust Fund (Fund). Pursuant to § 300.425(e)(3) of the NCP, any site deleted from the NPL remains eligible for Fund-financed remedial actions if conditions at the site warrant such action.

EPA proposes to delete the DOPC site, located at Hwy C97 in Cantonment, Escambia County, Florida from the NPL.

EPA will accept comments concerning this Site for thirty days after publication of this notice in the **Federal Register**.

Section II of this notice explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses how this Site meets the deletion criteria.

II. NPL Deletion Criteria

The NCP establishes the criteria that the Agency uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from, or re-categorized on, the NPL where no further response is appropriate. In making this determination, EPA shall consider, in consultation with the State, whether any of the following criteria have been met:

(i) Responsible or other parties have implemented all appropriate response actions required;

(ii) All appropriate Fund-financed responses under CERCLA have been implemented and no further action by responsible parties is appropriate; or

(iii) The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

CERCLA section 121(c), 42 U.S.C. 9621(c), provides in pertinent part that:

> If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the Site, the President shall review such remedial action no less often than each five years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. * * *

EPA policy interprets this provision of CERCLA to apply to those sites where treated, in this case solidified, waste remains on-site. On that basis, for reasons set forth below, the statutory requirement has been satisfied at this Site, and five year reviews and operation and maintenance activities will be required. In the event new information is discovered which indicates a need for further action, EPA may initiate appropriate remedial actions. In addition, whenever there is a significant release from a site previously deleted from the NPL, that site may be restored to the NPL without application of the Hazardous Ranking System. Accordingly, the Site is qualified for deletion from the NPL.

III. Deletion Procedures

EPA will accept and evaluate public comments before making a final decision on deletion. The following procedures were used for the intended deletion of the Site:

1. FDEP has concurred with the deletion decision;

2. Concurrently with this Notice of Intent, a notice has been published in local newspapers and has been distributed to appropriate federal, state and local officials and other interested parties announcing a 30-day public comment period on the proposed deletion from the NPL; and

3. The Region has made all relevant documents available at the information repositories.

The Region will respond to significant comments, if any, submitted during the comment period.

Deletion of the Site from the NPL does not itself create, alter, or revoke any individual rights or obligations. The NPL is designed primarily for informational purposes to assist Agency management.

A deletion occurs when the Regional Administrator places a final notice in the **Federal Register**. Generally, the NPL will reflect any deletions in the final update following the Notice. Public notices and copies of the Responsiveness Summary, if any, will be made available to local residents by the Regional office.

IV. Basis for Intended Site Deletion

The following site summary provides the Agency's rationale for the intention to delete this Site from the NPL.

The Dubose Oil Products Company Site is located at Hwy C97 Cantonment, Escambia County, Florida. The inactive Site is 10 acres in size and it was used as a waste disposal storage, treatment, recycling, and disposal facility. The surrounding land use is primarily rural agricultural.

The Dubose Oil Production Company Site was operated as a waste storage, treatment, recycling and disposal facility. The facility received waste oils, petroleum refining waste, spent solvents, and wood treating waste for processing and recovery operations and disposal. Waste arrived via tanker trucks and in 55 gallon drums. The facility used a batch thermal treatment process to recover a usable oil product from various waste streams.

In September 1980, Dubose Oil Production Company (DOPC) applied to EPA for a Resource Conservation and Recovery Act (RCRA) Interim Status permit to operate a treatment, storage, and disposal (TSD) facility at the site. In Novemeber 1981, DOPC ceased operations, but an FDEP compliance inspection conducted in March 1982 found that the company was preparing to close the facility without an approved closure plan. Later that same year, EPA and FDEP sampled the site and found evidence of buried drums, contaminated springs, and an oil sheen on one of the onsite ponds.

After various administrative and judicial efforts to secure appropriate closure and cleanup of the site between 1982 and 1984 were unsuccessful, FDEP hired a contractor in late 1984 to excavate contaminated materials and secure the site. Between November 1984 and May 1985, the South Pound was excavated, filled with contaminated soils to approximately 20 feet above surrounding grade and covered with a 30 mil PVC cover. The temporary ''vault'' contained 38,000 cubic yards of soil, leaving a ravine in the southwest corner of the site. EPA proposed the site for inclusion on the National Priorities List (NPL) in 1984, finalizing the site's listing in June 1986.

Based on DOPC company records and other information, FDEP and EPA identified a number of potentially responsible parties (PRPs) who had sent waste to the DOPC facility. In October 1987, FDEP negotiated an Administrative Order on Consent with a group of PRPs known as the DOPC Steering Committee (DOPCSC) in which DOPCSC agreed to conduct the

Remedial Investigation and Feasibility Study (RI/FS) at the site. The final RI report was published in April 1989. The FS report was completed in January 1990.

The RI documented contamination in soil, surface water, sediments, and groundwater by various organic compounds. Primary contaminants of concern included polynuclear aromatic hydrocarbons (PNAs), pentachlorophenol (PCP), and various volatile organic compounds (VOC). Soil contamination was limited to the material in the vault and various ''hot spots'' which were better characterized during the Additional Investigation in 1992. Although trace amounts of organics were detected in three monitor wells, contaminants were not detected above drinking water standards. However, the perched groundwater contained VOCs above drinking water standards, including trichloroethene (TCE) and 1,1-dichloroethene (DCE).

After reviewing the results of the RI/FS, EPA issued a Record of Decision on March 29, 1990. On June 17, 1991, A Consent Decree (CD) negotiated between EPA and DOPCSC for the performance of the Remedial Design Remedial Action (RD/RA). The CD was entered by the Northern District Court of Florida, Pensacola Division. In accordance with the ROD, an additional investigation was also completed in 1992 as part of the RD to confirm the extent of hot spots of contaminated soils outside the vault. The remedy implemented in accordance with the ROD included the:

—Installation of temporary construction facilities, stormwater management controls, and a wastewater treatment plant.
—Excavation and stockpiling of contaminated soil from the Silo Hot Spot.
—Erection of the biotreatment facility.
—Excavation of 38,854 tons of non-contaminated soil from the vault, confirmatory sampling, and placement in the ravine.
—Excavation and bioremediation of 19,705 tons of contaminated vault and hot spot soils, confirmatory sampling, and disposal in the ravine. Two additional hot spots were discovered in the sediment of the leachate pond and the northern berm of the vault. This material was also excavated and treated.
—Draining and backfilling three onsite ponds.
—Final grading of the ravine, former vault, and former pond areas, and seeding of the entire site.
—Construction of surface water runoff controls to accommodate seasonal precipitation, including inlets, terraces, culverts, and retention basins.

After draining and backfilling the leachate pond, a contaminated spring was discovered. To address this contamination and ensure the protectiveness of the remedy, a riprap swale was constructed to provide passive aeration of the contaminated water. In addition, the spring and portions of the swale were fenced to prevent human and animal contact with the spring discharge. The pre-final inspection was conducted at the site on May 31, 1995, with representatives present from EPA, FDEP, and DOPCSC. The punch list produced at this inspection indicated that all components of the remedy had been constructed in accordance with the ROD and the remedial design. The Site completion document was approved by EPA on September 25, 1995 with the completion of the soil treatment (achievement of soil cleanup goals). Long term groundwater and surface water monitoring was implemented in October 1995 with continued quarterly monitoring.

As stated in the September 24, 1998, Five Year Review document, the contamination in groundwater and surface water would naturally attenuate to health protective levels over time. As of June 2003, during the collection of additional groundwater and surface water sampling, the surface water compliance point sample and the North Pond discharge compliance point sample were non-detect for all target compounds. The maintenance inspection performed on June 6, 2003, verified that all of the berms were performing adequately and the drainage features were free of debris and functioning as intended.

EPA, with concurrence of FDEP, has determined that all appropriate actions at the Dubose Oil Producing Company Site have been completed, and no further remedial action is necessary. Therefore, EPA is proposing deletion of the Site from the NPL.

Dated: May 26, 2004.

J.I. Palmer, Jr.,

Regional Administrator, U.S. EPA Region 4.

[FR Doc. 04–17659 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173, 175, and 178

[Docket No. RSPA–04–17664 (HM–224B)]

RIN 2137–AD33

Hazardous Materials: Transportation of Compressed Oxygen, Other Oxidizing Gases and Chemical Oxygen Generators on Aircraft

AGENCY: Research and Special Programs Administration (RSPA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); extension of comment period.

SUMMARY: RSPA is extending until December 13, 2004, the period for interested persons to submit comments on the May 6, 2004 notice of proposed rulemaking in response to a request by the Air Transport Association (ATA). In the May 6, 2004 NPRM, we proposed to amend the Hazardous Materials Regulations (HMR) to require that cylinders of compressed oxygen and packages of chemical oxygen generators be placed in an outer packaging that meets certain flame penetration and thermal resistance requirements when transported aboard an aircraft. This proposal was developed based on recommendations from the Federal Aviation Administration (FAA). RSPA is also proposing to: Raise the pressure relief device setting limit on cylinders of compressed oxygen transported aboard aircraft; limit the types of cylinders authorized to transport compressed oxygen aboard aircraft; prohibit the transportation of all oxidizing gases, other than compressed oxygen, aboard cargo and passenger aircraft; and convert most of the provisions of an oxygen generator approval into the HMR. These proposals would increase the level of safety associated with transportation of these materials aboard aircraft.

DATES: Submit comments by December 13, 2004. To the extent possible, we will consider comments received after this date.

ADDRESSES: You may submit comments 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.
- Web site: *http://regulations.gov*. Follow instructions for submitting comments.

• Mail: Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–402, Washington, DC 20590–001.

• Hand Delivery: To the Docket Management System; 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.

Instructions: You must include the agency name and docket number RSPA–04–17664 (HM–224B) or the Regulatory Identification Number (RIN 2137–AD33) for this notice at the beginning of your comment. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act section of this document.

FOR FURTHER INFORMATION CONTACT: John A. Gale, Office of Hazardous Materials Standards, telephone (202) 366–8553, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001 or David Catey, Office of Flight Standards, (202) 267–3732, Federal Aviation Administration, U.S. Department of Transportation, 800 Independence Avenue, SW., Washington, DC 20591.

SUPPLEMENTARY INFORMATION:

I. Background

On May 6, 2004, RSPA published a notice of proposed rulemaking (69 FR 25470) to amend the Hazardous Materials Regulations to require that cylinders of compressed oxygen and packages of chemical oxygen generators be placed in an outer packaging that meets certain flame penetration and thermal resistance requirements when transported aboard an aircraft. This proposal was developed based on recommendations from the Federal Aviation Administration (FAA). RSPA is also proposing to: Raise the pressure relief device setting limit on cylinders of compressed oxygen transported aboard aircraft; limit the types of cylinders authorized to transport compressed oxygen aboard aircraft; prohibit the transportation of all oxidizing gases, other than compressed oxygen, aboard cargo and passenger aircraft; and convert most of the provisions of an oxygen generator approval into the HMR (49 CFR parts 171–180). These proposals would increase the level of safety associated with transportation of these materials aboard aircraft. In the NPRM, RSPA requested comments on 15 specific questions pertaining to the proposed amendments in order to gather feedback from affected members of the regulated community.

The HMR govern the transportation of hazardous materials in commerce in all modes of transportation, including aircraft (49 CFR 171.1(a)(1)). Parts 172 and 173 of the HMR include requirements for classification and packaging of hazardous materials, hazard communication, and training of employees who perform functions subject to the requirements of the HMR. Part 175 contains requirements applicable to aircraft operators transporting hazardous materials aboard an aircraft, and authorizes passengers and crew members to carry hazardous materials on board an aircraft under certain conditions. Part 178 contains additional requirements applicable to the specifications for packagings in all modes.

On June 22, 2004, ATA requested an extension of the comment period (closing August 13, 2004) until December 13, 2004. ATA stated that its member air carriers need additional time to prepare and develop comments to RSPA's particular questions. ATA stated that its members have determined the need to consult other sources before preparing comments, including maintenance and engineering advice. ATA stated that carriers have little reliable information about the availability or cost of aspects of the NPRM and will need to research the market to obtain this information. ATA stated its members need additional time to collect information germane to their responses and to provide inclusive industry comments on the impact of the NPRM on safety and carrier operations. RSPA agrees that extending the comment period on this rulemaking is in the public interest because it will assure a more thorough consideration of the issues by the affected parties. Therefore we are extending the comment period to December 13, 2004.

Issued in Washington, DC on July 29, 2004, under the authority delegated in 49 CFR part 106.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 04–17747 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2004–17980; Notice 2]

RIN 2127–AI38

Federal Motor Vehicle Safety Standards; Seat Belt Assemblies

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Extension of comment period.

SUMMARY: NHTSA received a letter asking us to extend the comment period for the Notice of Proposed Rulemaking (NPRM) to amend the Federal motor vehicle safety standard (FMVSS) for seat belt assemblies. The NPRM proposed to redefine the requirements and establish a new test methodology for emergency-locking retractors. If adopted, the amendments would establish a new acceleration corridor, add a figure illustrating the acceleration corridor, provide tolerance on angle measurements, and employ the same instrumentation specifications currently found in other FMVSSs containing crash tests. To provide interested persons additional time to prepare comments, we are extending the end of the comment period from August 2, 2004, to October 1, 2004. This 60-day extension will allow seat belt manufacturers the opportunity to conduct additional testing in support of the NPRM and provide more meaningful comments.

DATES: Comments must be received by October 1, 2004.

ADDRESSES: You may submit comments (identified by the docket number set forth above) by any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

• Web Site: *http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site. Please note, if you are submitting petitions electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.[1]

[1] Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

- 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. to 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. All comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Privacy Act heading of the Supplementary Information section of this document.

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.

FOR FURTHER INFORMATION CONTACT: The following persons at the National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590 can be contacted.

For non-legal issues: William Fan, Office of Crashworthiness Standards, NVS–112. Telephone: (202) 366–4922. Fax: (202) 493–2739.

For legal issues: Christopher Calamita, Office of Chief Counsel, NCC–112. Telephone: (202) 366–2992. Fax: (202) 366–3820.

SUPPLEMENTARY INFORMATION: On June 3, 2004, NHTSA published in the **Federal Register** (69 FR 31330) a NPRM to amend FMVSS No. 209, ''Seat belt assemblies,'' to redefine the requirements and establish a new test methodology for emergency-locking retractors. This rulemaking was initiated in response to a petition for rulemaking submitted by the Automotive Occupant Restraints Council (AORC), a trade association representing manufacturers of occupant restraints. The AORC petition requested that NHTSA amend the performance requirements and test procedures for emergency-locking retractors to include an acceleration corridor. Additionally, the AORC requested that NHTSA apply the same instrumentation specifications to emergency-locking retractors, as used in other FMVSS dynamic performance requirements.

In developing the NPRM, the agency examined vehicle crash tests, hard braking tests, FMVSS No. 209 compliance test pulses, and data presented by the AORC in its petition for rulemaking. Based on our analysis of available data, NHTSA proposed amendments to FMVSS No. 209 that would establish a new acceleration corridor, add a figure illustrating the acceleration corridor, provide tolerance on angle measurements, and employ the same instrumentation specifications currently found in other FMVSSs containing crash tests. In general, the NPRM expanded upon, and modified, the performance specifications recommended by the AORC in their original petition. The agency did so to allow for a wider range of acceleration pulses, including those historically used for ensuring a minimum level of safety performance.

On July 14, 2004, the AORC requested a 60-day extension of the comment period to October 1, 2004. The AORC stated that the basis for the extension is to gather additional technical information. The AORC stated its belief that the additional time requested for comments would allow for sufficient testing and assessment. Specifically, the AORC made the following statements about gathering additional information:

- Due to significant changes of the proposed emergency-locking retractor corridor, the restraint suppliers need to test and analyze the impact of these changes to the totality of the proposed rulemaking, as well as the ability of products to comply with pulses within the corridor.
- The addition of the ''nuisance locking'' 0.3 g requirement, which was not in the AORC petition, needs further study. This evaluation may consider the applicability of a corridor, limits, and the ability of retractors to meet the proposed requirements.
- The addition of the ''tolerance for angles'' of plus or minus 3 degrees, which was not in the AORC petition, needs to be reviewed for applicability to this standard in test lab practices and procedures.
- The proposal to use the Society of Automotive Engineers J211–1 filtering for webbing payout needs to be reviewed with the equipment manufacturers and assessed in terms of product compliance.

In conclusion, the AORC stated that the additional 60-days would allow for a more thorough evaluation and response to the proposed rulemaking.

After considering the AORC's request, we have decided that it would be in the public's interest to extend the comment period to obtain as much data as possible. The AORC may provide additional tests and analyses to better assess the merits of the proposal, and the potential for product compliance with the technical performance requirements specified in the NPRM. There is also a public interest in having the views of the public be as informed as possible. Since the proposal seeks to clarify the requirements and test procedures applicable to emergency-locking retractors, we stated in the NPRM that we do not anticipate any substantial changes in their performance. Consequently, we believe the 60-day extension of the comment period will not adversely affect safety. Furthermore, since the AORC initiated both the original petition and the 60-day extension request, our decision to extend the comment period is supported by the petitioner in this case. Therefore, we believe that providing additional time for the AORC to collect and analyze information will result in more helpful comments.

Privacy Act: Anyone is able to search the electronic form of all submissions received into any of our dockets by the name of the individual submitting the comment or petition (or signing the comment or petition, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (volume 65, number 70; pages 19477–78), or you may visit *http://dms.dot.gov*.

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

Issued: July 29, 2004.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 04–17702 Filed 7–30–04; 8:58 am]

BILLING CODE 4910–59–P

Notices

Federal Register
Vol. 69, No. 149
Wednesday, August 4, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Forest-Wide Integrated Weed Management, Lolo National Forest; Missoula, Mineral, Sanders, Granite, Lewis and Clark, Flathead, Ravalli, Lake and Powell Counties, MT

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement (EIS) to disclose the effects of Forest-wide Integrated Weed Management treatments that includes herbicide (aerial and ground application), biological, and manual control methods.

DATES: Initial comments concerning the analysis should be received in writing no later than September 20, 2004.

Responsible Official: Send written comments to Deborah L.R. Austin, Forest Supervisor, Lolo National Forest, Building 24, Fort Missoula, Missoula, MT 59804.

FOR FURTHER INFORMATION CONTACT: Andy Kulla, Forest Weed Program Manager, or Bruce Higgins, Project Leader at the Missoula Ranger District, Building 24A, Fort Missoula, Missoula, MT 59801, or at (406) 329–3750. You may also contact them via e-mail—*akulla@fs.fed.us* or *bdhiggins@fs.fed.us.*

Project Description: The Lolo National Forest proposes to manage invasive plant species through the use of an integrated weed management approach that utilizes a variety of control methods. Treatments areas would be identified based upon specific representative site types, forest-wide priority screening criteria, and standardizes methodology for resource protection. The proposed action would treat a maximum of 15,000 acres per year with herbicides (less than one percent of the Lolo National Forest acreage), using ground or aerial applied methods. No limit to the number of acres of biological or manual control methods is proposed. Prevention and education strategies will continue, as present, to be a key component of the overall management approach.

The proposed action is in response to the need to respond promptly to new weed species invasions, the spread of existing infestations and to control existing weed infestations in areas outside of existing projects areas with NEPA decisions. Representative site types include: bunchgrass winter ranges, burned areas, areas of concentrated public use, administrative sites, disturbed areas along roads, trails, trailheads, power lines, right-of-ways, gravel and rock quarries, and fuels reduction projects.

Effects of the proposed action on recreation, wildlife, native vegetation, human health, threatened and endangered species will be disclosed in the analysis. Alternatives to be considered in detail include the no action and proposed action. Additional alternatives may be identified during the public scoping process.

The Federal Forest Service is the lead agency for preparing this EIS. They will consult with the United States Fish and Wildlife Service when making this decision. The responsible official who will make the decision is Deborah L.R. Austin, Forest Supervisor, Lolo National Forest, Building 24, Fort Missoula, Missoula MT 59804. She will decide on this proposal after considering comment, responses, environmental consequences, applicable laws, regulations, and policies. The decision and rationale for the decision will be documented in a Record of Decision.

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in May, 2005. At that time, the EPA will publish a Notice of Availability of the Draft EIS in the **Federal Register.** The comment period on the Draft EIS will be 45 days from the date of the EPA's notice of availability in the **Federal Register.** The final EIS is scheduled to be completed by October 2005. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the Notice of Availability in the **Federal Register.**

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.)

Dated: July 28, 2004.

Deborah L.R. Austin,

Forest Supervisor, Lolo National Forest.

[FR Doc. 04–17748 Filed 8–3–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

Notice of Proposed Changes to Section IV of the Field Office Technical Guide (FOTG) of the Natural Resources Conservation Service in Indiana

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of availability of proposed changes in Section IV of the FOTG of the NRCS in Indiana for review and comment.

SUMMARY: It is the intention of NRCS in Indiana to issue three revised conservation practice standards in Section IV of the FOTG. The revised standards are: Fire Break (394), Land Reconstruction, Abandoned Mined Land (543) and Land Reconstruction, Currently Mined Land (544). These practices may be used in conservation systems that treat highly erodible land and/or wetlands.

DATES: Comments will be received for a 30-day period commencing with this date of publication.

ADDRESSES: Address all requests and comments to Jane E. Hardisty, State Conservationist, Natural Resources Conservation Service (NRCS), 6013 Lakeside Blvd., Indianapolis, Indiana 46278. Copies of this standard will be made available upon written request. You may submit your electronic requests and comments to *Darrell.brown@in.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Jane E. Hardisty, telephone 317–290–3200.

SUPPLEMENTARY INFORMATION: Section 343 of the Federal Agriculture Improvement and Reform Act of 1996 states that after enactment of the law, revisions made to NRCS state technical guides used to carry out highly erodible land and wetland provisions of the law, shall be made available for public review and comment. For the next 30 days, the NRCS in Indiana will receive comments relative to the proposed changes. Following that period, a determination will be made by the NRCS in Indiana regarding disposition of those comments and a final determination of changes will be made.

Dated: July 19, 2004.

Jane E. Hardisty,

State Conservationist, Indianapolis, Indiana.

[FR Doc. 04–17805 Filed 8–3–04; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE

Submission For OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Current Population Survey (CPS), October 2004 School Enrollment Supplement.

Form Number(s): The CPS is conducted by personal or telephone interview using laptop computers. There is no paper questionnaire.

Agency Approval Number: 0607–0464.

Type of Request: Revision of a currently approved collection.

Burden: 7,600 hours.

Number of Respondents: 57,000.

Avg Hours Per Response: 8 minutes.

Needs and Uses: The U.S. Census Bureau requests clearance for the supplemental inquiry concerning school enrollment to be conducted in conjunction with the Current Population Survey (CPS) October 2004 Supplement. The School Enrollment Supplement is jointly sponsored by the U.S. Census Bureau, the Bureau of Labor Statistics (BLS), and the National Center for Education Statistics (NCES). The basic school enrollment questions have been collected annually in the CPS for 40 years. In October 2004, the School Enrollment Supplement will include not only the basic items, but also additional NCES-sponsored items on grade retention, English proficiency, and disabilities (asked of all adults aged 15–24 and children aged 3 years or older), as well as school attendance in the United States (asked of foreign-born adults). In prior October supplements, we have asked similar questions to those that we are requesting for 2004.

This data series provides basic information on enrollment status of various segments of the population necessary as background for policy formation and implementation. The CPS October supplement is the only annual source of data on public/private elementary and secondary school enrollment and characteristics of private school students and their families, which are used for tracking historical trends and for policy planning and support. It is the only source of national data on the age distribution and family characteristics of college students and the only source of demographic data on preprimary school enrollment. As part of the federal government's efforts to collect data and provide timely information to local governments for policymaking decisions, this supplement provides national trends in enrollment and progress in school. Discontinuance of these data would mean not complying with the federal government's obligation to provide data to decision makers on current educational issues and would disrupt a data series that has been in existence for 40 years.

Affected Public: Individuals or households.

Frequency: Annually.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., Section 182 and Title 29 U.S.C., Sections 1–9.

OMB Desk Officer: Susan Schechter, (202) 395–5103.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Susan Schechter, OMB Desk Officer either by fax (202–395–7245) or email (*susan_schechter@omb.eop.gov*).

Dated: July 29, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–17701 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Export and Reexport Controls for Iraq

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before October 4, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, DOC Paperwork Clearance Officer, (202) 482–2066,

Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via Internet at *dHynek@doc.gov*.)

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to George Ipock, BIS ICB Liaison, (202) 482–5569, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

I. Abstract

The primary purpose of this proposed collection of information is to establish a new and expedited export license type developed specifically for exports and reexports of controlled items destined to civil infrastructure rebuilding projects in Iraq. The name given this license type is the Special Iraq Reconstruction License or SIRL. The information furnished by U.S. exporters provides the basis for decisions to grant licenses for export, reexport, and classifications of commodities, goods and technologies that are controlled for reasons of national security and foreign policy.

II. Method of Collection

Submitted on form BIS–748P or electronically through the Simplified Network Application Process (SNAP).

III. Data

OMB *Number:* 0694–0129.
Form Number: BIS–748P.
Type of Review: Regular submission for extension of a currently approved collection.
Affected Public: Individuals, businesses or other for-profit and not-for-profit institutions.
Estimated Number of Respondents: 25.
Estimated Time Per Response: 3 to 3.5 hours per response.
Estimated Total Annual Burden Hours: 88.
Estimated Total Annual Cost: No start-up capital expenditures.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: July 30, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–17801 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Assessment of Foreign Defense Procurement Practices

ACTION: Proposed collection; request for comments.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Pub. L. 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted October 4, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, DOC Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to George Ipock, BIS ICB Liaison, (202) 482–5469, Department of Commerce, Room 6622, 14th & Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Defense Production Act Amendments of 1992, Section 123 (Pub. L. 102558), which amended Section 309 or the Defense Production Act of 1950, requires United States firms to furnish information for a variety of defense industrial base studies and reports undertaken by the Bureau of Industry and Security (BIS) within the U.S. Department of Commerce. The information to be collected regarding foreign defense procurement practices will be used by the Bureau of Industry and Security to assess the defense procurement policies of allied nations in an effort to ensure a competitive environment for U.S. defense firms in the global defense market. This assessment is within the scope of BIS's core functions to develop, promote, and implement policies that ensure a strong technologically superior U.S. defense industrial base. To ensure that U.S. industry has the capacity to meet current and future national security, economic security, and homeland security requirements, BIS conducts analyses of defense sectors important to the national defense, promotes U.S. defense exports, and monitors U.S. defense industry access to foreign markets.

II. Method of Collection

Electronic Survey to be sent to 150 U.S. suppliers to the U.S. Department of Defense. The information will be compiled into a report for use by U.S. Government officials.

III. Data

OMB Number: None.
Form Number: None.
Type of Review: New Collection.
Affected Public: Individuals, businesses or other for-profit and not-for-profit institutions.
Estimated Number of Respondents: 150.
Estimated Time Per Response: 3 hours per response.
Estimated Total Annual Burden Hours: 450.
Estimated Total Annual Cost: No start-up costs or capital expenditures.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection;

they will also become a matter of public record.

Dated: July 30, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–17802 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

Information on Articles for Physically or Mentally Handicapped Persons Imported Free of Duty

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burdens, invites the general public and other Federal agencies to take this opportunity to comment on the continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(C)(2)(A)).

DATES: Written comments must be submitted on or before October 4, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th & Constitution Avenue, NW., Washington, DC 20230; phone(202) 482–0266 or via the Internet at *dHynek@doc.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to: Faye Robinson, U.S. Department of Commerce, FCB Suite 4100W, 14th Street & Constitution Avenue, NW., Washington, DC 20230; phone (202) 482–1660, fax (202) 482–0949.

SUPPLEMENTARY INFORMATION:

I. Abstract

Congress, when it enacted legislation to implement the Nairobi Protocol to the Florence Agreement, included a provision for the Departments of Commerce and Homeland Security to collect information on the import of articles for the handicapped. Form ITA–362P, Information on Articles for Physically or Mentally Handicapped Persons Imported Free of Duty, is the vehicle by which statistical information is obtained to assess whether the duty-free treatment of articles for the handicapped has had a significant adverse impact on a domestic industry (or portion thereof) manufacturing or producing a like or directly competitive article. Without the collection of data, it would be almost impossible for a sound determination to be made and for the President to appropriately redress the situation.

II. Method of Collection

The Department of Commerce and U.S. Customs and Border Protection (''CBP'') have copies of Form ITA–362P and distribute the form to importers and brokers upon request. Also, Form ITA–362P may be printed from the Statutory Import Programs Staff portion of the Department of Commerce Web site at *http://www.ia.ita.doc.gov/sips/ita362p.html.* The applicant completes the form and then forwards it to the CBP. Upon acceptance by CBP as a valid application, the application is transmitted to Commerce for processing.

III. Data

OMB Number: 0625–0118.

Form Number: ITA–362P.

Type of Review: Extension-Regular Submission.

Affected Public: Businesses or other for-profit, not-for-profit institutions, state, local or tribal governments, federal government, individuals or households.

Estimated Number of Respondents: 240.

Estimated Time per Response: 4 mins.

Estimated Total Annual Burden Hours: 337.

Estimated Total Annual Cost: $17,748 ($4,048 for respondents and $13,700 for federal government).

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: July 29, 2004.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–17700 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–848]

Notice of Extension of Time Limit of Preliminary Results of New Shipper Reviews: Freshwater Crawfish Tail Meat From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: The Department of Commerce is extending the time limit for the preliminary results of the new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China that were initiated on October 31, 2003 (68 FR 62774) for the following: Qingdao Xiyuan Refrigerate Food Co., Ltd. (Qingdao Refrigerate); Siyang Foreign Trading Corporation (Siyang) and its producer, Anhui Golden Bird Agricultural Products Development Co., Ltd.; and Yancheng Fuda Foods Co., Ltd. (Yancheng Fuda). Preliminary results of this review are extended until no later than August 26, 2004. This extension is made pursuant to section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act).

EFFECTIVE DATE: August 4, 2004.

FOR FURTHER INFORMATION CONTACT: Scot Fullerton or Matt Renkey, Office of AD/CVD Enforcement VII, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; telephone: (202) 482–1386 or (202) 482–2312, respectively.

SUPPLEMENTARY INFORMATION:

Statutory Time Limits

Section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(1) of the Department's regulations require the Department to issue the preliminary results of a new shipper review within 180 days after the date on which the new shipper review was initiated, and final results of review within 90 days after the date on which the preliminary results were issued. However, if the Department determines that the issues are extraordinarily complicated, section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(2) of the

Department's regulations allow the Department to extend the deadline for the preliminary results to up to 300 days after the date on which the new shipper review was initiated.

Background

The Department received timely requests for new shipper reviews of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China from the following: Qingdao Refrigerate; Siyang and its producer, Anhui Golden Bird Agricultural Products Development Co., Ltd.; and Yancheng Fuda. These requests were filed in accordance with section 751(a)(2)(B) of the act and section 351.214 of the Department's regulations. On October 31, 2003, the Department initiated these new shipper reviews covering the periods September 1, 2002 through August 31, 2003 for Qingdao Refrigerate and Yancheng Fuda; and July 1, 2002 through August 31, 2003 for Siyang. *See Freshwater Crawfish Tail Meat From the People's Republic of China: Initiation of New Shipper Reviews*, 68 FR 62774 (November 6, 2003). The preliminary results of these reviews were scheduled for April 28, 2004. The Department extended the time limits for completion of the preliminary results to July 30, 2004. *See Notice of Extension of Time Limit of New Shipper Reviews: Freshwater Crawfish Tail Meat From the People's Republic of China*, 69 FR 24567 (May 4, 2004).

Extension of Time Limits for Preliminary Results

Pursuant to section 751(a)(2)(B)(iv) of the Act, the Department may extend the deadline for completion of the preliminary results of a new shipper review if it determines that the case is extraordinarily complicated. Because the Department needs additional time to explore various ownership issues and to issue additional supplemental questionnaires, the Department has determined that these reviews are extraordinarily complicated, and the preliminary results of these new shipper reviews cannot be completed within the statutory time limit of 180 days. Therefore, in accordance with section 751(a)(2)(B)(iv) of the Act and section 351.214(i)(2) of the regulations, the Department is extending the time limit for the completion of the preliminary results to no later than August 26, 2004.

This notice is published pursuant to sections 751(a)(2)(B)(iv) and 777(i)(1) of the Act.

Dated: July 29, 2004.

Jeffrey A. May,

Deputy Assistant Secretary for Import Administration, Group I.

[FR Doc. 04–17820 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–838]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value.

SUMMARY: We preliminarily determine that certain frozen and canned warmwater shrimp from Brazil are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act).

Interested parties are invited to comment on this preliminary determination. Because we are postponing the final determination, we will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

EFFECTIVE DATE: August 4, 2004.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Rebecca Trainor, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4929 or (202) 482–4007, respectively.

Preliminary Determination

We preliminarily determine that certain frozen and canned warmwater shrimp from Brazil are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice.

Background

Since the initiation of this investigation (*see Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 FR 3876 (January 27, 2004) (*Initiation Notice*)), the following events have occurred.

On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warmwater shrimp from Brazil are materially injuring the United States industry. *See* ITC Investigation Nos. 731–TA–1063–1068 (Publication No. 3672).

On February 20, 2004, we selected the three largest producers/exporters of certain frozen and canned warmwater shrimp from Brazil as the mandatory respondents in this proceeding. *See* Memorandum to Louis Apple, Director Office 2, from The Team dated February 20, 2004. We subsequently issued the antidumping questionnaire to Empresa de Armazenagem Frigorifica Ltda. (EMPAF), Central de Industrializacao e Distribuicao de Alimentos Ltda. (CIDA), and Norte Pesca S.A. (Norte Pesca) on February 20, 2004.

During the period February through June 2004, various interested parties, including the petitioners, submitted comments on the scope of this and the concurrent investigations of certain frozen and canned warmwater shrimp concerning whether the following products are covered by the scope of the investigations: a certain seafood mix, dusted shrimp, battered shrimp, salad shrimp sold in counts of 250 pieces or higher, the species *Macrobachium rosenbergii*, organic shrimp, and peeled shrimp used in breading.[1] In addition, the Louisiana Shrimp Alliance (LSA), an association of domestic shrimp harvesters and processors, requested

[1] Specifically, Ocean Duke Corporation (Ocean Duke), an importer and wholesaler of the subject merchandise, requested that the following products be excluded from the scope of this and the concurrent investigations on certain frozen and canned warmwater shrimp: (1) ''dusted shrimp,'' (2) ''battered shrimp,'' and (3) ''seafood mix.'' Another importer, Rubicon Resources LLP, supported Ocean Duke's request regarding dusted and battered shrimp. Eastern Fish Company and Long John Silver's, Inc. also requested that dusted and battered shrimp be excluded from the scope of the investigations. Furthermore, the Seafood Exporters' Association of India requested that the Department find that warmwater salad shrimp in counts of 250 pieces or higher are not within the scope, and that the species *Machrobachium rosenbergii* is a separate class or kind of merchandise. Also, Exportadora de Alimentos S.A., one of the respondents in the Ecuador case, requested that the Department find that farm-raised organic shrimp is not covered by the scope of the investigations. Finally, the American Breaded Shrimp Processors Association, comprised of importers of peeled shrimp which they consume in the production of breaded shrimp products, requested that peeled shrimp imported for the sole purpose of breading be excluded from the scope of the investigations.

that the Department expand the scope to include fresh (never frozen) shrimp. *See* ''Scope Comments'' section of this notice.

We received section A questionnaire responses from the three respondents in March 2004, and section B and C questionnaire responses from CIDA and EMPAF, as well as section C and D questionnaire responses from Norte Pesca, in April 2004. We issued and received responses to our supplemental questionnaires from April through June 2004.

On April 30, 2004, the petitioners[2] alleged that CIDA made third country sales below the cost of production (COP) and, therefore, requested that the Department initiate a sales-below-cost investigation of CIDA with respect to its third country sales in France.[3] On June 7, 2004, the Department initiated a sales-below-cost investigation of CIDA, and required it to respond to section D of the Department's questionnaire. *See* Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Central de Industrializacao e Distribuicao de Alimentos Ltda.

On June 7, 2004, the petitioners alleged that EMPAF made home market sales below the COP and, therefore, requested that the Department initiate a sales-below-cost investigation of EMPAF. On June 15, 2004, the Department initiated a sales-below-cost investigation of EMPAF, and required it to respond to section D of the Department's questionnaire. *See* Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Empresa de Armazenagem Frigorifica Ltda. With respect to CIDA and EMPAF, we received original section D responses in June 2004, and supplemental section D responses in July 2004.

On May 18, 2004, pursuant to sections 733(c)(1)(B) and (c)(2) of the Act and 19 CFR 351.205(f), the Department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than July 28, 2004. *See Notice of Postponement of Preliminary Determinations of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil (A–351–838), Ecuador (A–331–802), India (A–533–840), Thailand (A–549–822), the People's Republic of China (A–570–893), and the Socialist Republic of Vietnam (A–503–822)*, 69 FR 29509 (May 24, 2004).

On May 21, 2004, the Department denied LSA's request to amend the scope to include fresh (never frozen) shrimp. *See* Memorandum from Jeffrey A. May, Deputy Assistant Secretary, AD/CVD Enforcement Group I, and Joseph A. Spetrini, Deputy Assistant Secretary AD/CVD Enforcement Group III, to James J. Jochum, Assistant Secretary for Import Administration Re: Antidumping Investigations on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, the People's Republic of China, Thailand and the Socialist Republic of Vietnam: Scope Determination Regarding Fresh (Never Frozen) Shrimp, dated May 21, 2004 (Scope Decision Memorandum I).

On June 29, 2004, EMPAF requested that the Department allow it to report its COP based on its fiscal year rather than the period of investigation (POI) because its fiscal year ended within three months of the POI. On July 6, 2004, EMPAF provided information that the Department requested in a July 1, 2004, letter addressing the impact of such a period shift on its cost reporting. On July 8, 2004, the Department granted EMPAF's request because it appeared, based on the information provided, that shifting the cost reporting period would not materially impact the antidumping duty analysis.

Pursuant to the Department's solicitation, on June 7, 2004, various interested parties, including the petitioners, submitted comments on the issue of whether product comparisons and margin calculations in this and the concurrent investigations of certain frozen and canned warmwater shrimp should be based on data provided on an ''as sold'' basis or data converted to a headless, shell-on (HLSO) basis.[4] Additional comments were subsequently submitted on June 15 and 25, 2004. *See* ''Product Comparison Comments'' section below.

On July 2, 2004, the Department made preliminary scope determinations with respect to the following shrimp products: Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp, peeled shrimp used in breading, dusted shrimp and battered shrimp. *See* Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration Re: Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarifications: (1) Ocean Duke's Seafood Mix; (2) Salad Shrimp Sold in Counts of 250 Pieces or Higher; (3) *Macrobrachium rosenbergii*; (4) Organic Shrimp; and (5) Peeled Shrimp Used in Breading, dated July 2, 2004 (Scope Decision Memorandum II); and Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration Re: Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Dusted Shrimp and Battered Shrimp, dated July 2, 2004 (Scope Decision Memorandum III). *See also* ''Scope Comments'' section below.

On July 7, 2004, the petitioners filed comments on various company-specific issues for consideration in the preliminary determination. On July 8, 2004, CIDA responded to these comments as they pertained to CIDA's reported data. On July 12, 2004, EMPAF submitted revised U.S. and home market databases to correct clerical errors in previously submitted data.

On July 9, 2004, the Department found it appropriate to select France as the third country comparison market for CIDA. *See* Memorandum to Louis Apple, Director Office 2, from The Team Re: Selection of Third Country Market for Central de Industrializacao e Distribuicao de Alimentos Ltda. (CIDA)

[2] The petitioners in this investigation are the Ad Hoc Shrimp Trade Alliance (an ad hoc coalition representative of U.S. producers of frozen and canned warmwater shrimp and harvesters of wild-caught warmwater shrimp), Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company.

[3] Although the petitioners' sales below cost allegation pertained to third country sales in both Spain and France, we only analyzed the allegation with respect to France, which is the largest third country market reported by CIDA.

[4] Specifically, the Department received comments from the following interested parties, in addition to the petitioners, on June 7: the Brazilian Shrimp Farmers' Association and Central de Industrializacao e Distribuicao de Alimentos Ltda.; Empresa De Armazenagem Frigorifica Ltda.; Camara Nacional de Acuacultura (National Chamber of Aquaculture) of Ecuador; the Rubicon Group (comprised of Andaman Seafood Co., Ltd. Chanthaburi Seafoods Co., Ltd. And Thailand Fishery Cold Storage Public Co., Ltd.), Thai I-Mei Frozen Foods Co., Ltd. and its affiliated reseller Ocean Duke; the Seafood Exporters of India and its members Devi Sea Foods Ltd., Hindustan Lever Limited, and Nekkanti Seafoods Limited; the VASEP Shrimp Committee and its members; and Shantou Red Garden Foodstuff Co., Ltd. In addition to addressing the ''as sold''/HLSO issue, some of these parties also commented on the significance of species and container weight in the Department's product characteristic hierarchy.

(Third Country Comparison Market Selection Memorandum).

On July 21, 2004, CIDA and EMPAF submitted revised U.S. and comparison market databases as a result of refinements to the COP databases, also submitted on this date, and to correct minor errors in the sales listings previously submitted to the Department. The revised sales databases were not submitted in time to be fully analyzed for use in the preliminary determination, except where the revised data was solicited by the Department in the context of the section D supplemental questionnaire issued in July 2004.

Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or, in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

Pursuant to section 735(a)(2) of the Act, on June 16, 2004, CIDA, EMPAF, Norte Pesca, and the Association of Brazilian Shrimp Farmers requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register**, and extend the provisional measures to not more than six months. In accordance with 19 CFR 351.210(b), because (1) our preliminary determination is affirmative, (2) the respondents account for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting respondents' request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

Period of Investigation

The POI is October 1, 2002, through September 30, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2003).

Scope of Investigation

The scope of this investigation includes certain warmwater shrimp and prawns, whether frozen or canned, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[5] deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form.

The frozen or canned warmwater shrimp and prawn products included in the scope of the investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through either freezing or canning and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the investigation. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the investigation.

Excluded from the scope are (1) breaded shrimp[6] and prawns (1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (1605.20.05.10); and (5) dried shrimp and prawns.

The products covered by this scope are currently classifiable under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, 1605.20.10.30, and 1605.20.10.40. These HTSUS subheadings are provided for convenience and Customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

Scope Comments

In accordance with the preamble to our regulations, we set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice.* (*See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997) and *Initiation Notice* at 69 FR 3877.) Throughout the 20 days and beyond, the Department received many comments and submissions regarding a multitude of scope issues, including: (1) Fresh (never frozen) shrimp, (2) Ocean Duke's seafood mix, (3) salad shrimp sold in counts of 250 pieces or higher, (4) *Macrobrachium rosenbergii,* (5) organic shrimp, (6) peeled shrimp used in breading, (7) dusted shrimp and (8) battered shrimp. On May 21, 2004, the Department determined that the scope of this and the concurrent investigations remains unchanged, as certain frozen and canned warmwater shrimp, without the addition of fresh (never frozen) shrimp. *See* Scope Decision Memorandum I.

On July 2, 2004, the Department made scope determinations with respect to Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii,* organic shrimp and peeled shrimp used in breading. *See* Scope Decision Memorandum II. Based on the information presented by interested parties, the Department determined that Ocean Duke's seafood mix is excluded from the scope of this and the concurrent investigations; however, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii,* organic shrimp and peeled shrimp used in breading are included

[5] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

[6] Pursuant to our scope determination on battered shrimp, we find that breaded shrimp includes battered shrimp as discussed in the ''Scope Comments'' section below. *See* Scope Memorandum III.

within the scope of these investigations. *See* Scope Decision Memorandum II at 33.

Additionally, on July 2, 2004, the Department made a scope determination with respect to dusted shrimp and battered shrimp. *See* Scope Decision Memorandum III. Based on the information presented by interested parties, the Department preliminarily finds that while substantial evidence exists to consider battered shrimp to fall within the meaning of the breaded shrimp exclusion identified in the scope of these proceedings, there is insufficient evidence to consider that shrimp which has been dusted falls within the meaning of ''breaded'' shrimp. However, there is sufficient evidence for the Department to consider excluding this merchandise from the scope of these proceedings provided an appropriate description can be developed. *See* Scope Decision Memorandum III at 18. To that end, along with the previously solicited comments regarding breaded and battered shrimp, the Department solicits comments from interested parties which enumerate and describe a clear, administrable definition of dusted shrimp. *See* Scope Decision Memorandum III at 23.

Fair Value Comparisons

To determine whether sales of certain frozen and canned warmwater shrimp from Brazil to the United States were made at LTFV, we compared the export price (EP) or constructed export price (CEP) to the normal value (NV), as described in the ''Export Price/ Constructed Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs and CEPs to NVs.

As discussed below under the ''Home Market Viability and Comparison Market Selection'' section, we determined that CIDA did not have a viable home market during the POI and that Norte Pesca did not have a viable home or third country market during the POI. Therefore, as the basis for NV, we used third country sales to France for CIDA and constructed value (CV) for Norte Pesca when making comparisons in accordance with sections 773(a)(1)(C) and 773 (a)(4) of the Act, respectively.

For purposes of the preliminary dumping calculation, we have treated EMPAF and Maricultura Netuno S.A. (Maricultura), an affiliate of EMPAF that is involved in the production of the subject merchandise, as one entity. These two producers are affiliated under section 771(33)(E) of the Act and 19 CFR 351.102 based on EMPAF's level of ownership in Maricultura, and should be treated as one entity for dumping calculation purposes under 19 CFR 351.401(f). Specifically, EMPAF and Maricultura have production facilities for similar or identical products that would not require substantial retooling of either facility to restructure manufacturing priorities and there is significant potential for the manipulation of price or production. We also note that EMPAF and Maricultura presented themselves as one entity for purposes of responding to the Department's antidumping questionnaire.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced and sold by the respondents in Brazil during the POI that fit the description in the ''Scope of Investigation'' section of this notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market or third country, where appropriate. Where there were no sales of identical merchandise in the home market or third country made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade, we made product comparisons using CV.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: processed form, cooked form, head status, count size (on an ''as sold'' basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

Product Comparison Comments

As Sold v. *HLSO Methodology*

We received comments from various interested parties concerning whether to perform product comparisons and margin calculations using data provided on an ''as sold'' basis or on data converted to an HLSO basis.[7]

The petitioners argue that using a consistent HLSO equivalent measure permits accurate product comparisons and margin calculations whereas the ''as sold'' measures do not. In particular, the petitioners emphasize that it is necessary to translate the actual sold volumes (weights) and count sizes to a uniform unit of measure that takes into account the various levels of processing of the different shrimp products sold and the allegedly large difference in value between the shrimp tail meat and other parts of the shrimp that may constitute ''as sold'' weight or count size, such as the head or shell. The petitioners'' contention is premised upon their belief that the shrimp tail meat is the value-driving component of the shrimp. The respondents disagree, maintaining generally that using HLSO-equivalent data violates the antidumping duty law and significantly distorts product comparisons and margin calculations. In particular, they argue that: (1) Shrimp is sold based on its actual size and form, not on an HLSO basis, and it is the Department's practice to use actual sales/cost data in its margin analysis; (2) the rates used to convert price, quantity and expense data to an HLSO basis are uncertain as they are not maintained by the respondents in the ordinary course of business, and are generally based on each individual company's experience rather than any accepted industry-wide standard; and (3) the HLSO methodology introduces a significant distortion through the incorrect assumption that the value of the product varies solely in direct proportion to the change in weight resulting from production yields, when in fact the value of the product depends also on other factors such as quality and form.

Our analysis of the company responses shows that: (1) No respondent uses HLSO equivalents in the normal course of business, for either sales or cost purposes; and (2) there is no reliable or consistent HLSO conversion formula for all forms of processed shrimp across all companies, as each company defined its conversion factors differently and derived these factors

[7] In this notice, we address only those comments pertaining to market-economy dumping calculation methodology. Any comments pertaining to non-market-economy dumping calculation methodology are separately addressed in the July 2, 2004, preliminary determinations in the antidumping duty investigations of certain frozen and canned warmwater shrimp from the People's Republic of China and the Socialist Republic of Vietnam. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China* (69 FR 42654, July 16, 2004), and *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam* (69 FR 42672, July 16, 2004).

based on its own production experience. Therefore, we preliminarily determine it is appropriate to perform product comparisons and margin calculations using data ''as sold.'' This approach is in accordance with our normal practice and precludes the use of conversion rates, the accuracy of which is uncertain. Given the variety and overlap of the ''as sold'' count size ranges reported by the respondents, we also preliminarily determine that it is appropriate to standardize product comparisons across respondents by fitting the ''as sold'' count sizes into the count size ranges specified in the questionnaire.

EMPAF reported that certain of its home market sales were not made on the basis of count size, and thus it was unable to report an ''as sold'' count size for these sales because this information does not exist in its records. In response to the Department's request, EMPAF provided estimated average count sizes for certain count size ranges but stated that these ranges are simply estimates and are not reliable. Therefore, as facts available under section 776(a)(1) of the Act, we assigned count size code ''10'' (the mid-point of all of the count size ranges specified in the Department's questionnaire) to those home market sales. *See* Memorandum from Kate Johnson to The File dated July 28, 2004, Re: Preliminary Determination Calculation Memorandum for Empresa de Armazenagem Frigrofica Ltd. (EMPAF) (EMPAF Calculation Memo). We will scrutinize this issue at verification for purposes of the final determination and revisit it if this investigation proceeds to an antidumping duty order and a subsequent review of the order.

Product Characteristics Hierarchy

We also received comments from various interested parties regarding the significance of the species and container weight criteria in the Department's product comparison hierarchy.

Various parties requested that the species criterion be ranked higher in the Department's product characteristic hierarchy—as high as the second most important characteristic, rather than the thirteenth—based on their belief that species is an important factor in determining price. One party provided industry publications indicating price variations according to species type. Another party requested further that the Department revise the species categories specified in the Department's questionnaire to reflect characteristics beyond color (*i.e.*, whether the shrimp was farm-raised or wild-caught). In addition, several parties requested that container weight, the eleventh characteristic in the Department's product characteristic hierarchy, be eliminated altogether as a product matching criterion, as they believe it is commercially insignificant and relates to packing size or form, rather than the physical attributes of the product.

With respect to the arguments regarding the species criterion, the petitioners disagree, maintaining that there is no credible evidence that species drives pricing to such a significant extent that buyers consider it more important than product characteristics such as head and cooked status. Rather, the petitioners contend that once shrimp is processed (*e.g.*, cooked, peeled, etc.), the species classification becomes essentially irrelevant. Therefore, the petitioners assert that while species type has some, not entirely insignificant effect on shrimp prices, it is appropriately captured in the Department's product matching hierarchy. Furthermore, with respect to the container weight criterion, the petitioners assert that, while the shrimp inside the container may be identical, in many cases the size of the container is an integral part of the product and an important determinant of the markets and channels through which shrimp can be sold. For this reason, the petitioners maintain that the Department should continue to include container weight as a product matching characteristic.

Regarding the species criterion, we have not changed the position of this criterion in the product characteristic hierarchy for the preliminary determination. We agree that the physical characteristic of species type may impact the price or cost of processed shrimp. For that reason, we included species type as one of the product matching criteria. However, based on our review of the record evidence, we find that other physical characteristics of the subject merchandise, such as head status, count size, shell status, and frozen form, appear to be more significant in setting price or determining cost. The information provided by the parties, which suggests that price may be affected in some cases by species type, does not provide sufficient evidence that species type is more significant than the remaining physical characteristics of the processed shrimp. Therefore, we find an insufficient basis to revise the ranking of the physical characteristics established in the Department's questionnaire for the purpose of product matching.

With respect to differentiating between species types beyond the color classifications identified in the questionnaire, we do not find that such differentiations reflect meaningful differences in the physical characteristics of the merchandise. In particular, we note that whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. Therefore, we have not accepted the additional species classifications proposed by the respondents. Accordingly, in those cases where the respondents reported additional species classifications for their processed shrimp products, we reclassified the products into one of the questionnaire color classifications. We made an exception for the shrimp identified as ''scampi'' (or *Macrobrachium rosenbergii*) and ''red ring'' (or *Aristeus alcocki*), where appropriate, because they represent species distinct from those associated by color in the Department's questionnaire. Regarding this exception, we note that while scampi and red ring are sufficiently distinct for product matching purposes, they are not so distinct as to constitute a separate class or kind of merchandise (*see* Scope Memorandum II). We also made an exception for the shrimp identified as ''mixed'' (*e.g.*, ''salad'' shrimp), where appropriate, because there is insufficient information on the record to classify these products according to the questionnaire color classifications.

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products of equivalent container weight (*e.g.*, a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

Broken Shrimp

CIDA reported sales of broken shrimp in its U.S. market. Because: (1) The matching criteria for this investigation do not currently account for broken shrimp; (2) no interested parties have provided comments on the appropriate methodology to match these sales; and (3) the quantity of such sales does not constitute a significant percentage of the respondent's database, we have excluded these sales from our analysis

for purposes of the preliminary determination. Nonetheless, we are seeking comments from interested parties regarding our treatment of these sales for consideration in the final determination.

Norte Pesca also reported sales of broken shrimp in its U.S. market. However, because the quantity of sales of broken shrimp to the U.S. market is significant and because we used CV as the basis for calculating NV, thereby eliminating the matching issue, we have included these sales in our analysis for purposes of the preliminary determination.

Export Price/Constructed Export Price

For CIDA and Norte Pesca we used EP price methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed FOB or CFR (Norte Pesca only) prices to unaffiliated purchasers in the United States.

CIDA

We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign warehousing, foreign inland freight, foreign inland insurance, and foreign brokerage and handling expenses. We did not allow CIDA's claim for a freight charge adjustment because there was no evidence on the record to suggest that such an adjustment was realized by CIDA. *See* Memorandum to Irene Darzenta Tzafolias from Rebecca Trainor dated July 28, 2004, Re: Calculation Memorandum for the Preliminary Determination for Central de Industrializacao e Distribuicao de Alimentos Ltd. (CIDA).

Norte Pesca

We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign brokerage and handling expenses, ocean freight, U.S. brokerage and handling, U.S. customs duties, and U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer). We also made deductions, where appropriate, for the profit earned by Norte Pesca's unaffiliated U.S. consignee. (*See* Norte Pesca's June 8, 2004, supplemental questionnaire response at 4–6.)

EMPAF

We calculated CEP in accordance with section 772(b) of the Act for those sales where the merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

We based CEP on the packed CFR or FOB prices to unaffiliated purchasers in the United States. We made deductions for billing adjustments and discounts, as appropriate. We also made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign warehousing expenses, brokerage and handling expenses, ocean freight (net of freight rebates), U.S. brokerage and handling, U.S. customs duties, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), and post-sale warehousing expenses. With respect to sales made on a CFR basis, we used the flat rate foreign inland freight expense reported in the original section B and C response because it appears to be less distortive than the destination- and sale term-specific expenses reported in the June 17, 2004, supplemental response. We did not deduct this expense from the starting price for FOB sales. *See* EMPAF Calculation Memo.

In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.*, finance charges and imputed credit expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by EMPAF and its affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

Normal Value

A. Home Market Viability and Comparison Market Selection

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared each respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

In this investigation, we determined that EMPAF's aggregate volume of home market sales of the foreign like product was greater than five percent of the aggregate volume of U.S. sales of the subject merchandise. Therefore, we used home market sales as the basis for NV in accordance with section 773(a)(1)(B) of the Act.

Furthermore, we determined that CIDA's aggregate volume of home market sales of the foreign like product and Norte Pesca's aggregate volume of home market and third country sales of the foreign like product were insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, with respect to CIDA, we used sales to France, which is CIDA's largest third country market, as the basis for comparison-market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. *See* Third Country Comparison Market Selection Memorandum. For Norte Pesca, we used CV as the basis for calculating NV, in accordance with section 773(a)(4) of the Act.

B. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP or CEP. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (SG&A) and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP

sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP-offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa,* 62 FR 61731 (Nov. 19, 1997).

In this investigation, we obtained information from each respondent regarding the marketing stages involved in making the reported home market or third country and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company-specific LOT findings are summarized below.

CIDA

CIDA made direct sales to distributors/traders through the same channel of distribution in both the United States and France. As described in its questionnaire response, CIDA performs the identical selling functions in the United States and France. Therefore, these sales channels are at the same LOT. Accordingly, all comparisons are at the same LOT for CIDA and an adjustment pursuant to section 773(a)(7)(A) is not warranted.

EMPAF

EMPAF sold through one channel of distribution in the home market—directly to unaffiliated small distributors, retailers, and consumers. We examined the chain of distribution and the selling activities and selling expenses associated with sales reported by EMPAF to distributors, retailers, and consumers in the home market. EMPAF's sales to these customers did not differ from each other with respect to selling activities (*e.g.* packing, order input/processing, direct sales personnel, freight and delivery logistics and warranty services). Therefore, we found that all of EMPAF's sales to customers in the home market constituted one LOT.

In the U.S. market, EMPAF made CEP sales to distributors through two channels of distribution: (1) directly to U.S. customers with assistance from NetUSA (EMPAF's affiliated U.S. importer) and (2) to NetUSA, which then resold the subject merchandise to U.S. customers. We examined EMPAF's U.S. distribution system, including selling functions, classes of customers, and selling expenses, and determined that EMPAF performs the same selling functions with respect to all CEP sales. Therefore, we found only one LOT for EMPAF's CEP sales. This CEP LOT differed from the home market LOT in that EMPAF reported a lower intensity of selling activities associated with order input/processing, direct sales personnel, freight and delivery logistics, and warranty services for the CEP LOT than the home market LOT. Therefore, we found the CEP LOT to be different from the home market LOT and to be at a less advanced stage of distribution than the home market LOT.

Therefore, we could not match CEP sales to sales at the same LOT in the home market, nor could we determine an LOT adjustment based on EMPAF's sales in Brazil because there is only one LOT in the home market, and it is not possible to determine if there is a pattern of consistent price differences between the sales on which NV is based and home market sales at the LOT of the export transaction. Furthermore, we have no other information that provides an appropriate basis for determining an LOT adjustment. Consequently, because the data available do not form an appropriate basis for making an LOT adjustment but the home market LOT is at a more advanced stage of distribution than the CEP LOT, we have made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act. The CEP offset is calculated as the lesser of: (1) the indirect selling expenses on the home market sales, or (2) the indirect selling expenses deducted from the starting price in calculating CEP.

Norte Pesca

Norte Pesca had no viable home or third country market during the POI. Therefore, we based NV on CV. When NV is based on CV, the NV LOT is that of the sales from which we derive SG&A expenses and profit. (*See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon From Chile,* 63 FR 2664 (January 16, 1998).) In accordance with 19 CFR 351.412(d), the Department will make its LOT determination under paragraph (d)(1) of this section on the basis of sales of the foreign like product by the producer or exporter. Because we based the selling expenses and profit for Norte Pesca on the weighted-average selling expenses incurred and profits earned by the other respondents in the investigation, we could not determine the LOT of the sales from which we derived selling expenses and profit for CV. As a result, there is insufficient information on the record to enable us to determine whether there is a difference in LOT between any U.S. sales and CV. Therefore, we made no LOT adjustment to NV. *See* ''Calculation of Normal Value Based on Constructed Value'' section of this notice below.

C. Cost of Production Analysis

Based on our analysis of the petitioners' allegations, we found that there were reasonable grounds to believe or suspect that CIDA's and EMPAF's sales of frozen and canned warmwater shrimp in the third country and home market, respectively, were made at prices below their COP. Accordingly, pursuant to section 773(b) of the Act, we initiated sales-below-cost investigations to determine whether CIDA's and EMPAF's sales were made at prices below their respective COPs. *See* Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Central de Industrializacao e Distribuicao de Alimentos Ltda. dated June 7, 2004; and Memorandum to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production for Empresa de Armazenagem Frigorifica Ltda. dated June 15, 2004.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative expenses (G&A), interest expenses, and home market or third country packing costs. *See* ''Test of Home Market/Third Country Sales Prices'' section below for treatment of home market/third country selling expenses. We relied on the COP data submitted by the respondents except in the following instances:

CIDA

During the POI, CIDA used an affiliated processor, Cia. Exportadora de Produtos do Mar (PRODUMAR), to produce the subject merchandise. CIDA purchased all material inputs, and maintained ownership of the materials and the processed shrimp, and PRODUMAR charged a fee for processing. During the POI, PRODUMAR neither produced nor sold the subject merchandise or the foreign like product for its own account. CIDA performed all marketing and selling functions, and controlled both the sale of the subject merchandise and the production schedules followed by PRODUMAR. For cost reporting purposes, CIDA collapsed itself with PRODUMAR as a single entity, and reported the processing costs incurred by PRODUMAR.

Based upon the facts above, we find that PRODUMAR is a toller under 19 CFR 351.401(h). Section 351.401(h) of the Department's regulations mandates that the Department will not consider a toller to be a manufacturer or producer where the toller does not acquire ownership, and does not control the relevant sale of the subject merchandise. Consistent with our practice with respect to subcontractors and tollers, we do not consider CIDA and PRODUMAR to be one reporting entity. *See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above from Taiwan,* 64 FR 56308, 56318 (October 19, 1999). Accordingly, because we consider PRODUMAR to be a toller affiliated with CIDA, we invoked the transactions disregarded and major input rules, in accordance with sections 773(f)(2) and (3) of the Act and 19 CFR 351.407(b). We determined the value of PRODUMAR's toll processing based on the higher of the transfer price paid by CIDA and PRODUMAR's reported processing costs. *See* Memorandum to Neal Halper from Sheikh M. Hannan dated July 28, 2004, Re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination (CIDA COP/CV Calculation Memo.)

However, the Department recognizes that, given the nature of the affiliation between CIDA and PRODUMAR, a related issue could arise with respect to whether there is a potential for manipulation of price or production and, if so, whether CIDA and PRODUMAR should receive the same antidumping duty rate. Therefore, the Department is soliciting comments on this issue for consideration in the final determination.

We also made the following adjustments to CIDA's reported COP information:

1. We revised the reported cost of manufacturing to include the internal taxes on purchases of inputs which were not refunded.

2. As noted above, we revised the reported cost of manufacturing for affiliated party transactions in accordance with sections 773(f)(3) of the Act.

3. We revised the reported product-specific G&A and net financial expense amounts by applying the reported G&A and financial expense ratios to the product-specific cost of manufacturing.

4. CIDA did not report costs for some products that were sold in the third country and U.S. markets. In these instances, as facts available under 776(a)(1) of the Act, we assigned to those products the costs reported for comparable products. We intend to solicit the missing cost information from CIDA after the preliminary determination for consideration in the final determination.

For further discussion of these adjustments, *see* CIDA COP/CV Calculation Memo.

EMPAF

1. We revised EMPAF's and Maricultura's G&A expense rate to include Maricultura's amortization of pre-operating costs.

2. We revised EMPAF's and Maricultura's financial expense rate to exclude EMPAF's other financial income.

3. EMPAF did not report costs for one product that was sold in the home market. In this instance, as facts available under 776(a)(1) of the Act, we assigned to that product the cost reported for a comparable product. We intend to solicit the missing cost information from EMPAF after the preliminary determination for consideration in the final determination. *See* Memorandum to Neal Halper from Michael P. Harrison dated July 28, 2004, Re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination (EMPAF COP/CV Calculation Memo).

Norte Pesca

1. We revised the direct materials costs by increasing the raw material shrimp costs for all shrimp with a count size of 51/60 per pound and lower (*i.e.*, the larger shrimp). *See* the ''Facts Available'' section of this notice below.

2. Norte Pesca asserted that it did not pay ICMS and PIS taxes on the purchases of shrimp. Thus, we revised the direct materials cost by excluding an offset to the raw material shrimp costs for the recovery of ICMS and PIS taxes.

3. We adjusted the reported variable and fixed overhead ratios in the CV/COP database to reflect the revised ratios submitted by Norte Pesca.

4. We revised Norte Pesca's per-unit cost of manufacturing to reflect a correction to the production quantity.

5. We adjusted the reported G&A expense ratio in the CV/COP database to reflect the revised ratio submitted by Norte Pesca and to exclude an offset for the recovery of ICMS, IPI, and PIS taxes, as Norte Pesca reported that it did not pay these taxes.

6. We adjusted the reported financial expense ratio in the CV/COP database to reflect the revised ratio submitted by Norte Pesca.

See Memorandum to Neal Halper from Mark Todd dated July 28, 2004, Re: Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination (Norte Pesca COP/CV Calculation Memo).

2. Test of Home Market/Third Country Sales Prices

On a product-specific basis, we compared the adjusted weighted-average COP to the home market/third country sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. The prices were exclusive of any applicable billing adjustments, movement charges, discounts, and direct and indirect selling expenses. In determining whether to disregard home market/third country market sales made at prices less than their COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which permitted the recovery of all costs within a reasonable period of time.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of the respondent's sales of a given product during the POI are at prices less than the COP, we do not disregard any below-cost sales of that product, because we determine that in such instances the below-cost sales were not made in substantial quantities. Where 20 percent or more of the respondent's sales of a given product during the POI are at prices less than the COP, we determine that the below-cost sales represent substantial quantities within an extended period of time, in accordance with section 773(b)(1)(A) of the Act. In such cases, we also determine whether such sales were made at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act.

We found that, for certain specific products, more than 20 percent of respondents' sales during the POI were at prices less than the COP and, in addition, the below-cost sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act. Where there were no sales of any comparable product at prices above the COP, we used CV as the basis for determining NV.

4. Use of Facts Available

Section 776(a)(2) of the Act provides that, if an interested party withholds information requested by the Department, fails to provide such information by the deadline or in the form or manner requested, significantly impedes a proceeding, or provides information which cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the Department's request, the Department shall promptly inform the responding party and provide an opportunity to remedy the deficient submission. Section 782(e) of the Act further states that the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In this case, Norte Pesca has failed to provide information requested by the Department that is necessary to properly calculate antidumping margins for its preliminary determination. Specifically, Norte Pesca failed to provide product-specific raw material costs by control number. The Department's section D questionnaire at III.A.3, requests that if a physical characteristic identified by the Department is not tracked by the company's normal cost accounting system, then the respondent company should calculate the appropriate cost differences for the physical characteristic, using a reasonable method based on available company records (*e.g.*, production records, engineering statistics). Norte Pesca did not comply with the instructions in the Department's original Section D questionnaire nor did it explain why it could not do so. Moreover, Norte Pesca failed to provide requested information in a supplemental questionnaire that would enable the Department to differentiate raw material costs by control number. As a result of Norte Pesca's failure to provide the above requested information, the Department is unable to use the reported raw materials data to properly calculate CV.

Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, we have based Norte Pesca's raw materials cost on facts otherwise available in calculating the dumping margin.

In applying facts otherwise available, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. See, *e.g., Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 55792, 55794–96 (August 30, 2002). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 870 (1994) (SAA). Furthermore, ''affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27355 (May 19, 1997). *See* also *Nippon Steel* v. *U.S.,* 337 F.3d 1373 (Fed. Cir. 2003). In this case, Norte Pesca failed to provide adequate responses to the Department's section D questionnaires in regard to the cost of raw materials. Norte Pesca's April 15, 2004, response to the original section D questionnaire was inadequate with respect to differentiating raw material costs by control number. In order to address the deficiencies in Norte Pesca's response, pursuant to section 782(d) of the Act, the Department issued supplemental section D questionnaires on June 17, 2004, and June 25, 2004. Norte Pesca's responses were received on July 6, 2004, and July 9, 2004, respectively. In the June 25, 2004, supplemental questionnaire, the Department requested detailed raw materials purchase cost information necessary for the Department to adequately differentiate raw material costs by control number but Norte Pesca failed to provide it in its July 9, 2004, supplemental questionnaire response. Norte Pesca's failure to provide this critical information in any of its responses has rendered its raw materials costs inadequate for the preliminary determination. This constitutes a failure on the part of Norte Pesca to cooperate to the best of its ability to comply with a request for information by the Department within the meaning of section 776(b) of the Act. Therefore, the Department has preliminarily determined that in selecting from among the facts otherwise available, an adverse inference is warranted with regard to the raw material costs. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan,* 65 FR 42985, 42986 (July 12, 2000).

Where the Department applies adverse facts available (AFA) because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. *See* also 19 CFR 351.308(c); SAA at 829–831. In this case, we revised Norte Pesca's raw material costs based on Norte Pesca's own data placed on the record. Because an adverse inference is warranted, we have increased raw material costs for all shrimp with a count size of 51/60 per pound and lower (*i.e.*, the larger size shrimp) by the percent difference between the reported total average purchase price for all shrimp and the top ten percent of the reported highest purchase prices for shrimp during the POI. *See* Norte Pesca COP/CV Calculation Memo. Thus, for the preliminary determination, the Department has differentiated raw material costs by control number for the larger size shrimp based on AFA.

D. Calculation of Normal Value Based on Comparison Market Prices

CIDA

We calculated NV based on delivered prices to unaffiliated customers. We made deductions for movement expenses, including inland freight and insurance, brokerage, and warehousing under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit and other direct selling expenses.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

EMPAF

We calculated NV based on delivered prices to unaffiliated customers. We made deductions, where appropriate, from the starting price for billing adjustments. We made further deductions for taxes in accordance with section 773(a)(6)(B)(iii) of the Act. *See Notice of Preliminary Determination of Less Than Fair Value and Postponement of Final Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 18165, 18169 (April 15, 2002). We also made deductions for movement expenses, including inland freight, under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit and interest revenue.

In accordance with 19 CFR 351.403(d), we excluded from our analysis sales made to employees because they were insignificant in terms of volume and value. We also excluded home market sales of processed shrimp produced by manufacturers other than EMPAF or Maricultura in accordance with section 771(16) of the Act.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted home market packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

Finally, we made a CEP offset pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f). We calculated the CEP offset as the lesser of the indirect selling expenses on the comparison-market sales or the indirect selling expenses deducted from the starting price in calculating CEP.

E. Calculation of Normal Value Based on Constructed Value

In accordance with section 773(a)(4) of the Act, we based NV on CV where there was no viable home market or third country market (Norte Pesca), or no comparable sales in the third country market (CIDA) made in the ordinary course of trade.

In accordance with section 773(e) of the Act, we calculated CV based on the sum of the respondents' cost of materials and fabrication for the foreign like product, plus amounts for SG&A, profit, and U.S. packing costs. We calculated the cost of materials and fabrication, G&A and interest based on the methodology described in the ''Calculation of COP'' section of this notice. For further details, *see* CIDA COP/CV Calculation Memo and Norte Pesca COP/CV Calculation Memo.

Because Norte Pesca does not have a viable comparison market, the Department cannot determine profit under section 773(e)(2)(A) of the Act, which requires sales by the respondent in question in the ordinary course of trade in a comparison market. Likewise, because Norte Pesca does not have sales of any product in the same general category of products as the subject merchandise, we are unable to apply alternative (i) of section 773(e)(2)(B) of the Act. Further, the Department cannot calculate profit based on alternative (ii) of this section without violating our responsibility to protect respondents' administrative protective order (APO) information because EMPAF is the only other respondent with viable home market sales (19 CFR 351.405(b) requires that a profit ratio under this alternative be based solely on home market sales). If we were to use EMPAF's profit ratio exclusively under this alternative, Norte Pesca would be able to determine EMPAF's proprietary profit rate. Therefore, we calculated Norte Pesca's CV profit and selling expenses based on the third alternative, any other reasonable method, in accordance with section 773(e)(2)(B)(iii) of the Act. As a result, as a reasonable method, we calculated Norte Pesca's CV profit and selling expenses based on the weighted average of the profit and selling expenses incurred by the two other respondents in this investigation. Specifically, we calculated weighted-average profit and selling expenses incurred on home market sales by EMPAF and third country sales by CIDA.

Pursuant to alternative (iii), the Department has the option of using any other reasonable method, as long as the result is not greater than the amount realized by exporters or producers ''in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,'' the ''profit cap.'' In the instant case, the profit cap cannot be calculated using the available data (*i.e.*, CIDA and EMPAF), because this data would render the cap unrepresentative or inaccurate. Specifically, a cap using CIDA's third country data would not reflect profit derived solely based on home market data. Furthermore, using EMPAF's home market data, the only information we have to allow us to calculate the amount normally realized by other exporters or producers in connection with the sale, for consumption in the home market, of merchandise in the same general category, would violate our responsibility to protect the respondent's APO information. Therefore, as facts available, we are applying option (iii), without quantifying a profit cap.

For comparisons to EP for CIDA and Norte Pesca, we made circumstances-of-sale adjustments for direct selling expenses. For CIDA we deducted third country direct selling expenses and added U.S. direct selling expenses. For Norte Pesca, we deducted the weighted-average direct selling expenses of the other two respondents, as described above, and added U.S. direct selling expenses.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Verification

As provided in section 782(i) of the Act, we will verify all information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which NV exceeds EP or CEP, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average margin percentage
Empresa de Armazenagem Frigorifica Ltda./Maricultura Netuno S.A.	0.00
Central de Industrializacao e Distribuicao de Alimentos Ltda.	8.41
Norte Pesca S.A.	67.80
All Others	36.91

The All Others rate is derived exclusive of all *de minimis* margins and margins based entirely on adverse facts available.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with 19 CFR 351.224(b).

Public Comment

Case briefs for this investigation must be submitted to the Department no later than seven days after the date of the final verification report issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will make our final determination no later than 135 days after the publication of this notice in the **Federal Register**.

This determination is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: July 28, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–17814 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–331–802]

Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From Ecuador

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value.

SUMMARY: We preliminarily determine that certain frozen and canned warmwater shrimp from Ecuador are being sold, or are likely to be sold, in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). Interested parties are invited to comment on this preliminary determination. Because we are postponing the final determination, we will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register.**

EFFECTIVE DATE: August 4, 2004.

FOR FURTHER INFORMATION CONTACT: David J. Goldberger or Terre Keaton, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4136, or (202) 482–1280, respectively.

Preliminary Determination

We preliminarily determine that certain frozen and canned warmwater shrimp from Ecuador are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice.

Background

Since the initiation of this investigation the following events have occurred. *See Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam,* 69 FR 3876 (January 27, 2004) (*Initiation Notice*).

On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warmwater shrimp from Ecuador are materially injuring the United States industry. *See* ITC Investigation Nos. 731–TA–1063–1068 (Publication No. 3672).

On February 20, 2004, we selected the three largest producers/exporters of certain frozen and canned warmwater shrimp from Ecuador as the mandatory respondents in this proceeding. *See* Memorandum to Louis Apple, Director Office 2, from The Team dated February 20, 2004. We subsequently issued the antidumping questionnaire to Exporklore S.A. (Exporklore), Exportadora De Alimentos S.A. (Expalsa), and Promarisco S.A. (Promarisco) on February 20, 2004.

During the period February through June 2004, various interested parties, including the petitioners, submitted comments on the scope of this and the concurrent investigations of certain frozen and canned warmwater shrimp concerning whether the following products are covered by the scope of the investigations: a certain seafood mix,

dusted shrimp, battered shrimp, salad shrimp sold in counts of 250 pieces or higher, the species *Macrobachium Rosenbergii,* organic shrimp, and peeled shrimp used in breading.[1] In addition, the Louisiana Shrimp Alliance (LSA), an association of domestic shrimp harvesters and processors, requested that the Department expand the scope to include fresh (never frozen) shrimp. *See* ''Scope Comments'' section of this notice.

We received section A questionnaire responses from the three respondents in March 2004, and section B and C questionnaire responses in April 2004. We issued and received responses to our supplemental questionnaires from April through June 2004.

On April 29, 2004, the petitioners[2] alleged that Exporklore, Expalsa and Promarisco made third country sales below the cost of production (COP) and, therefore, requested that the Department initiate a sales-below-cost investigation of each of the three respondents. On May 28, 2004, the Department initiated a sales-below-cost investigation of each of the three respondents, and required them to respond to section D of the Department's questionnaire. *See* Memoranda to Louis Apple, Director Office 2, from The Team Re: Petitioners' Allegation of Sales Below the Cost of Production by Explorkore S.A., Exportadora de Alimentos S.A., and Promarisco S.A. Ltd., dated May 28, 2004. With respect to Exporklore, Expalsa and Promarisco, we received original section D responses and revised sales databases in June 2004, and supplemental section D responses in July 2004.

On May 18, 2004, pursuant to sections 733(c)(1)(B) and (c)(2) of the Act and 19 CFR 351.205(f), the Department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than July 28, 2004. *See Notice of Postponement of Preliminary Determinations of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil (A–351–838), Ecuador (A–331–802), India (A–533–840), Thailand (A–549–822), the People's Republic of China (A–570–893), and the Socialist Republic of Vietnam (A–503–822),* 69 FR 29509 (May 24, 2004).

On May 21, 2004, the Department denied the LSA's request to amend the scope to include fresh (never frozen) shrimp. *See* Memorandum from Jeffrey A. May, Deputy Assistant Secretary, AD/CVD Enforcement Group I, and Joseph A. Spetrini, Deputy Assistant Secretary AD/CVD Enforcement Group III, to James J. Jochum, Assistant Secretary for Import Administration Re: Antidumping Investigations on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, the People's Republic of China, Thailand and the Socialist Republic of Vietnam: Scope Determination Regarding Fresh (Never Frozen) Shrimp, dated May 21, 2004 (Scope Decision Memorandum I).

On June 7, 2004, the Department determined that a particular market situation existed in Ecuador that rendered the home market inappropriate for use as the comparison market for normal value (NV) purposes. Therefore, the Department determined it appropriate to use third country sales as the basis for NV. *See* June 7, 2004 Memorandum to Louis Apple, Director Office 2, from The Team Re: Home Market as Appropriate Comparison Market. Also, on June 7, 2004, after taking into account Promarisco's and the petitioners' claims, the Department found it appropriate to select Spain as the third country comparison market for Promarisco. *See* June 7, 2004 Memorandum to Louis Apple, Director Office 2, from The Team Re: Selection of Third Country Market for Promarisco (Third Country Comparison Market Selection Memorandum). The petitioners objected to the Department's third country comparison market selection decision for Promarisco on June 10, 2004, and filed additional comments on this topic in June and July 2004. Promarisco responded to these comments in submissions filed in June and July 2004.

On June 4, 2004, Expalsa and Promarisco requested that the Department allow them to report their costs of production based on their fiscal year rather than the period of investigation (POI) because their fiscal years ended within three months of the POI. On June 9, 2004, they each provided information that the Department requested in a June 4, 2004, letter addressing the impact of such a period shift on their cost reporting. On June 14, 2004, the Department denied the respondents' requests because it appeared, based on the information they provided, that shifting the cost reporting period would materially impact the antidumping duty analysis. *See* June 14, 2004, Letter to Warren Connelly, Counsel for Respondents, from Neal Halper, Director, Office of Accounting.

Pursuant to the Department's solicitation, on June 7, 2004, various interested parties, including the petitioners, submitted comments on the issue of whether product comparisons and margin calculations in this and the concurrent investigations of certain frozen and canned warmwater shrimp should be based on data provided on an ''as sold'' basis or data converted to a headless, shell-on (HLSO) basis.[3] Additional comments were subsequently submitted on June 15 and 25, 2004. *See* ''Product Comparison Comments'' section below.

On July 2, 2004, the Department made preliminary scope determinations with respect to the following shrimp products: Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii,* organic shrimp, peeled shrimp used in breading, dusted shrimp and battered shrimp. *See* Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import

[1] Specifically, Ocean Duke Corporation (Ocean Duke), an importer and wholesaler of the subject merchandise, requested that the following products be excluded from the scope of this and the concurrent investigations on certain frozen and canned warmwater shrimp: (1) ''dusted shrimp,'' (2) ''battered shrimp,'' and (3) ''seafood mix.'' Another importer, Rubicon Resources LLP, supported Ocean Duke's request regarding dusted and battered shrimp. Eastern Fish Company and Long John Silver's, Inc. also requested that dusted and battered shrimp be excluded from the scope of the investigations. Furthermore, the Seafood Exporters' Association of India requested that the Department find that warmwater salad shrimp in counts of 250 pieces or higher are not within the scope, and that the species *Machrobachium Rosenbergii* is a separate class or kind of merchandise. Also, Exportadora de Alimentos S.A., one of the respondents in the Ecuador case, requested that the Department find that farm-raised organic shrimp is not covered by the scope of the investigations. Finally, the American Breaded Shrimp Processors Association, comprised of importers of peeled shrimp which they consume in the production of breaded shrimp products, requested that peeled shrimp imported for the sole purpose of breading be excluded from the scope of the investigations.

[2] The petitioners in this investigation are the Ad Hoc Shrimp Trade Alliance (an ad hoc coalition representative of U.S. producers of frozen and canned warmwater shrimp and harvesters of wild-caught warmwater shrimp), Versaggi Shrimp Corporation and Indian Ridge Shrimp Company.

[3] Specifically, the Department received comments from the following interested parties, in addition to the petitioners, on June 7: the Brazilian Shrimp Farmers' Association and Central de Industrializacao e Distribuicao de Alimentos Ltda.; Empresa De Armazenagem Frigorifica Ltda.; Camara Nacional de Acuacultura (National Chamber of Aquaculture) of Ecuador; the Rubicon Group (comprised of Andaman Seafood Co., Ltd. Chanthaburi Seafoods Co., Ltd. And Thailand Fishery Cold Storage Public Co., Ltd.), Thai I-Mei Frozen Foods Co., Ltd. and its affiliated reseller Ocean Duke; the Seafood Exporters of India and its members Devi Sea Foods Ltd., Hindustan Lever Limited, and Nekkanti Seafoods Limited ; the VASEP Shrimp Committee and its members; and Shantou Red Garden Foodstuff Co., Ltd. In addition to addressing the ''as sold''/HLSO issue, some of these parties also commented on the significance of species and container weight in the Department's product characteristic hierarchy.

Administration Re: Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarifications: (1) Ocean Duke's Seafood Mix; (2) Salad Shrimp Sold in Counts of 250 Pieces or Higher; (3) *Macrobrachium rosenbergii;* (4) Organic Shrimp; and (5) Peeled Shrimp Used in Breading, dated July 2, 2004 (Scope Decision Memorandum II); and Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration Re: Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Dusted Shrimp and Battered Shrimp, dated July 2, 2004 (Scope Decision Memorandum III). *See also* ''Scope Comments'' section below.

The petitioners and respondents each submitted comments in July 2004 on various company-specific issues for consideration in the preliminary determination. In addition, Expalsa and Exporklore submitted new information on July 16, July 21, and July 23, 2004, respectively, including revised sales and COP data bases for Exporklore. Except for minor, readily-identifiable data corrections, we have not relied on this information for the preliminary determination because there was insufficient time to analyze it prior to the preliminary determination.

Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

Pursuant to section 735(a)(2) of the Act, on June 22, 2004, the respondents requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register**, and extend the provisional measures to not more than six months. In accordance with 19 CFR 351.210(b), because (1) our preliminary determination is affirmative, (2) the respondent(s) account(s) for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting the respondents' request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

Period of Investigation

The POI is October 1, 2002, through September 30, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2003).

Scope of Investigation

The scope of this investigation includes certain warmwater shrimp and prawns, whether frozen or canned, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form.

The frozen or canned warmwater shrimp and prawn products included in the scope of the investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through either freezing or canning and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the investigation. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the investigation.

Excluded from the scope are (1) breaded shrimp [5] and prawns (1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (1605.20.05.10); and (5) dried shrimp and prawns.

The products covered by this scope are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, 1605.20.10.30, and 1605.20.10.40. These HTSUS subheadings are provided for convenience and for U.S. Customs and Border Protection (CBP) purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

Scope Comments

In accordance with the preamble to our regulations, we set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice.* (*See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997) and *Initiation Notice*, 69 FR at 3877.) Throughout the 20 days and beyond, the Department received many comments and submissions regarding a multitude of scope issues, including: (1) Fresh (never frozen) shrimp, (2) Ocean Duke's seafood mix, (3) salad shrimp sold in counts of 250 pieces or higher, (4) *Macrobrachium rosenbergii,* (5) organic shrimp, (6) peeled shrimp used

[4] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

[5] Pursuant to our scope determination on battered shrimp, we find that breaded shrimp includes battered shrimp as discussed in the ''Scope Comments'' section below. *See* Scope Memorandum III.

in breading, (7) dusted shrimp and (8) battered shrimp.

On May 21, 2004, the Department determined that the scope of this and the concurrent investigations remains unchanged, as certain frozen and canned warmwater shrimp, without the addition of fresh (never frozen) shrimp. *See* Scope Decision Memorandum I. On July 2, 2004, the Department made scope determinations with respect to Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii,* organic shrimp and peeled shrimp used in breading. *See* Scope Decision Memorandum II. Based on the information presented by interested parties, the Department determined that Ocean Duke's seafood mix is excluded from the scope of this and the concurrent investigations; however, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii,* organic shrimp and peeled shrimp used in breading are included within the scope of these investigations. *See* Scope Decision Memorandum II at 33.

Additionally, on July 2, 2004, the Department made a scope determination with respect to dusted shrimp and battered shrimp. *See* Scope Decision Memorandum III. Based on the information presented by interested parties, the Department preliminarily finds that while substantial evidence exists to consider battered shrimp to fall within the meaning of the breaded shrimp exclusion identified in the scope of these proceedings, there is insufficient evidence to consider that shrimp which has been dusted falls within the meaning of ''breaded'' shrimp. However, there is sufficient evidence for the Department to consider excluding this merchandise from the scope of these proceedings provided an appropriate description can be developed. *See* Scope Decision Memorandum III at 18. To that end, along with the previously solicited comments regarding breaded and battered shrimp, the Department solicits comments from interested parties which enumerate and describe a clear, administrable definition of dusted shrimp. *See* Scope Decision Memorandum III at 23.

Fair Value Comparisons

To determine whether sales of certain frozen and canned warmwater shrimp from Ecuador to the United States were made at LTFV, we compared the export price (EP) to the NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(1)(A)(I) of the Act, we compared POI weighted-average EPs to NVs.

As discussed below under the ''Home Market Viability and Comparison Market Selection'' section, we have determined that a particular market situation existed in Ecuador that rendered the home market inappropriate for use as the comparison market for NV purposes. Therefore, as the basis for NV, we used third country sales to Italy (Exporklore and Expalsa) and Spain (Promarisco) when making comparisons in accordance with section 773(a)(1)(C) of the Act.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced and sold by the respondents in the third countries during the POI that fit the description in the ''Scope of Investigation'' section of this notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the third countries, where appropriate. Where there were no sales of identical merchandise in the third countries made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade, we made product comparisons using CV.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: processed form, cooked form, head status, count size (on an ''as sold'' basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

Product Comparison Comments

As Sold v. *HLSO Methodology*

We received comments from various interested parties concerning whether to perform product comparisons and margin calculations using data provided on an ''as sold'' basis or on data converted to an HLSO basis.[6]

The petitioners argue that using a consistent HLSO equivalent measure permits accurate product comparisons and margin calculations whereas the ''as sold'' measures do not. In particular, the petitioners emphasize that it is necessary to translate the actual sold volumes (weights) and count sizes to a uniform unit of measure that takes into account the various levels of processing of the different shrimp products sold and the allegedly large difference in value between the shrimp tail meat and other parts of the shrimp that may constitute ''as sold'' weight or count size, such as the head or shell. The petitioners' contention is premised upon their belief that the shrimp tail meat is the value-driving component of the shrimp.

The respondents disagree, maintaining generally that using HLSO-equivalent data violates the antidumping duty law and significantly distorts product comparisons and margin calculations. In particular, they argue that: (1) Shrimp is sold based on its actual size and form, not on an HLSO basis, and it is the Department's practice to use actual sales/cost data in its margin analysis; (2) the rates used to convert price, quantity and expense data to an HLSO basis are uncertain as they are not maintained by the respondents in the ordinary course of business, and are generally based on each individual company's experience rather than any accepted industry-wide standard; and (3) the HLSO methodology introduces a significant distortion through the incorrect assumption that the value of the product varies solely in direct proportion to the change in weight resulting from production yields, when in fact the value of the product depends also on other factors such as quality and form.

Our analysis of the company responses shows that: (1) no respondent uses HLSO equivalents in the normal course of business, for either sales or cost purposes; and (2) there is no reliable or consistent HLSO conversion formula for all forms of processed shrimp across all companies, as each company defined its conversion factors differently and derived these factors

[6] In this notice, we address only those comments pertaining to market-economy dumping calculation methodology. Any comments pertaining to non-market-economy dumping calculation methodology are separately addressed in the July 2, 2004, preliminary determinations in the antidumping duty investigations of certain frozen and canned warmwater shrimp from the People's Republic of China and the Socialist Republic of Vietnam. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China,* 69 FR 42654 (July 16, 2004), and *Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the Socialist Republic of Vietnam,* 69 FR 42672 (July 16, 2004).

based on its own production experience. Therefore, we preliminarily determine it is appropriate to perform product comparisons and margin calculations using data ''as sold.'' This approach is in accordance with our normal practice and precludes the use of conversion rates, the accuracy of which is uncertain. Given the variety and overlap of the ''as sold'' count size ranges reported by the respondents, we also preliminarily determine that it is appropriate to standardize product comparisons across respondents by fitting the ''as sold'' count sizes into the count size ranges specified in the questionnaire. *See* Memorandum to the File entitled ''Exportadora de Alimentos S.A. Preliminary Determination Notes and Margin Calculation'' dated July 28, 2004 (Expalsa Memo); Memorandum to the File entitled ''Exporklore S.A., Preliminary Determination Notes and Margin Calculation'' dated July 28, 2004; and ''Promarisco, S.A. Preliminary Determination Notes and Margin Calculation'' dated July 28, 2004 for a further discussion of our reclassification of count sizes.

Product Characteristics Hierarchy

We also received comments from various interested parties regarding the significance of the species and container weight criteria in the Department's product comparison hierarchy.

Various parties requested that the species criterion be ranked higher in the Department's product characteristic hierarchy—as high as the second most important characteristic, rather than the thirteenth—based on their belief that species is an important factor in determining price. One party provided industry publications indicating price variations according to species type. Another party requested further that the Department revise the species categories specified in the Department's questionnaire to reflect characteristics beyond color (*i.e.*, whether the shrimp was farm-raised or wild-caught). In addition, several parties requested that container weight, the eleventh characteristic in the Department's product characteristic hierarchy, be eliminated altogether as a product matching criterion, as they believe it is commercially insignificant and relates to packing size or form, rather than the physical attributes of the product.

With respect to the arguments regarding the species criterion, the petitioners disagree, maintaining that there is no credible evidence that species drives pricing to such a significant extent that buyers consider it more important than product characteristics such as head and cooked status. Rather, the petitioners contend that once shrimp is processed (*e.g.*, cooked, peeled, etc.), the species classification becomes essentially irrelevant. Therefore, the petitioners assert that while species type has some, not entirely insignificant effect on shrimp prices, it is appropriately captured in the Department's product matching hierarchy. Furthermore, with respect to the container weight criterion, the petitioners assert that, while the shrimp inside the container may be identical, in many cases the size of the container is an integral part of the product and an important determinant of the markets and channels through which shrimp can be sold. For this reason, the petitioners maintain that the Department should continue to include container weight as a product matching characteristic.

Regarding the species criterion, we have not changed the position of this criterion in the product characteristic hierarchy for the preliminary determination. We agree that the physical characteristic of species type may impact the price or cost of processed shrimp. For that reason, we included species type as one of the product matching criteria. However, based on our review of the record evidence, we find that other physical characteristics of the subject merchandise, such as head status, count size, shell status, and frozen form, appear to be more significant in setting price or determining cost. The information provided by the parties, which suggests that price may be affected in some cases by species type, does not provide sufficient evidence that species type is more significant than the remaining physical characteristics of the processed shrimp. Therefore, we find an insufficient basis to revise the ranking of the physical characteristics established in the Department's questionnaire for the purpose of product matching.

With respect to differentiating between species types beyond the color classifications identified in the questionnaire, we do not find that such differentiations reflect meaningful differences in the physical characteristics of the merchandise. In particular, we note that whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. Therefore, we have not accepted the additional species classifications proposed by the respondents. Accordingly, in those cases where the respondents reported additional species classifications for their processed shrimp products, we reclassified the products into one of the questionnaire color classifications. We made an exception for the shrimp identified as ''scampi'' (or *Macrobrachium rosenbergii*) and ''red ring'' (or *Aristeus alcocki*), where appropriate, because they represent species distinct from those associated by color in the Department's questionnaire. Regarding this exception, we note that while scampi and red ring are sufficiently distinct for product matching purposes, they are not so distinct as to constitute a separate class or kind of merchandise (*see* Scope Memorandum II). We also made an exception for the shrimp identified as ''mixed'' (*e.g.*, ''salad'' shrimp), where appropriate, because there is insufficient information on the record to classify these products according to the questionnaire color classifications.

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products of equivalent container weight (*e.g.*, a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

Grade and ''Input Materials''

Expalsa contends that the Department should include grade and input material as product matching characteristics for its sales because it states that these factors have a significant effect on both prices and costs in its normal course of business. We have not incorporated these characteristics in our matching criteria because no party in this or any of the concurrent investigations has provided evidence of consistent industry-wide standards for reporting shrimp grade. Each company or customer appears to have its own grade specifications. Accordingly, we have no basis to establish a consistent method of classifying shrimp by grade. Further, we are not convinced that input material, a characteristic which Expalsa uses to distinguish processed shrimp products consisting of ''non-standard mixes'' of shrimp (*i.e.*, shrimp of mixed grades and mixed sizes), is a proper physical characteristic to be considered as a product matching criterion. Instead, the input material appears to be a factor related to calculating the direct material

costs for each product. Moreover, because we are not considering grade to be a matching criterion for the preliminary determination, the input material issue is moot with respect to grade. With respect to the mixed size aspect of this issue, we have reclassified the count size ranges reported by the respondents into the count size ranges specified in the questionnaire, as noted above in the ''Product Comparison Comments'' section of the notice. However, we may examine Expalsa's claims further at verification for consideration in our final determination.

Substandard Quality Shrimp

Each of the respondents in this investigation reported sales of substandard quality shrimp, such as ''broken shrimp'' or ''shrimp meat'', in their sales to the U.S. market, but none to their respective third country markets. Because: (1) the matching criteria for this investigation do not currently account for substandard quality shrimp; (2) no interested parties have provided comments on the appropriate methodology to match these sales; and (3) the quantity of such sales does not constitute a significant percentage of the respondents' respective databases, we have excluded these sales from our analysis, where possible, for purposes of the preliminary determination. Nonetheless, we are seeking comments from interested parties regarding our treatment of these sales for consideration in the final determination.

Export Price

In accordance with section 772(a) of the Act, for all three respondents, we used EP methodology for sales in which the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States.

We made company-specific adjustments as follows.

Exporklore

In accordance with section 772(a) of the Act, we based EP on the packed FOB or C&F price to unaffiliated purchasers in the United States. We adjusted the starting price for billing adjustments associated with the sale, where appropriate. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these expenses included, where appropriate, international freight, foreign inland freight, foreign inland insurance, and foreign brokerage and handling expenses.

Some of Exporklore's U.S. sales were sold on a glazed-weight basis (*i.e.*, the reported sales quantity included the weight of frozen water). Where appropriate, we converted the data in the U.S. market to a net-weight equivalent basis.

Expalsa

In accordance with section 772(a) of the Act, we based EP on the packed FOB or C&F price to unaffiliated purchasers in the United States. We adjusted the starting price, where appropriate, for certain billing adjustments and freight revenue associated with the sale. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these expenses included, where appropriate, foreign inland freight, brokerage and handling fees and international freight.

The reported expense amount identified as ''total export charge'' in the U.S. sales listing that includes brokerage and handling fees also includes inspection fees and other expenses which may be considered selling expenses rather than movement expenses. However, as Expalsa did not separate the brokerage and handling charges from the other expenses included in the reported amount, we have treated the entire amount as movement expenses for purposes of the preliminary determination.

Expalsa reported three types of billing adjustments for certain U.S. sales, each of which was paid or credited in 2004, after the filing of the petition, although Expalsa claimed that the basis for the adjustment was established during the POI. As stated in *Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses from Germany,* 61 FR 38166, 38181 (July 23, 1996) (*LNPP from Germany*), the Department is cautious in accepting price adjustments which occur after receipt of a petition so as to discourage potential manipulation of potential dumping margins. Based on our analysis of the information on the record at this time, we find that Expalsa has demonstrated that the basis for a price adjustment was established prior to the filing of the petition for only one of the three reported types of billing adjustments. Accordingly, we have disallowed two of the billing adjustments for purposes of the preliminary determination, but we will examine all three billing adjustments further at verification for consideration in the final determination. *See Expalsa Memo* for additional information as Expalsa has claimed proprietary treatment for the factual details surrounding these adjustments.

Promarisco

In accordance with section 772(a) of the Act, we based EP on the packed FOB, C&F, or CIF prices to unaffiliated purchasers in the United States. We made deductions from the starting price for movement expenses in accordance with section 772(c)(2)(A) of the Act; these expenses included, where appropriate, foreign inland freight, foreign inland insurance, international freight, and marine insurance.

Promarisco reported as billing adjustments two sets of price revisions made after the petition in this investigation was filed. As discussed above, and consistent with *LNPP from Germany,* we have disallowed those post-petition price adjustments because the information on the record at this time fails to demonstrate that the basis for these adjustments was established prior to the filing of the petition. However, we will examine them further at verification for consideration in the final determination. *See* Promarisco Memo for additional information as Promaricso has claimed proprietary treatment for the factual details surrounding these adjustments.

Normal Value

A. Home Market Viability and Comparison Market Selection

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared each respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

As noted above, the Department determined that a particular market situation existed in Ecuador that rendered the home market inappropriate for use as the comparison market for NV purposes. Therefore, the Department determined it appropriate to use third country sales as the basis for NV for all three respondents. For a detailed discussion of this issue, *see* June 7, 2004, Memorandum to Louis Apple, Director Office 2, from The Team Re: Home Market as Appropriate Comparison Market. Therefore, we used sales to the respondent's most appropriate third country market as the basis for comparison-market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. As discussed above and in the Third Country Comparison Market Selection

Memorandum, we used Italy for Expalsa and Exporklore, and Spain for Promarisco.

With respect to the selection of Spain as the comparison market for Promarisco, the petitioners filed additional comments in June 2004, objecting to the Department's decision to select Spain, rather than Japan, as the most appropriate third country comparison market. Specifically, the petitioners claimed that the Department erred in concluding that Promarisco's sales to Spain were more similar to its U.S. sales than its Japanese sales. According to the petitioners, the Department did not accurately account for the petitioners' product comparison analysis in determining the ''most similar'' comparison market. In response, Promarisco filed additional comments supporting the Department's decision.

The petitioners' subsequent comments offer no basis to compel us to alter our decision. The Department considered the petitioners' product comparison analysis along with its own product comparison analysis in selecting Promarisco's third country comparison market. However, as we emphasized in the Third Country Comparison Market Selection Memorandum, we considered all of the criteria under 19 CFR 351.404(e) in determining the appropriate third country comparison market. That is, we considered: (1) Whether the foreign like product exported to a particular third country is more similar to the subject merchandise exported to the United States than is the foreign like product exported to other third countries; (2) whether the volume of sales to a particular third country is larger than the volume of sales to other third countries; and (3) other factors as the Secretary considers appropriate. After analyzing the available information in terms of all three criteria, we determined that Spain is the appropriate comparison market. Based on the preliminary determination results, and after review of the additional comments submitted by the petitioners and Promarisco, we continue to hold that Spain is the appropriate comparison market.

The petitioners argue that, based on the product matching characteristics, the Japanese market offers the ''most similar'' comparisons to U.S. sales compared to the Spanish market. As we indicated in the Third Country Comparison Market Selection Memorandum, we agree with the petitioners that there is a high proportion of identical or similar product matches when comparing Japanese sales to U.S. sales. We also noted that the Spanish market also offered a high proportion of matches to U.S. sales. Our analysis at that time showed identical or similar product matches of Spanish sales to U.S. sales of at least ninety-eight percent of U.S. sales; this preliminary determination results in one-hundred percent identical or similar product matches of Spanish sales to U.S. sales.

We have no basis to dispute the petitioners' contention that we would also find a significant proportion of product matches from Japanese sales. However, similarity of foreign like product is only one of the three criteria for determining the appropriate third country market under 19 CFR 351.404(e). The petitioners' June 2004 comments do not address the criterion of sales volume. In the Third Country Comparison Market Selection Memorandum, we did not specifically address which of the two markets was the larger in terms of sales volume. We stated that both the Spanish and Japanese markets is sufficiently large for purposes of serving as the comparison market. Subsequent to this Memorandum, as discussed above, the Department has determined to perform product comparisons and margin calculations using data on an ''as sold'' basis. We note that the volume of Promarisco's sales to Spain is greater, on an ''as sold'' basis, than Promarisco's sales to Japan during the POI.

Finally, we note that the petitioners did not address the Department's analysis of the third criterion under 19 CFR 351.404(e)(3), the ''other factors the Secretary considers appropriate.'' As we explained in the Third Country Comparison Market Selection Memorandum, Promarisco reported that its Japanese customers require a higher level of quality and freshness than do its U.S. customers and its Spanish customers. Promarisco also reported that the harvesting, transportation, handling and processing procedures associated with the sale of subject merchandise in Japan are more stringent than are the same processes associated with the sale of this merchandise in the United States.

Based on a consideration of all three criteria under 19 CFR 351.404(e), we continue to find that Spain is the more appropriate third-country market for Promarisco. Nevertheless, we intend to verify all factual representations made by Promarisco on this topic; any misrepresentations may result in the use of adverse facts available under section 776(b) of the Act.

B. Level of Trade Analysis

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP or CEP. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (SG&A) and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the level of trade of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61731 (November 19, 1997).

In this investigation, we obtained information from each respondent regarding the marketing stages involved in making the reported third country (Italy or Spain) and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company-specific LOT findings are summarized below.

Exporklore

Exporklore made sales to wholesalers/distributors through the same channel of distribution in both the United States and Italy. As described in its questionnaire response, Exporklore performs identical selling functions in the United States and Italy. Therefore, these sales channels are at the same LOT. Accordingly, all comparisons are at the same LOT for Exporklore and an adjustment pursuant to section 773(a)(7)(A) is not warranted.

Expalsa

Expalsa made sales to distributors through the same channel of distribution in both the U.S. and Italy. As described in its questionnaire response, Expalsa performs identical selling functions in the United States and Italy. Therefore, these sales channels are at the same LOT. Accordingly, all comparisons are at the same LOT for Expalsa and an adjustment pursuant to section 773(a)(7)(A) is not warranted.

Promarisco

Promarisco made sales to food processors and distributors through the same channel of distribution in both the United States and Spain. As described in its questionnaire response, Promarisco performs the identical selling functions in the United States and Spain. Therefore, these sales channels are at the same LOT. Accordingly, all comparisons are at the same LOT for Promarisco and an adjustment pursuant to section 773(a)(7)(A) is not warranted.

C. Cost of Production Analysis

Based on our analysis of the petitioners' allegations, we found that there were reasonable grounds to believe or suspect that the respondents' sales of frozen and canned warmwater shrimp in the third countries were made at prices below their respective COPs. Accordingly, pursuant to section 773(b) of the Act, we initiated sales-below-cost investigations to determine whether sales by Expalsa, Exporklore, and Promarisco were made at prices below their respective COPs. See Memorandum to Louis Apple, Director Office 2, from The Team entitled ''Petitioners'' Allegation of Sales Below the Cost of Production by Expalsa'' dated May 28, 2004; Memorandum to Louis Apple, Director Office 2, from The Team entitled ''Petitioners'' Allegation of Sales Below the Cost of Production by Exporklore'' dated May 28, 2004; and Memorandum to Louis Apple, Director Office 2, from The Team entitled ''Petitioners'' Allegation of Sales Below the Cost of Production by Promarisco'' dated May 28, 2004.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative expenses (G&A), interest expenses, and third country packing costs. *See* ''Test of Third Country Sales Prices'' section below for treatment of third country selling expenses. We relied on the COP data submitted by Exporklore, Expalsa and Promarisco except in the following instances:

Exporklore

1. We adjusted Exporklore's reported direct labor costs to disallow the offset taken for co-packing revenues.
2. We adjusted Exporklore's reported costs for shrimp harvested from affiliated farms to reflect the higher of transfer price, market price or the affiliate's COP in accordance with section 773(f)(3) of the Act.
3. We revised Exporklore's reported COP by re-allocating the raw shrimp costs among products sold in the U.S., third country and domestic markets.
4. We adjusted Exporklore's reported costs for affiliated payroll service commissions to reflect the higher of market or transfer price in accordance with section 773(f)(2) of the Act.
5. We revised Exporklore's G&A expense rate to exclude offshore expenses from the cost of sales denominator used to calculate the rate.
6. We revised Exporklore's financial expense rate to include the change in currency adjustment from the financial statements and to exclude offshore expenses from the cost of sales denominator used to calculate the rate.

See Memorandum to Neal Halper from Heidi Schriefer entitled ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Exporklore, S.A.'' dated July 28, 2004.

Expalsa

1. We adjusted the reported costs for shrimp harvested from affiliated farms to reflect the higher of transfer price, market price, or the affiliate's COP in accordance with section 773(f)(3) of the Act.
2. We adjusted the fixed overhead expenses to reflect the costs for the POI rather than the calendar year 2003.

See Memorandum to Neal Halper from Nancy Decker entitled ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Exportadora de Alimentos, S.A.'' dated July 28, 2004 (Expalsa Cost Memo).

Promarisco

1. We adjusted Promarisco's reported costs for affiliated shrimp purchases to reflect the higher of market or transfer price in accordance with section 773(f)(2) of the Act. *See* Memorandum to Neal Halper from Taija A. Slaughter entitled ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Promarisco S.A.'' dated July 28, 2004.

2. Test of Third Country Sales Prices

On a product-specific basis, we compared the adjusted weighted-average COP to the third country sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. The prices were exclusive of any applicable billing adjustments, movement charges, discounts, and direct and indirect selling expenses. In determining whether to disregard third country market sales made at prices less than their COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which permitted the recovery of all costs within a reasonable period of time.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of the respondent's sales of a given product during the POI are at prices less than the COP, we did not disregard any below-cost sales of that product, because we determined that in such instances the below-cost sales were not made in substantial quantities. Where 20 percent or more of the respondent's sales of a given product during the POI were at prices less than the COP, we determined that the below-cost sales represented substantial quantities within an extended period of time, in accordance with section 773(b)(1)(A) of the Act. In such cases, we also determined whether such sales were made at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act.

We found that, for certain specific products, more than 20 percent of the respondents' respective third country sales during the POI were at prices less than the COP and, in addition, the below-cost sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act as the basis for determining NV. Where there were no sales of any comparable product at prices above the COP, we used CV as the basis for determining NV.

D. Calculation of Normal Value Based on Comparison Market Prices

Exporklore

We calculated NV based on FOB or C&F prices to unaffiliated customers. We made deductions, where appropriate, from the starting price for rebates. We also made deductions for movement expenses, including foreign inland freight, foreign inland insurance, brokerage and handling, and international freight, under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit and inspection fees. Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with section 773(a)(6)(A) and (B) of the Act.

Some of Exporklore's Italian sales were sold on a glazed-weight basis (*i.e.*, the reported sales quantity included the weight of frozen water). Where appropriate, we converted the data in the Italian market to a net-weight equivalent basis.

Expalsa

We calculated NV based on FOB or C&F prices to unaffiliated customers. We made deductions, where appropriate, from the starting price for rebates and billing adjustments. We also made deductions for movement expenses, including inland freight and international freight, under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit, testing and inspection expenses, bank fees, and other direct selling expenses. Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with section 773(a)(6)(A) and (B) of the Act.

Expalsa reported freight expenses associated with the shipment and return of cancelled sales to Italy as a direct selling expense. Expalsa is unable to determine with certainty the ultimate destination of this merchandise (*see* June 2, 2004, submission at page SB–14). When expenses cannot be associated with a sale to the first unaffiliated customer, the Department will normally treat them as indirect selling expenses to the selling market and entity of the originating sale (*i.e.*, the market for which the expenses were incurred, and the corporate entity which incurred the expenses). *See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia,* 69 FR 20592 (April 16, 2004), Issues and Decision Memorandum at Comment 2. Accordingly, we have reclassified the freight expenses at issue as indirect selling expenses in the Italian market, the market of the originating sales. In addition, we recalculated these expenses by allocating them over all Italian sales made during the POI because Expalsa had incorrectly allocated them over calendar year 2003 sales. *See* Expalsa Memo.

Promarisco

We calculated NV based on CIF, C&F or FOB prices to unaffiliated customers. We made deductions from the starting price for movement expenses, including inland freight, inland insurance, marine insurance, and international freight under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for imputed credit expenses, testing expenses, inspection fees, and commissions. Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with section 773(a)(6)(A) and (B) of the Act.

Promarisco reported a bonus paid to its unaffiliated agent in the Spanish market several months after the filing of the petition in the instant investigation. Although Promarisco claims that the bonus applied to sales made during the POI, the information on the record at this time does not adequately demonstrate that the basis for this claim was established prior to the filing of the petition. As discussed above for similar claimed adjustments, we are disallowing the bonus as an adjustment to price for the preliminary determination but will examine it further at verification.

E. Calculation of Normal Value Based on Constructed Value

In accordance with section 773(a)(4) of the Act, for Expalsa, we based NV on CV in those instances where there were no comparable sales in the Italian third country market made in the ordinary course of trade.

In accordance with section 773(e) of the Act, we calculated CV based on the sum of the respondent's cost of materials and fabrication for the foreign like product, plus amounts for SG&A, profit, and U.S. packing costs. We calculated the cost of materials and fabrication, G&A and interest based on the methodology described in the ''Calculation of COP'' section of this notice. For further details, *see* Expalsa Cost Memo.

For comparisons to EP, we made circumstances-of-sale adjustments by deducting third country direct selling expenses and adding U.S. direct selling expenses.

Currency Conversion

As all three respondents reported their prices, expenses, and costs in U.S. dollars, no currency conversions were required in our margin calculations.

Verification

As provided in section 782(I) of the Act, we will verify all information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing CBP to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the NV exceeds EP, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/Manufacturer	Weighted-average margin percentage
Exporklore S.A.	9.35
Exportadora De Alimentos S.A.	6.08
Promarisco S.A.	6.77
All Others	7.30

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final

determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with 19 CFR 351.224(b).

Public Comment

Case briefs for this investigation must be submitted to the Department no later than seven days after the date of the final verification report issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will make our final determination no later than 135 days after the publication of this notice in the **Federal Register**.

This determination is published pursuant to sections 733(f) and 777(I) of the Act.

Dated: July 28, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–17815 Filed 8–3–04; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–822]

Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp From Thailand

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value.

SUMMARY: We preliminarily determine that certain frozen and canned warmwater shrimp from Thailand are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). In addition, we preliminarily determine that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to the subject merchandise exported from Thailand.

Interested parties are invited to comment on this preliminary determination. Because we are postponing the final determination, we will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

EFFECTIVE DATE: August 4, 2004.

FOR FURTHER INFORMATION CONTACT: Irina Itkin or Elizabeth Eastwood, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0656 or (202) 482–3874, respectively.

Preliminary Determination

We preliminarily determine that certain frozen and canned warmwater shrimp from Thailand are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice. In addition, we preliminarily determine that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to the subject merchandise exported from Thailand. The critical circumstances analysis for the preliminary determination is discussed below under the section ''Critical Circumstances.''

Background

Since the initiation of this investigation (*see Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 FR 3876 (January 27, 2004) (*Initiation Notice*)), the following events have occurred.

On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warmwater shrimp from Thailand are materially injuring the United States industry. *See* ITC Investigation Nos. 731–TA–1063–1068 (Publication No. 3672).

On February 20, 2004, we selected the four largest producers/exporters of certain frozen and canned warmwater shrimp from Thailand as the mandatory respondents in this proceeding. *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand—Selection of Respondents,'' dated February 20, 2004. We subsequently issued the antidumping questionnaire to Chanthaburi Seafoods Co., Ltd. (CSF), Thailand Fishery Cold Storage Public Co., Ltd. (TFC), Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei), and the Union Frozen Products Co., Ltd. (UFP) on February 20, 2004. From February 11, 2004, through March 16, 2004, Andaman Seafood Co., Ltd. (AMS), CSF, and TFC provided information to the Department related to the affiliation of these companies and a U.S. importer, Rubicon Resources.

During the period February through June 2004, various interested parties, including the petitioners,[1] submitted comments on the scope of this and the concurrent investigations of certain frozen and canned warmwater shrimp concerning whether the following products are covered by the scope of the investigations: a certain seafood mix, dusted shrimp, battered shrimp, salad shrimp sold in counts of 250 pieces or higher, the species *Macrobachium rosenbergii*, organic shrimp, and peeled

[1] The petitioners in this investigation are the Ad Hoc Shrimp Trade Alliance (an ad hoc coalition representative of U.S. producers of frozen and canned warmwater shrimp and harvesters of wild-caught warmwater shrimp), Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company.

shrimp used in breading.[2] In addition, the Louisiana Shrimp Alliance (LSA), an association of domestic shrimp harvesters and processors, requested that the Department expand the scope to include fresh (never frozen) shrimp. *See* ''Scope Comments'' section of this notice.

On March 22, 2004, the Department determined that it was appropriate to treat AMS, CSF, and TFC as a single respondent (*i.e.*, the Rubicon Group) for purposes of the investigation, in accordance with 19 CFR 351.401(f). *See* letter from Louis Apple, Director Office 2 to the Rubicon Group, dated March 22, 2004.

We received section A questionnaire responses from the three respondents in March 2004, and section B and C questionnaire responses in April 2004.

We issued and received responses to our supplemental questionnaires from April through July 2004.

On May 4 and 10, 2004, respectively, the petitioners alleged that UFP and the Rubicon Group made third country sales below the cost of production (COP) and, therefore, requested that the Department initiate a sales-below-cost investigation of these respondents.

On May 18, 2004, pursuant to sections 733(c)(1)(B) and (c)(2) of the Act and 19 CFR 351.205(f), the Department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than July 28, 2004. *See Notice of Postponement of Preliminary Determinations of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil (A–351–838), Ecuador (A–331–802), India (A–533–840), Thailand (A–549–822), the People's Republic of China (A–570–893), and the Socialist Republic of Vietnam (A–503–822)*, 69 FR 29509 (May 24, 2004).

On May 21, 2004, the Department denied LSA's request to amend the scope to include fresh (never frozen) shrimp. *See* Memorandum from Jeffrey A. May, Deputy Assistant Secretary, AD/CVD Enforcement Group I, and Joseph A. Spetrini, Deputy Assistant Secretary AD/CVD Enforcement Group III, to James J. Jochum, Assistant Secretary for Import Administration entitled: ''Antidumping Investigations on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, the People's Republic of China, Thailand and the Socialist Republic of Vietnam: Scope Determination Regarding Fresh (Never Frozen) Shrimp,'' dated May 21, 2004 (Scope Decision Memorandum I).

On May 28, 2004, and June 2, 2004, respectively, the Department initiated a sales-below-cost investigation of UFP and the Rubicon Group and required the parties to respond to section D of the Department's questionnaire. *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Petitioners'' Allegation of Sales Below the Cost of Production for Union Frozen Products Co., Ltd.'' dated May 28, 2004, and Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Petitioners'' Allegation of Sales Below the Cost of Production for Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd.'' dated June 2, 2004. We received original section D and supplemental section D responses in June and July 2004.

On April 23, 2004, and June 15, 2004, the petitioners objected to the Rubicon Group's and UFP's use of Canada as their third country comparison markets, and they requested that the Department obtain sales data for these companies' second largest third country market, Japan. In July 2004, the Department determined that it is appropriate to use the third country market initially reported by the Rubicon Group and UFP (*i.e.*, Canada). *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand—Third-Country Market Selection for Two Respondents' dated July 28, 2004. (the Rubicon Group and UFP Third Country Comparison Market Selection Memorandum), for further discussion.

Pursuant to the Department's solicitation, on June 7, 2004, various interested parties, including the petitioners, submitted comments on the issue of whether product comparisons and margin calculations in this and the concurrent investigations of certain frozen and canned warmwater shrimp should be based on data provided on an ''as sold'' basis or data converted to a headless, shell-on (HLSO) basis.[3] Additional comments were subsequently submitted on June 15 and 25, 2004. *See* ''Product Comparison Comments'' section below.

On July 2, 2004, the Department made preliminary scope determinations with respect to the following shrimp products: Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp, peeled shrimp used in breading, dusted shrimp and battered shrimp. *See* Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration entitled: ''Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarifications: (1) Ocean Duke's Seafood Mix; (2) Salad Shrimp Sold in Counts of 250 Pieces or Higher; (3) *Macrobrachium rosenbergii*; (4) Organic Shrimp; and (5) Peeled Shrimp Used in Breading,'' dated July 2, 2004 (Scope Decision Memorandum II); and Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration entitled: ''Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Dusted Shrimp and Battered Shrimp,'' dated July 2, 2004

[2] Specifically, Ocean Duke Corporation (Ocean Duke), an importer and wholesaler of the subject merchandise, requested that the following products be excluded from the scope of this and the concurrent investigations on certain frozen and canned warmwater shrimp: (1) ''dusted shrimp,'' (2) ''battered shrimp,'' and (3) ''seafood mix.'' Another importer, Rubicon Resources LLP, supported Ocean Duke's request regarding dusted and battered shrimp. Eastern Fish Company and Long John Silver's, Inc. also requested that dusted and battered shrimp be excluded from the scope of the investigations. Furthermore, the Seafood Exporters' Association of India requested that the Department find that warmwater salad shrimp in counts of 250 pieces or higher are not within the scope, and that the species *Machrobachium Rosenbergii* is a separate class or kind of merchandise. Also, Exportadora de Alimentos S.A., one of the respondents in the Ecuador case, requested that the Department find that farm-raised organic shrimp is not covered by the scope of the investigations. Finally, the American Breaded Shrimp Processors Association, comprised of importers of peeled shrimp which they consume in the production of breaded shrimp products, requested that peeled shrimp imported for the sole purpose of breading be excluded from the scope of the investigations.

[3] Specifically, the Department received comments from the following interested parties, in addition to the petitioners, on June 7: the Brazilian Shrimp Farmers' Association and Central de Industrializacao e Distribuicao de Alimentos Ltda.; Empresa De Armazenagem Frigorifica Ltda.; Camara Nacional de Acuacultura (National Chamber of Aquaculture) of Ecuador; the Rubicon Group (comprised of Andaman Seafood Co., Ltd. Chanthaburi Seafoods Co., Ltd. And Thailand Fishery Cold Storage Public Co., Ltd.); Thai I-Mei Frozen Foods Co., Ltd. and its affiliated reseller Ocean Duke; the Seafood Exporters of India and its members Devi Sea Foods Ltd., Hindustan Lever Limited, and Nekkanti Seafoods Limited; the VASEP Shrimp Committee and its members; and Shantou Red Garden Foodstuff Co., Ltd. In addition to addressing the ''as sold''/HLSO issue, some of these parties also commented on the significance of species and container weight in the Department's product characteristic hierarchy.

(Scope Decision Memorandum III). *See also* ''Scope Comments'' section below.

Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

Pursuant to section 735(a)(2) of the Act, on June 10, 2004, the Rubicon Group and UFP requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register**, and extend the provisional measures to not more than six months.[4] In accordance with 19 CFR 351.210(b), because (1) our preliminary determination is affirmative, (2) the Rubicon Group and UFP account for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting the respondents' request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**. Suspension of liquidation will be extended accordingly.

Period of Investigation

The period of investigation (POI) is October 1, 2002, through September 30, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2003).

Scope of Investigation

The scope of this investigation includes certain warmwater shrimp and prawns, whether frozen or canned, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[5] deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form.

The frozen or canned warmwater shrimp and prawn products included in the scope of the investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through either freezing or canning and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the investigation. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the investigation.

Excluded from the scope are (1) breaded shrimp[6] and prawns (1605.20.10.20); (2) shrimp and prawns generally classified in the Pandalidae family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (1605.20.05.10); and (5) dried shrimp and prawns.

The products covered by this scope are currently classifiable under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, 1605.20.10.30, and 1605.20.10.40. These HTSUS subheadings are provided for convenience and customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

Scope Comments

In accordance with the preamble to our regulations, we set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice.* (*See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997) and *Initiation Notice* at 69 FR 3877.) Throughout the 20 days and beyond, the Department received many comments and submissions regarding a multitude of scope issues, including: (1) Fresh (never frozen) shrimp, (2) Ocean Duke's seafood mix, (3) salad shrimp sold in counts of 250 pieces or higher, (4) *Macrobrachium rosenbergii,* (5) organic shrimp, (6) peeled shrimp used in breading, (7) dusted shrimp and (8) battered shrimp. On May 21, 2004, the Department determined that the scope of this and the concurrent investigations remains unchanged, as certain frozen and canned warmwater shrimp, without the addition of fresh (never frozen) shrimp. *See* Scope Decision Memorandum I.

On July 2, 2004, the Department made scope determinations with respect to Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii,* organic shrimp and peeled shrimp used in breading. *See* Scope Decision Memorandum II. Based on the information presented by interested parties, the Department determined that Ocean Duke's seafood mix is excluded from the scope of this and the concurrent investigations; however, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii,* organic shrimp and peeled shrimp used in breading are included within the scope of these investigations. *See* Scope Decision Memorandum II at 33.

Additionally, on July 2, 2004, the Department made a scope determination with respect to dusted shrimp and battered shrimp. *See* Scope Decision Memorandum III. Based on the information presented by interested parties, the Department preliminarily finds that while substantial evidence

[4] We note that Thai I-Mei also requested a postponement of the final determination until not later than 60 days after the date of the publication of the preliminary determination in the **Federal Register**.

[5] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

[6] Pursuant to our scope determination on battered shrimp, we find that breaded shrimp includes battered shrimp as discussed in the ''Scope Comments'' section below. *See* Scope Memorandum III.

exists to consider battered shrimp to fall within the meaning of the breaded shrimp exclusion identified in the scope of these proceedings, there is insufficient evidence to consider that shrimp which has been dusted falls within the meaning of ''breaded'' shrimp. However, there is sufficient evidence for the Department to consider excluding this merchandise from the scope of these proceedings provided an appropriate description can be developed. *See* Scope Decision Memorandum III at 18. To that end, along with the previously solicited comments regarding breaded and battered shrimp, the Department solicits comments from interested parties which enumerate and describe a clear, administrable definition of dusted shrimp. *See* Scope Decision Memorandum III at 23.

Fair Value Comparisons

To determine whether sales of certain frozen and canned warmwater shrimp from Thailand to the United States were made at LTFV, we compared the export price (EP) or constructed export price (CEP) to the normal value (NV), as described in the ''Export Price/ Constructed Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs and CEPs to NVs.

For this preliminary determination, we have determined that the Rubicon Group and UFP did not have a viable home market during the POI. Therefore, as the basis for NV, we used third country sales to Canada for these companies when making comparisons in accordance with section 773(a)(1)(C) of the Act. *See* the Rubicon Group and UFP Third Country Comparison Market Selection Memorandum.

In addition, we have determined that Thai I-Mei did not have a viable home or third country market during the POI. Therefore, as the basis for NV, we used constructed value (CV) when making comparisons for Thai I-Mei in accordance with section 773(a)(4) of the Act.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced and sold by the Rubicon Group and UFP in Canada during the POI that fit the description in the ''Scope of Investigation'' section of this notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the third country, where appropriate. Where there were no sales of identical merchandise in the third country made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. For Thai I-Mei, and where there were no sales of identical or similar merchandise, we made product comparisons using CV.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: processed form, cooked form, head status, count size (on an ''as sold'' basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

Product Comparison Comments

As Sold v. *HLSO Methodology*

We received comments from various interested parties concerning whether to perform product comparisons and margin calculations using data provided on an ''as sold'' basis or on data converted to an HLSO basis.[7]

The petitioners argue that using a consistent HLSO equivalent measure permits accurate product comparisons and margin calculations whereas the ''as sold'' measures do not. In particular, the petitioners emphasize that it is necessary to translate the actual sold volumes (weights) and count sizes to a uniform unit of measure that takes into account the various levels of processing of the different shrimp products sold and the allegedly large difference in value between the shrimp tail meat and other parts of the shrimp that may constitute ''as sold'' weight or count size, such as the head or shell. The petitioners' contention is premised upon their belief that the shrimp tail meat is the value-driving component of the shrimp. The respondents disagree, maintaining generally that using HLSO-equivalent data violates the antidumping duty law and significantly distorts product comparisons and margin calculations. In particular, they argue that: (1) Shrimp is sold based on its actual size and form, not on an HLSO basis, and it is the Department's practice to use actual sales/cost data in its margin analysis; (2) the rates used to convert price, quantity and expense data to an HLSO basis are uncertain as they are not maintained by the respondents in the ordinary course of business, and are generally based on each individual company's experience rather than any accepted industry-wide standard; and (3) the HLSO methodology introduces a significant distortion through the incorrect assumption that the value of the product varies solely in direct proportion to the change in weight resulting from production yields, when in fact the value of the product depends also on other factors such as quality and form.

Our analysis of the company responses shows that: (1) No respondent uses HLSO equivalents in the normal course of business, for either sales or cost purposes; and (2) there is no reliable or consistent HLSO conversion formula for all forms of processed shrimp across all companies, as each company defined its conversion factors differently and derived these factors based on its own production experience. Therefore, we preliminarily determine it is appropriate to perform product comparisons and margin calculations using data ''as sold.'' This approach is in accordance with our normal practice and precludes the use of conversion rates, the accuracy of which is uncertain. Given the variety and overlap of the ''as sold'' count size ranges reported by the respondents, we also preliminarily determine that it is appropriate to standardize product comparisons across respondents by fitting the ''as sold'' count sizes into the count size ranges specified in the questionnaire.

Product Characteristics Hierarchy

We also received comments from various interested parties regarding the significance of the species and container weight criteria in the Department's product comparison hierarchy.

Various parties requested that the species criterion be ranked higher in the Department's product characteristic hierarchy—as high as the second most important characteristic, rather than the thirteenth—based on their belief that species is an important factor in determining price. One party provided industry publications indicating price variations according to species type. Another party requested further that the Department revise the species categories specified in the Department's questionnaire to reflect characteristics beyond color (*i.e.*, whether the shrimp was farm-raised or wild-caught). In addition, several parties requested that

[7] In this notice, we address only those comments pertaining to market-economy dumping calculation methodology. Any comments pertaining to non-market-economy dumping calculation methodology are separately addressed in the July 2, 2004, preliminary determinations in the antidumping duty investigations of certain frozen and canned warmwater shrimp from the People's Republic of China and the Socialist Republic of Vietnam (*see* 69 FR 42654 (July 16, 2004) and 69 FR 42672 (July 16, 2004), respectively).

container weight, the eleventh characteristic in the Department's product characteristic hierarchy, be eliminated altogether as a product matching criterion, as they believe it is commercially insignificant and relates to packing size or form, rather than the physical attributes of the product.

With respect to the arguments regarding the species criterion, the petitioners disagree, maintaining that there is no credible evidence that species drives pricing to such a significant extent that buyers consider it more important than product characteristics such as head and cooked status. Rather, the petitioners contend that once shrimp is processed (*e.g.*, cooked, peeled, etc.), the species classification becomes essentially irrelevant. Therefore, the petitioners assert that while species type has some, not entirely insignificant effect on shrimp prices, it is appropriately captured in the Department's product matching hierarchy. Furthermore, with respect to the container weight criterion, the petitioners assert that, while the shrimp inside the container may be identical, in many cases the size of the container is an integral part of the product and an important determinant of the markets and channels through which shrimp can be sold. For this reason, the petitioners maintain that the Department should continue to include container weight as a product matching characteristic.

Regarding the species criterion, we have not changed the position of this criterion in the product characteristic hierarchy for the preliminary determination. We agree that the physical characteristic of species type may impact the price or cost of processed shrimp. For that reason, we included species type as one of the product matching criteria. However, based on our review of the record evidence, we find that other physical characteristics of the subject merchandise, such as head status, count size, shell status, and frozen form, appear to be more significant in setting price or determining cost. The information provided by the parties, which suggests that price may be affected in some cases by species type, does not provide sufficient evidence that species type is more significant than the remaining physical characteristics of the processed shrimp. Therefore, we find an insufficient basis to revise the ranking of the physical characteristics established in the Department's questionnaire for the purpose of product matching.

With respect to differentiating between species types beyond the color classifications identified in the questionnaire, we do not find that such differentiations reflect meaningful differences in the physical characteristics of the merchandise. In particular, we note that whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. Therefore, we have not accepted the additional species classifications proposed by the respondents. Accordingly, in those cases where the respondents reported additional species classifications for their processed shrimp products, we reclassified the products into one of the questionnaire color classifications. We made an exception for the shrimp identified as ''scampi'' (or *Macrobrachium rosenbergii*) and ''red ring'' (or *Aristeus alcocki*), where appropriate, because they represent species distinct from those associated by color in the Department's questionnaire. Regarding this exception, we note that while scampi and red ring are sufficiently distinct for product matching purposes, they are not so distinct as to constitute a separate class or kind of merchandise (*see* Scope Memorandum II). We also made an exception for the shrimp identified as ''mixed'' (*e.g.*, ''salad'' shrimp), where appropriate, because there is insufficient information on the record to classify these products according to the questionnaire color classifications.

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products of equivalent container weight (*e.g.*, a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

Broken Shrimp/Mixed Seafood Products

Two of the respondents in this case, the Rubicon Group and UFP, reported sales of broken shrimp in both their Canadian and U.S. markets. In addition, UFP reported sales of mixed seafood products in both markets. Because: (1) The matching criteria for this investigation do not currently account for broken shrimp or mixed seafood products; (2) no interested parties have provided comments on the appropriate methodology to match these sales; and (3) the quantity of such sales does not constitute a significant percentage of the respondents' databases, we have excluded these sales from our analysis for purposes of the preliminary determination. Nonetheless, we are seeking comments from interested parties regarding our treatment of these sales for consideration in the final determination.

Export Price/Constructed Export Price

A. The Rubicon Group

In accordance with section 772(a) of the Act, we calculated EP for those sales where the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed price to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for billing adjustments and discounts. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign warehousing expenses, foreign inland insurance, foreign brokerage and handling expenses, ocean freight, marine insurance, U.S. brokerage and handling, gate charges, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. inland insurance, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), container charges, customs inspection and storage fees, and U.S. warehousing expenses.

In accordance with section 772(b) of the Act, we calculated CEP for those sales where the merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. We used the earlier of shipment date from Thailand to the customer or the U.S. affiliate's invoice date as the date of sale for CEP sales, in accordance with our practice. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany,* 67 FR 35497 (May 20, 2002) (*SS Beams from Germany*) and accompanying Issues and Decision Memorandum at *Comment 2.*

We based CEP on the packed delivered prices to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for billing adjustments and discounts. We

made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign warehousing expenses, foreign inland insurance, foreign brokerage and handling expenses, ocean freight, marine insurance, U.S. brokerage and handling, gate charges, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. inland insurance, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), container charges, customs inspection and storage fees, and U.S. warehousing expenses. In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.*, bank charges, advertising, imputed credit expenses, and repacking), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses). Although the Rubicon Group reported imputed interest revenue related to accruals, we have not increased the reported gross unit price by this amount, in accordance with the Department's practice.

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by the Rubicon Group and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

B. Thai I-Mei

In accordance with section 772(b) of the Act, we calculated CEP for those sales where the merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. We used the earlier of shipment date from Thailand to the customer or the U.S. affiliate's invoice date as the date of sale for CEP sales, in accordance with our practice. *See e.g., SS Beams from Germany* and accompanying Issues and Decision Memorandum at *Comment 2.*

We based CEP on the packed delivered prices to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for billing adjustments. We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign warehousing expenses, foreign inland insurance, foreign brokerage and handling expenses, ocean freight, marine insurance, U.S. brokerage and handling, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. inland insurance, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), and U.S. warehousing expenses. In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.*, imputed credit expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by Thai I-Mei and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

C. UFP

In its U.S. and third country sales listings, UFP reported sales of frozen shrimp purchased from other countries and further processed in Thailand before exportation. Where we were able to identify these sales, we excluded them from our analysis because we find that the country of origin for these products is not Thailand.

In accordance with section 772(a) of the Act, we calculated EP for those sales where the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed price to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for billing adjustments. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign warehousing, foreign inland freight, foreign brokerage and handling expenses, and international freight (offset by destination delivery charge revenue).

Duty Drawback

The Rubicon Group, Thai I-Mei, and UFP claimed a duty drawback adjustment based on their participation in the Thai government's Duty Compensation on Exported Goods Manufactured in the Kingdom. Such adjustments are permitted under section 772(c)(1)(B) of the Act.

The Department will grant a respondent's claim for a duty drawback adjustment where the respondent has demonstrated that there is (1) a sufficient link between the import duty and the rebate, and (2) a sufficient amount of raw materials imported and used in the production of the final exported product. *See Rajinder Pipe Ltd.* v. *United States,* 70 F. Supp. 2d 1350, 1358 (CIT 1999) (Rajinder Pipes). In Rajinder Pipes, the Court of International Trade upheld the Department's decision to deny a respondent's claim for duty drawback adjustments because there was not substantial evidence on the record to establish that part one of the Department's test had been met. *See also Viraj Group, Ltd.* v. *United States,* Slip Op. 01–104 (CIT August 15, 2001).

In this investigation, the Rubicon Group, Thai I-Mei, and UFP have failed to demonstrate that there is a link between the import duty paid and the rebate received, and that imported raw materials are used in the production of the final exported product. Therefore, because they have failed to meet the Department's requirements, we are denying the respondents' requests for a duty drawback adjustment.

The Rubicon Group has argued that, if the Department chooses not to grant it a duty drawback adjustment, the Department should make a circumstance of sale adjustment for the amounts it received as duty drawback. In support of this assertion, the Rubicon Group cites *Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 69 FR 19388 (April 13, 2004) and accompanying Issues and Decision Memorandum at *Comment 2* (*Hot-Rolled Steel from Thailand*). However, we find that Rubicon's reliance on *Hot-Rolled Steel from Thailand* is misplaced. That case merely stands for the proposition that when we make a duty drawback adjustment to EP, we will consider whether an increase in NV is warranted, as a circumstance of sale adjustment, in order to account for the effect of the duty drawback on home market sales. That case does not signify that in the absence of a duty drawback adjustment, we will make a circumstance of sale adjustment to NV.

Finally, Thai I-Mei has argued that, if the Department chooses not to grant it a duty drawback adjustment, the Department should reduce its raw material costs by the amount of the duty drawback. As support for its proposed

methodology, Thai I-Mei cites *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From India,* 67 FR 34899 (May 12, 2002) and accompanying Issues and Decision Memorandum at *Comment 3* (*PET Film from India*). However, we note that Thai I-Mei's reliance on that case is also misplaced because in *PET Film from India,* the respondent demonstrated that it used a portion of the duty drawback it received to pay import duties on raw materials used in the production of the subject merchandise. In this investigation, we find that Thai I-Mei is unable to tie the import duty paid to the rebate received, and thus any cost adjustment for duty drawback would be unwarranted.

Normal Value

A. Home Market Viability

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared each respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

In this investigation, we determined that the Rubicon Group's and UFP's aggregate volume of home market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, we used sales to the Rubicon Group's and UFP's largest third country market (*i.e.*, Canada) as the basis for comparison-market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. Further, we determined that Thai I-Mei's aggregate volume of home and third country market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, we used CV as the basis for calculating NV for Thai I-Mei, in accordance with section 773(a)(4) of the Act.

B. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP or CEP. Pursuant to 19 CFR 351.412(c)(1), the NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (SG&A) and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. *See* 19 CFR 351.412(c)(2). If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP-offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR 61731 (November 19, 1997).

In this investigation, we obtained information from each respondent regarding the marketing stages involved in making the reported third country, as applicable, and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company-specific LOT findings are summarized below.

We examined the chain of distribution and the selling activities associated with sales reported by the Rubicon Group to distributors/wholesalers and retailers in the Canadian market. The Rubicon Group's sales to different customer categories did not differ from each other with respect to selling activities (*i.e.*, sales forecasting/market research, sales promotion/trade shows/advertising, inventory maintenance, order processing/invoicing, freight and delivery arrangements, and direct sales personnel). Based on our overall analysis, we found that all of the Rubicon Group's sales in the Canadian market constituted one LOT.

In the U.S. market, the Rubicon Group reported both EP and CEP sales to distributors/wholesalers, retailers, and food service industry customers. The Rubicon Group reported sales through two channels of distribution: (1) Direct sales from the Thai exporters to unaffiliated U.S. customers; and (2) sales made to the affiliated U.S. importer. According to the Rubicon Group, its Canadian and U.S. EP sales are at the same LOT and this LOT is more advanced than that of its CEP sales.

We examined the selling activities performed for each channel. Specifically, for direct sales (*i.e.*, EP sales), the Rubicon Group reported the following selling functions: sales forecasting/market research, sales promotion/trade shows/advertising, inventory maintenance, order processing/invoicing, freight and delivery arrangements, and direct sales personnel. For sales to the U.S. affiliate, the Rubicon Group reported the following selling functions: sales promotion/trade shows/advertising, inventory maintenance, order processing/invoicing, freight and delivery arrangements, and direct sales personnel. Regarding CEP sales, although the Rubicon Group reported that it performed fewer selling functions for sales to its U.S. affiliate, we do not find that these selling functions differ significantly from those performed for the direct sales.

After analyzing the selling functions performed for each sales channel, we find that the distinctions in selling functions are not material. We acknowledge that the Rubicon Group provides sales forecasting/market research for sales to Canada and direct U.S. sales, but not for sales to its U.S. affiliate. However, we do not find that this difference, combined with the claimed difference in the levels of the common selling functions, amounts to a significant difference in the selling functions performed for the two channels of distribution. Further, we note that the Rubicon Group has reported a higher level of indirect selling expenses for sales made to Rubicon Resources. Therefore, we do not find that the U.S. LOT for CEP sales is less advanced than the LOT for Canadian sales.

Based on the above analysis, we find that the Rubicon Group performed essentially the same selling functions when selling in both Canada and the United States (for both the EP and CEP sales). Therefore, we determine that these sales are at the same LOT and no LOT adjustment is warranted. Because we find that no difference in the LOT exists between markets, we have not granted a CEP offset to the Rubicon Group.

UFP made sales to distributors through three channels of distribution

in the Canadian market and two channels of distribution in the U.S. market. UFP's two channels of distribution in the U.S. market are the same as two of the three channels of distribution in the Canadian market. Further, UFP sales through these two channels of distribution did not differ from each other with respect to selling activities (*i.e.*, sales forecasting, sales promotion, order processing, sales and marketing support, freight and delivery, packing, and payment processing).

Regarding UFP's third channel of distribution in the Canadian market, sales made through its affiliate Bright Sea, we note that UFP performs the same selling activities to sell to Bright Sea as it does to sell through its other sales channels. While Bright Sea also provides order and payment processing, we do not find these additional selling functions to be significant. Therefore, we find that all of UFP's sales channels are at the same LOT. Accordingly, all comparisons are at the same LOT for UFP and an adjustment pursuant to section 773(a)(7)(A) is not warranted.

With respect to Thai I-Mei, this exporter had no viable home or third country market during the POI. Therefore, we based NV on CV. When NV is based on CV, the NV LOT is that of the sales from which we derive SG&A expenses and profit. (*See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon from Chile,* 63 FR 2664 (January 16, 1998)). In accordance with 19 CFR 351.412(d), the Department will make its LOT determination under paragraph (d)(2) of this section on the basis of sales of the foreign like product by the producer or exporter. Because we based the selling expenses and profit for Thai I-Mei on the weighted-average selling expenses incurred and profits earned by the other respondents in the investigation, we are able to determine the LOT of the sales from which we derived selling expenses and profit for CV.

Thai I-Mei reported making sales through six channels of distribution in the United States; however, it stated that the selling activities it performed did not vary by channel of distribution.[8] Thai I-Mei reported performing the following selling functions for sales to its U.S. affiliate: order input/processing, direct sales personnel, freight and delivery arrangements, and packing. We find that the Rubicon Group's and UFP's selling functions performed for third country sales are more significant than those performed by Thai I-Mei to sell to its U.S. affiliate. Therefore, we determine that the NV LOT for Thai I-Mei is more advanced than the LOT of Thai I-Mei's CEP sales. However, because the Rubicon Group and UFP only made sales at one LOT in their third country markets, and there is no additional information on the record that would allow for an LOT adjustment, no LOT adjustment is possible for Thai I-Mei. Because we find that the NV LOT is more advanced than the CEP LOT, we have preliminarily granted a CEP offset to Thai I-Mei.

C. Cost of Production Analysis

Based on our analysis of the petitioners' allegation, we found that there were reasonable grounds to believe or suspect that the Rubicon Group's and UFP's sales of frozen and canned warmwater shrimp in the third country were made at prices below their COP. Accordingly, pursuant to section 773(b) of the Act, we initiated sales-below-cost investigations to determine whether the Rubicon Group's and UFP's sales were made at prices below their respective COPs. *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Petitioners'' Allegation of Sales Below the Cost of Production for Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd.,'' dated June 2, 2004, and Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Petitioners'' Allegation of Sales Below the Cost of Production for Union Frozen Products Co., Ltd.,'' dated May 28, 2004.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative expenses (G&A), interest expenses, and third country packing costs. *See* ''Test of Third Country Sales Prices'' section below for treatment of third country selling expenses. We relied on the COP data submitted by the Rubicon Group, Thai I-Mei, and UFP except in the following instances.

A. The Rubicon Group

1. We revised Rubicon Group's producer-specific G&A expense rates in order to exclude revenue offsets which did not relate to the general operations of the company.

2. We revised Rubicon Group's producer-specific financial expense rates in order to include an interest income offset for one of the entities.

3. For each of the six producers in the Rubicon Group, we deducted the total ''excludable'' costs from the cost of goods sold (COGS) denominators instead of a portion of them.

See Memorandum from Gina Lee to Neal Halper, Director Office of Accounting, entitled: ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—the Rubicon Group,'' dated July 28, 2004.

B. Thai I-Mei

1. We used the COGS shown on Thai I-Mei's fiscal year 2003 financial statements net of packing expense and scrap offset as the denominator of the G&A and interest expense rate calculations.

2. Thai I-Mei did not report direct packaging costs for certain control numbers. For these control numbers, we assigned the direct packaging costs for PE bags and film submitted by Thai I-Mei.

3. Thai I-Mei did not provide the Department with cost data for all of its U.S. sales, as instructed in both the original questionnaire and in the Department's section D supplemental questionnaire issued on June 16, 2004. Thai I-Mei's failure to provide this necessary information meets the requirements for application of adverse facts available set forth in *Nippon Steel Corp.* v. *United States*, 337 F. 3d 1373 (Fed. Cir. 2003) (*Nippon Steel*). As stated by the Court of Appeals for the Federal Circuit during its discussion of section 776(a) of the Act in *Nippon Steel*, ''[t] he focus of subsection (a) is respondent's failure to provide information. The reason for the failure is of no moment. The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.'' *See Id.* at 1381. In regard to the use of an adverse inference, section 776(b) of the Act states that the Department may use an adverse inference if ''an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. * * *'' In Nippon Steel, the Court set out two requirements for drawing an adverse inference under section 776(b) of the Act. First, the Department ''must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and

[8] Thai I-Mei states that its U.S. affiliate, Ocean Duke, did not provide inventory maintenance for those sales which were shipped directly to the U.S. customer (*i.e.*, two of the six sales channels).

regulations.'' *See Nippon Steel*, 337 F. 3d 1382–83. Next the Department must ''make a subjective showing that the respondent * * * has failed to promptly produce the requested information'' and that ''failure to fully respond is the result of the respondent's lack of cooperation in either: (a) Failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.'' *See Id.* Because: (1) Thai I-Mei reasonably should have known that the necessary information was required to be kept and maintained and it did not report this information; and (2) it failed to put forth its maximum effort as required by the Department's questionnaire, we find that Thai I-Mei's failure to provide complete cost information in this case clearly meets these standards. As facts available, we have applied the highest cost reported for any control number, in accordance with our practice. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Cold-Rolled Carbon Steel Flat Products From Brazil*, 67 FR 31200, 31202 (May 9, 2002).

For further discussion of these adjustments, *see* Memorandum from Oh Ji to Neal Halper, Director Office of Accounting, entitled: ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Thai I-Mei Frozen Foods Co., Ltd.,'' dated July 28, 2004.

C. UFP

1. We revised UFP's G&A expense rate to include the ''Expense in previous accounting period,'' because we find this expense was recorded in the company's current year audited financial statements and represents a current period expense.

See Memorandum from Ernest Gziryan to Neal Halper, Director Office of Accounting entitled: ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—The Union Frozen Products Co., Ltd.,'' dated July 28, 2004.

2. Test of Third Country Sales Prices

On a product-specific basis, we compared the adjusted weighted-average COP to the third country sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. The prices were exclusive of any applicable billing adjustments, movement charges, and direct and indirect selling expenses. In determining whether to disregard third country market sales made at prices less than their COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which permitted the recovery of all costs within a reasonable period of time.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of the respondent's sales of a given product during the POI are at prices less than the COP, we do not disregard any below-cost sales of that product, because we determine that in such instances the below-cost sales were not made in substantial quantities. Where 20 percent or more of the respondent's sales of a given product during the POI are at prices less than the COP, we determine that the below-cost sales represent substantial quantities within an extended period of time, in accordance with section 773(b)(1)(A) of the Act. In such cases, we also determine whether such sales were made at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act.

We found that, for certain specific products, more than 20 percent of the Rubicon Group's and UFP's third country sales during the POI were at prices less than the COP and, in addition, the below-cost sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act. Where there were no sales of any comparable product at prices above the COP, we used CV as the basis for determining NV.

D. Calculation of Normal Value Based on Comparison Market Prices

1. The Rubicon Group

For the Rubicon Group, we calculated NV based on delivered prices to unaffiliated customers. We also made deductions for movement expenses, including inland freight (plant to warehouse and warehouse to port), warehousing, foreign inland insurance, gate charges, international freight, and foreign brokerage and handling under section 773(a)(6)(B)(ii) of the Act.

For third country price-to-EP comparisons, we made circumstance of sale adjustments for differences in credit expenses and commissions, pursuant to section 773(a)(6)(C) of the Act.

For third country price-to-CEP comparisons, we made deductions for third country credit expenses, commissions, and repacking, pursuant to 773(a)(6)(C) of the Act.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

2. UFP

For UFP, we calculated NV based on delivered prices to unaffiliated customers. We made adjustments, where appropriate, to the starting price for billing adjustments. We also made deductions for movement expenses, including foreign warehousing, foreign inland freight, foreign brokerage and handling expenses, and international freight (offset by destination delivery charge revenue), under section 773(a)(6)(B)(ii) of the Act. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for credit expenses (offset by interest revenue), payment insurance, bank charges, discounting charges, and commissions.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

E. Calculation of Normal Value Based on Constructed Value

In accordance with section 773(a)(4) of the Act, for Thai I-Mei, we based NV on CV because there was no viable home or third country market.

In accordance with section 773(e) of the Act, we calculated CV based on the sum of Thai I-Mei's cost of materials and fabrication for the foreign like product, plus amounts for SG&A, profit, and U.S. packing costs. We calculated the cost of materials and fabrication, SG&A and interest based on the methodology described in the ''Calculation of COP'' section of this notice.

Because Thai I-Mei does not have a viable comparison market, the Department cannot determine profit

under section 773(e)(2)(A) of the Act, which requires sales by the respondent in question in the ordinary course of trade in a comparison market. Likewise, because Thai I-Mei does not have sales of any product in the same general category of products as the subject merchandise, we are unable to apply alternative (i) of section 773(e)(2)(B) of the Act. Further, the Department cannot calculate profit based on alternative (ii) of this section because the other two respondents in this investigation do not have viable home markets and 19 CFR 351.405(b) requires a profit ratio under this alternative be based on home market sales. Therefore, we calculated Thai I-Mei's CV profit and selling expenses based on the third alternative, any other reasonable method, in accordance with section 773(e)(2)(B)(iii) of the Act. As a result, as a reasonable method, we calculated Thai I-Mei's CV profit and selling expenses as a weighted-average of the profit and selling expenses incurred by the two other respondents in this investigation. Specifically, we calculated the weighted-average profit and selling expenses incurred on third country sales by the Rubicon Group and UFP.

Pursuant to alternative (iii), the Department has the option of using any other reasonable method, as long as the amount allowed for profit is not greater than the amount realized by exporters or producers ''in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,'' the ''profit cap.'' We are unable to calculate the profit cap because the available data (*i.e.*, the Rubicon Group and UFP data) are based solely on the third country sales, and thus cannot be used under 19 CFR 351.405(b). Therefore, as facts available we are applying option (iii), without quantifying a profit cap. *See* the Memorandum from Alice Gibbons to the file entitled, ''Calculations Performed for Thai I-Mei Frozen Foods Co., Ltd. for the Preliminary Determination in the Investigation of Certain Frozen and Canned Warmwater Shrimp from Thailand'' dated July 28, 2004.

For comparisons to CEP, we deducted from CV the weighted-average third country direct selling expenses. Finally, we made a CEP offset pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f). We calculated the CEP offset as the lesser of the weighted-average third country indirect selling expenses or the indirect selling expenses deducted from the starting price in calculating CEP.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Critical Circumstances

On May 19, 2004, the petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigations of certain frozen and canned warmwater shrimp from Thailand. In accordance with 19 CFR 351.206(c)(2)(i), because the petitioners submitted critical circumstances allegations more than 20 days before the scheduled date of the preliminary determination, the Department must issue preliminary critical circumstances determinations not later than the date of the preliminary determination.

Section 733(e)(1) of the Act provides that the Department will preliminarily determine that critical circumstances exist if there is a reasonable basis to believe or suspect that: (A)(i) There is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise; or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and, (B) there have been massive imports of the subject merchandise over a relatively short period. Section 351.206(h)(1) of the Department's regulations provides that, in determining whether imports of the subject merchandise have been ''massive,'' the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, section 351.206(h)(2) of the Department's regulations provides that an increase in imports of 15 percent during the ''relatively short period'' of time may be considered ''massive.'' Section 351.206(i) of the Department's regulations defines ''relatively short period'' as normally being the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later. The regulations also provide, however, that if the Department finds that importers, exporters, or producers had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.

In determining whether the relevant statutory criteria have been satisfied, we considered: (i) Exporter-specific shipment data requested by the Department; (ii) information presented by the respondents in their May 26, 2004, and June 14, 2004, submissions, and (iii) the ITC preliminary injury determination.

To determine whether there is a history of injurious dumping of the merchandise under investigation, in accordance with section 733(e)(1)(A)(i) of the Act, the Department normally considers evidence of an existing antidumping duty order on the subject merchandise in the United States or elsewhere to be sufficient. *See Preliminary Determination of Critical Circumstances: Steel Concrete Reinforcing Bars From Ukraine and Moldova*, 65 FR 70696 (November 27, 2000). With regard to imports of certain frozen and canned warmwater shrimp from Thailand, the petitioners make no specific mention of a history of dumping for Thailand. We are not aware of any antidumping order in the United States or in any country on certain frozen and canned warmwater shrimp from Thailand. For this reason, the Department does not find a history of injurious dumping of the subject merchandise from Thailand pursuant to section 733(e)(1)(A)(i) of the Act.

To determine whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales in accordance with 733(e)(1)(A)(ii) of the Act, the Department normally considers margins of 25 percent or more for EP sales, or 15 percent or more for CEP transactions, sufficient to impute knowledge of dumping. *See Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 FR 31972, 31978 (October 19, 2001).

For the Rubicon Group, Thai I-Mei, and UFP, we preliminarily determine that there is not a sufficient basis to find that importers should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales pursuant to section 733(e)(1)(A)(ii) of the Act, because the calculated margins were not 25 percent or more for EP sales, or 15 percent or more for CEP sales. Because

the knowledge criterion has not been met, we have not addressed the second criterion of whether or not imports were massive in the comparison period when compared to the base period.

Regarding the companies subject to the ''all others'' rate, it is the Department's normal practice to conduct its critical circumstances analysis for these companies based on the experience of investigated companies. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars From Turkey,* 62 FR 9737, 9741 (March 4, 1997). However, the Department does not automatically extend an affirmative critical circumstances determination to companies covered by the ''all others'' rate. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan,* 64 FR 30574 (June 8, 1999) (*Stainless Steel from Japan*). Instead, the Department considers the traditional critical circumstances criteria with respect to the companies covered by the ''all others'' rate. Consistent with *Stainless Steel from Japan,* the Department has, in this case, applied the traditional critical circumstances criteria to the ''all others'' category for the antidumping investigation of shrimp from Thailand.

The dumping margin for the ''all others'' category in the instant case, 6.39 percent, does not exceed the 15/25 percent thresholds necessary to impute knowledge of dumping. Therefore, we do not find that importers knew or should have known that there would be material injury from the dumped merchandise.

In summary, we find that there is no reasonable basis to believe or suspect importers had knowledge of dumping and the likelihood of material injury with respect to certain frozen and canned warmwater shrimp from Thailand. Given the analysis summarized above, and described in more detail in the Critical Circumstances Memo, we preliminarily determine that critical circumstances do not exist for imports of certain frozen and canned warmwater shrimp produced in and exported from Thailand.

We will make a final determination concerning critical circumstances for all producers and exporters of subject merchandise from Thailand when we make our final dumping determinations in this investigation, which will be 135 days after publication of the preliminary dumping determination.

Verification

As provided in section 782(i) of the Act, we will verify all information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the NV exceeds EP or CEP, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average margin percentage	Critical circumstances
The Rubicon Group	5.56	No.
Thai I-Mei	5.91	No.
UFP	10.25	No.
All Others	6.39	No.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with 19 CFR 351.224(b).

Public Comment

Case briefs for this investigation must be submitted to the Department no later than seven days after the date of the final verification report issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will make our final determination no later than 135 days after the publication of this notice in the **Federal Register**.

This determination is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: July 28, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–17816 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840]

Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from India

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary determination of sales at less than fair value.

SUMMARY: We preliminarily determine that certain frozen and canned warmwater shrimp from India are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended (the Act). In addition, we preliminarily determine that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to the subject merchandise exported from India for Hindustan Lever Limited (HLL). We also preliminarily determine that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to the subject merchandise exported from India for respondents Devi Sea Foods Ltd. (Devi) and Nekkanti Seafoods Limited (Nekkanti), or for companies subject to the ''all others'' rate.

Interested parties are invited to comment on this preliminary determination. Because we are postponing the final determination, we will make our final determination not later than 135 days after the date of publication of this preliminary determination in the **Federal Register**.

DATES: Effective Date: August 4, 2004.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood or Jill Pollack, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3874 or (202) 482–4593, respectively.

Preliminary Determination

We preliminarily determine that certain frozen and canned warmwater shrimp from India are being, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice. In addition, we preliminarily determine that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to the subject merchandise exported from India by HLL. The critical circumstances analysis for the preliminary determination is discussed below under the section ''Critical Circumstances.''

Background

Since the initiation of this investigation (*see Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 FR 3876 (January 27, 2004) (*Initiation Notice*)), the following events have occurred.

On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warmwater shrimp from India are materially injuring the United States industry. *See* ITC Investigation Nos. 731-TA–1063–1068 (Publication No. 3672).

On February 20, 2004, we selected the three largest producers/exporters of certain frozen and canned warmwater shrimp from India as the mandatory respondents in this proceeding. *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled, ''Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from India—Selection of Respondents,'' dated February 20, 2004. We subsequently issued the antidumping questionnaire to Devi, HLL, and Nekkanti on February 20, 2004.

During the period February through June 2004, various interested parties, including the petitioners,[1] submitted comments on the scope of this and the concurrent investigations of certain frozen and canned warmwater shrimp concerning whether the following products are covered by the scope of the investigations: a certain seafood mix, dusted shrimp, battered shrimp, salad shrimp sold in counts of 250 pieces or higher, the species *Macrobachium rosenbergii*, organic shrimp, and peeled shrimp used in breading.[2] In addition, the Louisiana Shrimp Alliance (LSA), an association of domestic shrimp harvesters and processors, requested that the Department expand the scope to include fresh (never frozen) shrimp. *See* ''Scope Comments'' section of this notice.

We received section A questionnaire responses from the three respondents in March 2004, and section B, C, and D questionnaire responses in April 2004.

We issued and received responses to our supplemental questionnaires from May through July 2004.

On May 3, 2004, the petitioners alleged that Devi and HLL made third country sales below the cost of production (COP) and, therefore, requested that the Department initiate a sales-below-cost investigation of these respondents.[3] On May 28, 2004, the Department initiated a sales-below-cost investigation for Devi and HLL. *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Petitioners'' Allegation of Sales Below the Cost of Production for Devi Sea Foods Limited,'' (Devi Cost Allegation Memo) dated May 28, 2004, and Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Petitioners'' Allegation of Sales Below the Cost of Production for Hindustan Lever Limited,'' date May 28, 2004 (HLL Cost Allegation Memo).

On May 18, 2004, pursuant to sections 733(c)(1)(B) and (c)(2) of the Act and 19

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[1] The petitioners in this investigation are the Ad Hoc Shrimp Trade Alliance (an ad hoc coalition representative of U.S. producers of frozen and canned warmwater shrimp and harvesters of wild-caught warmwater shrimp), Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company.

[2] Specifically, Ocean Duke Corporation (Ocean Duke), an importer and wholesaler of the subject merchandise, requested that the following products be excluded from the scope of this and the concurrent investigations on certain frozen and canned warmwater shrimp: (1) ''Dusted shrimp,'' (2) ''battered shrimp,'' and (3) ''seafood mix.'' Another importer, Rubicon Resources LLP, supported Ocean Duke's request regarding dusted and battered shrimp. Eastern Fish Company and Long John Silver's, Inc. also requested that dusted and battered shrimp be excluded from the scope of the investigations. Furthermore, the Seafood Exporters' Association of India requested that the Department find that warmwater salad shrimp in counts of 250 pieces or higher are not within the scope, and that the species *Machrobachium rosenbergii* is a separate class or kind of merchandise. Also, Exportadora de Alimentos S.A., one of the respondents in the Ecuador case, requested that the Department find that farm-raised organic shrimp is not covered by the scope of the investigations. Finally, the American Breaded Shrimp Processors Association, comprised of importers of peeled shrimp which they consume in the production of breaded shrimp products, requested that peeled shrimp imported for the sole purpose of breading be excluded from the scope of the investigations.

[3] Based on our analysis of an allegation contained in the petition, we found that there were reasonable grounds to believe or suspect that sales of foreign-like product in the relevant third country market for Nekkanti, *i.e.*, Japan, were made at prices below their COP. Accordingly, pursuant to section 773(b) of the Act, we initiated a country-wide cost investigation relating to third-country sales to Japan at the time of the initiation to determine whether sales were made at prices below their respective COPs. *See Initiation Notice*, 69 FR at 3880.

CFR 351.205(f), the Department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than July 28, 2004. *See Notice of Postponement of Preliminary Determinations of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil (A–351–838), Ecuador (A–331–802), India (A–533–840), Thailand (A–549–822), the People's Republic of China (A–570–893), and the Socialist Republic of Vietnam (A–503–822)*, 69 FR 29509 (May 24, 2004).

On May 21, 2004, the Department denied LSA's request to amend the scope to include fresh (never frozen) shrimp. *See* Memorandum from Jeffrey A. May, Deputy Assistant Secretary, AD/CVD Enforcement Group I, and Joseph A. Spetrini, Deputy Assistant Secretary AD/CVD Enforcement Group III, to James J. Jochum, Assistant Secretary for Import Administration entitled: ''Antidumping Investigations on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, the People's Republic of China, Thailand and the Socialist Republic of Vietnam: Scope Determination Regarding Fresh (Never Frozen) Shrimp,'' dated May 21, 2004 (Scope Decision Memorandum I).

On May 26, 2004, HLL provided a third country sales listing for its second largest third country market, Italy, in response to the Department's concerns that certain of its sales to Spain were not destined for that country.

Pursuant to the Department's solicitation, on June 7, 2004, various interested parties, including the petitioners, submitted comments on the issue of whether product comparisons and margin calculations in this and the concurrent investigations of certain frozen and canned warmwater shrimp should be based on data provided on an ''as sold'' basis or data converted to a headless, shell-on (HLSO) basis.[4] Additional comments were subsequently submitted on June 15 and 25, 2004. *See* ''Product Comparison Comments'' section, below.

On June 8, 2004, the petitioners alleged that HLL made below-cost sales to Italy and, therefore, requested that the Department initiate a sales-below-cost investigation. However, because we have not selected Italy as HLL's comparison market in this case, we have not considered this allegation. *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from India—Third-Country Market Selection for Hindustan Lever, Limited,'' dated July 28, 2004 (HLL Third Country Comparison Market Selection Memorandum), for further discussion.

On June 15, 2004, the petitioners objected to Devi's use of Canada as its third country comparison market, and they requested that the Department obtain sales data for the company's second largest third country market, Japan. In July 2004, the Department determined that it is appropriate to use the third country market initially reported by Devi (*i.e.*, Canada). *See* Memorandum to Louis Apple, Director Office 2, from the Team entitled: ''Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from India—Third-Country Market Selection for Devi Sea Foods Limited,'' dated July 28, 2004 (Devi Third Country Comparison Market Selection Memorandum), for further discussion.

On July 2, 2004, the Department made preliminary scope determinations with respect to the following shrimp products: Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp, peeled shrimp used in breading, dusted shrimp, and battered shrimp. *See* Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration entitled: ''Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarifications: (1) Ocean Duke's Seafood Mix; (2) Salad Shrimp Sold in Counts of 250 Pieces or Higher; (3) *Macrobrachium rosenbergii*; (4) Organic Shrimp; and (5) Peeled Shrimp Used in Breading,'' dated July 2, 2004 (Scope Decision Memorandum II); and Memorandum from Edward C. Yang, Vietnam/NME Unit Coordinator, Import Administration to Jeffrey A. May, Deputy Assistant Secretary for Import Administration entitled: ''Antidumping Investigation on Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam: Scope Clarification: Dusted Shrimp and Battered Shrimp,'' dated July 2, 2004 (Scope Decision Memorandum III). *See also* ''Scope Comments'' section below.

On July 12, 2004, HLL requested that the Department find that one of its third country sales was made outside the ordinary course of trade. While we were unable to consider this request for the preliminary determination, we will consider it for purposes of the final determination.

Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

Pursuant to section 735(a)(2) of the Act, on June 22, 2004, Seafood Exporters Association of India (SEAI) and the individual respondents in this investigation, Devi, HLL and Nekkanti, requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register**, and extend the provisional measures to not more than six months. In accordance with 19 CFR 351.210(b), because (1) our preliminary determination is affirmative, (2) the respondents account for a significant proportion of exports of the subject merchandise, and (3) no compelling reasons for denial exist, we are granting the respondents' request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal**

[4] Specifically, the Department received comments from the following interested parties, in addition to the petitioners, on June 7: the Brazilian Shrimp Farmers' Association and Central de Industrializacao e Distribuicao de Alimentos Ltda.; Empresa De Armazenagem Frigorifica Ltda.; Camara Nacional de Acuacultura (National Chamber of Aquaculture) of Ecuador; the Rubicon Group (comprised of Andaman Seafood Co., Ltd. Chanthaburi Seafoods Co., Ltd. And Thailand Fishery Cold Storage Public Co., Ltd.); Thai I-Mei Frozen Foods Co., Ltd. and its affiliated reseller Ocean Duke; the Seafood Exporters of India and its members Devi, HLL, and Nekkanti; the VASEP Shrimp Committee and its members; and Shantou Red Garden Foodstuff Co., Ltd. In addition to addressing the ''as sold'/HLSO issue, some of these parties also commented on the significance of species and container weight in the Department's product characteristic hierarchy.

Register. Suspension of liquidation will be extended accordingly.

Period of Investigation

The period of investigation (POI) is October 1, 2002, through September 30, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2003).

Scope of Investigation

The scope of this investigation includes certain warmwater shrimp and prawns, whether frozen or canned, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[5] deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form.

The frozen or canned warmwater shrimp and prawn products included in the scope of the investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through either freezing or canning and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (Penaeus merguiensis), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the investigation. In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the investigation.

Excluded from the scope are (1) breaded shrimp[6] and prawns (1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (1605.20.05.10); and (5) dried shrimp and prawns.

The products covered by this scope are currently classifiable under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, 1605.20.10.30, and 1605.20.10.40. These HTSUS subheadings are provided for convenience and customs purposes only and are not dispositive, but rather the written description of the scope of this investigation is dispositive.

Scope Comments

In accordance with the preamble to our regulations, we set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice*. *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997) and *Initiation Notice* at 69 FR 3877. Throughout the 20 days and beyond, the Department received many comments and submissions regarding a multitude of scope issues, including: (1) Fresh (never frozen) shrimp, (2) Ocean Duke's seafood mix, (3) salad shrimp sold in counts of 250 pieces or higher, (4) *Macrobrachium rosenbergii*, (5) organic shrimp, (6) peeled shrimp used in breading, (7) dusted shrimp and (8) battered shrimp. On May 21, 2004, the Department determined that the scope of this and the concurrent investigations remains unchanged, as certain frozen and canned warmwater shrimp, without the addition of fresh (never frozen) shrimp. *See* Scope Decision Memorandum I.

On July 2, 2004, the Department made scope determinations with respect to Ocean Duke's seafood mix, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp and peeled shrimp used in breading. *See* Scope Decision Memorandum II. Based on the information presented by interested parties, the Department determined that Ocean Duke's seafood mix is excluded from the scope of this and the concurrent investigations; however, salad shrimp sold in counts of 250 pieces or higher, *Macrobrachium rosenbergii*, organic shrimp and peeled shrimp used in breading are included within the scope of these investigations. *See* Scope Decision Memorandum II at 33.

Additionally, on July 2, 2004, the Department made a scope determination with respect to dusted shrimp and battered shrimp. *See* Scope Decision Memorandum III. Based on the information presented by interested parties, the Department preliminarily finds that, while substantial evidence exists to consider battered shrimp to fall within the meaning of the breaded shrimp exclusion identified in the scope of these proceedings, there is insufficient evidence to consider that shrimp which has been dusted falls within the meaning of ''breaded'' shrimp. However, there is sufficient evidence for the Department to consider excluding this merchandise from the scope of these proceedings provided an appropriate description can be developed. *See* Scope Decision Memorandum III at 18. To that end, along with the previously solicited comments regarding breaded and battered shrimp, the Department solicits comments from interested parties which enumerate and describe a clear, administrable definition of dusted shrimp. *See* Scope Decision Memorandum III at 23.

Fair Value Comparisons

To determine whether sales of certain frozen and canned warmwater shrimp from India to the United States were made at LTFV, we compared the export price (EP) to the normal value (NV), as described in the ''Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs to NVs.

For this preliminary determination, we have determined that Devi, HLL, and Nekkanti did not have viable home market sales during the POI. Therefore, as the basis for NV, we used third country sales to Canada (Devi), Spain (HLL), and Japan (Nekkanti) when making comparisons in accordance with section 773(a)(1)(C) of the Act. *See* Devi Third Country Comparison Market Selection Memorandum and HLL Third Country Comparison Market Selection Memorandum for further discussion.

[5] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

[6] Pursuant to our scope determination on battered shrimp, we find that breaded shrimp includes battered shrimp as discussed in the ''Scope Comments'' section below. *See* Scope Memorandum III.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced and sold by Devi in Canada, HLL in Spain, and Nekkanti in Japan, as appropriate, during the POI that fit the description in the ''Scope of Investigation'' section of this notice to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the third country, where appropriate. Where there were no sales of identical merchandise in the third country made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade, we made product comparisons using constructed value (CV).

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: Processed form, cooked form, head status, count size (on an ''as sold'' basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

Product Comparison Comments

As Sold v. *HLSO Methodology*

We received comments from various interested parties concerning whether to perform product comparisons and margin calculations using data provided on an ''as sold'' basis or on data converted to an HLSO basis.[7]

The petitioners argue that using a consistent HLSO equivalent measure permits accurate product comparisons and margin calculations whereas the ''as sold'' measures do not. In particular, the petitioners emphasize that it is necessary to translate the actual sold volumes (weights) and count sizes to a uniform unit of measure that takes into account the various levels of processing of the different shrimp products sold and the allegedly large difference in value between the shrimp tail meat and other parts of the shrimp that may constitute ''as sold'' weight or count size, such as the head or shell. The petitioners' contention is premised upon their belief that the shrimp tail meat is the value-driving component of the shrimp. The respondents disagree, maintaining generally that using HLSO-equivalent data violates the antidumping duty law and significantly distorts product comparisons and margin calculations. In particular, they argue that: (1) Shrimp is sold based on its actual size and form, not on an HLSO basis, and it is the Department's practice to use actual sales/cost data in its margin analysis; (2) the rates used to convert price, quantity and expense data to an HLSO basis are uncertain as they are not maintained by the respondents in the ordinary course of business, and are generally based on each individual company's experience rather than any accepted industry-wide standard; and (3) the HLSO methodology introduces a significant distortion through the incorrect assumption that the value of the product varies solely in direct proportion to the change in weight resulting from production yields, when in fact the value of the product depends also on other factors such as quality and form.

Our analysis of the company responses shows that: (1) No respondent uses HLSO equivalents in the normal course of business, for either sales or cost purposes; and (2) there is no reliable or consistent HLSO conversion formula for all forms of processed shrimp across all companies, as each company defined its conversion factors differently and derived these factors based on its own production experience. Therefore, we preliminarily determine it is appropriate to perform product comparisons and margin calculations using data ''as sold.'' This approach is in accordance with our normal practice and precludes the use of conversion rates, the accuracy of which is uncertain. Given the variety and overlap of the ''as sold'' count size ranges reported by the respondents, we also preliminarily determine that it is appropriate to standardize product comparisons across respondents by fitting the ''as sold'' count sizes into the count size ranges specified in the questionnaire.

Product Characteristics Hierarchy

We also received comments from various interested parties regarding the significance of the species and container weight criteria in the Department's product comparison hierarchy.

Various parties requested that the species criterion be ranked higher in the Department's product characteristic hierarchy—as high as the second most important characteristic, rather than the thirteenth—based on their belief that species is an important factor in determining price. One party provided industry publications indicating price variations according to species type. Another party requested further that the Department revise the species categories specified in the Department's questionnaire to reflect characteristics beyond color (*i.e.*, whether the shrimp was farm-raised or wild-caught). In addition, several parties requested that container weight, the eleventh characteristic in the Department's product characteristic hierarchy, be eliminated altogether as a product matching criterion, as they believe it is commercially insignificant and relates to packing size or form, rather than the physical attributes of the product.

With respect to the arguments regarding the species criterion, the petitioners disagree, maintaining that there is no credible evidence that species drives pricing to such a significant extent that buyers consider it more important than product characteristics such as head and cooked status. Rather, the petitioners contend that once shrimp is processed (*e.g.*, cooked, peeled, etc.), the species classification becomes essentially irrelevant. Therefore, the petitioners assert that while species type has some, not entirely insignificant effect on shrimp prices, it is appropriately captured in the Department's product matching hierarchy. Furthermore, with respect to the container weight criterion, the petitioners assert that, while the shrimp inside the container may be identical, in many cases the size of the container is an integral part of the product and an important determinant of the markets and channels through which shrimp can be sold. For this reason, the petitioners maintain that the Department should continue to include container weight as a product matching characteristic.

Regarding the species criterion, we have not changed the position of this criterion in the product characteristic hierarchy for the preliminary determination. We agree that the physical characteristic of species type may impact the price or cost of processed shrimp. For that reason, we included species type as one of the product matching criteria. However, based on our review of the record evidence, we find that other physical characteristics of the subject merchandise, such as head status, count size, shell status, and frozen form, appear to be more significant in setting

[7] In this notice, we address only those comments pertaining to market-economy dumping calculation methodology. Any comments pertaining to non-market-economy dumping calculation methodology are separately addressed in the July 2, 2004, preliminary determinations in the antidumping duty investigations of certain frozen and canned warmwater shrimp from the People's Republic of China and the Socialist Republic of Vietnam (*see* 69 FR 42654 (July 16, 2004) and 69 FR 42672 (July 16, 2004), respectively).

price or determining cost. The information provided by the parties, which suggests that price may be affected in some cases by species type, does not provide sufficient evidence that species type is more significant than the remaining physical characteristics of the processed shrimp. Therefore, we find an insufficient basis to revise the ranking of the physical characteristics established in the Department's questionnaire for the purpose of product matching.

With respect to differentiating between species types beyond the color classifications identified in the questionnaire, we do not find that such differentiations reflect meaningful differences in the physical characteristics of the merchandise. In particular, we note that whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. Therefore, we have not accepted the additional species classifications proposed by the respondents. Accordingly, in those cases where the respondents reported additional species classifications for their processed shrimp products, we reclassified the products into one of the questionnaire color classifications. We made an exception for the shrimp identified as ''scampi'' (or *Macrobrachium rosenbergii*) and ''red ring'' (or *Aristeus alcocki*), where appropriate, because they represent species distinct from those associated by color in the Department's questionnaire. Regarding this exception, we note that while scampi and red ring are sufficiently distinct for product matching purposes, they are not so distinct as to constitute a separate class or kind of merchandise (*see* Scope Memorandum II). We also made an exception for the shrimp identified as ''mixed'' (*e.g.*, ''salad'' shrimp), where appropriate, because there is insufficient information on the record to classify these products according to the questionnaire color classifications.

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products of equivalent container weight (*e.g.*, a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

Broken Shrimp

Two of the respondents in this case, HLL and Nekkanti, reported sales of broken shrimp in their third country markets, while the third respondent, Devi, reported such sales in its U.S. market. Because: (1) The matching criteria for this investigation do not currently account for broken shrimp; (2) no interested parties have provided comments on the appropriate methodology to match these sales; and (3) the quantity of such sales does not constitute a significant percentage of the respondents' databases, we have excluded these sales from our analysis for purposes of the preliminary determination. Nonetheless, we are seeking comments from interested parties regarding our treatment of these sales for consideration in the final determination.

Glazing

One of the respondents in this investigation, HLL, reported sales in the comparison market on a glazed-weight basis (*i.e.*, including the weight of frozen water). However, HLL reported sales to the United States on a net-weight basis (*i.e.*, without glazing). Therefore, in order to make comparisons for HLL on the same basis in both markets, we converted the data in the comparison market to a net-weight equivalent basis.

Export Price

Devi

In accordance with section 772(a) of the Act, we calculated EP for those sales where the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed price to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for billing adjustments. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, foreign brokerage and handling expenses, and international freight expenses. We also made deductions for export taxes, in accordance with section 772(c)(2)(B) of the Act. *See Notice of Preliminary Determination of Less Than Fair Value and Postponement of Final Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 18165, 18169 (April 15, 2002) (*Steel Wire Rod from Brazil*).

HLL

In accordance with section 772(a) of the Act, we calculated EP for those sales where the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed price to unaffiliated purchasers in the United States. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, foreign brokerage and handling expenses, international freight expenses, marine insurance, and port dues, and other miscellaneous shipment charges, including loading charges. Regarding these loading charges, HLL classified these expenses as direct selling expenses; however, we treated them as movement because they relate to the shipment of the merchandise. We also made deductions for export taxes, in accordance with section 772(c)(2)(B) of the Act. *See Steel Wire Rod from Brazil*, 67 FR at 18169.

Nekkanti

In accordance with section 772(a) of the Act, we calculated EP for those sales where the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed price to unaffiliated purchasers in the United States. We also made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, foreign brokerage and handling expenses, loading charges, container terminal handling charges, other miscellaneous movement expenses, and international freight expenses. We also made deductions for export taxes, in accordance with section 772(c)(2)(B) of the Act. *See Steel Wire Rod from Brazil*, 67 FR at 18169.

Nekkanti reported in its U.S. sales listing additional revenue received from one customer. However, we did not make adjustments for this revenue because Nekkanti failed to provide sufficient explanation of the circumstances under which it received it, and it provided inadequate supporting documentation in its supplemental questionnaire responses. We have issued an additional supplemental questionnaire related to this revenue, and we will examine this information at verification.

Duty Drawback

Devi, HLL, and Nekkanti claimed a price adjustment based on their participation in the Indian government's Duty Entitlement Passbook (DEPB) Program. The Department's practice is to consider the Indian DEPB program under section 772(c)(1)(B) of the Act (*i.e.*, the duty drawback provision). *See Notice of Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Bar From India*, 68 FR 11058, 11062 (March 7, 2003), unchanged in the final results.[8] The respondents disagree that this adjustment is like duty drawback, given that Indian exporters simply receive DEPB revenue after making an export sale. Further, they stated that the DEPB program differs from a duty drawback program in that, in order to be eligible to receive DEPB payments, Indian exporters need not: (1) Import product; or (2) pay import duties. However, because there is no provision in the Act for general export subsidies, we have continued to analyze this claim under the duty drawback provision.

The Department will grant a respondent's claim for a duty drawback adjustment where the respondent has demonstrated that there is (1) a sufficient link between the import duty and the rebate, and (2) a sufficient amount of raw materials imported and used in the production of the final exported product. *See Rajinder Pipe Ltd.* v. *United States (Rajinder Pipes),* 70 F. Supp. 2d 1350, 1358 (CIT 1999). In *Rajinder Pipes,* the Court of International Trade upheld the Department's decision to deny a respondent's claim for duty drawback adjustments because there was not substantial evidence on the record to establish that part one of the Department's test had been met. See also *Viraj Group, Ltd.* v. *United States,* Slip Op. 01–104 (CIT August 15, 2001).

In this investigation, Devi, HLL, and Nekkanti have failed to demonstrate that there is a link between the import duty paid and the rebate received, and that imported raw materials are used in the production of the final exported product. Therefore, because they have failed to meet the Department's requirements, we are denying the respondents' requests for an adjustment for DEPB revenue.

[8] *See Stainless Steel Bar From India; Final Results of Antidumping Duty Administrative Review*, 68 FR 47543 (August 11, 2003).

Normal Value

A. Home Market Viability

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared each respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

In this investigation, we determined that each respondent's aggregate volume of home market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, we used sales to the respondent's largest third country market as the basis for comparison-market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404. As discussed above, we used Canada for Devi, Spain for HLL, and Japan for Nekkanti.

B. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (LOT) as the EP. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (SG&A) and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer.

To determine whether NV sales are at a different LOT than EP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the level of trade of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act.

In this investigation, we obtained information from each respondent regarding the marketing stages involved in making the reported third country and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. We analyzed this data and found that each respondent made direct sales to distributors and/or trading companies in both the U.S. and comparison markets. In addition, Devi made direct sales to retailers in both markets. According to the information in their questionnaire responses, these respondents perform essentially the same selling functions in the United States and the relevant third country market (*i.e.*, inventory maintenance, packing, and freight and delivery arrangements (Devi); sales and marketing support, payment of commissions, packing, and freight and delivery arrangements (HLL); and sales and marketing support, payment of commissions, packing, and freight and delivery arrangements (Nekkanti)). Therefore, we find that, for each respondent, the sales channels in each market are at the same LOT. Accordingly, all comparisons are at the same LOT for Devi, HLL, and Nekkanti and an adjustment pursuant to section 773(a)(7)(A) of the Act is not warranted.

C. Cost of Production Analysis

Based on our analysis of the petitioners' allegations, we found that there were reasonable grounds to believe or suspect that Devi's, HLL's, and Nekkanti's sales of frozen and canned warmwater shrimp in their third country markets were made at prices below their COP. Accordingly, pursuant to section 773(b) of the Act, we initiated sales-below-cost investigations to determine whether the respondents' sales were made at prices below their respective COPs. *See* the Devi Cost Allegation Memo, the HLL Cost Allegation Memo, and the *Initiation Notice,* 69 FR at 3879–3880, for further discussion.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the cost of materials and fabrication for the foreign like product, plus an amount for general and administrative expenses (G&A), interest expenses, and third country packing costs. *See* ''Test of Third Country Sales Prices'' section below for treatment of third country selling expenses. We relied on the COP data submitted by the respondents except in the following instances:

A. Devi

1. We adjusted the reported G&A expense ratio by including in the calculation ''Loss on sale of assets'' which was recorded as an ''Administrative expense'' in the company's audited financial statements; and

2. We adjusted the reported financial expense ratio by including in the calculation the ''export packing credit'' and ''interest on packing credit in foreign currency,'' which were recorded as interest expense in the company's audited financial statements.

See Memorandum from Ernest Z. Gziryan to Neal M. Halper, Director Office of Accounting entitled: ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Devi Sea Foods Limited,'' dated July 28, 2004, for further discussion.

B. HLL

1. We recalculated HLL's financial expense ratio based on the December 31, 2003, audited consolidated financial statements of HLL's parent company Unilever PLC. We excluded Unilever PLC's profit from the sale of bonds and derivatives, as well as the claimed offset for credit expense and inventory carrying costs, from the financial expense calculation.

See Memorandum from Laurens Van Houten to Neal Halper, Director Office of Accounting, entitled: ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Hindustan Lever Ltd.,'' dated July 28, 2004, for further discussion.

C. Nekkanti

1. We adjusted the G&A expense ratio to reflect the use of cost goods sold as a denominator rather than cost of production; and

2. We adjusted the financial expense ratio to use the cost of goods sold, rather than cost of production, as the denominator. We excluded from the financial expense calculation the claimed offset for credit expenses and inventory carrying cost.

See Memorandum from Christopher J. Zimpo to Neal Halper, Director Office of Accounting, entitled: ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—Nekkanti Sea Foods Ltd.,'' dated July 28, 2004, for further discussion.

2. Test of Third Country Sales Prices

On a product-specific basis, we compared the adjusted weighted-average COP to the third country sales of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. The prices were exclusive of any applicable billing adjustments, movement charges, and direct and indirect selling expenses. In determining whether to disregard third country market sales made at prices less than their COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made (1) within an extended period of time in substantial quantities, and (2) at prices which permitted the recovery of all costs within a reasonable period of time.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of the respondent's sales of a given product during the POI are at prices less than the COP, we do not disregard any below-cost sales of that product, because we determine that in such instances the below-cost sales were not made in substantial quantities. Where 20 percent or more of the respondent's sales of a given product during the POI are at prices less than the COP, we determine that the below-cost sales represent substantial quantities within an extended period of time, in accordance with section 773(b)(1)(A) of the Act. In such cases, we also determine whether such sales were made at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(1)(B) of the Act.

We found that, for certain specific products, more than 20 percent of Devi's, HLL's, and Nekkanti's third country sales during the POI were at prices less than the COP and, in addition, the below-cost sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales, if any, as the basis for determining NV, in accordance with section 773(b)(1) of the Act. Where there were no sales of any comparable product at prices above the COP, we used CV as the basis for determining NV.

D. Calculation of Normal Value Based on Comparison Market Prices

1. Devi

For Devi, we calculated NV based on delivered prices to unaffiliated customers. We made deductions for export taxes, in accordance with section 772(c)(2)(B) of the Act. *See Steel Wire Rod from Brazil,* 67 FR at 18169. We also made deductions for movement expenses, including foreign inland freight expenses, foreign brokerage and handling expenses, and international freight expenses. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for credit expenses, direct selling expenses (including survey charges, Export Inspection Agency fees, and microbiological examination fees), bank charges, and commissions. In its calculation of inventory carrying costs, Devi included an amount for export credit guarantee fees. Because these fees had not been accounted for in the U.S. and Canadian sales listings, we made an additional adjustment for differences in circumstances of sale for these expenses. *See* Memorandum from Elizabeth Eastwood to the file entitled: ''Calculations performed for Devi Sea Foods Limited (Devi) in the Investigation of Certain Frozen and Canned Warmwater Shrimp from India,'' dated July 28, 2004, for further discussion.

Furthermore, in accordance with 19 CFR 351.410(e), we offset U.S. commissions by the lesser of the commission amount or the amount of third country indirect selling expenses because Devi incurred commissions only in the U.S. market. We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

2. HLL

For HLL, we calculated NV based on delivered prices to unaffiliated customers. We made deductions for export taxes, in accordance with section 772(c)(2)(B) of the Act. *See Steel Wire Rod from Brazil,* 67 FR at 18169. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, foreign brokerage and handling expenses, international freight expenses, marine insurance, port dues, and other miscellaneous shipment charges, including loading charges. Regarding these miscellaneous charges, HLL classified these expenses as direct selling expenses; however, we treated them as movement expenses because they relate to the shipment of the merchandise.

In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for credit expenses and commissions.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also

deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

3. Nekkanti

For Nekkanti, we calculated NV based on delivered prices to unaffiliated customers. We made deductions for export taxes, in accordance with section 772(c)(2)(B) of the Act. *See Steel Wire Rod from Brazil,* 67 FR at 18169. We made further deductions for movement expenses, including foreign inland freight expenses, foreign brokerage and handling expenses, loading charges, container terminal handling charges, other miscellaneous movement expenses, and international freight expenses. In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for credit expenses, bank charges, Export Inspection Agency fees, and commissions.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

Currency Conversion

Devi, HLL, and Nekkanti reported that they purchased forward exchange contracts which were used to convert certain sales transactions into home market currency. Under 19 CFR 351.415(b), if a currency transaction on forward markets is directly linked to an export sale under consideration, the Department is directed to use the exchange rate specified with respect to such foreign currency in the forward sale agreement to convert the foreign currency. In this case, however, the respondents failed to adequately link the contracts to specific sales, and they also failed to identify the relevant sales in the U.S. and third country sales listings. Therefore, we made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank. Nonetheless, we have requested that the respondents remedy the deficiencies in their sales reporting. We will examine this issue at verification and consider any additional data submitted by these parties for the final determination.

Critical Circumstances

On May 19, 2004, the petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigation of certain frozen and canned warmwater shrimp from India. In accordance with 19 CFR 351.206(c)(2)(i), because the petitioners submitted a critical circumstances allegation more than 20 days before the scheduled date of the preliminary determination, the Department must issue its preliminary critical circumstances determination not later than the date of the preliminary determination.

Section 733(e)(1) of the Act provides that the Department will preliminarily determine that critical circumstances exist if there is a reasonable basis to believe or suspect that: (A)(i) There is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and there was likely to be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

Section 351.206(h)(1) of the Department's regulations provides that, in determining whether imports of the subject merchandise have been ''massive,'' the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, section 351.206(h)(2) of the Department's regulations provides that ''unless the imports during a ''relatively short period'' have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.'' Section 351.206(i) of the Department's regulations defines ''relatively short period'' as normally being the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later. The regulations also provide, however, that if the Department finds that importers, exporters, or producers had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.

In determining whether the above statutory criteria have been satisfied, we examined: (i) Exporter-specific shipment data requested by the Department; (ii) information presented by the respondents in their June 28, 2004, submission, and (iii) the ITC preliminary injury determination.

To determine whether there is a history of injurious dumping of the merchandise under investigation, in accordance with section 733(e)(1)(A)(i) of the Act, the Department normally considers evidence of an existing antidumping duty order on the subject merchandise in the United States or elsewhere to be sufficient. *See Preliminary Determination of Critical Circumstances: Steel Concrete Reinforcing Bars From Ukraine and Moldova*, 65 FR 70696 (November 27, 2000). With regard to imports of certain frozen and canned warmwater shrimp from India, the petitioners make no statement concerning a history of dumping. We are not aware of any antidumping order in the United States or in any country on certain frozen and canned warmwater shrimp from India. For this reason, the Department does not find a history of injurious dumping of the subject merchandise from India pursuant to section 733(e)(1)(A)(i) of the Act.

To determine whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales in accordance with section 733(e)(1)(A)(ii) of the Act, the Department normally considers margins of 25 percent or more for export price sales or 15 percent or more for constructed export price transactions sufficient to impute knowledge of dumping. *See Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 62 FR 31972, 31978 (October 19, 2001). Each respondent reported only EP sales. The preliminary dumping margin calculated for HLL is greater than 25 percent and less than 25 percent for the remaining respondents. Based on the ITC's preliminary determination of injury, and the preliminary dumping margin for HLL, we find there is a reasonable basis to impute to importers knowledge of dumping and likely injury only for HLL. *See Critical Circumstances Memo* at Attachment II.

In determining whether there are ''massive imports'' over a ''relatively short period,'' pursuant to section

733(e)(1)(B) of the Act, the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the petition (*i.e.*, the ''base period'') to a comparable period of at least three months following the filing of the petition (*i.e.*, the ''comparison period''). However, as stated in section 351.206(i) of the Department's regulations, if the Secretary finds importers, exporters, or producers had reason to believe at some time prior to the beginning of the proceeding that a proceeding was likely, then the Secretary may consider a time period of not less than three months from that earlier time. Imports normally will be considered massive when imports during the comparison period have increased by 15 percent or more compared to imports during the base period.

For the reasons set forth in the *Critical Circumstances Memo*, we find sufficient bases exist for finding importers, or exporters, or producers knew or should have known an antidumping case was pending on certain frozen and canned shrimp imports from India by August 2003, at the latest. In addition, in accordance with section 341.206(i) of the Department's regulations, we determined December 2002 through August 2003 should serve as the ''base period,'' while September 2003 through May 2004 should serve as the ''comparison period'' in determining whether or not imports have been massive in the comparison period, as these periods represent the most recently available data for analysis.

For HLL, we preliminarily determine, as noted above, that importers knew or should have known that this respondent was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales in accordance with section 733(e)(1)(A)(ii) of the Act. For HLL, we also found massive imports over a relatively short period. *See Critical Circumstances Memo* at Attachment I.

In examining seasonal trends, under 19 CFR 351.206(h)(1)(ii), we compared the time series data for the two years prior to August 2003 (*i.e.*, 2001 and 2002) and found that there have not been significant surges in imports from India between comparable base and comparison periods in prior years. Therefore, based on the time series data, we conclude that imports of certain frozen and canned warmwater shrimp from India are not subject to seasonal trends. Consequently, we find imports of certain frozen and canned warmwater shrimp from India for HLL were massive pursuant to section 733(e)(1)(B) of the Act. Because HLL satisfies the imputed knowledge of injurious dumping criterion under section 733(e)(1)(A)(ii) of the Act and the massive imports in accordance with section 733(e)(1)(B) of the Act, we preliminarily find that critical circumstances exist for HLL. Because Devi and Nekkanti do not satisfy the imputed knowledge of injurious dumping criterion under section 733(e)(1)(A)(ii) of the Act, we preliminarily find that critical circumstances do not exist for Devi and Nekkanti.

Regarding the companies subject to the ''all others'' rate, it is the Department's normal practice to conduct its critical circumstances analysis for these companies based on the experience of investigated companies. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars From Turkey*, 62 FR 9737, 9741 (March 4, 1997). However, the Department does not automatically extend an affirmative critical circumstances determination to companies covered by the ''all others'' rate. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan*, 64 FR 30574 (June 8, 1999) (*Stainless Steel from Japan*). Instead, the Department considers the traditional critical circumstances criteria with respect to the companies covered by the ''all others'' rate. Consistent with *Stainless Steel from Japan*, the Department has, in this case, applied the traditional critical circumstances criteria to the ''all others'' category for the antidumping investigation of frozen and canned warmwater shrimp from India.

The dumping margin for the ''all others'' category in the instant case, 14.20 percent, does not exceed the 25 percent threshold necessary to impute knowledge of dumping. Therefore we do not find that importers knew or should have known that there would be material injury from the dumped merchandise.

In summary, we find that there is a reasonable basis to believe or suspect importers had knowledge of dumping and the likelihood of material injury with respect to certain frozen and canned warmwater shrimp from India for HLL. We also find that there have been massive imports of certain frozen and canned warmwater shrimp over a relatively short period from respondent HLL. However, for Devi, Nekkanti, and the companies subject to the ''all others'' rate, we find that there is no reasonable basis to believe or suspect importers had knowledge of dumping and the likelihood of material injury with respect to certain frozen and canned warmwater shrimp from India. Given the analysis summarized above, and described in more detail in the *Critical Circumstances Memo*, we preliminarily determine that critical circumstances exist with regard to imports of certain frozen and canned warmwater shrimp from India only for respondent HLL.

We will make a final determination concerning critical circumstances for all producers/exporters of subject merchandise from India when we make our final dumping determinations in this investigation, which will be 135 days after publication of the preliminary dumping determination.

Verification

As provided in section 782(i) of the Act, we will verify all information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, except for imports by HLL. For HLL, in accordance with section 733(e)(2) of the Act, we are directing CBP to suspend liquidation of imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after 90 days prior to the date of publication of this notice in the **Federal Register**.

We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the NV exceeds EP, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/Manufacturer	Weighted-average Margin percentage	Critical circumstances
Devi Sea Foods Ltd.	3.56	No

Exporter/Manufacturer	Weighted-average Margin percentage	Critical circumstances
Hindustan Lever Limited	27.49	Yes
Nekkanti Seafoods Limited	9.16	No
All others	14.20	No

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Disclosure

We will disclose the calculations used in our analysis to parties in this proceeding in accordance with 19 CFR 351.224(b).

Public Comment

Case briefs for this investigation must be submitted to the Department no later than seven days after the date of the final verification report issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the rebuttal brief deadline date at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs.

We will make our final determination no later than 135 days after the publication of this notice in the **Federal Register**.

This determination is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: July 28, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–17817 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–423–809]

Stainless Steel Plate in Coils from Belgium; Extension of Final Results of Expedited Sunset Review of Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Extension of Time Limit for Final Results of Expedited Sunset Review: Stainless Steel Plate in Coils from Belgium.

SUMMARY: The Department of Commerce (''the Department'') is extending the time limit for its final results in the expedited sunset review of the countervailing duty order on stainless steel plate in coils (''SSPC'') from Belgium. Based on adequate responses from the domestic interested parties and inadequate responses from respondent interested parties, the Department is conducting an expedited sunset review to determine whether revocation of the CVD order would lead to the continuation or recurrence of a countervailable subsidy. As a result of this extension, the Department intends to issue final results of this sunset review on or about August 30, 2004.

EFFECTIVE DATE: August 4, 2004.

FOR FURTHER INFORMATION CONTACT: Hilary E. Sadler, Esq., Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4340.

Extension of Final Results: In accordance with section 751(c)(5)(C)(ii) of the Tariff Act of 1930, as amended (''the Act''), the Department may treat sunset reviews as extraordinarily complicated if the issues are complex. As discussed below, the Department has determined that these issues are extraordinarily complicated. On April 1, 2004, the Department initiated a sunset review of the countervailing duty order on SSPC from Belgium. *See Initiation of Five-Year (Sunset) Reviews,* 69 FR 17129 (April 1, 2004). The Department, in this proceeding, determined that it would conduct an expedited sunset review of this order based on responses from the domestic and respondent interested parties to the notice of initiation. The Department's final results of this review were scheduled for July 30, 2004. However, several issues have arisen regarding the revised net subsidy rate of the order with respect to U & A Belgium and its effect on this sunset review. *See Final Results of Redetermination pursuant to Court Remand: ALZ* v. *United States,* Slip Op. 03–81, Court No. 01–00834 (CIT July 1, 2003) and *ALZ N.V.* v. *United States,* Slip Op. 04–38, Court No. 01–00834 (CIT April 22, 2004) and *SSPC from Belgium: Notice of Decision of the Court of International Trade,* 69 FR 26075 (May 11, 2004).

Because of the complex issues in this proceeding, the Department will extend the deadline for issuance of the final results. Thus, the Department intends to issue the final results on or about August 30, 2004 in accordance with section 751(c)(5)(B).

Dated: July 29, 2004.

Jeffrey A. May,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–17819 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072904E]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene public meetings of the Shark and Oceanic Migratory Species Scientific and Statistical Committees (SSC) and Highly Migratory Species (HMS) and Billfish Advisory Panels (APs) to review potential issues for NOAA Fisheries Highly Migratory Species Division action on August 23–24, 2004.

DATES: The Council's Special Shark and Special Oceanic Migratory Species Scientific and Statistical Committees will convene jointly at 9 a.m. on Monday, August 23, 2004. The Highly Migratory Species and Billfish Advisory Panels will convene jointly at 9 a.m. on Tuesday, August 24, 2004.

ADDRESSES: The meetings will be held at the Hilton Tampa Airport Westshore, 2225 North Lois Avenue, Tampa, FL; telephone: 813–877–6688.

Council address: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619.

FOR FURTHER INFORMATION CONTACT: Mr. Steven Atran, Population Dynamics Statistician, or Mr. Stu Kennedy, Biologist, Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619; telephone: 813–228–2815.

SUPPLEMENTARY INFORMATION: At each of these meetings, a representative from the NOAA Fisheries Highly Migratory Species Division will present a summary of issues and options for Amendment 2 to the HMS and Billfish Fishery Management Plans, which is currently in its initial scoping phase. The issues and options include a wide range of potential management measures that could affect fishermen, dealers, or equipment suppliers for the Atlantic tuna, swordfish, shark, or billfish fisheries. Some of the issues and potential options for which NOAA Fisheries is requesting comment include, but are not limited to: modifying the General category allocation of Bluefin tuna; filleting Atlantic tuna at sea; modifying the swordfish bag limit for anglers; changing the large coastal shark trip limit for directed permit holders; streamlining the limited access permit program; simplifying the quota and permitting administrative processes for exempted fishing permits; modifying non-tournament reporting of billfish harvest; establishing outreach workshops; implementing the bycatch reduction plan; green stick and/or spearfishing as allowable gears for HMS fisheries; and updating essential fish habitat identifications and data for all HMS.

The joint Shark/Oceanic Migratory Species SSC and the joint HMS/Billfish AP will provide recommendations to the Council on issues and alternatives that should be included in the amendment. The Council will review the SSC and AP recommendations at its September 13–17, 2004 meeting in Panama City Beach, FL, at which time it will make its recommendations to the NOAA Fisheries HMS Division.

The Gulf of Mexico Fishery Management Council is one of eight regional fishery management councils that were established by the Magnuson-Stevens Fishery Conservation and Management Act of 1976. The Gulf of Mexico Fishery Management Council prepares fishery management plans that are designed to manage fishery resources in the U.S. Gulf of Mexico. Although the Council does not manage highly migratory species, it does provide recommendations to the NMFS HMS Division on management measures that affect fisheries in the Gulf of Mexico.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Dawn Aring at the Council (see **ADDRESSES**) by August 13, 2004.

Dated: July 30, 2004.

Alan D. Risenhoover,

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

[FR Doc. E4–1730 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072904D]

New England Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Oversight Committee and Herring Advisory Panel in August and September, 2004 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from these groups will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meetings will be held on August 20, 2004 and September 7, 2004. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meetings will be held in Portland, ME and Peabody, MA. See **SUPPLEMENTARY INFORMATION** for specific locations.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Meeting Dates and Agendas

Friday, August 20, 2004 at 10 a.m. Herring Advisory Panel Meeting.

Location: Holiday Inn by the Bay, 88 Spring Street, Portland, ME 04101; telephone: (207) 775–2311.

The advisory panel will discuss development and packaging of alternatives for consideration in Amendment 1 to the Herring Fishery Management Plan. They will review limited access alternatives proposed in Amendment 1 and develop preliminary Advisory Panel recommendations regarding the packaging of alternatives for Amendment 1, including possible elimination of some alternatives/options. Also on the agenda will be the review of the Amendment 1 timeline and process for completing the alternatives and analyses.

Tuesday, September 7, 2004 at 9:30 a.m. Scallop Oversight Committee Meeting.

Location: Holiday Inn, One Newbury Street, Peabody, MA 01960; telephone: (978) 535–4600.

The committee will discuss whether to initiate a framework action to adjust open area days at sea allocations in 2005, to change measures to monitor or control fishing activity by vessels holding general category scallop permits, and to require potential new sea turtle protection measures and actions to address other management concerns as necessary. The Plan Development Team will also provide management advice about how the Council should respond to the recent stock assessment, which found that overfishing was occurring on the sea scallop resource. The committee may also discuss long-term planning issues for the Stock Assessment and Fishery Evaluation (SAFE) Report, the next regular framework adjustment for the 2006 fishing year, and possibly future plan amendments.

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting dates.

Dated: July 30, 2004.

Alan D. Risenhoover,

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

[FR Doc. E4–1729 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072904F]

South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a joint public meeting.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a joint meeting of its Information and Education Committee and Information and Education Advisory Panel in Charleston, SC.

DATES: The meeting will take place August 24–26, 2004. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Hampton Inn and Suites, 678 Citadel Haven Drive, Charleston, SC 29414; telephone: 843/573–1200 or toll free 800/426–7866.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407; telephone: 843/571–4366 or toll free 866/SAFMC–10; fax: 843/769–4520.

SUPPLEMENTARY INFORMATION: The Information and Education Committee will meet jointly with the Advisory Panel from 1:30 p.m. until 5 p.m. on August 24,2004, from 8:30 a.m. until 5 p.m. on August 25, 2004, and from 8:30 a.m. until 12 noon on August 26, 2004.

The Information and Education Committee and Advisory Panel will meet jointly to review and discuss issues relative to outreach and public affairs. During the joint meeting, the Committee and Advisory Panel will review and discuss options and develop recommendations to the Council regarding the following: the Council's current Web site design, content, and hosting; an outreach strategy for the Oculina Bank Experimental Closed Area off the central East Coast of Florida; and outreach efforts relevant to the Council's Action Plan for Ecosystem-Based Management. In addition, the Committee and Advisory Panel will review the current regulations brochure and develop recommendations for options regarding design and distribution of the brochure.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) by August 23, 2004.

Dated: July 30, 2004.

Alan D. Risenhoover,

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

[FR Doc. E4–1728 Filed 8–3–04; 8:45 am]

BILLING 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072204C]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Receipt of applications for issuance and renewal and modification of scientific research/enhancement permits and request for comment.

SUMMARY: Notice is hereby given that NOAA Fisheries has received applications to renew and modify permits from Bureau of Reclamation, Weaverville, CA (Permit 1072) and Bureau of Land Management, Arcata, CA (Permit 1088), and to issue a new Permit to Humboldt State University Foundation, Institute for River Ecosystems (1283). These permits would affect any or all of three Evolutionarily Significant Units (ESUs) of salmonids identified in the Supplementary Information section. This document serves to notify the public of the availability of the permit application for review and comment before a final approval or disapproval is made by NOAA Fisheries.

DATES: Written comments on the permit application must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Daylight Savings Time on September 3, 2004.

ADDRESSES: Written comments on any of these requests should be sent to the appropriate office as indicated below. Comments may also be sent via facsimile to the number indicated for the request. Comments will be accepted if submitted via e-mail at *FRNpermits.ar@noaa.gov*. Email comments must have the permit number in the subject line. The applications and

related documents are available for review in the indicated office, by appointment: For Permits 1072, 1088, and 1283: Karen Hans, Protected Species Division, NOAA Fisheries, 1655 Heindon Road, Arcata, CA 95521 (ph: 707–825–5180, fax: 707–825–4840).

FOR FURTHER INFORMATION CONTACT: Karen Hans at phone number (707 825 5180), or e-mail: *karen.hans@noaa.gov*

SUPPLEMENTARY INFORMATION:

Authority

Under section 3(18) of the Endangered Species Act of 1973 as amended (ESA) (16 U.S.C. 1536 *et seq.*), take is defined as ''to harass, harm, pursue , hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct''. Under section 10(a)(1)(A) of the ESA, ''The Secretary may permit, under such terms and conditions as he shall prescribe- (A) any act otherwise prohibited by section 9 for scientific purposes...''. Issuance of permits and permit modifications, as required by the ESA, is based on a finding that such permits/modifications (1) are applied for in good faith, (2) would not operate to the disadvantage of the listed species which are the subject of the permits, and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NOAA Fisheries regulations governing listed fish and wildlife permits (50 CFR parts 222–226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NOAA Fisheries.

Species Covered in This Notice

This notice is relevant to the following three threatened salmonid ESUs:

Southern Oregon/Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*),

California Coastal (CC) Chinook salmon (*O. tshawytscha*).

Northern California (NC) steelhead (*O. mykiss*),

Renewal and Modification Requests Received

Permit 1072

The Bureau of Reclamation (BOR) has requested the renewal and modification of Permit 1072 for take of juvenile SONCC coho salmon and tissue collection from adult carcasses from these species, associated with studies assessing presence and population abundances, and genetic diversity of salmon and steelhead in the Trinity River. Permit 1072 was originally issued on May 4, 1998. The BOR has proposed to use in-stream trapping as the method of capture. The BOR has requested non-lethal take of 4650 juvenile SONCC coho salmon with an unintentional mortality of 3.0 percent of fish captured. Permit 1072 will expire on September 1, 2014.

Permit 1088

The Bureau of Land Management (BLM) has requested the renewal and modification of Permit 1088 for take of SONCC coho salmon, CC Chinook salmon, and NC steelhead associated with studies assessing presence and population abundances of salmon and steelhead in selected locations on BLM lands under the jurisdiction of the Arcata Field Office. The BLM proposes to capture juvenile and adult salmon and steelhead by in-stream traps and electrofishing, and requests take for juvenile salmon and steelhead captured during macroinvertebrate sampling. Permit 1088 was originally issued on April 24, 1998. The BLM has requested non-lethal take of up to 12,200 juvenile SONCC coho salmon with an unintentional mortality of 1.0 percent of fish handled; 20,050 juvenile CC Chinook salmon with an unintentional mortality of 1.0 percent of fish handled; and 60,400 juvenile NC steelhead with an unintentional mortality of 1.0 percent of fish handled. Permit 1088 will expire April 1, 2014.

Issuance Request Received

Permit 1283

Humboldt State University Foundation Institute for River Ecosystems (IRE) has requested the issuance of Permit 1283 for take of SONCC coho salmon, CC Chinook salmon, and NC steelhead associated with studies assessing presence and population abundances of coho salmon and steelhead in selected locations in the Mad-Redwood hydrologic unit (MR-HUC). The MR-HUC includes all anadromous streams that drain into Humboldt Bay and all streams that drain into the Pacific Ocean north to, but not including, the Klamath River. The IRE has requested non-lethal take of up to 9,000 juvenile SONCC coho salmon with an unintentional mortality of 2.0 percent of fish handled; 30 juvenile CC Chinook salmon with an unintentional mortality of 1 fish; and 9,600 juvenile NC steelhead with an unintentional mortality of 2.0 percent of fish handled. Permit 1283 will expire January 1, 2012.

Dated: July 29, 2004.

Susan Pultz,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–17806 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: United States Patent and Trademark Office (USPTO).

Title: United States Patent Applicant Survey.

Form Number(s): None. The surveys contained in this information collection do not have USPTO form numbers assigned to them. When the surveys are approved, they will carry the OMB Control Number and the date on which OMB's approval of the information collection expires.

Agency Approval Number: 0651–00XX.

Type of Request: New collection.

Burden: 187 hours.

Number of Respondents: 445 responses.

Avg. Hours Per Response: 7 or 30 minutes, depending on the survey.

The USPTO estimates that it takes an average of 7 minutes (0.12 hours) to complete the surveys for the independent inventors and that it takes an average of 30 minutes (0.50 hours) to complete the surveys for large domestic corporations, small to medium-size businesses, and universities and non-profit research organizations. This includes the time to gather the necessary information, respond to the surveys, and submit them to the USPTO. The USPTO believes that it takes the same amount of time to respond to the surveys, whether the

completed surveys are mailed to the USPTO or completed online.

Needs and Uses: The USPTO developed the United States Patent Applicant Survey to obtain information on customer filing intentions in order to predict future growth rates in patent applications over the next four years from patent-generating entities. The USPTO also developed this survey in response to the Senate Appropriations Report 106–404 (September 8, 2000), which directed the USPTO to ''develop a workload forecast with advice from a representative sample of industry and the inventor community.'' There are three versions of this survey: one for large domestic corporations and small to medium-size businesses, one for universities and non-profit research organizations, and another for independent inventors. The top 209 patent-generating corporations and other large businesses, small to medium-size businesses, universities and non-profit research organizations, and independent inventors responding to these surveys will provide the USPTO with the number of filings (domestic, international, or combined) that they plan to submit, in addition to providing general feedback concerning industry trends and the survey itself. The USPTO will use this feedback to estimate future revenue flow, allocate resources, and determine quality control measures to meet filing demands.

The initial survey was reviewed and approved by OMB under OMB Control Number 0651–0038 Customer Input, Patent and Trademark Customer Surveys, the USPTO's generic customer survey clearance. However, due to the fact that the USPTO will use this survey to predict workload and revenue flow and the fact that the survey methodology has matured, the USPTO is submitting this survey separately to OMB for review and approval and not under the generic clearance.

Affected Public: Individuals or households; business or other for-profit; and not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by any of the following methods:

E-mail: *Susan.Brown@uspto.gov.* Include ''0651–00XX United States Patent Applicant Survey copy request'' in the subject line of the message.

Fax: 703–308–7407, marked to the attention of Susan Brown.

Mail: Susan K. Brown, Records Officer, Office of the Chief Information Officer, Office of Data Architecture and Services, Data Administration Division, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before September 3, 2004, to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503.

Dated: July 29, 2004.

Susan K. Brown,

Records Officer, USPTO, Office of Data Architecture and Services, Data Administration Division.

[FR Doc. 04–17749 Filed 8–3–04; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER PRODUCT SAFETY COMMISSION

Notification of Request for Extension of Approval of Information Collection Requirements—Recordkeeping Requirements Under the Safety Regulations for Full-Size Cribs

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In the May 18, 2004, **Federal Register** (69 FR 28123), the Consumer Product Safety Commission published a notice in accordance with provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) to announce the agency's intention to seek an extension of approval of information collection requirements in the safety regulations for full-size cribs. 16 CFR 1500.18(a)(13) and part 1508). No comments were received in response to that notice. The Commission now announces that it has submitted to the Office of Management and Budget a request for extension of approval of that collection of information.

These regulations were issued to reduce hazards of strangulation, suffocation, pinching, bruising, laceration, and other injuries associated with full-size cribs. The regulations prescribe performance, design, and labeling requirements for full-size cribs. They also require manufacturers and importers of those products to maintain sales records for a period of three years after the manufacture or importation of full-size cribs. If any full-size cribs subject to provisions of 16 CFR 1500.18(a)(13) and Part 1508 fail to comply in a manner severe enough to warrant a recall, the required records can be used by the manufacturer or importer and by the Commission to identify those persons and firms who should be notified of the recall.

Additional Information About the Request for Extension of Approval of Information Collection Requirements

Agency address: Consumer Product Safety Commission, Washington, DC 20207.

Title of information collection: Recordkeeping Requirements for Full-Size Baby Cribs, 16 CFR 1508.10.

Type of request: Extension of approval.

Frequency of collection: Varies, depending upon volume of products manufactured, imported, or sold.

General description of respondents: Manufacturers and importers of full-size cribs.

Estimated Number of respondents: 54.

Estimated average number of responses per respondent: 1 per year.

Estimated number of responses for all respondents: 54 per year.

Estimated number of hours per response: 5.

Estimated number of hours for all respondents: 270 per year.

Estimated cost of collection for all respondents: $6,610.

Comments: Comments on this request for extension of approval of information collection requirements should be submitted by September 3, 2004, to (1) Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for CPSC, Office of Management and Budget, Washington, DC 20503; telephone: (202) 395–7340, and (2) the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207. Comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127 or by e-mail at *cpsc-os@cpsc.gov.*

Copies of this request for an extension of an information collection requirement are available from Linda L. Glatz, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 504–7671; or by e-mail to *lglatz@cpsc.gov.*

Dated: July 30, 2004.

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 04–17803 Filed 8–3–04; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Notification of Request for Extension of Approval of Information Collection Requirements —Recordkeeping Requirements Under the Safety Regulations for Non-Full-Size Cribs

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In the May 18, 2004, **Federal Register** (69 FR 28124), the Consumer Product Safety Commission published a notice in accordance with provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) to announce the agency's intention to seek an extension of approval of information collection requirements in the safety regulations for non-full-size cribs. 16 CFR 1500.18(a)(14) and part 1509. No comments were received on that notice. The Commission now announces that it has submitted to the Office of Management and Budget a request for extension of approval of that collection of information.

These regulations were issued to reduce hazards of strangulation, suffocation, pinching, bruising, laceration, and other injuries associated with non-full-size cribs. The regulations prescribe performance, design, and labeling requirements for non-full-size cribs. They also require manufacturers and importers of those products to maintain sales records for a period of three years after the manufacture or importation of non-full-size cribs. If any non-full-size cribs subject to provisions of 16 CFR 1500.18(a)(14) and part 1509 fail to comply in a manner severe enough to warrant a recall, the required records can be used by the manufacturer or importer and by the Commission to identify those persons and firms who should be notified of the recall.

Additional Information About the Request for Extension of Approval of Information Collection Requirements

Agency address: Consumer Product Safety Commission, Washington, DC 20207.

Title of information collection: Recordkeeping Requirements Under the Safety Regulations for Non-Full-Size Baby Cribs, 16 CFR 1509.12.

Type of request: Extension of approval.

Frequency of collection: Varies, depending upon volume of products manufactured, imported, or sold.

General description of respondents: Manufacturers and importers of non-full-size cribs.

Estimated Number of respondents: 16.

Estimated average number of responses per respondent: 1 per year.

Estimated number of responses for all respondents: 16 per year.

Estimated number of hours per response: 5.

Estimated number of hours for all respondents: 80 per year.

Estimated cost of collection for all respondents: $1,958.

Comments: Comments on this request for extension of approval of information collection requirements should be submitted by September 3, 2004, to (1) Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for CPSC, Office of Management and Budget, Washington, DC 20503; telephone: (202) 395–7340, and (2) the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207. Comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127 or by e-mail at *cpsc-os@cpsc.gov.*

Copies of this request for an extension of an information collection requirement are available from Linda L. Glatz, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 504–7671; or by e-mail to *lglatz@cpsc.gov.*

Dated: July 30, 2004.

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 04–17804 Filed 8–3–04; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Chemical and Biological Defense Program Final Programmatic Environmental Impact Statement (CBDP FPEIS)

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Army has prepared an FPEIS covering the execution of an integrated CBDP designed to protect the members of the Armed Forces from the evolving chemical and biological (CB) threats they may encounter on the battlefield. The FPEIS includes an evaluation of how the various environmental compliance programs in the military services, the Program Executive Office for Chemical and Biological Defense, and the Defense Advanced Research Projects Agency would be able to mitigate environmental impacts.

DATES: The waiting period for the FPEIS will end 30 days after publication of the Notice of Availability in the **Federal Register** by the U.S. Environmental Protection Agency

ADDRESSES: Written comments or requests for copies of the FPEIS may be made to: Ms. JoLane Souris, Command Environmental Coordinator, U.S. Army Medical Research and Materiel Command, Office of Surety, Safety, and Environment, 504 Scott Street, Fort Detrick, MD 21702–5012 or visit the CBDP PEIS Web site at *http://chembioeis.detrick.army.mil.*

FOR FURTHER INFORMATION CONTACT: Ms. JoLane Souris at phone at (301) 619–2004, or by fax at (301) 619–6627.

SUPPLEMENTARY INFORMATION: Prior to 2003, the mission of the DoD CBDP was to provide CB defense capabilities to allow the military forces of the United States to survive and successfully complete their operational missions in battle space environments contaminated with CB warfare agents. Now this mission has expanded to cover military capability to operate in the face of threats in homeland security missions, as well as war fighter missions. If our military forces are not fully and adequately prepared to meet these threats, the consequences could be devastating. The CBDP to support this mission comprises research, development, and acquisition activities. Each of the Military Services, the Joint Program Executive Office for Chemical and Biological Defense, and the Defense Advanced Research Projects Agency conduct CBDP activities. Some of these CBDP activities necessarily involve the use of hazardous chemicals or infectious disease agents for research, development, and production purposes. The controls on and the potential environmental consequences of such use for both the proposed action and the alternative were primary focuses of the CBDP FPEIS.

The activities take place at numerous military installations and contractor facilities throughout the United States. Details concerning the CBDP are contained in the Chemical and Biological Defense Program, Annual Report to Congress, April 2003 at *http://www.acq.osd.mil/cp/reports.html.* The proposed action consists of the execution of an integrated CBDP designed to protect the members of the Armed Forces from the evolving CB threats they may encounter on the battlefield. The No Action Alternative, continuation of current CBDP operations as described in and covered by existing environmental analyses, also was evaluated. No other alternatives

were identified during the public scoping process.

Although numerous environmental documents dating back to the Biological Defense Research Program Final Programmatic Environmental Impact Statement (April 1989) have been prepared analyzing the potential environmental consequences of various elements of the CBDP, no one document analyzes the potential environmental impacts of the full range of CBDP activities. In keeping with the purposes of NEPA, DoD has now prepared such a document in the form of the CBDP FPEIS. This document creates an overarching framework that will continue to ensure fully informed Government decision making within the CBDP and will provide a single, up-to-date information resource for the public. The FPEIS addresses and incorporates comments received on the Draft PEIS during the public comment period.

Dated: July 28, 2004.

Raymond J. Fatz,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health) OASA (I&E).

[FR Doc. 04–17750 Filed 8–3–04; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Performance Review Board Membership

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), the Department of the Navy (DON) announces the appointment of members to the DON's numerous Senior Executive Service (SES) Performance Review Boards (PRBs). The purpose of the PRBs is to provide fair and impartial review of the annual SES performance appraisal prepared by the senior executive's immediate and second level supervisor; to make recommendations to appointing officials regarding acceptance or modification of the performance rating; and to make recommendations for monetary performance awards. Composition of the specific PRBs will be determined on an ad hoc basis from among individuals listed below:

ACKLEY, V.H. MR.
ADAMS, P.C. MS.
AKIN, M.G. MR.
ANTOINE, C.S. MR.
ARNY, L.W. MR.
AVILES, D.M. HON.
BALDERSON, W.M. MR.
BARBER, A.H. MR.
BARNUM, H.C. MR.
BAUMAN, D.M. MR.
BEALL, V.R. MS.
BELAND, R.W. DR.
BETRO, T.A. MR.
BEVINS, S.E. MR.
BLAIR, A.K. MS.
BLINCOE, R.J. MR.
BONIN, R.L. MR.
BONWICH, S.M. MR.
BRANT, D.L. MR.
BRAGG, L.N. MR.
BREEDLOVE, W.J. DR.
BROWN, P.F. MR.
BURNS, J. RADM
CALI, R.T. MR.
CAREY, R.J. MR.
CARPENTER, A. MS.
CATRAMBONE, G.P. MR.
CHURCH III, A.T. VADM
CIESLAK, R.C. MR.
CLARK, C.A. MS.
COCHRANE JR., E.R. MR.
COHEN, J.M. RADM
COHN, H. MR.
COOK, C.E. MR.
COX, A.D. MR.
CRABTREE, T.R. MR.
CREEDON, C.G. MR.
CUDDY, J.V. MR.
CURTIS, D.I. MR.
DAVIS, A.R. MS.
DECKER, J. MS.
DECKER, M.H. MR.
DEEGAN, C.S. MR.
DEWITTE, C.K. MS.
DONAHUE, P.E. MR.
DOWD, T.K. MR.
DUDLEY, W.S. DR.
DUNN, S.C. MR.
EARL, R.L. MR.
EASTER, S.B. MS.
EASTON, M.E. MR.
EDMOND, D.J. MS.
EHRLER, S.M. MR.
ELLIS, W.G. MR.
ENGELHARDT, B.B. RADM
ENNIS, M. BGEN
ESSIG, T.W. MR.
EVANS, G.L. MS.
EXLEY, R.L. MR.
FILIPPI, D.M. MS.
FLYNN, B.P. MS.
FRANKLIN, R.E. MR.
GIACCHI, C.A. MR.
GLAS, R.A. MR.
GREER, E.R. MR.
GRIFFIN JR., R.M. MR.
GOUGH, E.C. MR.
HAGEDORN, G.D. MR.
HAMILTON, C. RADM
HANDEL, T.H. MR.
HANNAH, B.W. DR.
HANSON, H.V. MR.
HAYNES, R.S. MR.
HEELY, T. RADM
HILDEBRANDT, A.H. MR.
HOBART, R.L. MR.
HOEWING, G.L. RADM
HOGUE, R.D. MR.
HONECKER, M.W. MR.
HOWARD, J.S. MR.
HUBBELL, P.C. MR.
HUGHES, J.T. MS.
JAGGARD, M.F. MR.
JAMES, J.H. MR.
JIMENEZ, F.R. MR.
JOHNSON, H.T. HON
JOHNSTON, B. RADM
JOHNSTON JR., C.H. RADM
JOHNSTON, K.J. DR.
JUNKER, B.R. DR.
KAMP, J. CAPT
KASKIN, J.D. MR.
KEEN, S.L. MS.
KEENEY, C.A. MS.
KELSEY, H.D. MR.
KLEIN, J.A. MR.
KLEINTOP, M.U. MS.
KLEMM, W.R. RADM
KOWBA, W.R. RADML
KRASIK, S.A. MS.
KRUM, R.A. MR.
KUNESH, N.J. MR.
LA RAIA, J.H. MR.
LAUX, T.E. MR.
LEACH, R.A. MR.
LEDVINA, T.N. MR.
LEGGIERI, S.R. MS.
LENGERICH, A.W. RADM
LEWIS, R.D. MS.
LIBERATORE, C. MS.
LOFTUS, J.V. MS.
LONG, L.A. MS.
LOWELL, P.M. MR.
MAGLICH, M.F. MR.
MAGNUS, R. LTGEN
MARSHALL, J.B. MR.
MASCIARELLI, J.R. MR.
MATTHEIS, W.G. MR.
McDONNELL, T.E. MR.
McERLEAN, D.P. DR.
McGRATH, M.F. MR.
McLAUGHLIN, P.M. MR.
McNAIR, J.W. MR.
MEADOWS, L.J. MS.
McNAMARA, R.R. MR.
MEEKS JR., A.W. DR.
MELCHER, G.K. MR.
MELOY, K.E. MS.
MILLER, K.E. MR.
MOHLER, M.K. MR.
MOLZAHN, W.R. MR.
MONTGOMERY, J.A. DR.
MOORE, S.B. MR.
MORA, A.J. HON
MURPHY, P.M. MR.
MURPHY, R.E. MR.
MUTH, C.C. MS.
NAVAS JR., W.A. HON.
NEWSOME, L.D. RADM
NEWTON, L.A. MS.
ORNER, J.G. MR.
PANEK, R.L. MR.
PARKS, G.L. LTGEN
PERSONS, B.J. MR.
PHELPS, F.A. MR.

PIC, J.E. MR.
PIVIROTTO, R.R. MR.
PLUNKETT, B.J. MR.
POLZIN, J.E. MR.
RANDALL, S.R. MR.
RAPS, S.P. MS.
REEVES, C.R. MR.
RHODES, M.L. MR.
ROARK JR., J.E. MR.
ROBY, C. MS.
RODERICK, B.A. MR.
RODRIGUEZ, W.D. RADML(SEL)
ROGERS, L.F. MR.
ROSENTHAL, R.J. MR
RYZEWIC, W.H. MR.
SANDEL, E.A. MS.
SANDERS, D. MR.
SAUL, E.L. MR.
SCHAEFER, J.C. MR.
SCHREGARDUS, D.R. MR.
SCHUBERT, D. CAPT
SCHUSTER, J.G. MR.
SCOVEL, G.A. MR.
SHEPHARD, M.R. MS.
SHOUP, F.E. DR.
SIEL, C.R. MR.
SIMON, E.A. MR.
SLOCUM, W. MR.
SMITH, R.F. MR.
SMITH, R.M. MR.
SOMOROFF, A.R. DR.
STEFFEE, D.P. MR.
STELLOH-GARNER, C. MS.
STILLER, A.F. MS.
SULLIVAN, P.E. RADM
TAMBURRINO, P.M. MR.
TARRANT, N.J. MS.
TESCH, T.G. MR.
THOMSEN, J.E. MR.
THROCKMORTON JR., E.L. MR.
TOWNSEND, D.K. MS.
TULLAR, E.W. MR.
WALDHAUSER, T.D. BGEN
WARD, J.D. MR.
WENNERGREN, D.M. MR.
WEYMAN, A.S. MR.
WHITON, H.W. RADM
WHITTEMORE, A. MS.
WILLIAMS, G.P. MR.
WINOKUR, R.S. MR.
WRIGHT JR., J.W. DR.
YOUNG, C. RADM
YOUNG JR., J.J. HON.
ZEMAN, A.R. DR.

FOR FURTHER INFORMATION CONTACT: Ms. Carmen Arrowood, Office of Civilian Human Resources, telephone (202) 685–6668.

Dated: July 23, 2004.

J.H. Wagshul,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 04–17693 Filed 8–3–04; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[CFDA No. 84.358A]

Small, Rural School Achievement Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice extending application deadline.

SUMMARY: Under the Small, Rural School Achievement (SRSA) Program, we will award grants on a formula basis to eligible local educational agencies (LEAs) to address the unique needs of rural school districts. In this notice, we are extending the deadline for eligible LEAs to apply for fiscal year (FY) 2004 funding under the program.

Application Deadline: All applications must be received electronically by August 6, 2004, 4:30 p.m. Eastern time.

SUPPLEMENTARY INFORMATION: On June 30, 2004, we published a notice in the **Federal Register** (69 FR 39443–39444) establishing a July 30, 2004 deadline for LEAs to apply for funding under the program. As discussed in that notice, some LEAs that are eligible for FY 2004 SRSA funding are considered already to have met the application deadline based on their previously submitted application and do not have to submit a new application to the Department to receive their FY 2004 SRSA grant awards. The Department's Web site at *http://www.ed.gov/offices/OESE/* indicates which eligible LEAs must submit an application to receive a FY 2004 SRSA grant award.

We have been informed that some eligible LEAs are unable to meet the original July 30, 2004 deadline because of changes to the SRSA eligibility spreadsheets and for other reasons. In order to afford as many eligible LEAs as possible an opportunity to receive funding under this program, we are extending the application deadline until August 6, 2004, 4:30 p.m. Eastern time. We have already notified each State educational agency of this extension and have also posted the new application deadline on the Department's Web site.

An eligible LEA that is required to submit a new SRSA application in order to receive FY 2004 SRSA funding and that has not done so by the original application deadline may apply for funds by the deadline in this notice.

Electronic Submission of Applications: To receive its share of FY 2004 SRSA funding, an eligible LEA that is required to submit a new SRSA application and that has not done so must submit an electronic application to the Department by August 6, 2004, 4:30 p.m. Eastern time. Submission of an electronic application involves the use of the Department's Electronic Grant Application System (e-Application) available through the Department's e-GRANTS system.

You can access the electronic application for the SRSA Program at: *http://e-grants.ed.gov.*

Once you access this site, you will receive specific instructions regarding the information to include in your application.

The regular hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until midnight, Saturday (Washington, DC time). Please note that the system is unavailable on Sundays, Federal holidays, and after 7 p.m. on Wednesdays for maintenance (Washington, DC time).

FOR FURTHER INFORMATION CONTACT: Mr. Robert Hitchcock. Telephone: (202) 401–0039 or via Internet: *reap@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this notice in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: You may view this document, as well as other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll-free, at 1–888–293–6498; or in the Washington DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official version of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Program Authority: 20 U.S.C. 7345–7345b.

Dated: August 2, 2004.

Raymond J. Simon,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 04–17861 Filed 8–3–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services, Overview Information; Research and Innovation To Improve Services and Results for Children With Disabilities—Evidence-Based Interventions for Severe Behavior Problems; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2004

Catalog of Federal Domestic Assistance (CFDA) Number: 84.324P.

Applications Available: August 4, 2004.

Deadline for Transmittal of Applications: September 10, 2004.

Eligible Applicants: State educational agencies (SEAs); local educational agencies (LEAs); institutions of higher education (IHEs); other public agencies; nonprofit private organizations; outlying areas; freely associated States; and Indian tribes or tribal organizations.

Estimated Available Funds: $4,300,000.

Estimated Average Size of Awards: $1,075,000.

Maximum Award: We will reject any application that proposes a budget exceeding $1,075,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of this program is to produce, and advance the use of, knowledge to improve the results of education and early intervention for infants, toddlers, and children with disabilities.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from allowable activities specified in the statute (see sections 661(e)(2) and 672 of the Individuals with Disabilities Education Act, as amended (IDEA)).

Absolute Priority: For FY 2004 this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Research and Innovation to Improve Services and Results for Children with Disabilities—Evidence-Based Interventions for Severe Behavior Problems.

Background: Children with severe behavior problems often engage in behaviors that are disruptive in school environments and, at times, dangerous to themselves and others. Aggression, self-injurious behavior, and other disruptive behaviors pose a serious threat to efforts to help these individuals lead more independent lives. Behavior problems have been linked to initial referrals to institutions and increased recidivism for those individuals leaving institutional settings or those referred to crisis intervention programs from community placements. Behavior problems interfere with such essential activities as family life, employment, and educational activities.

There have been significant research advances in identifying procedures for reducing severe behavior problems—almost exclusively using behavioral approaches—and this research has expanded significantly over the past several decades. Theoretical formulations that incorporate the variables maintaining these behavior problems have informed research on assessment and intervention. Functional assessments (that determine why a child might be disruptive in a particular setting) and functionally-based interventions (such as teaching replacement skills and addressing environmental limitations) for assessing and treating behavior problems dominate the research literature and reviews of the effectiveness of these behavioral interventions are supportive of their use. Analyses of the research on positive behavioral support conclude that from one-half to two-thirds of the outcomes are successful.[1]

The No Child Left Behind Act of 2001 (NCLB) encourages education decision-makers to base instructional practices and programs on scientifically based research. Yet, despite growing evidence of the potential of various behavioral interventions to reduce behavior problems, there is a need to better understand these interventions and document their strengths and limitations. The accumulated knowledge base primarily is derived from discovery-based research (identifying new intervention strategies) and community-based research (applying various strategies for a 2 limited number of students in community settings, such as schools). However, broad-based recommendations for practitioners and families cannot proceed without addressing population-based questions (*e.g.*, what proportion of all children and what type of child will succeed with a particular intervention).

Important guidelines common to most outcome evaluations are often not adequately followed in behavioral intervention studies. For example, standardization in applying interventions among participants is rare. Instead, programs aimed at reducing severe behavior problems are frequently designed individually for each student. This lack of standardization limits the ability to make definitive recommendations about a particular intervention approach. Similar concerns can be applied to functional assessments and outcome data. Functional assessments are designed independently by each research group, and often without addressing the psychometric properties of the instruments. Traditional measures of interrater reliability and test-retest reliability as well as measures of validity are lacking in most functional assessments used in research programs. Outcomes assessed in most behavioral studies tend to rely solely on idiosyncratic observational data (*e.g.*, frequency or duration of screaming), which makes the interpretation of results across studies problematic. Recent research using medical interventions use psychometrically sound rating scale data.[2] However, the exclusive reliance on this form of data makes judgments about the educational relevance of these findings suspect. Again, these concerns limit the ability to make generalizations about the role of functional assessment in intervention design and obscure conclusions about outcomes.

Adequate information about the characteristics of successful and unsuccessful participants is also noticeably absent in this research literature. Contributing to this problem is the lack of information about selection and attrition in individual

[1] Carr, E.G., Horner, R.H., Turnbull, A.P., Marquis, J.G., McLaughlin, D.M., McAtee, M.L., Smith, C.E., Ryan, K.A., Ruef, M.B., & Doolabh, A. (1999). *Positive behavior support for people with developmental disabilities: A research synthesis.* Washington, DC: American Association on Mental Retardation.

[2] Aman, M.G., De Smedt, G., Derivan, A., Lyons, B., Findling, R.L.; Risperidone Disruptive Behavior Study Group (2002). Double-blind, placebo-controlled study of risperidone for the treatment of disruptive behaviors in children with subaverage intelligence. *American Journal of Psychiatry, 159,* 1337–1346

studies.[3] Relatively low numbers of studies make mention of how they select those included in the research and few studies mention if they use procedures to reduce selection bias. Few studies indicate if participants drop out of treatment prematurely or assess potential subject characteristics that would predict differential attrition. This relative lack of information on important population-based questions calls into question the ability to generalize of otherwise positive outcome data on the treatment of behavior problems among students with severe behavior problems.[4]

Population-based educational research (including the use of randomized controlled trials—RCTs) is necessary to inform the field about the *educational efficacy* and *effectiveness* of interventions.[5] Educational efficacy refers to research in which control has been exercised by the investigator over sample selection, the delivery of the intervention, and the conditions under which the intervention occurs.[6] Efficacy research provides scientific evidence comparing an intervention's effects to other interventions, to non-specific intervention (*e.g.*, ''treatment as usual''), or to no intervention. Randomized experimental designs such as RCTs are recognized as the standards by which efficacy is assessed. Guidelines, including the CONSORT Statement,[7] provide criteria for designing, analyzing and reporting the findings from randomized experimental designs.

Educational effectiveness refers to research in which a previously tested efficacious intervention is examined with a heterogeneous group within a more naturalistic setting (*e.g.*, a school) or is provided by real-world service practitioners rather than research therapists.[8] Standards exist for identifying efficacious interventions [9] and there are components of positive behavior support that meet the criteria for ''probably efficacious'' interventions.[10]

Priority: This priority supports rigorous efficacy and effectiveness evaluations of empirically based interventions designed to reduce severe problem behaviors and promote achievement and positive social development among children with severe behavior problems. A student with severe behavior problems is defined as a student whose behavior significantly impedes his or her own learning or the learning of others. Interventions must focus on skill building and address social and environmental obstacles.

Year one will be considered a pilot year in which awardees may work out final development issues for the intervention, pilot specific outcome measures, refine materials, work out implementation issues, and train school personnel. Such pilot work could, but need not, include a series of replicated single-case research designs. The implementation of the intervention will occur during years two through four.

Applications must:

(a) Propose a general design that is a randomized experiment in which each site randomly assigns students or classrooms or schools to the intervention or comparison group.

(b) Specify in detail what activities will be conducted in the pilot year.

(c) Propose to implement an intervention that is appropriate for children in grades kindergarten through eight.

(d) Provide a convincing theoretical and empirical rationale for the proposed intervention being likely to improve children's outcomes compared with the practices used in the comparison conditions. Programs must have some preliminary data or ''soft'' evidence supporting the potential effectiveness of the intervention or the potential effectiveness of the components of the intervention, if the applicant is combining components to form a more comprehensive intervention. Preliminary or soft evidence means that the data may not be conclusive. The preliminary data may have been gathered in such a way as not to rule out alternative hypotheses. For example, the investigator might have pre-test and post-test data indicating reduction in behavior problems or improvement in positive behavior in a school or classroom using the intervention, but not have data from a control group. This could also include controlled research not yet implemented across multiple sites or by typical intervention agents (*e.g.*, teachers). This could also include work using single subject designs that have not been subjected to randomized designs. Preliminary data may include data that were obtained separately for specific components of the proposed intervention, but not from an evaluation of all of the proposed intervention components integrated into one intervention.

(e) Describe the level and type of behavior support that is in place for each school (such as the presence of school-wide discipline procedures). This information may be used in analyses to determine if differences across schools influence outcomes of the targeted intervention. Applicants should describe how the level and type of behavior support will be assessed.

(f) Provide access to students in a minimum of eight schools that agree to implement the proposed intervention (if assigned to the treatment condition) and to allow data collection to occur as outlined in this initiative (whether the school is selected for the treatment or comparison condition). Note that schools are not required to belong to the same school district.

Before applicants may receive awards, they must—

(1) provide written acknowledgement from schools that the schools agree to cooperate fully with the random assignment. To facilitate random assignment, applicants may offer incentives to schools, such as compensation for additional staff time required to cooperate with the research effort, and provision of additional resources to enable a school to conduct new activities under the project; and

(2) provide a letter of cooperation from participating schools or school districts for the purposes of conducting the research. In the letter of cooperation, representatives of the participating schools or school districts must clearly indicate and accept the responsibilities associated with participating in the study. These responsibilities must include (i) an agreement to provide a sufficient number of students to

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[3] Durand, V.M. (2002, September). *Methodological challenges: Single subject designs.* Presentation at the National Institutes of Health Conference—Research on Psychosocial and Behavioral Interventions in Autism: Confronting Methodological Challenges. Bethesda, MD.

[4] *Id.*

[5] APA Task Force on Psychological Intervention Guidelines (1995). *Template for developing guidelines: Interventions for mental disorders and psychosocial aspects of physical disorders.* Washington, DC: American Psychological Association; Chorpita, B.F., Barlow, D.H., Albano, A.M., & Daleiden, E.L. (1998). Methodological strategies in child clinical trials: Advancing the efficacy and effectiveness of psychosocial treatments. *Journal of Abnormal Child Psychology, 26,* 7–16.

[6] Hoagwood, K., Hibbs, E., Brent, D., & Jensen, P. (1995). Introduction to the special section: Efficacy and effectiveness in studies of child and adolescent psychotherapy. *Journal of Consulting and Clinical Psychology, 63,* 683–687.

[7] Mosher, D., Schulz, K.F. & Altman, D. (2001). The CONSORT Statement: Revised recommendations for improving the quality of reports of parallel-group randomized designs. *Journal of the American Medical Association, 285,* 1987–1991.

[8] Hoagwood *et al.*, *supra* note 6, at 683–687.

[9] Division 12 Task Force. (1995). Training in and dissemination of empirically-validated psychological treatments: Report and recommendations. *The Clinical Psychologist, 48,* 3–23.

[10] Kurtz, P.F., Chin, M.D., Huete, J.M., Tarbox, R.S., O'Connor, J.T., Paclawskyj, T.R., & Rush, K.S. (2003). Functional analysis and treatment of self-injurious behavior in young children a summary of 30 cases. *Journal of Applied Behavior Analysis, 36,* 205–219.

participate in the study; (ii) an agreement to the random assignment of students or classrooms or schools to the intervention being evaluated versus the comparison group (*i.e.*, ''business as usual''); and (iii) an agreement to cooperate with school-level data collection (*e.g.*, school personnel competing interventions, data from school records indicating number of students receiving office referrals).

(g) Designate a coordinator to manage all aspects of data collection, intervention implementation, and interaction with the national contractor.

(h) Assure that they will provide approval from the applicant's Institutional Review Board (IRB) for conducting research with human subjects in time to begin data collection for schools for the cross-site study in the spring of year one of the award. Applicants need to have approval both for their own site-specific research and for the cross-site data collection.

(i) Propose a sample of sufficient size to detect meaningful differences between outcomes in the intervention and control condition, taking into account attrition, variability across sites and children, and differences in fidelity of implementation of the intervention. Initial samples of fewer than 80 participants may be insufficient and need to be carefully and persuasively justified. In general, the larger the sample the better. A power analysis should be included.

(j) Include students from a range of settings. These settings may include regular classrooms, segregated classrooms, or segregated schools, although the percentage of students in segregated settings should not exceed 60 percent of the total sample.

(k) Propose to use the intervention only if the intervention is based on the individual needs of the child and will not interfere with the services required on a child's individualized education program (IEP) or the broad procedural safeguards stated in the IDEA.

(l) Propose primary settings for evaluating the intervention only in classrooms within the child's educational placement. The intervention sites must implement the same intervention. The intervention must *not* be implemented in an intervention or comparison school prior to the beginning of the evaluation study.

(m) Describe how age-related effects will be addressed in the research if the range of ages of selected students spans across both elementary and middle school age students. For example, the investigator may randomly assign students into intervention and comparison groups using child age stratification so that the groups will not 5 differ significantly according to age. Age stratification would insure that the results are attributable to the experimental intervention and not differential maturation. Applicants are encouraged to incorporate age as a variable for analysis if there is a theoretical or empirical reason to analyze age as a variable in the research. In either case, applicants should discuss the rationale.

(n) Describe how the applicant will handle the flow of participants through each stage (a diagram is strongly recommended), and indicate how protocol deviations will be decided and handled.

(o) Provide research designs that permit the identification and assessment of factors impacting the fidelity of implementation. Mediating and moderating variables that are measured in the intervention condition and are also likely to affect outcomes in the comparison condition should be measured in the comparison condition (*e.g.*, student time-on-task, school personnel experience/time in position). Outcome measures of behavior change and skill development should include standardized assessments of these outcomes.

Studies must be planned in such a way that the design ensures a contribution to a greater program of knowledge beyond the efficacy or effectiveness of a particular approach. This requires attending to replicability, including treatment manuals, standard subject selection and measures, and some links between theory and predictions.

(p) Describe plans to create an implementation manual for the intervention that provides sufficient information for others to be able to adopt and replicate the program.

(q) Propose complementary studies to conduct in conjunction with the cross-site program evaluation. Complementary studies provide investigators with the opportunity to design studies and collect data within the context of the cross-site evaluation. Investigators will be responsible for collecting the data for their complementary studies. Funding for this data collection must be included in the applicant's budget. The complementary research studies may address a range of issues related broadly to the efficacy or effectiveness of the intervention, the mechanisms by which the intervention results in behavioral improvements, the development of assessment tools, or other related topics. The complementary research provides an opportunity to identify outcomes that, because of data constraints, are not explored in the core evaluation or are specific to an individual site. It expands the possibilities for multiple measures of the same variable, and for the development of new measures. The scientific merit of the complementary studies will be considered an important aspect of the applicant's proposal.

(r) Address questions of implementation and how best to train and support school personnel in the use of these interventions in their classrooms.

(s) Use psychometrically sound observational, survey, or qualitative methodologies as a complement to experimental methodologies to assist in the identification of factors that may explain the effectiveness or ineffectiveness of the intervention.

(t) Propose research teams that collectively demonstrate expertise in (1) functional behavioral assessments and behavioral intervention, (2) implementation and analysis of results from the research design that will be employed, and (3) working with school personnel, schools, or other education delivery settings that will be employed.

(u) Provide information documenting the credentials and level of preparation required to deliver the intervention (*e.g.*, certified teacher, paraprofessional) and the nature and extent of professional development, coaching, and monitoring required to effectively implement the intervention. Additionally, applicants should document existing family or community involvement in behavioral support plans.

(v) Discuss likely threats to the internal validity of the study including attrition, student mobility, existing behavioral intervention activities or programs at comparison schools, and potential difficulty in implementation.

Projects must include a plan to:

(a) Work with the Office of Special Education Programs (OSEP) and a national evaluation coordination contractor, funded through a separate competition, to carry out randomized experiments of behavioral interventions. The national evaluation coordination contractor, working with OSEP and the recipients of awards under this competition, will coordinate the collection of a core set of measures following consistent protocols across sites so that comparable outcome data (including measures of positive and negative behaviors) will be obtained across sites. Details concerning the responsibilities of each awardee vis-a-vis the national contractor are provided in the sections below.

(b) Within a month of receiving the award, meet with the Department and

the national evaluation coordinator in Washington, DC to agree upon common procedures that will permit linking of the funded studies. This linking will require agreement on a set of common identification and outcome measures collected by all projects that will help the evaluation of findings across studies and the generalization of the findings. Projects must also plan for an additional meeting during year one and two meetings (each year) in years two through four, for cross project activities with Federal officials, the national evaluation coordination contractor, and the other awardees funded in this competition. In addition, projects must budget for a two-day Project Directors' meeting in Washington, DC during each year of the project.

(c) If the intervention is effective, deliver training on implementation to the control schools in the fourth year. For comparison schools, intervention training must not be provided to the school staff until the summer of year four, once the final cross-site data collection has been completed.

(d) Obtain active informed consent of parents of children participating in the study and of all school staff from whom data will be collected.

(e) Provide all necessary materials, training, and professional development to school personnel to implement the intervention to be evaluated in the intervention schools.

(f) Work with the national evaluation coordination contractor for the collection of cross-site data, in coordination with any local data collection activities. The collection (including timing) of the cross-site data will take precedence over any data collection activities for the complementary studies. Cross-site data must be collected from school staff and sent to the contractor in a timely fashion. There will be regular conference calls with OSEP staff, the national contractor, and each awardee to discuss, plan, and coordinate evaluation activities at each site.

Projects must provide data to the national evaluation coordination contractor from each site in the fall and spring of years two and three, and the spring of year four of the project period. The core set of evaluation data provided to the national contractor will include assessments of the function of the students' behavior problems, changes in targeted behaviors, measures of intervention implementation, identified pro-social behaviors and measures of academic achievement. The core evaluation data will be collected by the contractor and the individual awardees beginning in the first year of the implementation of intervention and continuing through the second and third years of the implementation. (Note: applicants are not limited to collecting data through shared assessment procedures.)

(g) Collaborate and participate with OSEP staff in the cross-site study activities, including, (1) the design and implementation of the cross-site research; (2) the development of a research protocol for IRB review by all collaborating institutions; (3) the analysis, presentation, and publication of the cross-site study findings; and (4) the monitoring and evaluation of the scientific and operational accomplishments of the project through conference calls, site visits, and review of technical reports.

(h) Assess the extent to which treatment outcomes produce meaningful changes in behavior. Clinical significance must be assessed for all outcomes.

(i) Conduct an economic analysis of the intervention (*i.e.*, one of the outcome measures that must be collected by the awardee is the cost to conduct the intervention so that the cost-effectiveness of the intervention may be determined); and

(j) Form an advisory group to provide both technical and substantive guidance and feedback on project activities.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553) the Department generally offers interested parties the opportunity to comment on proposed priorities. However, section 661(e)(2) of the IDEA makes the public comment requirements inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1461 and 1472.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Cooperative agreements.

Estimated Available Funds: $4,300,000.

Estimated Average Size of Awards: $1,075,000.

Maximum Award: We will reject any application that proposes a budget exceeding $1,075,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs; IHEs; other public agencies; nonprofit private organizations; outlying areas; freely associated States; and Indian tribes or tribal organizations.

2. *Cost Sharing or Matching:* This competition does not involve cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (*see* section 606 of the IDEA).

(b) Applicants and grant recipients funded under this competition must involve individuals with disabilities or parents of individuals with disabilities in planning, implementing, and evaluating the projects (*see* section 661(f)(1)(A) of the IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), PO Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA number 84.324P.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 70 pages, using the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.

• Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.

• Use a font that is either 12-point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if—

• You apply these standards and exceed the page limit; or

• You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: August 4, 2004.

Deadline for Transmittal of Applications: September 10, 2004.

We do not consider an application that does not comply with the deadline requirements.

Applications for grants under this competition may be submitted by mail or hand delivery (including a commercial carrier or courier service), or electronically using the Electronic Grant Application System (e-Application) available through the Department's e-GRANTS system. For information (including dates and times) about how to submit your application by mail or hand delivery, or electronically, please refer to Section IV. 6. *Procedures for Submitting Applications* in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Procedures for Submitting Applications:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

If you submit your application to us electronically, you must use e-Application available through the Department's e-GRANTS system. The e-GRANTS system is accessible through its portal page at: *http://e-grants.ed.gov.*

If you use e-Application, you will be entering data online while completing your application. You may not e-mail an electronic copy of a grant application to us. The data you enter online will be saved into a database.

If you participate in e-Application, please note the following:

• Your participation is voluntary.

• You must submit your grant application electronically through the Internet using the software provided on the e-Grants Web site *(http://e-grants.ed.gov)* by 4:30 p.m., Washington, DC time, on the application deadline date. The regular hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until midnight Saturday, Washington, DC time. Please note that the system is unavailable on Sundays, and after 7 p.m. on Wednesdays for maintenance, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site. We strongly recommend that you do not wait until the application deadline date to initiate an e-Application package.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.

• You must submit all documents electronically, including the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• Your e-Application must comply with any page limit requirements described in this notice.

• After you electronically submit your application, you will receive an automatic acknowledgement, which will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the Application for Federal Education Assistance (ED 424) to the Application Control Center after following these steps:

1. Print ED 424 from e-Application.

2. The applicant's Authorizing Representative must sign this form.

3. Place the PR/Award number in the upper right hand corner of the hard copy signature page of the ED 424.

4. Fax the signed ED 424 to the Application Control Center at (202) 245–6272.

• We may request that you give us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of System Unavailability: If you are prevented from submitting your application on the application deadline date because the e-Application system is unavailable, we will grant you an extension of one business day in order to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

1. You are a registered user of e-Application and you have initiated an e-Application for this competition; and

2. (a) The e-Application system is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) The e-Application system is unavailable for any period of time during the last hour of operation (that is, for any period of time between 3:30 p.m. and 4:30 p.m., Washington, DC time) on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgement of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (*see* VII. Agency Contact) or (2) the e-GRANTS help desk at 1–888–336–8930.

You may access the electronic grant application for the Special Education—Research and Innovation to Improve Services and Results for Children with Disabilities—Evidence-Based Interventions for Severe Behavior Problems competition at: http://e-grants.ed.gov.

b. *Submission of Paper Applications By Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must send the original and two copies of your application on or before the application deadline date to the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.324P), 400 Maryland Avenue, SW., Washington, DC 20202.

You must show proof of mailing consisting of one of the following:

1. A legibly dated U.S. Postal Service Postmark;

2. A legible mail receipt with the date of mailing stamped by the U.S. Postal Service;

3. A dated shipping label, invoice, or receipt from a commercial carrier; or

4. Any other proof of mailing acceptable to the U.S. Secretary of Education.

If you mail your application through the U.S. Postal Service, we do not

accept either of the following as proof of mailing:

1. A private metered postmark, or

2. A mail receipt that is not dated by the U.S. Postal Service.

If your application is post marked after the application deadline date, we will notify you that we will not consider the application.

Note: Applicants should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application on or before the application deadline date to the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.324P), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays. A person delivering an application must show identification to enter the building.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department:

1. You must indicate on the envelope and—if not provided by the Department—in Item 4 of the Application for Federal Education Assistance (ED 424 (exp. 11/30/2004)) the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

2. The Application Control Center will mail a Grant Application Receipt Acknowledgment to you. If you do not receive the notification of application receipt within 15 days from the mailing of your application, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are listed in 34 CFR 75.210 of EDGAR. The specific selection criteria to be used for this competition are in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* Under the Government Performance and Results Act (GPRA), the Department is currently developing indicators and measures that will yield information on various aspects of the quality of the Research and Innovation to Improve Services and Results for Children with Disabilities program. Included in these indicators and measures will be those that assess the quality and relevance of newly funded research projects. Two indicators will address the quality of new projects. First, an external panel of eminent senior scientists will review the quality of a randomly selected sample of newly funded research applications, and the percentage of new projects that are deemed to be of high quality will be determined. Second, because much of the Department's work focuses on questions of effectiveness, newly funded applications will be evaluated to identify those that address causal questions and then to determine what percentage of those projects use randomized field trials to answer the causal questions. To evaluate the relevance of newly funded research projects, a panel of experienced education practitioners and administrators will review descriptions of a randomly selected sample of newly funded projects and rate the degree to which the projects are relevant to practice.

Other indicators and measures are still under development in areas such as the quality of project products and long-term impact. Data on these measures will be collected from the projects funded under this competition. Awardees will also be required to report information on their projects' performance in annual reports to the Department (EDGAR, 34 CFR 75.590).

We will notify grantees of the performance measures once they are developed.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Renee Bradley, U.S. Department of Education, 400 Maryland Avenue, SW., room 4105, Potomac Center Plaza, Washington, DC 20202–2600. Telephone: (202) 245–7277.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request by contacting the following office: The Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7363.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*

Dated: July 30, 2004.

Troy R. Justesen,

Acting Deputy Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 04–17739 Filed 8–3–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted an information collection package to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The package requests a three-year extension of its collection of information concerning annual applications from the owners of qualified renewable energy generation facilities for the consideration of Renewable Energy Production Incentive (REPI) payments, OMB Control Number 1910–0068. This information collection package covers information necessary to determine if an applicant's facility qualifies for these payments and to determine the amount of net electricity produced that qualifies for these payments and ensures that the government has sufficient information to ensure the proper use of public funds for these incentive payments.

DATES: Comments regarding this collection must be received on or before September 3, 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, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202–395–3122.

ADDRESSES: Written comments should be sent to DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503.

Comments should also be addressed to Susan L. Frey, Director, Records Management Division, IM–11/ Germantown Bldg., Office of the Chief Information Officer, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–1290, or e-mail at *susan.frey@im.doe.gov;* and to Dan Beckley, Energy Efficiency and Renewable Energy, EE–2K/Forrestal Bldg., U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, or e-mail at *dan.beckley@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: The DOE persons listed in **ADDRESSEES**.

SUPPLEMENTARY INFORMATION: This package contains: *(1) OMB No.:* 1910–0068; *(2) Package Title:* Renewable Energy Production Incentive; *(3) Purpose:* To provide required information to receive consideration for payment for qualified renewable energy electricity produced in the prior fiscal year; *(4) Estimated Number of Respondents:* 75 *(5) Estimated Total Burden Hours:* 450; *(6) Number of Collections:* The package contains 75 (one per grantee annually) information and/or recordkeeping requirements.

Statutory Authority: Energy Policy Act of 1992, Pub. L. 102–486, 42 U.S.C. 13317.

Issued in Washington, DC, on July 27, 2004.

Susan L. Frey,

Director, Records Management Division, Office of the Chief Information Officer.

[FR Doc. 04–17733 Filed 8–3–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC04–547–001, FERC–547]

Commission Information Collection Activities, Proposed Collection; Comment Request; Submitted For OMB Review

July 29, 2004.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) has submitted the information collection described below to the Office of Management and Budget (OMB) for review and reinstatement of this information collection requirement. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received no comments in response to an earlier **Federal Register** notice of February 18, 2004 (69 FR 7623–7624) and has made this indication in its submission to OMB.

DATES: Comments on the collection of information are due by August 30, 2004.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *Pamela_L._Beverly@omb.eop.gov* and include the OMB Control No. as a point of reference. The Desk Officer may be reached by telephone at (202) 395–7856. A copy of the comments should also be sent to the Federal Energy Regulatory Commission, Office of the Executive Director, ED–30, Attention: Michael Miller, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those persons filing electronically do not need to make a paper filing. For paper filings, such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket No. IC04–547–001.

Documents filed electronically via the Internet must be prepared in MS Word, Portable Document Format, Word Perfect or ASCII format. To file the document, access the Commission's Web site at *http://www.ferc.gov* and click on ''Make an E-filing,'' and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's e-mail address upon receipt of comments. User assistance for electronic filings is available at (202) 502–8258 or by e-mail to *efiling@ferc.gov*. Comments should not be submitted to the e-mail address.

All comments are available for review at the Commission 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, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION:

Description

The information collection submitted for OMB review contains the following:

1. *Collection of Information:* FERC–547 ''Gas Pipeline Rates: Refund Requirements.''

2. *Sponsor:* Federal Energy Regulatory Commission.

3. *Control No.:* 1902–0084.

The Commission is now requesting that OMB approve with a three-year extension of the expiration date, with no changes to the existing collection. The information filed with the Commission is mandatory.

4. *Necessity of the Collection of Information:* Submission of the information is necessary to enable the Commission to carry out its responsibilities in implementing the statutory provisions of sections 4, 5 and 16 of the Natural Gas Act (NGA). Sections 4 and 5 authorize the Commission to order a refund, with interest, on any portion of a natural gas company's increased rate or charge that is found to by not just or reasonable. Refunds may also be instituted by a natural gas company as stipulation to a Commission-approved settlement agreement or provisions under the company's tariff. Section 16 authorizes the Commission to prescribe the rules and regulations necessary to administer its refund mandates. The data collected under FERC–547 allows the Commission to monitor the refunds owed by the Natural gas companies and to ensure the flow through of refunds, with applicable interest, to the appropriate customers. The Commission implements the refund and reporting requirements in the Code of Regulations (CFR) under 18 CFR 154.501 and 154.502.

5. *Respondent Description:* The respondent universe currently comprises 75 companies (on average per year) subject to the Commission's jurisdiction.

6. 6. *Estimated Burden:* 5,625 total hours, 75 respondents (average per year), 1 response per respondent, and 75 hours per response (average).

7. *Estimated Cost Burden to respondents:* 5,625 hours / 2080 hours per years × $107,185 per year = $289,863. The cost per respondent is equal to $3,865.

Authority: Sections 4, 5, and 16 of the FPA (15 U.S.C. 717c, 717d and 717o).

Magalie R. Salas,

Secretary.

[FR Doc. E4–1724 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC04–588–001, FERC–588]

Commission Information Collection Activities, Proposed Collection; Comment Request; Submitted for OMB Review

July 29, 2004.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) has submitted the information collection described below to the Office of Management and Budget (OMB) for review and reinstatement of this information collection requirement. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received no comments in response to an earlier **Federal Register** notice of February 17, 2004 (69 FR 7461–7462) and has responded to their comments in its submission to OMB.

DATES: Comments on the collection of information are due by August 30, 2004.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o *Pamela_L._Beverly@omb.eop.gov* and include the OMB Control No. as a point of reference. The Desk Officer may be reached by telephone at (202) 395–7856. A copy of the comments should also be sent to the Federal Energy Regulatory Commission, Office of the Executive Director, ED–30, Attention: Michael Miller, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those persons filing electronically do not need to make a paper filing. For paper filings, such comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket No. IC04–588–001.

Documents filed electronically via the Internet must be prepared in, MS Word, Portable Document Format, Word Perfect or ASCII format. To file the document, access the Commission's Web site at *www.ferc.gov* and click on ''Make an E-filing,'' and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's e-mail address upon receipt of comments. User assistance for electronic filings is available at (202) 502–8258 or by e-mail to *efiling@ferc.gov*. Comments should not be submitted to the e-mail address.

All comments are available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''*e*Library'' link. Enter the docket number 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 (866) 208–3676, or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov*.

SUPPLEMENTARY INFORMATION:

Description

The information collection submitted for OMB review contains the following:

1. *Collection of Information:* FERC–588 ''Emergency Natural Gas Transportation, Sale and Exchange Transactions.''

2. *Sponsor:* Federal Energy Regulatory Commission.

3. *Control No.:* 1902–0144.

The Commission is now requesting that OMB approve with a three-year extension of the expiration date, with no changes to the existing collection. The information filed with the Commission is mandatory.

4. *Necessity of the Collection of Information:* Submission of the information is necessary to enable the Commission to carry out its responsibilities in implementing the statutory provisions 7(c) of the Natural Gas Act (NGA) (Pub. L. 75–688) (15 U.S.C. 717–717w) and provisions of the Natural Gas Policy Act of 1978 (NGPA), (15 U.S.C. 3301–3432). Under the NGA, a natural gas company must obtain Commission approval to engage in the transportation, sale or exchange of natural gas in interstate commerce. However, section 7(c) exempts from certificate requirements ''temporary acts or operations for which the issuance of a certificate will not be required in the public interest.'' The NGPA also provides for non-certificated interstate transactions involving intrastate pipelines and local distribution companies.

A temporary operation, or emergency, is defined as any situation in which an actual or expected shortage of gas supply would require an interstate pipeline company, intrastate pipeline or local distribution company, or Hinshaw pipeline to curtail deliveries of gas or provide less than the projected level of service to the customer. The natural gas companies file the necessary information with the Commission so that it may determine if the transaction/operation qualifies for exemption. A

report within forty-eight hours of the commencement of the transportation, sale or exchange, a request to extend the sixty-day term of the emergency transportation, if needed, and a termination report are required. The data required to be filed for the forty-eight hour report is specified by 18 CFR 284.270 of the Commission's regulations.

5. *Respondent Description:* The respondent universe currently comprises 8 companies (on average per year) subject to the Commission's jurisdiction.

6. *Estimated Burden:* 80 total hours, 8 respondents (average per year), 1 response per respondent, and 10 hours per response (average).

7. *Estimated Cost Burden to respondents:* 80 hours/2080 hours per years × $107,185 per year = $4,123.

Statutory Authority: Sections 7(c) of the Natural Gas Act (NGA), Pub. L. 75–688) (15 U.S.C. 717–717w and the Natural Gas Policy Act of 1978 (NGPA), (15 U.S.C. 3301–3432).

Magalie R. Salas,

Secretary.

[FR Doc. E4–1725 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–200–126]

CenterPoint Energy Gas Transmission Company; Notice of Compliance Filing

July 21, 2004.

Take notice that on July 15, 2004, CenterPoint Energy Gas Transmission Company (CEGT) filed the additional information required by the Commission's July 7, 2004 order in this docket.

CEGT states that copies of its filing are being mailed to all parties on the service list in this docket.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1722 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP04–409–000]

Pogo Producing Company; Notice of Alternative Dispute Resolution Meeting

July 29, 2004.

By order issued July 26, 2004, in the above-captioned docket, the Commission directed the Dispute Resolution Service (DRS) to convene a meeting with the parties by July 28, 2004. As a result of the meeting the DRS convened on July 28, 2004, the parties agreed to mediation. Accordingly, a mediation session will be held beginning at 3 p.m. c.s.t. (4 p.m. e.s.t.) on July 29, 2004, at the Shell Complex, 200 N. Diary Ashford, Houston, TX 77079. The mediation is expected to continue through Friday, July 30, 2004. If you have any questions regarding this mediation, please contact Richard Miles at (202) 502–8702.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1726 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL00–95–000, et al.; Docket Nos. EL00–98–000, et al.; and Docket Nos. ER03–746–000, et al.]

San Diego Gas & Electric Company; Investigation of Practices of the California Independent System Operator and the California Power Exchange; California Independent System Operator; Notice of Comment Procedures

July 29, 2004.

On July 26, 2004, the Federal Energy Regulatory Commission (Commission) staff held a meeting with the California Independent System Operator (CAISO) and the California Power Exchange (CalPX) to discuss procedures, remaining steps and timeline for completing the calculation of refunds in the California Refund proceeding. At the conclusion of the technical conference, Commission staff announced that it would accept comments and replies to comments on the matters discussed at the technical conference and that it would provide additional detail on filing procedures.

Comments and replies should be filed in the root dockets *i.e.,* the docket numbers listed in the instant notice). Comments are due on Monday, August 2, 2004, and replies to those comments are due by Friday, August 6, 2004. Comments and replies are limited to 10 pages. All comments and replies must be strictly limited to issues relating to process or procedural matters consistent with the July 26 technical. At the technical conference, staff also asked that commenters include a list of rehearing or clarification issues that have implications for the refund process. Commenters are directed to provide a list *only,* and not to raise new issues or expand upon matters already raised in requests for rehearing, as the deadline for rehearing requests has expired. The Commission will not entertain new arguments. Finally, the CAISO and CalPX are directed to file copies of their presentations.

Questions about the comment procedures should be directed to Andrea Hilliard Office of the General Counsel—Markets, Tariffs and Rates at 202–502–8288 or *andrea.hilliard@ferc.gov.*

Magalie R. Salas,

Secretary.

[FR Doc. E4–1723 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL00–95–107, et al.]

San Diego Gas & Electric Company, et al.; Electric Rate and Corporate Filings

July 27, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. San Diego Gas & Electric Company, Complainant, v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange Corporation, Respondents; Investigation of Practices of the California Independent System Operator and the California Power Exchange

[Docket Nos. EL00–95–107 and EL00–98–094]

Take notice that on July 22, 2004, the California Independent System Operator Corporation (ISO) submitted a compliance filing pursuant to the Commission's order issued June 22, 2004, in Docket Nos. EL00–95–085 and EL00–98–085.

ISO states that it has served copies of this letter, and all attachments, upon all parties on the official service list for the captioned docket. In addition, the ISO is posting this transmittal letter and all attachments on the ISO home page.

Comment Date: 5 p.m. eastern time on August 12, 2004.

2. New York Independent System Operator, Inc.

[Docket No. EL04–110–001]

Take notice that on July 22, 2004, the New York Independent System Operator, Inc. (NYISO) filed a report in compliance with the Commission's order issued June 22, 2004, in Docket No. EL04–110–001. NYISO states that the filing details the status of efforts to correct a Transmission Congestion Contract (TCC) database transcription error and describes the NYISO's plans for future TCC Reconfiguration Auctions.

NYISO states that it has electronically served a copy of this filing on the official representative of each of its customers, on each participant in its stakeholder committees, and on the New York State Public Service Commission.

Comment Date: 5 p.m. eastern time on August 12, 2004.

3. New York Independent System Operator, Inc.

[Docket Nos. ER97–1523–082, OA97–470–074, and ER97–4234–072]

Take notice that on July 23, 2004, the New York Independent System Operator, Inc. (NYISO) filed a refund report in compliance with the Commission's Letter Order issued April 13, 2004 in Docket No. ER97–1523–080, *et al.*

NYISO states that it has served a copy of this filing on all parties in the these proceedings.

Comment Date: 5 p.m. eastern time on August 13, 2004.

4. PJM Interconnection, L.L.C. Virginia Electric and Power Company

[Docket No. ER04–829–001]

Take notice that on July 23, 2004, Virginia Electric and Power Company (Dominion), pursuant to the submitted supplement to the Commission's deficiency letter issued July 16, 2004, in Docket No. ER04–829–000, filed a supplemental to the application filed May 11, 2004, in Docket No. ER04–829–000.

Dominion states that copies of the filing were served upon all parties to the service list for this docket.

Comment Date: 5 p.m. eastern time on August 6, 2004.

5. PJS Capital, LLC

[Docket No. ER04–896–002]

Take notice that on July 23, 2004 PJS Capital, LLC (PJS Capital) pursuant to the Commission's deficiency letter issued July 2, 2004, in Docket No. ER04–896–000, filed a second amendment to its May 28, 2004, Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority.

Comment Date: 5 p.m. eastern time on August 13, 2004.

6. POSDEF Power Company, LP

[Docket No. ER04–947–001

Take notice that on July 22, 2004, POSDEF Power Company, LP (POSDEF) submitted an amendment to its June 22, 2004, filing in Docket No. ER04–947–000, First Revised Sheet No. 2, POSDEF Power Company, LP FERC Electric Tariff, Original Volume No. 1. POSDEF states that the revised tariff sheet contains changes that conform with tariffs submitted by other affiliates of FPL Energy, LLC.

Comment Date: 5 p.m. eastern time on August 12, 2004.

7. AllEnergy Marketing Company, LLC

[Docket No. ER04–1032–000]

Take notice that on July 23, 2004, AllEnergy Marketing Company, LLC, filed a Notice of Cancellation of its FERC Electric Tariff, Original Volume No. 1, effective September 24, 2004.

Comment Date: 5 p.m. eastern time on August 13, 2004.

8. Pacific Gas and Electric Company

[Docket No. ER04–1036–000]

Take notice that on July 23, 2004, Pacific Gas and Electric Company (PG&E) tendered for filing a Wholesale Distribution Tariff (WDT) Service Agreement (Service Agreement) and an Interconnection Agreement (IA) between PG&E and Port of Stockton designated as Service Agreement No. 18 under PG&E Electric Tariff, First Revised Volume No. 4. PG&E states that the Service Agreement is submitted pursuant to the PG&E WDT and permits PG&E to recover the ongoing costs for service required over PG&E's distribution facilities. PG&E states that IA provides the terms and conditions for the continued interconnection of the Electric Systems of Port of Stockton and PG&E.

PG&E states that copies of this filing have been served upon Port of Stockton, the California Independent System Operator Corporation and the California Public Utilities Commission.

Comment Date: 5 p.m. eastern time on August 13, 2004.

9. Goldendale Energy Center, LLC

[Docket No. ER04–1038–000]

Take notice that on July 23, 2004, Goldendale Energy Center, LLC (the Applicant) submitted, under section 205 of the Federal Power Act (FPA), a request for authorization to make wholesale sales of electric energy, capacity, replacement reserves, and ancillary services at market-based rates, to reassign transmission capacity, and to resell firm transmission rights. Applicant states that it owns and will operate a nominal 271 megawatt natural gas-fired combined-cycle electric generation facility in Goldendale, Washington. Applicant requests an effective date of July 24, 2004.

Comment Date: 5 p.m. eastern time on August 13, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, as

appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1720 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER04–419–003, et al.]

Xcel Energy Services, Inc., et al.; Electric Rate and Corporate Filings

July 28, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. Xcel Energy Services Inc

[Docket No. ER04–419–003]

Take notice that on July 26, 2004, Xcel Energy Services Inc. (XES) submitted a compliance filing pursuant to the Commission's order issued June 25, 2004, in Docket No. ER04–419–002. The compliance tariff sheets are designated First Revised Sheet Nos. 151 through 309 and Original Sheet Nos. 310 through 323 to Xcel Energy Operating Companies' Joint Open Access Transmission Tariff, First Revised Volume No. 1. XES requests an effective date of April 26, 2004.

Comment Date: 5 p.m. eastern time on August 16, 2004.

2. Southern Company Services, Inc.

[Docket No. ER04–459–002]

Take notice that, on July 26, 2004, Southern Company Services, Inc. (SCS) submitted a compliance filing pursuant to a Commission order issued June 25, 2004, in Docket No. ER04–459–001, 107 FERC ¶ 61,317.

SCS states that copies of the filing were served on parties on the official service list in the above-captioned proceeding.

Comment Date: 5 p.m. eastern time on August 16, 2004.

3. Olde Towne Energy Associates, LLC

[Docket No. ER04–942–001]

Take notice that on July 26, 2004, Olde Towne Energy Associates, LLC (OTEA) submitted a supplement to its June 21, 2004, Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority.

Comment Date: 5 p.m. eastern time on August 16, 2004.

4. Florida Power Corporation

[Docket No. ER04–1041–000]

Take notice that July 23, 2004, Florida Power Corporation, doing business as Progress Energy Florida, (Florida Power) tendered for filing First Revised Sheet No. 17 to its Rate Schedule FERC No. 102 providing updated charges for its contract for assured capacity and energy with Florida Power & Light (FPL) pursuant to part 35 of the Commission's regulations. Florida Power states that the sheet was inadvertently omitted from Florida Power's May 7, 2004, filing of cost support and updated charges for interchange service in Docket No. ER04–822–000. Florida Power requests an effective date of May 1, 2004.

Florida Power states that copies of the filing were served on FPL and the Florida Public Service Commission.

Comment Date: 5 p.m. eastern time on August 13, 2004.

5. Illinois Power Company

[Docket No. ER04–1042–000]

Take notice that on July 26, 2004, Illinois Power Company (Illinois Power) submitted for filing Second Revised Service Agreement No. 355 under Illinois Power's FERC Electric Tariff Third Revised Volume No. 8, for Network Integration Transmission Service entered into by Illinois Power Company (Illinois Power) and Soyland Power Cooperative, Inc. Illinois Power requests an effective date of July 24, 2004.

Comment Date: 5 p.m. eastern time on August 16, 2004.

6. PJM Interconnection, L.L.C.

[Docket No. ER04–1043–000]

Take notice that on July 26, 2004, PJM Interconnection, L.L.C. (PJM) submitted Second Revised Sheet No. 230A to PJM's FERC Electric Tariff Sixth Revised Volume No. 1, amendments to Schedule 2 of the PJM Open Access Transmission Tariff to incorporate the revenue requirement for Reactive Supply and Voltage Control from General Sources Service for University Park Energy, LLC (University Park). PJM requests an effective date of June 1, 2004.

PJM states that copies of the filing were served upon all PJM members, including University Park, and each state electric utility regulatory commission in the PJM region.

Comment Date: 5 p.m. eastern time on August 16, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call

(866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E4–1721 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP02–60–004; CP04–64–000]

Trunkline LNG Company, LLC; Trunkline Gas Company, LLC; Notice of Availability of the Environmental Assessment for the Proposed Trunkline LNG and Loop Project

July 29, 2004.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) on the natural gas pipeline facilities proposed by Trunkline LNG Company, LLC (Trunkline LNG) and Trunkline Gas Company, LLC (Trunkline Gas) in the above-referenced docket numbers.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act. The staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

The EA assesses the potential environmental effects of the construction and operation of the proposed Trunkline Gas wants to expand the capacity of its facilities in Louisiana.

In Docket No. CP02–60–004, Trunkline LNG proposes to:

- Convert an LNG vessel lay berth to a LNG ship unloading dock with three liquid unloading arms and one vapor return/delivery arm at the import terminal;
- Construct a desuperheater knockout drum;
- Construct three 200 million standard cubic feet per day (MMscf/d) second stage pumps;
- Construct four 150 MMscf/d submerged combustion vaporizers; and
- Construct an additional fuel gas heater.

In Docket No. CP04–64–000, Trunkline Gas seeks authority to:

- Construct 22.2 miles of 30-inch-diameter pipeline from the Trunkline LNG Import Terminal at milepost (MP) 0.0 to the Trunkline Gas Lakeside Pipeline Gate 203A (MP 22.2);
- Construct 0.6 mile of 30-inch-diameter pipeline inside the Trunkline LNG Import Terminal;
- Construct a new meter station facility at the existing Trunkline LNG Import Terminal for receipt of regassified LNG into the proposed loop;
- Construct four new meter facilities for interconnections with 1) Calcasieu Gas Gathering System (Calcasieu Gas) at MP 0.0 in Calcasieu Parish; 2) Sabine Gas Transmission Company (MP 8.1) in Calcasieu Parish; 3) Texas Gas Transmission Corporation (MP L–191.6) [1] in Jefferson Davis Parish; and 4) Tennessee Gas Pipeline Company (MP L–198.1) in Calcasieu Parish;
- Modify two existing meter stations on Trunkline's Lakeside Pipeline System to increase capacity at the Texas Eastern Transmission, LP's delivery point interconnection (MP L–203.9) to 500,000 decatherms per day (Dth/day) and Transcontinental Gas Pipe Line Corporation's (Transco) Ragley delivery point interconnection (MP L–203.4) to 500,000 Dth/day in Beauregard Parish, Louisiana.

The purpose of the proposed facilities would be to transport an additional 2.1 billion cubic feet per day for service to Trunkline Gas' customers.

The EA has been placed in the public files of the FERC. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference and Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Copies of the EA have been mailed to Federal, State and local agencies, public interest groups, interested individuals, newspapers, and parties to this proceeding.

Any person wishing to comment on the EA may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your comments to: Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;
- Label one copy of the comments for the attention of the (Gas Branch 2 and LNG Engineering Branch), PJ11.2;
- Reference Docket Nos. CP02–60–004 and CP04–64–000; and
- Mail your comments so that they will be received in Washington, DC, on or before August 30, 2004.

Please note that we are continuing to experience delays in mail deliveries from the U.S. Postal Service. As a result, we will include all comments that we receive within a reasonable time frame in our environmental analysis of this project. However, the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link and the link to the User's Guide. Before you can file comments you will need to create a free account which can be created by clicking on ''Sign-up.''

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[2] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208-FERC or on the FERC Internet Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance with eLibrary, the eLibrary helpline can be reached at 1–866–208–3676, TTY (202) 502–8659 or at *FERCOnlineSupport@ferc.gov*. The eLibrary link on the FERC Internet website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the

[1] MP L-is the milepost designation for the existing 30-inch-diameter LNG Lateral, which is part of Trunkline Gas' Lakeside Pipeline System.

[2] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *www.ferc.gov*, click on ''eSubscription'' and then click on ''Sign-up.''

Magalie R. Salas,

Secretary.

[FR Doc. E4–1727 Filed 8–3–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7797–3]

Board of Scientific Counselors, Biotechnology Subcommittee Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of a Board of Scientific Counselors (BOSC) Biotechnology Subcommittee Meeting.

DATES: August 20, 2004. The Subcommittee will meet by conference call from 1 p.m. to 2 p.m. (Eastern Time). The purpose of this call is to discuss Subcommittee member comments on ORD's Draft Biotechnology Research Strategy and, if possible, approve a draft of a letter report.

Meeting Location: Participation in the meeting will be by teleconference only—a meeting room will not be used. Members of the public who wish to obtain the call-in number and access code to participate in the teleconference meeting may contact Ms. Lorelei Kowalski, Designated Federal Officer, via telephone/voice mail at (202) 564–3408, via e-mail at *kowalski.lorelei@epa.gov*, or by mail at Environmental Protection Agency, Office of Research and Development, Mail Code 8104–R, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, by the Monday preceding the conference call.

Document Availability

The Biotechnology Subcommittee will provide a letter review of ORD's Draft Biotechnology Research Strategy. Any member of the public interested in a hard copy of the draft strategy, or in making a presentation during the conference call, should contact Ms. Lorelei Kowalski, Designated Federal Officer, via telephone/voice mail at (202) 564–3408, via e-mail at *kowalski.lorelei@epa.gov*, or by mail at Environmental Protection Agency, Office of Research and Development, Mail Code 8104-R, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. In general, each individual making an oral presentation will be limited to a total of three minutes. Requests for the draft strategy or for making oral presentations at the meeting will be accepted up to 3 business days before the meeting date. The draft strategy can also be viewed through EDOCKET, as provided in Unit I.A. of the **SUPPLEMENTARY INFORMATION** section.

Submitting Comments

Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B. of the **SUPPLEMENTARY INFORMATION** section. Written comments will be accepted up to 3 business days before the meeting date.

FOR FURTHER INFORMATION CONTACT: Ms. Lorelei Kowalski, Designated Federal Officer, via telephone/voice mail at (202) 564–3408, via e-mail at *kowalski.lorelei@epa.gov*, or by mail at Environmental Protection Agency, Office of Research and Development, Mail Code 8104–R, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. General Information

The meeting is open to the public.

A. How Can I Get Copies of Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. ORD–2004–0011. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Documents in the official public docket are listed in the index in EPA's electronic public docket and comment system, EDOCKET. Documents may be available either electronically or in hard copy. Electronic documents may be viewed through EDOCKET. Hard copy of the draft agenda may be viewed at Board of Scientific Counselors Biotechnology Subcommittee Meeting 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 ORD Docket is (202) 566–1752.

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 EDOCKET. You may use EDOCKET 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.

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, confidential business information (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.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate 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.

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. *EDOCKET.* 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 EDOCKET 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, *www.epa.gov*, select ''Information Sources,'' ''Dockets,'' and ''EDOCKET.'' Once in the system, select ''search,'' and then key in Docket ID No. ORD–2004–0011. 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 *ORD.Docket@epa.gov*, Attention Docket ID No. ORD–2004–0011. In contrast to EPA's electronic public docket, EPA's e-mail system is not an anonymous access system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.B.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: U.S. Environmental Protection Agency, ORD Docket, EPA Docket Center (EPA/DC), Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. ORD–2004–0011.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. ORD–2004–0011 (note: this is not a mailing address). Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.A.1.

Dated: July 29, 2004.

Jeffery Morris,

Acting Director, Office of Science Policy.

[FR Doc. 04–17790 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0202; FRL–7368–9]

Pentachloronitrobenzene; Availability of Risk Assessment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of documents that were developed as part of EPA's process for making pesticide reregistration eligibility decisions and tolerance reassessments consistent with the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act (FQPA) of 1996. These documents are the human health and environmental fate and effects risk assessments and related documents for pentachloronitrobenzene (PCNB). PCNB is a fungicide widely used on agricultural crops such as cotton, vegetables, and on turf. This notice also starts a 60–day public comment period for the risk assessments. Comments are to be limited to issues directly associated with PCNB and raised by the risk assessments or other documents placed in the docket. By allowing access and opportunity for comment on the risk assessments, EPA is seeking to strengthen stakeholder involvement and help ensure that our decisions under FQPA are transparent and based on the best available information. The Agency cautions that the risk assessments for PCNB are preliminary and that further refinements may be appropriate. Risk assessments reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

DATES: Comments, identified by the docket identification (ID) number OPP–2004–0202, must be received on or before October 4, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Jill Bloom, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8019; e-mail address: *Bloom.Jill@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0202. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information

whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in EPA's Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2004–0202. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0202. 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 you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail.* Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0202.

3. *By hand delivery or courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2004–0202. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI

on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the notice.
7. Make sure to submit your comments by the deadline in this document.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. Background

What Action is the Agency Taking?

PCNB is a fungicide widely used on agricultural crops such as cotton, vegetables, and on turf. EPA is making available the risk assessments that have been developed as part of the Agency's public participation process for making the reregistration eligibility and tolerance reassessment decisions for PCNB, as it has done for other pesticides, and consistent with FFDCA, as amended by FQPA. The Agency's human health, and environmental fate and effects risk assessments and other related documents for PCNB are available in the official public docket for this action under docket ID number OPP–2004–0202. As additional comments, reviews, and risk assessment modifications for PCNB become available, these also will be docketed for PCNB.

The Agency cautions that the PCNB risk assessments are preliminary and that further refinements may be appropriate. Risk assessment documents reflect only the work and analysis conducted as of the time they were produced and it is appropriate that, as new information becomes available and/or additional analyses are performed, the conclusions they contain may change.

EPA is providing an opportunity, through this notice, for interested parties to provide written comments and input to the Agency on the risk assessment for the pesticide specified in this notice. Such comments and input could address, for example, the availability of additional data to further refine the risk assessments, such as percent crop treated information or submission of residue data from food processing studies, or could address the Agency's risk assessment methodologies and assumptions as applied to this specific chemical. Comments should be limited to issues raised within the risk assessment and associated documents. Failure to comment on any such issues as part of this opportunity will in no way prejudice or limit a commenter's opportunity to participate fully in later notice and comment processes. All comments should be submitted by October 4, 2004 using the methods in Unit I. of the **SUPPLEMENTARY INFORMATION**. Comments will become part of the Agency record for PCNB.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: July 14, 2004.

Debra Edwards,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 04–17800 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0218; FRL–7369–3]

Pesticide Product Registration; Conditional Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to conditionally register the pesticide product Technical Trypsin Modulating Oostatic Factor (TMOF) containing a new active ingredient not included in any previously registered product pursuant to the provisions of section 3(c)(7)(C) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: Alan Reynolds, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0515; e-mail address: *reynolds.alan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are a pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number

OPP–2004–0218. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, Crystal Mall #2, Arlington, VA ((703) 305–5805). Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

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. Did EPA Conditionally Approve the Application?

A conditional registration may be granted under section 3(c)(7)(C) of FIFRA for a new active ingredient where certain data are lacking, on condition that such data are received by the end of the conditional registration period and do not meet or exceed the risk criteria set forth in 40 CFR 154.7; that use of the pesticide during the conditional registration period will not cause unreasonable adverse effects; and that use of the pesticide is in the public interest. The Agency has considered the available data on the risks associated with the proposed use of Trypsin Modulating Oostatic Factor, and information on social, economic, and environmental benefits to be derived from such use. Specifically, the Agency has considered the nature and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of Trypsin Modulating Oostatic Factor during the period of conditional registration will not cause any unreasonable adverse effect on the environment, and that use of the pesticide is, in the public interest.

Consistent with section 3(c)(7)(C) of FIFRA, the Agency has determined that these conditional registrations are in the public interest. Use of the pesticides are of significance to the user community, and appropriate labeling, use directions, and other measures have been taken to ensure that use of the pesticides will not result in unreasonable adverse effects to man and the environment.

III. Conditionally Approved Registrations

EPA issued a notice, published in the **Federal Register** of October 9, 2002 (67 FR 62965) (FRL–7276–7), which announced that Insect Biotechnology Inc., 100 Capitola Drive. Suite 307, Durham, NC 27713, had submitted an application to conditionally register the pesticide product, Technical Trypsin Modulating Oostatic Factor (TMOF), insecticide (EPA File Symbol 74411–R), containing Trypsin Modulating Oostatic Factor at 100%, an active ingredient not included in any previously registered product.

The application was conditionally approved on May 24, 2004 as Technical Trypsin Modulating Oostatic Factor (TMOF) (EPA Registration Number 74411–1).

The product is registered as a manufacturing use product for formulation into insecticides for control of mosquito larvae. As the only condition of registration, EPA is requiring the registrant to provide a storage stability study by May 24, 2006.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: July 22, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 04–17505 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0217; FRL–7369–2]

Pesticide Product; Registration Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to register the pesticide product Actinovate Soluble containing an active ingredient not included in any previously registered product pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: Alan Reynolds, Biopesticides and Pollution Prevention Division (7511C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0515; e-mail address: *reynolds.alan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food producer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production/agriculture (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be

affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket identification (ID) number OPP–2004–0217.The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are also available for public inspection. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. The request should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

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. Did EPA Approve the Application?

The Agency approved the application after considering all required data on risks associated with the proposed use of *Streptomyces lydicus* WYEC 108, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of *Streptomyces lydicus* WYEC 108 when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

III. Approved Application

EPA issued a notice, published in the **Federal Register** of October 4, 2000 (65 FR 59185) (FRL–6742–1), which announced that Natural Industries, Inc., 6223 Theall Road, Houston, TX 77066, had submitted an application to register the pesticide product, Actinovate Soluble, Fungicide (EPA File Symbol 73314–R), containing *Streptomyces lydicus* WYEC 108 at 1.0% for control of root decay fungi. This product was not previously registered.

The application was approved on May 24, 2004, as Actinovate Soluble (EPA Registration Number 73314–1) for control of root decay fungi.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: July 22, 2004.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 04–17504 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0222; FRL–7369–6]

Acetamiprid; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2004–0222, must be received on or before September 3, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Akiva Abramovitch, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8328; e-mail address: *abramovitch.akiva@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

Potentially affected entities may include, but are not limited to:

- Industry, (NAICS 111)
- Crop production (NAICS 1112)
- Animal production, (NAICS 311)
- Food manufacturing, (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established an official public docket for this action under docket ID number OPP–2004–0222. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although, a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although, not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also, include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2004–0222. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID number OPP–2004–0222. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID number OPP–2004–0222.

3. *By hand delivery or courier*. Deliver your comments to: Public Information

and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 South Bell St., Arlington, VA, Attention: Docket ID number OPP–2004–0222. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Make sure to submit your comments by the deadline in this notice.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also, provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 16, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by Nippon Soda Company, Ltd. % Nisson America Inc., and represents the view of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Nippon Soda Company, Ltd.

PP 3F6575

EPA has received a pesticide petition (PP 3F6575) from Nippon Soda Co., Ltd., c/o Nisso America Inc., 220 East 42nd Street, Suite 3002, New York, NY, 10017. This petition proposes, pursuant to section 408(d) of the Federal Food, Drug and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR 180.578, by establishing tolerances for the residues of acetamiprid in tuberous and corm vegetables as given below. The proposed analytical method is by LC/MS/MS. Pursuant to section 408(d)(2) of the FFDCA, as amended by the Food Quality Protection Act (FQPA), Nippon Soda Co., Ltd. has submitted the following summary of information, data and rationales in support of their pesticide petition and authorization for the summary to be published in the **Federal Register** in a notice of receipt of the petition. This summary was prepared by Nippon Soda Co., Ltd. EPA is in the process of evaluating the petition and has not determined whether the data supports granting of the petition. EPA may have made minor edits to the summary for the purpose of clarity.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism of acetamiprid in plants is well understood, having been investigated in eggplant, apples, cabbage, carrots, and cotton. Metabolism in plants primarily involves demethylation of the N-methyl group with subsequent hydrolysis of the acetamidine function to give the N-acetyl compound. This compound is then hydrolyzed to the corresponding amine followed by oxidation to the alcohol and acid. Conjugation of the alcohol with glucose is also significant. Degradation of the side chain without loss of the N-methyl group is seen in carrots since this is the major metabolic route in soil.

2. *Analytical method.* Based upon the metabolism of acetamiprid in plants and the toxicology of the parent and metabolites, quantification of the parent acetamiprid is sufficient to determine toxic residues. As a result a method has been developed which involves extraction of acetamiprid from crops with methanol, filtration, partitioning and cleanup, and analysis by LC/MS/MS methods. The limit of quantification (LOQ) for the method is 0.01 parts per million (ppm) and the method detection limit (MDL) is 0.0003 ppm.

3. *Magnitude of residues.* Magnitude of residue studies were conducted in potatoes as the representative crop for tuberous and corm vegetables. Trials were conducted in all of the major use areas for each of the crops as specified in the Residue Chemistry Guidelines OPPTS 860.1500 with applications at the maximum label use rate for each crop. As a result of the field trials the following tolerances are proposed for each of the tuberous and corm crop groups: 0.01 ppm. A processing study was also conducted with potatoes however even at 5X the labeled rate, acetamiprid residues were below the LOQ in the raw agricultural commodity and collected potato processing fractions were not analyzed.

B. Toxicological Profile

1. *Acute toxicity for technical acetamiprid.* The acute oral LD_{-50} for acetamiprid was 146 milligrams/

kilogram (mg/kg) for female Sprague-Dawley rats and 217 for male rats. The acute dermal LD_{-50} for acetamiprid was greater than 2,000 mg/kg in rats. The acute 4 hour inhalation LC_{-50} for acetamiprid was greater than 1.15 milligrams/Liter (mg/L), the highest attainable concentration. Acetamiprid was not irritating to the eyes or skin and was not considered to be a sensitizing agent. The no observed effect level (NOEL) for acute neurotoxicity was 10 gram/kilogram (g/kg) and no evidence of neuropathy was noted.

Acute toxicity for formulated acetamiprid 70WP. The acute oral LD_{-50} for Acetamiprid 70WP was 944 mg/kg for female Sprague-Dawley rats and 1,107 mg/kg for male rats. The acute dermal LD_{-50} for formulated acetamiprid was greater than 2,000 mg/kg in rats. The acute inhalation LC_{-50} (4 hours) for acetamiprid 70WP was determined to be greater than 2.88 milligrams per Liter (mg/L), the highest attainable concentration. Acetamiprid 70WP was concluded to be a mild eye irritant and slight skin irritant. There were no indications of skin sensitization for the formulated product.

2. *Genoxicity for technical acetamiprid.* Based on the weight of the evidence provided by a complete test battery, acetamiprid is neither mutagenic nor genotoxic. The compound was found to be devoid of mutagenic activity (with and without metabolic activation) in *salmonella typhimurium* and *escherichia coli* (Ames assay). Acetamiprid was also, not mutagenic in an *in vitro* mammalian cell gene mutation assay on Chinese hamster ovary (CHO) cells (HPRT locus, with and without metabolic activation). Acetamiprid did not induce unscheduled DNA synthesis (UDS) in either rat liver primary cell cultures or in mammalian liver cells *in vivo**COM028*. In an *in vitro*, chromosomal aberration study using CHO cells, acetamiprid was positive when tested under metabolic activation at cytotoxic dose levels; no effect was detected without metabolic activation. Acetamiprid was non-clastogenic in an *in vivo* chromosomal aberration study in rat bone marrow. It was negative also, in an *in vivo* mouse bone marrow micronucleus assay.

3. *Reproductive and developmental toxicity.* In the multi-generation rat reproduction study a no observed effect level (NOEL) of 100 ppm was established based on decreased body weight gains and a reproduction NOEL of 800 ppm (highest dose tested) was established for reproductive performance and fertility. In the rat teratology study the developmental NOEL was 50 milligrams/kilogram/day (mg/kg/day) (maternal NOEL of 16 mg/kg/day based on decreased body weight and food consumption) and in the rabbit teratology study the developmental NOEL was 30 mg/kg/day (maternal NOEL of 15 mg/kg/day based on decreased body weight and food consumption). In both the rat and rabbit studies there were no fetotoxic or teratogenic findings.

4. *Subchronic toxicity.* In the 3–month dog feeding study a NOEL of 800 ppm (32 mg/kg/day for both males and females) was established based on growth retardation and decreased food consumption.

In the 3–month rat feeding study a NOEL of 200 ppm (12.4 and 14.6 mg/kg/day respectively for male and female rats) was established based on liver cell hypertrophy at a dose of 800 ppm.

In the 3–month mouse feeding study a NOEL of 400 ppm (53.2 and 64.6 mg/kg/day respectively for male and female mice) was established based on increased liver/body weight ratio and decreased cholesterol in females at 800 ppm.

A 13–week dietary neurotoxicity study for acetamiprid established a NOEL of 200 ppm (14.8 and 16.3 mg/kg for male and female rats) based on reduced body weight and food consumption decreases at 800 ppm. There was no evidence of neurotoxicity.

A 21–day dermal study in rabbits at dose levels up to 1,000 mg/kg/day caused no systemic toxicity, dermal irritation or histomorphological lesions in either sex tested.

5. *Chronic toxicity.* In the 1–year dog study, the NOEL was established at 600 ppm (20 and 21 mg/kg/day for male and female dogs, respectively) based on growth retardation and decreased food consumption at a dose of 1,500 ppm.

In the 18–month mouse study the NOEL was established at 130 ppm (20.3 and 25.2 mg/kg/day for male and female mice) based on growth retardation and hepatic toxicity at 400 ppm.

In the 2–year rat study the NOEL was 160 ppm (7.1 and 8.8 mg/kg/day for male and female rats) based on growth retardation and hepatic toxicity. There were no indications of carcinogenicity in either the rat or mouse chronic studies.

6. *Animal metabolism.* The metabolism of acetamiprid is well understood and the primary animal metabolite is IM-2-1.

7. *Metabolite toxicology.* Testing of IM-2-1 demonstrated that it is significantly less toxic than the parent acetamiprid and it is not being considered as part of the total toxic residue, therefore, no tolerance is being requested by the registrant. The acute oral LD_{50} of IM-2-1 is 2,543 mg/kg for male rats and 1,762 mg/kg for female rats.

8. *Endocrine disruption.* Acetamiprid does not belong to a class of chemicals known or suspected of having adverse effects on the endocrine system. Developmental toxicity studies in rats and rabbits and a reproductive study in rats gave no indication that acetamiprid has any effects on endocrine function. The chronic feeding studies also, did not show any long-term effects related to endocrine systems.

C. Aggregate Exposure

1. *Dietary exposure.* Acute and chronic dietary analyses were conducted to estimate exposure to potential acetamiprid residues in/on the following crops: Cole crop group, citrus crop group, fruiting vegetable crop group, pome fruit crop group, grapes, leafy vegetables, canola oil, mustard seed, cotton, and the tuberous and corm vegetable crop group using the Dietary Exposure Evaluation Model (DEEM™) software. Exposure estimates to water were made based upon modeling.

2. *Food.* The acute dietary exposure estimates at the 99.9^{th} percentile for the U.S. population was calculated to be 5.9% of the acute RfD. The population subgroup with the highest exposure was non-nursing infants at 15.4% of the acute RfD. The acute RfD was based on the NOEL of 10 mg/kg in the acute neurotoxicity study. Chronic dietary exposure estimates from residues of acetamiprid for the U.S. population was 0.3% of the chronic Populaton Adjusted Dose (cPAD). The subpopulation with the highest exposure was children 1–6 with 1.3% of the cPAD used. These values are based on projected percentages for percent of crop treated and field trial residues at maximum label rates and minimum PHI's with no reduction factors for common washing, cooking, or preparation practices. These can be considered conservative values. The cPAD was based on the NOEL of 7.1 mg/kg/day in the chronic rat study, an uncertainty factor of 100 to account for interspecies and intraspecies variations, and an FQPA safety factor of 3.

3. *Drinking water.* EPA's standard operating procedure (SOP) for drinking water exposure and risk assessments was used to perform the drinking water analysis for acetamiprid. This SOP utilizes a variety of tools to conduct drinking water assessment. These tools include water models such as screening concentration in ground water (SCI-GROW), generic expected environmental concentration (GENEEC), pesticide root zone model/exposure

analysis modeling system (PRZM/EXAMS), and monitoring data. If monitoring data are not available then the models are used to predict potential residues in surface water and ground water. In the case of acetamiprid, monitoring data do not exist, therefore, GENEEC and SCIGROW models were used to estimate a water residue. The calculated drinking water levels of comparison (DWLOC) for acute and chronic exposures for all adults and children greatly exceed the modeled acetamiprid water residues, drinking water estimated concentrations (DWEC). The acute DWLOC values are 3,360 ppb for adults and 940 parts per billion (ppb) for children. The worst case DWEC for acute scenarios is calculated to be 13.27 ppb using the GENEEC surface water model. The chronic DWLOC values are 2,450 ppb for adults and 700 ppb for children. The DWEC for the worst case chronic scenario is 1.59 ppb (GENEEC).

4. *Non-dietary exposure.* A ready to use, dilute formulation of acetamiprid is registered for insect control on outdoor ornamentals, vegetables and fruit trees. Based on surrogate exposure data obtained from a carbaryl study, the homeowner margin of exposure (MOE) was calculated to exceed ten million. Postapplication exposure resulting from contact with acetamiprid treated foliage resulted in an MOE in excess of 500,000.

D. Cumulative Effects

EPA and ILSI are developing the methodologies to resolve the complex scientific issues concerning common mechanism of toxicity and how to cumulate pesticides in a quantitative manner. A determination has not been made that acetamiprid has a common mechanism of toxicity with other substances. Acetamiprid does not appear to produce a common toxic metabolite with other substances. A cumulative risk assessment was, therefore, not performed for this analysis.

E. Safety Determination

1. *U.S. population.* Using the conservative assumptions described above, based on the completeness and reliability of the toxicity data, it is concluded that aggregate exposure to the proposed uses of acetamiprid will utilize at most 5.9% of the acute reference dose for the U.S. population, and is likely to be much less, as more realistic data and models are developed. EPA generally has no concern for exposures below 100% of the RfD because the RfD represents the level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. Drinking water levels of comparison based on this exposure are much greater than conservative estimated concentrations, and would be expected to be well below the 100% level, if they occur at all. Therefore, there is a reasonable certainty that no harm will occur to the U.S. population from aggregate exposure to acetamiprid.

2. *Infants and children.* In multi-generation reproduction and teratology studies, no adverse effects on reproduction were observed in either rats or rabbits. In the long term feeding studies in rats and mice there was no evidence of carcinogenicity. Acetamiprid was not mutagenic under the conditions of testing. Using the conservative exposure assumptions described in the exposure section above, the percent of the reference dose that will be used for short term aggregate exposure to residues of acetamiprid will be 15.4% for non-nursing infants (the most highly exposed sub-group). This value is based on dietary exposure alone as only children over 7 are expected to have residential post-application exposure for the proposed acetamiprid uses. As in the adult situation, drinking water levels of comparison are much higher than the worst case drinking water estimated concentrations and would be expected to use well below 100% of the RfD, if they occur at all. Therefore, there is a reasonable certainty that no harm will occur to infants and children from aggregate exposure to residues of acetamiprid.

F. International Tolerances

Acetamiprid is registered for use on food crops in several countries outside the United States (e.g., maximum residue levels (MRLs) are established in Canada and Japan).

[FR Doc. 04–17507 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0207; FRL–7367–7]

Ethylene Glycol; Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket identification (ID) number OPP–2004–0207, must be received on or before September 3, 2004.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Bipin Gandhi, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8380; e-mail address: *gandhi.bipin@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS 111)
- Animal production (NAICS 112)
- Food manufacturing (NAICS 311)
- Pesticide manufacturing (NAICS 32532)

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket ID number OPP–2004–0207. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the

collection of materials that is available for public viewing at the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA. This docket facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The docket telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select ''search,'' then key in the appropriate docket ID number.

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For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket ID number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Unit I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. *Electronically*. If you submit an electronic comment as prescribed in this unit, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets*. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket/*, and follow the online instructions for submitting comments. Once in the system, select ''search,'' and then key in docket ID number OPP–2004–0207. The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail*. Comments may be sent by e-mail to *opp-docket@epa.gov*, Attention: Docket ID Number OPP–2004–0207. In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD ROM*. You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Unit I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By mail*. Send your comments to: Public Information and Records Integrity Branch (PIRIB) (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001, Attention: Docket ID Number OPP–2004–0207.

3. *By hand delivery or courier*. Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1801 S. Bell St., Arlington, VA, Attention: Docket ID Number OPP–2004–0207. Such deliveries are only accepted during the docket's normal hours of operation as identified in Unit I.B.1.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket or by e-mail. You may claim information that you submit to EPA as

CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

E. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 19, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by FFDCA section 408(d)(3). The summary of the petition was prepared by the petitioner and represents the view of the petitioner. The summary may have been edited by EPA if the terminology used was unclear, the summary contained extraneous material, or the summary unintentionally made the reader conclude that the findings reflected EPA's position and not the position of the petitioner. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Sumitomo Chemical Company

PP 4E6828

EPA has received a pesticide petition (4E6828) from Sumitomo Chemical Company, Limited, 5–33, Kitahara, 4–Chome, Chuo-Ku, Osaka 541, Japan, through their United States agent, proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 to establish an exemption from the requirement of a tolerance for ethylene glycol when used as an encapsulating agent for pesticides being applied post-harvest as residual, and crack and crevice sprays in and around food and non-food areas of residential and non-residential structures, including food handling establishments, with no limit. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

The primary method for determining ethylene glycol in biological samples is by gas (and high-resolution gas) high performance liquid chromotography (HPLC), or colorimetric determination. Gas chromatography (GC) is also employed to determine ethylene glycol concentrations in environmental samples such as air, water, food, drugs, or other substances. Methods for determining biomarkers of exposure to, and effects of, ethylene glycol are available for blood, tissue, and urine, as well as for the metabolic products (glycolic acid and oxalic acid) in blood and urine. The 1997 Agency for Toxic Substances and Disease Registry (ATSDR) report contains details of extraction and concentration methods for measuring these metabolites in humans. Methods for determining ethylene glycol in air, water, or aqueous solutions, foods, as well as foods stored in plastic containers from which leaching has occurred have been developed. Methods used to detect ethylene glycol in environmental samples are approved by EPA, National Institute of Occupational Safety and Health (NIOSH), Association of Official Analytical Chemists (AOAC) International, and American Public Health Association (APHA).

B. Toxicological Profile

1. *Acute toxicity*. ATSDR established an maximum residue level (MRL) (minimal risk level) of 0.5 parts per million (ppm) based on a no observed adverse effect level (NOAEL) of 197 ppm for acute inhalation exposure to ethylene glycol, and an MRL of 2.0 milligrams/kilogram/day (mg/kg/day) for acute oral exposure. The American Conference of Governmental Industrial Hygienists (ACGIH) recommends a maximum level of 50 ppm (125 milligrams/cubic meter (mg/m^3)).

Dermal exposure to ethylene glycol causes minimum skin irritation or toxic effect. Eye contact with ethylene oxide may cause irritation.

2. *Genotoxicity*. Negative results for mutagenicity were obtained in the following assays: Mouse lymphoma, with and without activation; chromosomal aberrations and sister chromatid exchange in cultured chinese hampster ovary (CHO) cells (with and without activation); and for deoxyribonucleic acid (DNA) damage in rat hepatocytes. In *in vivo* genotoxicity studies, results have also been negative.

3. *Reproductive and developmental toxicity*. Literature on reproductive effects of ethylene glycol in humans could not be located.

Pregnant mice and rats fed ethylene glycol in their diet produced young with statistically significant increases in external and vertebral malformations, and the percentage of malformed live fetuses per litter was significantly increased. Decreased pup weights were observed, particularly in animals receiving higher doses. New Zealand White rabbits showed no adverse effects in similar tests.

4. *Subchronic toxicity*. A human study showed that inhalation of 7–19 ppm for 20–22 hours a day for 4 weeks did not cause adverse hematological or immune function effects. No studies were located describing neurological, reproductive, genotoxicity, or developmental effects in humans by all other routes of exposure. No subchronic dermal or oral human studies were found. No subchronic inhalation animal toxicity studies were located, but subchronic dermal and oral studies for inhalation exposure showed adverse effects similar to chronic exposure.

5. *Chronic toxicity*. The oral reference dose (RfD) for ethylene glycol is 2.0 mg/kg/day with an uncertainty factor (UF) of 100, based on the NOAEL of 200 mg/kg/day toxic effect in kidneys in rats.The oral RfD for ethylene glycol is 2.0 mg/kg/day with an UF of 100, based on the NOAEL of 200 mg/kg/day toxic effect in kidneys in rats. Rats and mice given ethylene glycol orally for 2 years, in separate studies, did not exhibit any carcinogenic effect. The Department of Health and Human Services (DHHS), the International Agency for Research on Cancer (IARC), and EPA have not classified ethylene glycol for carcinogenicity. Studies with people who used ethylene glycol did not show carcinogenic effects. However, rodents fed ethylene glycol in long-term feeding studies showed mortality.

6. *Animal metabolism*. Animal studies have shown that rats and dogs are more sensitive to ethylene glycol exposure than mice. Ethylene glycol ingestion causes metabolic acidosis and toxic calcium oxalate production in humans and other animals. The main toxic metabolites are glycolic acid, glyoxylic acid, and oxalic acid.

7. *Metabolite toxicology*. Ethylene glycol is absorbed from the digestive tract rapidly, depleting the water in the body and breaking down into three major metabolites; glycolic acid, glyoxylic acid, and oxalic acid that cause harmful crystalline deposits in the body. These metabolites are typically detected in urine. Ethylene glycol can be detected in the blood and serum soon after ingestion, but much less so after metabolic activity begins.

8. *Endocrine disruption*. Neither mice nor rats have exhibited endocrine effects after experimental exposure.

C. Aggregate Exposure

1. *Dietary exposure*. Oral consumption of ethylene glycol by humans is usually accidental, but has serious, sometimes fatal, toxicity. Oral consumption by animals attracted by the sweet odor is an important cause of veterinary emergencies. The oral dose of ethylene glycol required to cause death in humans is not well defined, but a lethal dose is estimated to be 1,330 mg/kg body weight.

i. *Food*. The migration of ethylene glycol from regenerated cellulose films containing triethylene glycol and polyethylene glycol as softening agents into food has been documented. It has also been found to migrate into food from pet (polyethylene terephthalate) plastic bottles used for packaging carbonated beverages. Ethylene oxide is a commonly used food disinfectant and preservative. After treatment with ethylene oxide, trace amounts of residual ethylene glycol may be retained in food. Potential exposure to minute amounts of ethylene glycol present in microencapsulated pesticides used in food and non-food areas of food handling establishments would not be of concern.

ii. *Drinking water*. EPA has established several drinking water Health Advisories for ethylene glycol. The (DWEL) Drinking Water Equivalent Level is 70 milligrams per liter for an adult. Ethylene glycol would only be present in drinking water by accidental release into reservoirs. However, biodegradation is an effective method of removing ethylene glycol from soil and water.

2. *Non-dietary exposure*. The most likely route of exposure to ethylene glycol is through dermal exposure; however, dermal exposure is not likely to lead to lethal toxic effects. Dermal exposure can occur occupationally in production facilities, and by handling liquid antifreeze, brake and other car and industrial fluids and solvents, inks in stamp pads, ballpoint pens, and in print shops. Inhalation of ethylene glycol mist may occur in industrial production, and there are trace amounts in cigarette smoke. Dermal and inhalation exposure may occur during airplane de-icing. Hazardous waste sites may also contain ethylene glycol until degradation occurs. Small amounts of ethylene glycol are also in pharmaceuticals (components of skin lotions, powders, and as a glycerin substitute).

D. Cumulative Effects

Humans and animals are exposed to significant levels of ethylene glycol by several routes of exposure. Available studies have not shown that cumulative effects are seen, due to the rapid biodegradation of ethylene glycol.

E. Safety Determination

1. *U.S. population*. Little information on quantitative levels in human tissues and body fluids, populations near hazardous waste sites, or those occupationally exposed to ethylene glycol is available. Most exposure to the general population is through dermal contact with products containing ethylene glycol during application or use, or by accidental or intentional oral ingestion. Workers involved in the manufacture or use of products containing high concentrations of ethylene glycol are at greater risk by this exposure than the general population, but no widespread reports of toxicity and deaths have been located.

2. *Infants and children*. As ethylene glycol is mainly used in antifreeze, hydraulic fluids and de-icing compounds, and other industrial and consumer products, children and infants would be exposed to it mostly by adult carelessness in use, disposal, and storage of products containing ethylene glycol.

F. International Tolerances

No listings found.

[FR Doc. 04–17506 Filed 8–3–04; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

[DA 04–2154]

The Consumer & Governmental Affairs Bureau Seeks Additional Information Regarding Certain Slamming Informal Complaints

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Consumer & Governmental Affairs Bureau seeks additional information for certain informal complaints regarding ''slamming'' (the unauthorized change of a subscriber's selection of telephone exchange or telephone toll service).

DATES: Additional information regarding certain slamming informal complaints is due on or before August 16, 2004.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Diane Fallica, (202) 418–0298 (voice), (202) 418–0484 (TTY), or e-mail *Diane.Fallica@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Public Notice* DA 04–2154, released July 16, 2004, seeking additional information regarding certain slamming informal complaints. If you would like to submit additional information for any of the informal complaint cases below, contact Diane Fallica, (202) 418–0298 (voice), *Diane.Fallica@fcc.gov*, of the Consumer Policy Division, Consumer & Governemental Affairs Bureau. The TTY number is (202) 418–0484. Any case number listed below for which no additional information is received by the Commission on or before August 16, 2004, may be dismissed in accordance with §§ 64.1100 through 64.1195 of the Commission's rules, 47 CFR 64.1100 through 64.1195.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). This *Public Notice* can also be downloaded in Word and Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy/slamming.html*.

Synopsis: This *Public Notice* contains the case file numbers for certain informal complaints regarding ''slamming'' (the unauthorized change of a subscriber's selection of telephone exchange or telephone toll service) for which we are in need of additional information. The purpose of the slamming rules is to protect consumers and law abiding carriers from companies that engage in slamming in violation of our rules. Since the current slamming rules became effective, the Commission has ordered over half a million dollars in consumer refunds and credits. As part of our continuing effort to vigorously enforce our slamming rules, we seed additional information for the cases listed below:

01–S52091, 01–S54640, 01–S55024, 01–S55457, 01–S56724, 01–S56764, 01–S57323, 01–S57853, 01–S58226, 01–S58227, 01–S58239, 01–S58318, 01–S58612, 01–S60205, 01–S61086, 01–S61414, 01–S62301, 01–S62446, 01–S62548, 01–S63474, 01–S65664, 01–S66825, 02–B0003652, 02–B0007313, 02–B0011332, 02–F0007637, 02–N69287, 02–P28259, 02–S66700, 02–S66758, 02–S67038, 02–S67160, 02–S67535, 02–S67614, 02–S67622, 02–S67654, 02–S67966, 02–S67976, 02–S67989, 02–S67998, 02–S68005, 02–S68023, 02–S68044, 02–S68056, 02–S68114, 02–S68124, 02–S68125, 02–S68491, 02–S68495, 02–S68640, 02–S70222, 02–S70489, 02–S70491, 02–S70515, 02–S70608, 02–S71109, 02–S71450, 02–S71556, 02–S7192, 02–S71946, 02–S72027, 02–S72304, 02–S72441, 02–S72451, 02–S7269, 02–S72794, 02–S72798, 02–S73093, 02–S73099, 02–S73100, 02–S73260, 02–S73337, 02–S73363, 02–S73366, 02–S73368, 02–S73370, 02–S73376, 02–S73401, 02–S73402, 02–S73467, 02–S73492, 02–S73523, 02–S74508, 02–S74904, 02–S74907, 02–S74928, 02–S75895, 02–S76098, 02–S76207, 02–S76267, 02–S76290, 02–S76313, 02–S76490, 02–S76586, 02–S76608, 02–S76832, 02–S76977, 02–S77181, 02–S77183, 02–S77201, 02–S77233, 02–S77236, 02–S77252, 02–S77365, 02–S77441, 02–S78709, 02–S78980, 02–S79295, 02–S79297, 02–S79379, 02–S79386, 02–S79485, 02–S79590, 02–S79592, 02–S79603, 02–S79736, 02–S79785, 02–S80051, 02–S80447, 02–S80622, 02–S80645, 02–S80690, 02–S80697, 02–S80765, 02–S80775, 02–S81306, 02–S81334, 02–S81339, 02–S81399, 02–S81436, 02–S81521, 02–S81522, 02–S81568, 02–S81634, 02–S81647, 02–S81905, 02–S81920, 02–S81921, 02–S81951, 03–B0021109, 03–B0042690S, 03–I0024166, 03–I0024540, 03–I0024947, 03–I0026539, 03–I0028598, 03–I0028818, 03–I0028835, 03–I0035079S, 03–I0046885S, 03–I0047501S, 03–I0048539S, 03–I0052955S, 03–I0053481S, 03–I0054773S, 03–I0055388S, 03–I0056465S, 03–I0056842S, 03–I0056969S, 03–I0063318S, 03–I0064075S, 03–I0073916S, 03–I0074884S, 03–I0075087S, 03–I0077518S, 03–S000377S, 03–S82112, 03–S82177, 03–S82297, 03–S82350, 03–S82633, 03–S82654, 03–S82997, 03–S83063, 03–S83073, 03–S83168, 03–S83170, 03–S83283, 03–S83328, 03–S83343, 03–S83361, 03–S83438, 03–S83442, 03–S83485, 03–S83509, 03–S83510, 03–S83533, 03–S83544, 03–S83816, 03–S83817, 03–S83857, 03–S83860, 03–S83941, 03–S83955, 03–S84324, 03–S84388, 03–S84395, 03–S84425, 03–S84460, 03–S84470, 03–S84572, 03–S84594, 03–S84716, 03–S84762, 03–S84842, 03–S84913, 03–S84937, 03–S84946, 03–S84960, 03–S84990, 03–S85012, 03–S85017, 03–S85021, 03–S85029, 03–S85058, 03–S85118, 03–S85183, 03–S85262, 03–S85266, 03–S85299, 03–S85714, 03–S85728, 03–S85818, 03–S85833, 03–S85848, 04–S000392S, 04–S85901

Federal Communications Commission.

Thomas D. Wyatt,

Deputy Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 04–17818 Filed 8–3–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may obtain copies of agreements by contacting the Commission's Office of Agreements at 202–523–5793 or via e-mail at *tradeanalysis@fmc.gov*. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 011776–001.

Title: Lykes/CSAV Slot Charter Agreement.

Parties: Lykes Lines Limited LLC and Compania Sud Americana de Vapores S.A.

Filing Party: Wayne R. Rohde, Esq., Sher & Blackwell, 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The amendment adds Honduras to the geographic scope, increases CSAV's space allocation, and clarifies CSAV's rights with respect to the use of space within its allocation. It also makes conforming changes and restates the agreement.

Agreement No.: 011852–009.

Title: Maritime Security Discussion Agreement.

Parties: American President Lines, Ltd.; APL Co. Pte Ltd.; Australia-New Zealand Direct Line; China Shipping Container Lines, Co., Ltd.; Canada Maritime; CMA–CGM, S.A.; Contship Container Lines; COSCO Container Lines Company, Ltd.; CP Ships (UK) Limited; Evergreen Marine Corp.; Hanjin Shipping Company, Ltd.; Hapag Lloyd Container Linie GmbH; Hyundai Merchant Marine Co., Ltd.; Italia di Navigazione, LLC; Kawasaki Kisen Kaisha Ltd.; Lykes Lines Limited, LLC; A.P. Moller-Maersk A/S; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Orient Overseas Container Line Limited; P&O Nedlloyd Limited; Safmarine Container Line, NV; TMM Lines Limited, LLC; Yang Ming Marine Transport Corp.; Zim Israel Navigation Co., Ltd.; Alabama State Port Authority; APM Terminals North America, Inc.; Ceres Terminals, Inc.; Cooper/T. Smith Stevedoring Co., Inc.; Eagle Marine Services Ltd.; Global Terminal &

Container Services, Inc.; Howland Hook Container Terminal, Inc.; Husky Terminal & Stevedoring, Inc.; International Shipping Agency; International Transportation Service, Inc.; Lambert's Point Docks Inc.; Long Beach Container Terminal, Inc.; Maersk Pacific Ltd.; Maher Terminals, Inc.; Marine Terminals Corp.; Maryland Port Administration; Massachusetts Port Authority; Metropolitan Stevedore Co.; P&O Ports North American, Inc.; Port of Tacoma; South Carolina State Ports Authority; Stevedoring Services of America, Inc.; Trans Bay Container Terminal, Inc.; TraPac Terminals; Universal Maritime Service Corp.; Virginia International Terminals; and Yusen Terminals, Inc.

Filing Parties: Carol N. Lambos, Lambos & Junge; 29 Broadway, 9th Floor, New York, NY 10006 and Charles T. Carroll, Jr., Carroll & Froelich, PLLC, 2011 Pennsylvania Avenue, NW., Suite 301, Washington, DC 20006.

Synopsis: The amendment adds P&O Nedlloyd Limited as a Carrier Class member.

Agreement No.: 201160.

Title: Marine Terminal Lease and Operating Agreement Between Broward County and Mediterranean Shipping Company, S.A.

Parties: Broward County, Florida, and Mediterranean Shipping Company, S.A.

Filing Party: Candace J. McCann; Broward County Board of County Commissioners; Office of the County Attorney; 1850 Eller Drive Suite 502; Fort Lauderdale, FL 33316.

Synopsis: The agreement provides for the lease of terminal space at the port of Port Everglades.

Dated: July 30, 2004.

By Order of the Federal Maritime Commission.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–17807 Filed 8–3–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding date shown below:

License Number: 014009N.
Name: Cargofast International Inc.
Address: 80 Tanforan Avenue, Unit 18, South San Francisco, CA 94080.
Date Revoked: July 21, 2004.
Reason: Failed to maintain a valid bond.

License Number: 017958NF.
Name: DLM Ventures, Inc.
Address: 1850 NW 84th Avenue, Suite 114, Miami, FL 33126.
Date Revoked: July 17, 2004.
Reason: Failed to maintain valid bonds.

License Number: 004546F.
Name: Foreign Freight Systems Corp.
Address: 10250 NW 89th Avenue, Bay 10, Medley, FL 33178.
Date Revoked: July 20, 2004.
Reason: Failed to maintain a valid bond.

License Number: 016071N.
Name: Heron International, Inc.
Address: 2623 Autumn Springs Lane, Spring, TX 77373.
Date Revoked: July 17, 2004.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 04–17809 Filed 8–3–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicant:

LCL Agencies (India) Private Limited dba LCL Lines, 310 Hillside Avenue, South Plane Field, NJ 07080. Officers: Unnikrishnan Nair, President (Qualifying Individual), Ravindranath K. Menon, Director.

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

Monumental Shipping & Moving Corp., 103–10 Astoria Blvd., East Elmhurst, NY 11369. Officer: Jose L. Jorge, President (Qualifying Individual).

Titan International, Inc., 3812 Springhill Avenue, Mobile, AL 36608. Officer: Samford T. Myers, President (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants:

Affordable Shipping Services, L.L.C., 10641 Harwin Drive, Suite 502, Houston, TX 77036. Officers: Benjamin E. Mbonu, Manager of Logistics (Qualifying Individual), Nicholas O. Ezenwa, Vice President.

Aras Forwarding, 10805 180th Avenue East, Bonney Lake, WA 98390. Sara Barnes, Sole Proprietor.

Dated: July 30, 2004.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 04–17808 Filed 8–3–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Rescission of Orders of Revocation

Notice is hereby given that the Order revoking the following license is being rescinded by the Federal Maritime Commission pursuant to sections 14 and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address
002769F	New York Forwarding Services Inc., 330 Snyder Avenue, Berkeley Heights, NJ 07922.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 04–17810 Filed 8–3–04; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or

bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 27, 2004.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. Nicholas, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Heritage Bancshares Group, Inc., Wilmar, Minnesota; to acquire 100 percent of the voting shares of Raymond Bancshares, Inc., Raymond, Minnesota, and thereby indirectly acquire voting shares of Farmers State Bank of Raymond, Raymond, Minnesota.

Board of Governors of the Federal Reserve System, July 29, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–17695 Filed 8–3–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Meeting of the Advisory Committee on Blood Safety and Availability

AGENCY: Office of the Secretary.

ACTION: Notice of meeting.

SUMMARY: The Advisory Committee on Blood Safety and Availability will meet on Thursday, August 26, 2004 and Friday, August 27, 2004 from 8 a.m. to 5 p.m. The meeting will take place at the Hyatt Regency Hotel on Capitol Hill, 400 New Jersey Ave., NW., Washington, DC 20001. Please note this is a change in location from the previous two meetings. The meeting will be entirely open to the public.

The purpose of this meeting will be to review the progress of prior recommendations and solicit additional comments from the Committee regarding recommendations made over the past year. Specifically the Committee will be asked to review the safety and availability of platelet products since the introduction of the voluntary 100% quality control for bacterial contamination. The Committee may also review the progress made by the American Association of Blood Banks Task Force on Bacterial Contamination to identify potential studies to standardize, validate, and determine the predictive value of bacterial testing with the intent to extend the dating of platelet products from five to seven days and the possible pre-storage pooling of whole blood derived platelets; issues related to hepatitis B testing; and issues related to blood and blood products, including plasma-derived therapeutics and their recombinant analogs. Individuals interested in this meeting are urged to refer to the Committee's Web page at *www.dhhs.gov/bloodsafety* for further information prior to the meeting.

Public comment will be solicited at the meeting. Public comment will be limited to five minutes per speaker. Those who wish to have printed material distributed to Advisory Committee members should submit thirty (30) copies to the Acting Executive Secretary prior to close of business August 20, 2004. Those who wish to utilize electronic data projection in their presentation to the Committee must submit their material to the Executive Secretary prior to close of business August 20, 2004. In addition, anyone planning to comment is encouraged to contact the Executive Secretary at her/his earliest convenience.

FOR FURTHER INFORMATION CONTACT: Jerry A. Holmberg, PhD, Executive Secretary, Advisory Committee on Blood Safety and Availability, Department of Health and Human Services, Office of Public Health and Science, 1101 Wootton Parkway, Room 275, Rockville, MD 20852, (301) 443–2331, FAX (301) 443–4361, e-mail: *jholmberg@osophs.dhhs.gov.*

Dated: July 29, 2004.

Jerry A. Holmberg,

Executive Secretary, Advisory Committee on Blood Safety and Availability.

[FR Doc. 04–17697 Filed 8–3–04; 8:45 am]

BILLING CODE 4150–28–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0331]

Determination That Esmolol Hydrochloride Injection and Ketorolac Tromethamine Injection Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that the two drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) for the drug products, and it will allow FDA to continue to approve ANDAs for the products.

FOR FURTHER INFORMATION CONTACT: Mary Catchings, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857,301–594–2041.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA sponsors must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. Sponsors of ANDAs do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is generally known as the ''Orange Book.'' Under FDA regulations, drugs are withdrawn from the list if the

agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness, or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (§ 314.162) (21 CFR 314.162)).

Under § 314.161(a) (21 CFR 314.161(a)), the agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) Before an ANDA that refers to that listed drug may be approved or (2) whenever a listed drug is voluntarily withdrawn from sale, and ANDAs that referred to the listed drug have been approved. Section 314.161(d) provides that if FDA determines that the listed drug was removed from sale for safety or effectiveness reasons, the agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

FDA has become aware that the drug products listed in table 1 of this document have been withdrawn from sale.

TABLE 1.

Application No.	Drug	Applicant
19–386	BREVIBLOC (esmolol HCl) Injection, 10 milligram (mg)/milliliter (mL) (formulation without sodium chloride)	Baxter Healthcare Corp., Route 120 and Wilson Rd., RLT–10, Round Lake, IL 60073–0490
19–698	TORADOL IV/IM (ketorolac tromethamine injection), 15 mg/mL and 30 mg/mL (formulations with and without citric acid)	Roche Pharmaceuticals, 340 Kingsland St., Nutley, NJ 07110–1199

FDA has reviewed our records and, under § 314.161, has determined that the drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the agency will continue to list these drug products in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' identifies, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. Approved ANDAs that refer to the NDAs listed in this document are unaffected by the withdrawal of the products subject to those NDAs. Additional ANDAs for the products may also be approved by the agency.

Dated: July 27, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–17692 Filed 8–3–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Pediatric Advisory Committee; 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 Committee: Pediatric Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues. The committee also advises and makes recommendations to the Secretary of Health and Human Services under 45 CFR 46.407 on research involving children as subjects that is conducted or supported by the Department of Health and Human Services (DHHS).

Date and Time: The meeting will be held on September 15, 2004, from 8 a.m. to 1 p.m.

Location: Center for Drug Evaluation and Research Advisory Committee Conference Room, rm. 1066, 5630 Fishers Lane, Rockville, MD.

Contact Person: Jan N. Johannessen, Office of the Commissioner (HF–33), Food and Drug Administration, 5600 Fishers Lane (for express delivery, rm. 17–51), Rockville, MD 20857, 301–827–6687, e-mail: *jjohannessen@fda.gov*, or FDA Advisory Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 8732310001. Please call the Information Line for up-to-date information on this meeting.

Agenda: The committee will discuss: (1) The recommendation of the Pediatric Ethics Subcommittee from its meeting on September 10, 2004, regarding a referral by an Institution Review Board under 21 CFR 50.54 and 45 CFR 46.407 of a proposed clinical investigation that involves both an FDA-regulated product and research involving children as subjects that is conducted or supported by the DHHS, and (2) a report by the agency on Adverse Event Reporting, as mandated in section 17 of the Best Pharmaceuticals for Children Act, for PULMICORT/RHINOCORT (budesonide), CLARINEX (desloratadine), CUTIVATE/FLONASE/FLOVENT (fluticasone), OCULFOX (ofloxacin), FLUDARA (fludarabine), and FOSAMAX (alendronate).

The background material will become available no later than the day before the meeting and will be posted under the Pediatric Advisory Committee (PAC) docket Web site at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2004 and scroll down to PAC meetings.)

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by September 1, 2004. Oral presentations from the public will be scheduled between approximately 11:30 a.m. and 12:30 p.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before September 1, 2004, 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 Jan N. Johannessen 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: July 29, 2004.

William K. Hubbard,

Associate Commissioner for Policy and Planning.

[FR Doc. 04–17823 Filed 7–30–04; 3:41 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0337]

Pediatric Ethics Subcommittee of the Pediatric Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of the Pediatric Ethics Subcommittee of the Pediatric Advisory Committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Pediatric Ethics Subcommittee of the Pediatric Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Pediatric Advisory Committee on FDA's and certain Department of Health and Human Services' (HHS) regulatory issues.

Date and Time: The meeting will be held on September 10, 2004, from 8:30 a.m. to 3:30 p.m.

Addresses: Electronic copies of the documents for public review can be viewed at the Pediatric Advisory Committee (PAC) Docket site at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2004 and scroll down to PAC meetings.) Electronic comments should be submitted to *http://www.fda.gov/dockets/ecomments*. Select Docket Number 2004N–0337, entitled ''Subpart D IRB Referral'' and follow the prompts to submit your statement. Written comments should be submitted to Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Received comments may be viewed on the FDA Web site at: *http://www.fda.gov/ohrms/dockets/dockets/04n0337/04n0337.htm* or may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Location: Regency Room, DoubleTree Hotel, 1750 Rockville Pike, Rockville, MD.

Contact Person: Jan N. Johannessen, Office of the Commissioner (HF–33), Food and Drug Administration, 5600 Fishers Lane (for express delivery, rm. 17–51), Rockville, MD 20857, 301–827–6687, or by e-mail: *jjohannessen@fda.gov*. Please call the FDA Advisory Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 8732310001, for up-to-date information on this meeting.

Agenda: On Friday, September 10, 2004, the Pediatric Ethics Subcommittee of the Pediatric Advisory Committee will meet to discuss a referral by an Institution Review Board (IRB) of a proposed clinical investigation that involves both an FDA-regulated product and research involving children as subjects that is conducted or supported by HHS. The proposed clinical investigation is entitled ''Effects of a Single Dose of Dextroamphetamine in Attention Deficit Hyperactivity Disorder (ADHD): A Functional Magnetic Resonance Study.'' Because the proposed clinical investigation would be regulated by FDA, and conducted or supported by HHS, both FDA and the Office for Human Research Protections, HHS, will participate in the meeting.

After presentation of an overview of the IRB referral process, background information on ADHD, an overview of the protocol and the referring IRB's deliberations on the protocol, and a summary of public comments received concerning whether the protocol should proceed, the subcommittee will discuss the proposed protocol and develop a recommendation regarding whether the protocol should proceed. The subcommittee's recommendation will then be presented to the FDA Pediatric Advisory Committee on September 15, 2004; the announcement of the September 15, 2004, meeting can be found elsewhere in this issue of the **Federal Register**.

Also elsewhere in this issue of the **Federal Register** is a document announcing a public comment period concerning whether the proposed clinical investigation should proceed. Information regarding submitting comments during that period is contained in that document.

The background materials for the subcommittee meeting will be made publicly available no later than the day before the meeting and will be posted under the Pediatric Advisory Committee (PAC) Docket site at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2004 and scroll down to PAC meetings.)

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the subcommittee. Written submissions may be made to the contact person by August 25, 2004. 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 by August 25, 2004, 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 notify Jan Johannessen at least 7 days prior to the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: July 29, 2004.

William K. Hubbard,

Associate Commissioner for Policy and Planning.

[FR Doc. 04–17824 Filed 7–30–04; 3:42 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Docket No. 2004N–0330]

Food and Drug Administration

Joint Meeting of the Psychopharmacologic Drugs Advisory Committee and the Pediatric Advisory Committee; 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: Psychopharmacologic Drugs Advisory Committee and the Pediatric Advisory Committee.

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 September 13, 2004, from 8 a.m. to 6:30 p.m. and on September 14, 2004, from 8 a.m. to 5 p.m.

Addresses: Electronic comments should be submitted to *http://www.fda.gov/dockets/ecomments*. Select ''2004N–0330—Suicidality in

Clinical Trials for Antidepressant Drugs in Pediatric Patients'' 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, 5600 Fishers Lane, rm. 1061, Rockville, MD 20852. Comments received by August 23, 2004, will be provided to the committee before the meeting. Comments received after August 23, 2004, will be reviewed by FDA's decision makers.

Location: Holiday Inn, Versailles Ballrooms, 8120 Wisconsin Ave., Bethesda, MD.

Contact Person: Anuja Patel, 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, FAX: 301–827–6776, e-mail: *patelA@cder.fda.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512544. Please call the Information Line for up-to-date information on this meeting.

Agenda: The Psychopharmacologic Drugs Advisory Committee and the Pediatric Advisory Committee will discuss reports of the occurrence of suicidality (both suicidal ideation and suicide attempts) in clinical trials for various antidepressant drugs in pediatric patients with major depressive disorder and other psychiatric disorders. Preliminary risk data based on the classification of these adverse event reports by the pharmaceutical sponsors of these products were presented at the joint meeting of the Psychopharmacologic Drugs Advisory Committee and the Pediatric Subcommittee of the Anti-Infective Drugs Advisory Committee held on February 2, 2004. Since that meeting, experts in pediatric suicidality, assembled by Columbia University, have independently classified these reported events, and FDA has conducted an analysis of these data. On September 13 and 14, 2004, the committees will consider the results of FDA's analysis of these independently classified events and will consider what further regulatory action may be needed with regard to the clinical use of these products in pediatric patients. The committees will also consider further research needs to address questions on this topic.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the Division of Dockets Management before August 23, 2004, as previously stated (see *Addresses*). Oral presentations from the public will be scheduled between approximately 2 p.m. to 6 p.m. on September 13, 2004. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before August 27, 2004, 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 Anuja Patel at 301–827–7001, 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: July 29, 2004.

William K. Hubbard,

Associate Commissioner for Policy and Planning.

[FR Doc. 04–17822 Filed 7–30–04; 3:41 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Public Health and Science and Food and Drug Administration

[Docket No. 2004N–0337]

Solicitation of Public Review and Comment on Research Protocol: Effects of a Single Dose of Dextroamphetamine in Attention Deficit Hyperactivity Disorder; A Functional Magnetic Resonance Study

AGENCY: Office of Public Health and Science and Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Office for Human Research Protections (OHRP), Office of Public Health and Science, Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA), HHS are soliciting public review and comment on a proposed research protocol entitled ''Effects of a Single Dose of Dextroamphetamine in Attention Deficit Hyperactivity Disorder (ADHD); A Functional Magnetic Resonance Study.'' The proposed research would be conducted at the National Institutes of Health (NIH) and supported by NIH's National Institute of Mental Health (NIMH). Public review and comment are solicited regarding the proposed research protocol under the requirements of HHS and FDA regulations.

DATES: To be considered, written or electronic comments on the proposed research must be received on or before 4:30 p.m. on August 20, 2004.

ADDRESSES: Electronic copies of the documents for public review can be viewed at the Pediatric Advisory Committee (PAC) Docket site at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2004 and scroll down to PAC meetings.) Submit written comments to the Division of Dockets Management (HFA–305), Docket No. 2004N–0337, Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. All comments should be identified with the docket number found in brackets in the heading of this document. Received comments may be viewed on the FDA Web site at: *http://www.fda.gov/ohrms/dockets/dockets/04n0337/04n0337.htm*, or may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Julia Gorey, Office for Human Research Protections, The Tower Building, 1101 Wootton Pkwy., suite 200, Rockville, MD 20852, 301–496–7005, FAX: 301–402–2071, e-mail: *Jgorey@osophs.dhhs.gov*; or Jan N. Johannessen, Office of the Commissioner (HF–33), Food and Drug Administration, 5600 Fishers Lane (for express delivery, rm. 17–51), Rockville, MD 20857, 301–827–3340, or by e-mail: *jjohannessen@fda.gov*.

SUPPLEMENTARY INFORMATION: All studies conducted or supported by HHS which are not otherwise exempt and which propose to involve children as subjects require Institutional Review Board (IRB) review in accordance with the provisions of HHS regulations for the protection of human subjects at 45 CFR part 46, subpart D. Under FDA's interim final rule effective April 30, 2001 (21 CFR part 50, subpart D), FDA adopted similar regulations to provide safeguards for children enrolled in clinical investigations of FDA-regulated products. Because the proposed research, ''Effects of a Single Dose of Dextroamphetamine in Attention Deficit Hyperactivity Disorder; A Functional Magnetic Resonance Study,'' would be

conducted and supported by NIH, a component of HHS, and would be regulated by FDA, both HHS and FDA regulations apply to this proposed research.

Under HHS regulations at 45 CFR 46.407, and FDA regulations at 21 CFR 50.54, if an IRB reviewing a protocol to be conducted or supported by HHS for a clinical investigation regulated by FDA does not believe that the proposed research involving children as subjects meets the requirements of HHS regulations at 45 CFR 46.404, 46.405, or 46.406, and FDA regulations at 21 CFR 50.51, 50.52, or 50.53, respectively, the research may proceed only if the following conditions are met: (1) The IRB finds that the research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; and (2) the Secretary (HHS) and the Commissioner (FDA), respectively, after consultation with experts in pertinent disciplines (e.g., science, medicine, education, ethics, law) and following opportunity for public review and comment, determine either: (a) That the research in fact satisfies the conditions of 45 CFR 46.404, 46.405, or 46.406 under HHS regulations, and 21 CFR 50.51, 50.52, or 50.53 under FDA regulations, or (b) that the following conditions are met: (i) The research or clinical investigation presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children; (ii) the research or clinical investigation will be conducted in accordance with sound ethical principles; and (iii) adequate provisions are made for soliciting the assent of children and the permission of their parents or guardians, as set forth in 45 CFR 46.408 and 21 CFR 50.55.

HHS has received a request on behalf of the IRB of NIMH, to review under 45 CFR 46.407 the protocol entitled ''Effects of a Single Dose of Dextroamphetamine in Attention Deficit Hyperactivity Disorder; A Functional Magnetic Resonance Study.'' The principal investigator proposes to administer a single 10-milligram dose of dextroamphetamine in conjunction with functional magnetic resonance imaging (fMRI) in healthy children and children with attention deficit hyperactivity disorder (ADHD), all between 9 and 18 years of age. Subjects of the study would include 10 children for piloting tasks; 14 healthy control children; 14 children with ADHD; 24 monozygotic twins (12 pairs), discordant for ADHD; and 24 dizygotic twins (12 pairs), discordant for ADHD.

The overall goal of the proposed study is to better understand the pathophysiology of ADHD. The three specific aims of the study are to: (1) Study brain activation patterns during response inhibition tasks in children with ADHD and in healthy controls; (2) simultaneously examine the central and behavioral effects of a single-dose of amphetamine versus placebo in the two groups; and (3) examine (using monozygotic and dizygotic twins) brain activation patterns in relation to clinical state and the degree of genetic relatedness.

The NIMH IRB determined that although the protocol was not approvable under 45 CFR 46.404, 46.405, or 46.406 because the administration of dextroamphetamine posed more than minimal risks to healthy children, the protocol was suitable for review under 45 CFR 46.407. Accordingly, the NIMH IRB forwarded the protocol to OHRP under 45 CFR 46.407. Because this clinical investigation is regulated by FDA, FDA's regulations at 21 CFR part 50, subpart D, specifically 21 CFR 50.54, apply as well.

In accordance with 45 CFR 46.407(b) and 21 CFR 50.54(b), OHRP and FDA are soliciting public review and comment on this proposed clinical investigation. In particular, comments are solicited on the following questions: (1) What are the potential benefits, if any, to the subjects and to children in general; (2) what are the types and degrees of risk that this research presents to the subjects; (3) are the risks to the subjects reasonable in relation to the anticipated benefits, and is the research likely to result in generalizable knowledge about the subjects disorder or condition; and (4) does the research present a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children.

To facilitate the public review and comment process, FDA has established a public docket and placed in that docket the following information relating to the proposed clinical investigation, including: Correspondence from NIH referring the proposed research protocol to HHS for consideration under 45 CFR 46.407; correspondence from FDA to NIH regarding the proposed protocol; the NIMH research protocol; the IRB deliberations on the proposed research; the parental permission documents; and the assent documents. Electronic copies of these documents can be viewed at the Pediatric Advisory Committee (PAC) Docket site at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*. (Click on the year 2004 and scroll down to PAC meetings.) These materials are also available on OHRP's website at: *http://hhs.gov/ohrp/children/*.

All written comments concerning this proposed research should be submitted to FDA's Division of Dockets Management under 21 CFR 10.20, no later than 4:30 p.m. on August 20, 2004. The background materials and received comments may be viewed on the FDA Web site at: *http://www.fda.gov/ohrms/dockets/dockets/04n0337/04n0337.htm* or may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m. Monday through Friday. The background materials may also be viewed on OHRP's website at: *http://hhs.gov/ohrp/children/*.

Dated: July 29, 2004.

Lester M. Crawford,

Acting Commissioner for Food and Drugs.

Dated: July 29, 2004.

Cristina V. Beato,

Acting Assistant Secretary for Health.

[FR Doc. 04–17825 Filed 7–30–04; 3:42 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

American Indians Into Psychology Program; Correction

ACTION: Notice; correction.

SUMMARY: The Indian Health Service published a document in the **Federal Register** on July 12, 2004. The document contained one error.

FOR FURTHER INFORMATION CONTACT: Martha Redhouse, Grants Management Branch, Indian Health Service, Reyes Building, 801 Thompson Avenue, Rockville, MD 20852, Telephone (301) 443–5204. (This is not a toll-free number.)

Correction

In the **Federal Register** of July 12, 2004, in FR Doc. 04–15715, on page 41820, in the first column, Project Budget, section C should be deleted.

Dated: July 29, 2004.

Phyllis Eddy,

Acting Director, Indian Health Service.

[FR Doc. 04–17777 Filed 8–3–04; 8:45 am]

BILLING CODE 4160–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; National Cancer Institute Science Enrichment Program Surveys

SUMMARY: In compliance with the requirement of section 44 U.S.C. 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Cancer Institute (NCI), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: National Cancer Institute Science Enrichment Program Evaluation: Follow-up Survey. *Type of Information collection Request:* New. *Need and Use of Information Collection:* NCI SEP is a five-week summer residential program on university campuses that services under-represented minority and under-served students who have just completed ninth grade. The program goals are to (1) Encourage student participants to select careers in science, mathematics, and/or research, and (2) broaden and enrich students' science, research, and sociocultural backgrounds. The proposed data collection is a follow-up survey of SEP students who participated in the program during one of three different funding cycles between 1990 and 2003, and a control group of students who did not participate in the program. The information from the proposed data collection will supplement previous evaluation results, which have been and will continue to be used to judge program process and outcomes. *Frequency of Response:* One time. *Affected Public:* Individuals or households. *Type of Respondents:* High school and college students, and young adults. *Cost to Respondents:* $5,872. The annual reporting burden is as follows:

ESTIMATES OF HOUR BURDEN: BURDEN REQUESTED

Type of respondents	Number of respondents	Frequency of response	Average time per response	Average annual hour burden
Former SEP Participants (1990–2003):				
SEP participants 1990–1997	644	1	0.25	161
SEP participants 1998–2002	479	1	0.25	119.75
SEP participants 2003	100	1	0.25	25
Control Group Participants	245	1	0.25	61.25
Total	1,468			367

There are no Capital Costs, Operating Costs, and/or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Mr. Frank Jackson, Center to Reduce Cancer Health Disparities, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, Suite 602, Rockville, MD 20852, or call non-toll-free number (301) 496–8589, or e-mail your request, including your address to *fj12i@nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of this publication.

Dated: July 28, 2004.

Rachelle Ragland-Greene,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 04–17705 Filed 8–3–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Commercializing Instruments, Reagents and Related Products Used for Sequencing of Single Nucleic Acid Molecules on a Substrate, Based on High Speed Parallel Molecular Nucleic Acid Sequencing Method

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. § 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of an exclusive license to practice the invention embodied in Patent Applications US 60/151,580, filed August 29, 1999; PCT/US00/23736, filed August 29, 2000 and US 10/070,053, filed June 10, 2002; entitled ''High Speed Parallel Molecular Nucleic Acid Sequencing'', to Helicos BioSciences Corporation, having a place of business in Cambridge, MA. The patent rights in this invention have been assigned to the United States of America.

DATES: Only written comments and/or application for a license that are received by the NIH Office of Technology Transfer on or before October 4, 2004 will be considered.

ADDRESSES: Requests for a copy of the patent application, inquiries, comments and other materials relating to the contemplated license should be directed to: Cristina Thalhammer-Reyero, Ph.D., M.B.A., Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Email: *ThalhamC@mail.nih.gov*; Telephone: 301–435–4507; Facsimile: 301–402–0220.

SUPPLEMENTARY INFORMATION: The invention relates to a method and apparatus for DNA sequencing, also known as Two Dye Sequencing (TDS). This invention is based on Fluorescence Resonance Energy Transfer (FRET), a technology increasingly in use for

several molecular analysis purposes. In particular, the method consists of: (1) Attachment of engineered DNA polymerases labeled with a donor fluorophore to the surface (chamber) of a microscope field of view, (2) addition to the chamber of DNA with an annealed oligonucleotide primer, which is bound by the polymerase, (3) further addition of four nucleotide triphosphates, each labeled on the base with a different fluorescent acceptor dye, (4) excitation of the donor fluorophore with light of a wavelength specific for the donor but not for any of the acceptors, resulting in the transfer of the energy associated with the excited state of the donor to the acceptor fluorophore for a given nucleotide, which is then radiated via FRET, (5) identification of the nucleotides most recently added to the primer by recording the fluorescent spectrum of the individual dye molecules at specific locations in the microscope field, and (6) converting the sequential spectrum into a DNA sequence for each DNA molecule in the microscope field of view.

The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within 60 days from the date of this published Notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The field of use may be limited to ''commercializing instruments, reagents and related products used for sequencing of single nucleic acid molecules on a substrate'.

Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. § 552.

Dated: July 28, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–17704 Filed 8–3–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Preliminary List of Drugs for Which Pediatric Studies Are Needed

ACTION: Notice.

SUMMARY: The National Institutes of Health (NIH) is providing notice of a ''Preliminary List of Drugs for Which Pediatric Studies Are Needed.'' The NIH developed the list in consultation with the Food and Drug Administration (FDA) and pediatric experts, as mandated by the Best Pharmaceuticals for Children Act (BPCA). This list identifies 23 drugs that will be reviewed at a scientific meeting on October 25 and 26, 2004, in Bethesda, Maryland. At that time, the drugs will be discussed by the NIH, FDA, and a group of scientific experts to help identify those in most urgent need of study. It is anticipated that the final listing of drugs most in need of study for use by children to ensure their safety and efficacy will be selected from this preliminary listing and will be published in the **Federal Register** in January 2005. This will be the third annual list published by NIH. NIH will continue to update the list at least annually until the Act expires on October 1, 2007.

DATES: The list is effective upon publication.

FOR FURTHER INFORMATION CONTACT: Dr. Tamar Lasky, National Institute of Child Health and Human Development, 6100 Executive Boulevard, Suite 5C01G, Bethesda, MD 20892–7510, e-mail <*BestPharmaceuticals@mail.nih.gov*>, telephone 301–594–8670 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The NIH is providing notice of a ''Preliminary List of Drugs for Which Pediatric Studies Are Needed,'' as authorized under Section 3, Pub. L. 107–109 (42 U.S.C. 409I). On January 4, 2002, President Bush signed into law the Best Pharmaceuticals for Children Act (BPCA). The BPCA mandates that not later than one year after the date of enactment, the NIH in consultation with the FDA and experts in pediatric research shall develop, prioritize, and publish an annual list of certain approved drugs for which pediatric studies are needed. For inclusion on the list, an approved drug must meet the following criteria: (1) There is an approved application under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)); (2) there is a submitted application that could be approved under the criteria of section 505(j) of the Federal Food, Drug, and Cosmetic Act; (3) there is no patent protection or market exclusivity protection under the Federal Food, Drug, and Cosmetic Act; or (4) there is a referral for inclusion on the list under section 505A(d)(4)(c); and additional studies are needed to assess the safety and effectiveness of the use of the drug in the pediatric population. The BPCA further stipulates that in developing and prioritizing the list, the NIH shall consider, for each drug on the list: (1) The availability of information concerning the safe and effective use of the drug in pediatric populations; (2) whether additional information is needed; (3) whether new pediatric studies concerning the drug may produce health benefits in pediatric populations; and (4) whether reformulation of the drug is necessary. In developing this list, the NIH consulted with the FDA and experts in pediatric research and practice. A preliminary list of drugs was drafted and categorized as a function of indication and use. The drugs were then prioritized based on frequency of use in the pediatric population, severity of the condition being treated, and potential for providing a health benefit in the pediatric population.

Following are the drugs and indications that will be reviewed at a scientific meeting on October 25 and 26, 2004, to select drugs and indications to add to the list for which pediatric studies are most urgently needed:

Acetylcysteine—acetaminophen poisoning
Aclometasone diproprionate cream—dermatitis
Acyclovir—herpetic infections
Albendazole—Giardia infection
Amantadine—influenza
Cefuroxime—infections in children with sickle cell anemia
Cephalexin—acute, oral infections
Chlorothiazide—hypertension
Clarithromycin—oral infections in dental patients
Clonidine—autism, attention deficit disorder
Cyclosporine—heart transplant patients
Desonide ointment—dermatitis
Ethambutol—tuberculosis
Flecainide—life threatening ventricular arrhythmias
Griseofulvin—tinea capitis
Hydrochlorothiazide—hypertension
Hydrocortisone valerate ointment and cream—dermatitis
Hydroxychloroquine—lupus
Ivermectin—scabies
Malathion—lice
Methadone—opiate addicted neonates
Rimantidine—influenza
Sulfasalazine—juvenile rheumatoid arthritis

Twelve additional drugs have been identified as having a sizeable number of studies published since 1990. These twelve drugs will receive extensive

systematic literature reviews and meta-analysis to assess the safety and efficacy questions that remain unstudied. The twelve drugs are:

Amoxicillin
Amoxicillin clavulanate potassium
Cefixime
Chloral Hydrate
Dexamethasone
Epinephrine
Fluconazole
Mebendazole
Methylprednisolone
Prednisolone
Prednisone
Trimethoprim

The Foundation for the NIH, Inc., has referred four on-patent drugs to NIH. The feasibility and public health importance of studying these drugs will be reviewed at the scientific meeting on October 25 and 26, 2004. The four on-patent drugs that have been referred by the Foundation for the NIH, Inc., for consideration for study are:

Bupropion
Morphine
Sevelamer
Zonisamide

Individuals or organizations with comments, information, and current data regarding these drugs are requested to contact Dr. Tamar Lasky at NICHD (contact information above).

Dated: July 28, 2004.

Elias A. Zerhouni,

Director, National Institutes of Health.

[FR Doc. 04–17703 Filed 8–3–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

National Outcomes Performance Assessment of the Collaborative Initiative to Help End Chronic Homelessness—(OMB No. 0930–0247; Revision)—This Initiative is coordinated by the U.S. Interagency Council on the Homeless and involves the participation of three Council members: the Department of Housing and Urban Development (HUD), the Department of Health and Human Services (HHS), and the Department of Veterans Affairs (VA). Within HHS, SAMHSA's Center for Mental Health Services is the lead agency.

This project will monitor the implementation and effectiveness of the Initiative. A national assessment of client outcomes is needed to assure a high level of accountability and to identify which models work best for which people, using the same methods for all sites. To this end, this project will provide a site-by-site description of program implementation, as well as descriptive information on clients served; services received; housing quality, stability, and satisfaction; and, client outcomes in health and functional domains. The VA Northeast Program Evaluation Center (NEPEC), based at the VA Connecticut Healthcare System in West Haven, Connecticut, is responsible for conducting this project.

Data collection will be conducted over a 36-month period. At each site, a series of measures will be used to assess (1) program implementation (*e.g.,* number and types of housing units produced and intensity and type of treatment and supportive services provided), (2) client descriptive information (*e.g.,* demographic and clinical characteristics, and housing and treatment services received) and, (3) client outcomes.

Client outcomes will be measured using a series of structured instruments administered by evaluation personnel employed and funded by the local VA medical center or outpatient clinic involved at each Initiative site who will work closely with central NEPEC staff. Assessment will be conducted through face-to-face interviews and, when needed, telephone interviews. Interviews (approximately one hour in length) will be conducted at baseline, defined as the date of entry into the clinical treatment program leading to placement into permanent housing, and quarterly (every 3 months) thereafter for up to three years. Discharge data will be collected from program staff at the time of official discharge from the program, or when the client has not had any clinical contact from members of the program staff for at least 6 months. In addition to client interviews, key informant interviews with program managers at each site will be conducted annually.

At most Initiative sites, it is expected that more people will be screened and or evaluated for participation in the program than receive the full range of core housing and treatment services. Entry into the Initiative is conceptualized as a two-phase process involving an Outreach/Screening/Assessment Phase (Phase I), and an Active Housing Placement/Treatment Phase (Phase II) that is expected to lead to exit from homelessness; in some programs these two phases may be described as the Outreach and Case Management Phases. It will be important to have at least some minimal information on all clients so as to be able to compare those who enter Housing/Treatment with those who do not.

Client-level data at the time of first contact with the program (*i.e.*, before the client receives more intensive treatment or housing services) will be collected using a screener form. The screener form will be completed by a member of the clinical staff when prospective clients are first told about the program, and express interest in participating in the program (*i.e.*, when they enter Phase I). The purpose of this form is to identify the sampling frame of the evaluation at each site, or the pool of potential clients from which clients are then selected. Program implementation will be measured using a series of progress summaries.

Initiative sites will be responsible for screening potential participants, assessing homeless and disabling condition eligibility criteria for the program, and documenting eligibility as part of the national performance assessment. Each site will identify a limited number of portals of entry into the program in a relatively small geographic area, so that the evaluator can practically and systematically contact clients about participating in the evaluation. VA evaluation staff, clinical program staff, and NEPEC will work together to establish systematic procedures for assessing eligibility, enrolling clients into the Housing/Treatment Activity of the Initiative, obtaining written informed consent to participate in the national performance assessment, and other evaluation activities.

The revisions being made are the addition of a comparison group to be recruited from all participating sites. A relatively small number (N = 61, on average) of individuals can be served at each site due to the considerable cost of providing persons who are chronically homeless with permanent housing and a comprehensive array of supportive services needed to sustain housing tenure and to promote self-sufficiency among the target population and limited federal funds available for the program. Those in the comparison group (N = 39, on average) will be enrolled after client recruitment/enrollment for program

services is complete. Comparison group participants will receive referral/access to housing resources usually available in the community or case management and other supportive services routinely available in the community for persons who are chronically homeless. The same data collection instruments and procedures will be used with both groups.

In addition, in order to examine the association of program client choice in attending mental health services, a ''Consumer Choice'' set of six additional items is being added to the client baseline and follow-up interviews. These questions are of great importance in determining the overall style of the housing first program, whether it in fact enhances choice, or in fact constrains choice by forcing people to comply with the service system's requirements in order to obtain their funds.

The estimated response burden to collect this information is as follows:

Respondents form name	No. of respondents	Responses per respondent	Hours per response	Total hour burden
Clients:				
Baseline assessment	1,100	1	1.50	1,650
Follow-up assessment	880	[1] 8	1.25	8,800
Sub-total				10,450
Clinicians:				
Screening	[2] 22	100	0.25	550
Discharge	[3] 22	63	0.40	114
Sub-total				664
Administrators:				
Network definition	44	1	0.25	11
Network participation	77	4	0.75	231
Sub-total				242
Total	1,243			11,356 hrs.
3-yr. Annual Avg.	1,243			3,785 hrs.

[1] Assumes average follow-up period of 2 yrs. due to delayed recruitment at some sites & 20% attrition overall.
[2] Assumes an average of 2 screening clinicians per site, and twice the number of persons screened as enrolled.
[3] Assumes an average of 2 discharge clinicians per site, and discharge rate of 25%.

Written comments and recommendations concerning the proposed information collection should be sent by September 3, 2004 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: July 28, 2004.

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. 04–17751 Filed 8–3–04; 8:45 am]

BILLING CODE 4162–20–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Proposed Project: Participant Feedback on Training Under the Cooperative Agreement for Mental Health Care Provider Education in *HIV/AIDS Program* (OMB No. 0930–0195; Revision)—The Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Mental Health Services (CMHS) intends to continue to conduct a multi-site assessment for the Mental Health Care Provider Education in HIV/AIDS Program. The education programs funded under this cooperative agreement are designed to disseminate knowledge of the psychological and neuropsychiatric sequelae of HIV/AIDS to both traditional (*e.g.,* psychiatrists, psychologists, nurses, primary care physicians, medical students, and social workers) and non traditional (*e.g.,* clergy, and alternative health care workers) first-line providers of mental health services, in particular to providers in minority communities.

The multi-site assessment is designed to assess the effectiveness of particular training curricula, document the integrity of training delivery formats, and assess the effectiveness of the various training delivery formats. Analyses will assist CMHS in documenting the numbers and types of traditional and non-traditional mental health providers accessing training; the content, nature and types of training participants receive; and the extent to which trainees experience knowledge, skill and attitude gains/changes as a result of training attendance. The multi-site data collection design uses a two-tiered data collection and analytic strategy to collect information on (1) the organization and delivery of training, and (2) the impact of training on participants' knowledge, skills and abilities. Information about the organization and delivery of training will be collected from trainers and staff who are funded by these cooperative agreements/contracts, hence there is no respondent burden. All training participants will be asked to complete a brief feedback form at the end of the training session. CMHS anticipates funding 10 education sites for the Mental Health Care Provider Education

in HIV/AIDS Program. The annual burden estimates for this activity are shown below:

Form	Responses per respondent	Estimated No. of respondents (× 10 sites)	Hours per response	Total hours
Session Report Form	1	60 × 10 = 600	0.080	48
Participant Feedback Form (General Education)	1	500 × 10 = 5000	0.167	835
Neuropsychiatric Participant Feedback Form	1	160 × 10 = 1600	0.167	267
Non Physician Neuropsychiatric Participant Feedback Form	1	240 × 10 = 2400	0.167	401
Adherence Participant Feedback Form	1	100 × 10 = 1000	0.167	167
Ethics Participant Feedback Form	1	200 × 10 = 2000	0.167	125
Total		12,600		1,843

Written comments and recommendations concerning the proposed information collection should be sent by September 3, 2004, to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC. 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: July 29, 2004.

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. 04–17752 Filed 8–3–04; 8:45 am]

BILLING CODE 4162–20–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories currently certified to meet the standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) published in the **Federal Register** on April 11, 1988 (53 FR 11970), and revised in the **Federal Register** on June 9, 1994 (59 FR 29908) and on September 30, 1997 (62 FR 51118). A notice listing all currently certified laboratories is published in the **Federal Register** during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory has withdrawn from HHS' National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh or Dr. Walter Vogl, Division of Workplace Programs, 5600 Fishers Lane, Rockwall 2, Room 815, Rockville, Maryland 20857; 301–443–6014 (voice), 301–443–3031 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were developed in accordance with Executive Order 12564 and section 503 of Pub. L. 100–71. Subpart C of the Guidelines, ''Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies,'' sets strict standards that laboratories must meet in order to conduct urine drug testing for Federal agencies. To become certified, an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection.

To maintain that certification, a laboratory must participate in a quarterly performance testing program plus periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements expressed in the HHS Mandatory Guidelines. A laboratory must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Mandatory Guidelines, the following laboratories meet the minimum standards set forth in the Mandatory Guidelines:

ACL Laboratories 8901 W. Lincoln Ave. West Allis, WI 53227, 414–328–7840 / 800–877–7016 (Formerly: Bayshore Clinical Laboratory)

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770 / 888–290–1150

Aegis Analytical Laboratories, Inc., 345 Hill Ave., Nashville, TN 37210, 615–255–2400

Baptist Medical Center-Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299, 501–202–2783 (Formerly: Forensic Toxicology Laboratory Baptist Medical Center)

Clinical Reference Lab, 8433 Quivira Rd., Lenexa, KS 66215–2802, 800–445–6917

Diagnostic Services Inc., dba DSI, 12700 Westlinks Dr., Fort Myers, FL 33913, 239–561–8200 / 800–735–5416

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602, 229–671–2281

DrugProof, Division of Dynacare/ Laboratory of Pathology, LLC, 1229 Madison St., Suite 500, Nordstrom Medical Tower, Seattle, WA 98104, 206–386–2661 / 800–898–0180 (Formerly: Laboratory of Pathology of Seattle, Inc., DrugProof, Division of Laboratory of Pathology of Seattle, Inc.)

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Rd., Warminster, PA 18974, 215–674–9310

Dynacare Kasper Medical Laboratories *, 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2, 780–451–3702/800–661–9876

ElSohly Laboratories, Inc., 5 Industrial Park Dr., Oxford, MS 38655, 662–236–2609

Express Analytical Labs, 3405 7th Ave., Suite 106, Marion, IA 52302, 319–377–0500

Gamma-Dynacare Medical Laboratories *, A Division of the Gamma-Dynacare Laboratory

Partnership, 245 Pall Mall St., London, ONT, Canada N6A 1P4, 519–679–1630

General Medical Laboratories, 36 South Brooks St., Madison, WI 53715, 608–267–6225

Kroll Laboratory Specialists, Inc., 1111 Newton St., Gretna, LA 70053, 504–361–8989 / 800–433–3823 (Formerly: Laboratory Specialists, Inc.)

LabOne, Inc., 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927 / 800–873–8845 (Formerly: Center for Laboratory Services, a Division of LabOne, Inc.)

Laboratory Corporation of America Holdings, 7207 N. Gessner Rd., Houston, TX 77040, 713–856–8288 / 800–800–2387

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400 / 800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 Alexander Dr., Research Triangle Park, NC 27709, 919–572–6900 / 800–833–3984 (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings, 10788 Roselle St., San Diego, CA 92121, 800–882–7272 (Formerly: Poisonlab, Inc.)

Laboratory Corporation of America Holdings, 1120 Stateline Rd. West, Southaven, MS 38671, 866–827–8042 / 800–233–6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

Marshfield Laboratories, Forensic Toxicology Laboratory, 1000 North Oak Ave., Marshfield, WI 54449, 715–389–3734 / 800–331–3734

MAXXAM Analytics Inc.*, 5540 McAdam Rd., Mississauga, ON, Canada L4Z 1P1, 905–890–2555 (Formerly: NOVAMANN (Ontario) Inc.)

MedTox Laboratories, Inc., 402 W. County Rd. D, St. Paul, MN 55112, 651–636–7466 / 800–832–3244

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295 / 800–950–5295

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Dr., Minneapolis, MN 55417, 612–725–2088

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250 / 800–350–3515

Northwest Drug Testing, a division of NWT Inc., 1141 E. 3900 S., Salt Lake City, UT 84124, 801–293–2300 / 800–322–3361 (Formerly: NWT Drug Testing, NorthWest Toxicology, Inc.)

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774 (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory)

Oregon Medical Laboratories, P.O. Box 972, 722 East 11th Ave., Eugene, OR 97440–0972, 541–687–2134

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991 / 800–541–7897x7

PharmChem Laboratories, Inc., 4600 N. Beach, Haltom City, TX 76137, 817–605–5300 (Formerly: PharmChem Laboratories, Inc., Texas Division; Harris Medical Laboratory)

Physicians Reference Laboratory, 7800 West 110th St., Overland Park, KS 66210, 913–339–0372 / 800–821–3627

Quest Diagnostics Incorporated, 3175 Presidential Dr., Atlanta, GA 30340, 770–452–1590 / 800–729–6432 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 4770 Regent Blvd., Irving, TX 75063, 800–824–6152 (Moved from the Dallas location on 03/31/01; Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 4230 South Burnham Ave., Suite 250, Las Vegas, NV 89119–5412, 702–733–7866 / 800–433–2750 (Formerly: Associated Pathologists Laboratories, Inc.)

Quest Diagnostics Incorporated, 400 Egypt Rd., Norristown, PA 19403, 610–631–4600 / 877–642–2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 506 E. State Pkwy., Schaumburg, IL 60173, 800–669–6995 / 847–885–2010 (Formerly: SmithKline Beecham Clinical Laboratories; International Toxicology Laboratories)

Quest Diagnostics Incorporated, 7600 Tyrone Ave., Van Nuys, CA 91405, 818–989–2520 / 800–877–2520 (Formerly: SmithKline Beecham Clinical Laboratories)

Scientific Testing Laboratories, Inc., 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130

Sciteck Clinical Laboratories, Inc., 317 Rutledge Rd., Fletcher, NC 28732, 828–650–0409

S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109, 505–727–6300 / 800–999–5227

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 574–234–4176 x276

Southwest Laboratories, 2727 W. Baseline Rd., Tempe, AZ 85283, 602–438–8507 / 800–279–0027

Sparrow Health System, Toxicology Testing Center, St. Lawrence Campus, 1210 W. Saginaw, Lansing, MI 48915, 517–377–0520 (Formerly: St. Lawrence Hospital & Healthcare System)

St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101, 405–272–7052

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273

Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on June 9, 1994 (59 FR 29908) and on September 30, 1997 (62 FR 51118). After receiving DOT certification, the laboratory will be included in the monthly list of HHS certified laboratories and

participate in the NLCP certification maintenance program.

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. 04–17862 Filed 8–3–04; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2004–18761]

Chemical Transportation Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of open teleconference meeting.

SUMMARY: This notice announces a teleconference meeting of the Subcommittee of the Chemical Transportation Advisory Committee (CTAC) on the National Fire Protection Association (NFPA) 472 Standard. The NFPA 472 Subcommittee will meet to discuss the future presentation to the NFPA 472 Technical Committee on Hazardous Materials Response Personnel about the initiative to draft a marine emergency responder chapter in NFPA 472, Professional Competence of Responders to Hazardous Materials Incidents. This meeting will be open to the public.

DATES: The teleconference call will take place on Tuesday, August 17, 2004, from 9:30 a.m. to 11:30 a.m. EDT. Written comments may be submitted on or before August 16, 2004.

ADDRESSES: Members of the public may participate by either calling in (*see* **SUPPLEMENTARY INFORMATION**) or by coming to Room 2100, U.S. Coast Guard Headquarters Building, 2100 Second Street, SW., Washington, DC 20593. We request that members of the public who plan to attend this meeting notify LT Matt Barker at 202 267–1217 so that he may notify building security officials. Written comments should be sent to CDR Robert J. Hennessy, Executive Director, CTAC, Commandant (G–MSO–3), 2100 Second Street, SW., Washington DC 20593–0001 or Fax: 202 267–4570. This notice is available on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Commander Robert J. Hennessy, Executive Director of CTAC, telephone 202 267–1217, fax 202 267–4570.

SUPPLEMENTARY INFORMATION: Members of the public may participate by dialing 202 366–3920, Pass code: 1243. Public participation is welcomed; however, the number of teleconference lines is limited and are available on a first-come, first-served basis. Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2 (Pub. L. 92–463, 86 Stat. 770, as amended).

Tentative Agenda

(1) Introduction of Subcommittee members and attendees.
(2) Discussion on future Subcommittee presentation to the NFPA 472 Technical Committee on Hazardous Materials Response Personnel.
(3) Public comment period.

Public Participation

The Chairman of this NFPA 472 Subcommittee shall conduct the teleconference in a way that will, in his judgment, facilitate the orderly conduct of business. During the teleconference, the Subcommittee welcomes public comment. Members of the public will be heard during the public comment period. The committee will make every effort to hear the views of all interested parties. Please note that the teleconference may close early if all business is finished. Written comments may be submitted on or before the day of the teleconference (*see* **ADDRESSES**).

Minutes

The teleconference will be recorded, and a summary will be available for public review and copying in the docket approximately 30 days following the teleconference meeting.

Dated: July 28, 2004.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security and Environmental Protection.

[FR Doc. 04–17684 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[CGD07–04–095]

Reorganization of Group Key West and Marine Safety Detachment Marathon; Implementation of Sector Key West

AGENCY: Coast Guard, DHS.

ACTION: Notice of organizational change.

SUMMARY: The Coast Guard announces the consolidation of Group Key West and Marine Safety Detachment (MSD) Marathon into one command, Sector Key West. The Sector Key West Commanding Officer will have the authority, responsibility and missions of a Group Commander and Commanding Officer, Marine Safety Office (MSO). The Coast Guard has established a continuity of operations whereby all previous practices and procedures will remain in effect until superseded by an authorized Coast Guard official and/or document.

DATES: This notice is effective August 4, 2004.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD07–04–095 and are available for inspection or copying at District 7 Resources, 9th Floor, 909 SE 1st Avenue, Miami, FL 33131 between 7:30 a.m. and 4:30 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Carlos A. Cuesta, District 7 Resources Program at 305–415–6706.

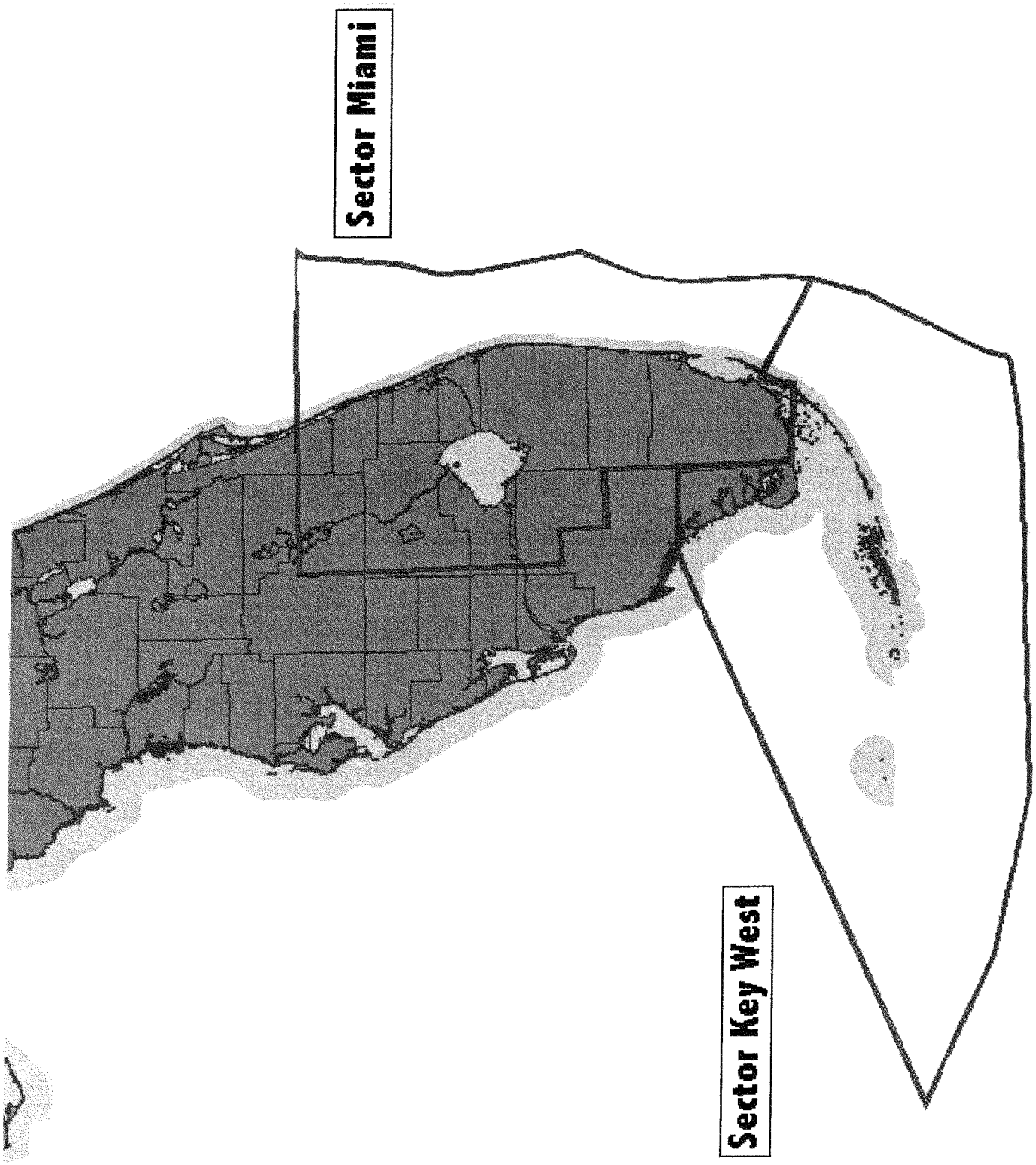
SUPPLEMENTARY INFORMATION:

Discussion of Notice

Sector Key West will be composed of a Response Department, Prevention Department, and Logistics Department. The Response and Logistics Departments will be located at Key West. The Prevention Department will be located at 1600 Overseas Highway, Marathon FL 33050. All existing missions and functions performed by Group Key West and MSD Marathon will be realigned under this new organizational structure as of August 5, 2004, and Group Key West and MSD Marathon will no longer exist as organizational entities.

Sector Key West will be responsible for all Coast Guard missions in the following zone: ''the boundary of the Key West Marine Inspection Zone and Captain of the Port zone starts at a line bearing 111° T from the shoreline at 25° 25′ N. Latitude, 80° 20′ W. Longitude seaward to the extent of the economic exclusive zone; including all of Monroe County, Florida, then from the economic exclusive zone easterly along a line bearing 065° T to the coast at the Monroe and Collier County boundary.'' The following chart depicts this area.

BILLING CODE 4910–15–P



BILLING CODE 4910–15–C

The Seventh District Commander may also designate sector Key West mission coordinator for search and rescue and law enforcement operations beyond the exclusive economic zone.

The Sector Key West Commander is vested with all the rights, responsibilities, duties, and authority of a Group Commander and Commanding Officer, Marine Safety Office, as provided for in Coast Guard regulations, and is the successor in command to the Commanding Officer, Group Key West. The Sector Key West Commander is designated: (a) Captain of the Port (COTP) for the Key West COTP zone; (b) Federal Maritime Security Coordinator (FMSC); (c) Federal On Scene Coordinator (FOSC) for the Key West COTP zone, consistent with the National Contingency Plan; (d) Officer In Charge of Marine Inspection (OCMI) for the Key West Marine Inspection Zone and, (e) Search and Rescue Mission Coordinator (SMC). The Deputy Sector Commander is designated alternate COTP, FMSC, FOSC, OCMI and SMC. A continuity of operations order has been issued providing that all previous Group Key West and MSD Marathon practices and procedures will remain in effect until superseded by Commander, Sector Key West. This continuity of operations order addresses existing COTP regulations, orders, directives and policies. Also, Sector Miami will provide contingency response and marine inspection support for Sector Key West.

The following information is a list of updated command titles, addresses and points of contact to facilitate requests from the public and assist with entry into security or safety zones:

Name: Sector Key West.

Address: Commander, U.S. Coast Guard Sector Key West, Trumbo Pt. Annex, Key West, FL 33040.

Contact: Operations Center, (305) 292–8727, Sector Commander: CAPT P.J. Heyl, (305) 292–8713, Deputy Sector Commander: CDR J.O. Fitton, (305) 292–8711.

Chief, Response Dept: LCDR T. J. Ciampaglio, (305) 292–8730.

Chief, Prevention Dept: LT D. Silvestro, (not yet assigned).

Chief, Logistics Dept: LT G.A. Hillman, (305) 292–8756.

Dated: July 26, 2004.

D. B. Peterman,

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

[FR Doc. 04–17687 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[CGD07–04–092]

Reorganization of Group Miami and MSO Miami; Implementation of Sector Miami

AGENCY: Coast Guard, DHS.

ACTION: Notice of organizational change.

SUMMARY: The Coast Guard announces the consolidation of Group Miami and Marine Safety Office Miami into one command, Sector Miami. The Sector Miami Commanding Officer has the authority, responsibility and missions of the prior Group Commander and COTP Miami. The Coast Guard has established a continuity of operations whereby all previous practices and procedures will remain in effect until superseded by an authorized Coast Guard official and/or document.

DATES: This notice is effective August 4, 2004.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD07–04–092 and are available for inspection or copying at District 7 Resources, 9th Floor, 909 SE 1st Avenue, Miami, FL 33131 between 7:30 a.m. and 4:30 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Carlos A. Cuesta, District 7 Resources Program at 305–415–6706.

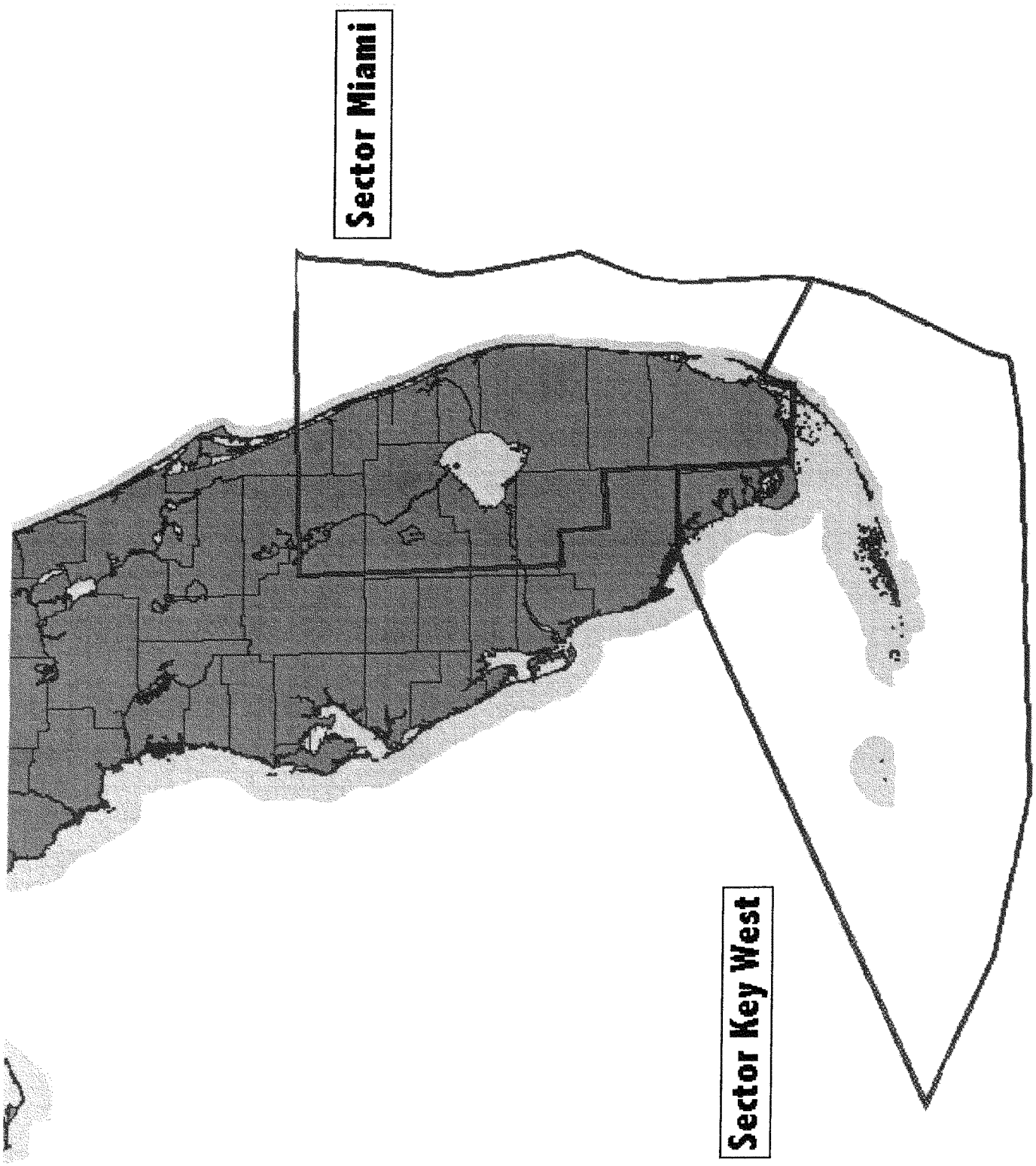
SUPPLEMENTARY INFORMATION:

Discussion of Notice

Sector Miami is located at Causeway Island, Miami Beach, FL and contains a single Command Center. Sector Miami is composed of a Response Command, Prevention Command, and Logistics Command. All existing missions and functions performed by Group and MSO Miami have been realigned under this new organizational structure as of July 12, 2004 and Group Miami and MSO Miami no longer exist as organizational entities.

Sector Miami is responsible for all Coast Guard missions in the following zone: ''the boundary of the Miami Marine Inspection Zone and Captain of the Port zone starts at the eastern Florida coast at 28° 00′ N. Latitude; thence proceeds west to 28° 00′ N. Latitude, 81° 30′ W. Longitude; thence south to the Collier County north boundary; thence following the Collier County boundary to the intersection with Broward County, thence south along the Collier County east boundary, continuing south along the Dade County boundary encompassing all of Dade county. The offshore area of the Miami Captain of the Port zone includes that portion of the western North Atlantic ocean area bounded on the north by 28° 00′ N. Latitude from the coast to the outermost extent of the exclusive economic zone and bounded on the east by the outermost extent of the exclusive economic zone; and on the south a line bearing 111° T from the shoreline at 25° 25′ N. Latitude, 80° 20′ W. Longitude.'' The following chart depicts this area.

BILLING CODE 4910–15–P



BILLING CODE 4910–15–C

Sector Miami may also be designated by the Seventh District Commander as mission coordinator for search and rescue and law enforcement operations beyond the exclusive economic zone.

The Sector Miami Commander is vested with all the rights, responsibilities, duties, and authority of a Group Commander and Commanding Officer, Marine Safety Office, as provided for in Coast Guard regulations, and is the successor in command to the Commanding Officer, Marine Safety Office Miami and the Commander, Group Miami. The Sector Miami Commander is designated: (a) Captain of the Port (COTP) for the Miami COTP zone; (b) Federal Maritime Security Coordinator (FMSC); (c) Federal On Scene Coordinator (FOSC) for the Miami COTP zone, consistent with the National Contingency Plan; (d) Officer In Charge of Marine Inspection (OCMI) for the Miami Marine Inspection Zone and, (e) Search and Rescue Mission Coordinator (SMC). The Deputy Sector Commander is designated alternate COTP, FMSC, FOSC, OCMI and SMC. A continuity of operations order has been issued providing that all previous Group Miami and MSO Miami practices and procedures will remain in effect until superseded by Commander, Sector Miami. This continuity of operations order addresses existing COTP regulations, orders, directives and policies. Also, Sector Miami provides contingency response and marine inspection support for newly implemented Sector Key West.

The following information is a list of updated command titles, addresses and points of contact to facilitate requests from the public and assist with entry into security or safety zones:

Name: Sector Miami.

Address: Commander, U.S. Coast Guard Sector Miami, 100 MacArthur Causeway, Miami Beach, FL 33139–5101.

Contact: General Number, (305) 535–8709, Sector Commander: CAPT J. Maes, (305) 535–4301, Deputy Sector Commander: CAPT L. Slein, (305) 535–4302.

Commander Prevention Command: (305) 535–8708, Commander Response Command: (305) 535–4302, Commander Logistics Command: (305) 535–8767.

Dated: July 26, 2004.

D. B. Peterman,

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

[FR Doc. 04–17686 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4903–N–59]

Notice of Submission of Proposed Information Collection to OMB; Low Income Housing Tax Credit Database

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 for continued approval to collect information on the Low Income Housing Tax Credit Program (LIHTC). LIHTC encourages the production of qualified low-income housing units. This information collection provides base data on LIHTC projects and is used for analysis of LIHTC projects. Several data elements have been added to the collection.

DATES: *Comments Due Date:* September 3, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2528–0165) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov*; telephone (202) 708–2374. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Mr. Eddins.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB, for emergency processing, a survey instrument to obtain information from faith based and community organizations on their likelihood and success at applying for various funding programs. This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Low Income Housing Tax Credit Database.

OMB Approval Number: 2528–0165.

Form Numbers: None.

Description of the Need for the Information and its Proposed Use: The Low Income Housing Tax Credit Program (LIHTC) encourages the production of qualified low-income housing units. This information collection provides base data on LIHTC projects and is used for analysis of LIHTC projects. Several data elements have been added to the collection.

Frequency of Submission: Annually.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden	58	1		24		1,392

Total Estimated Burden Hours: 1,392.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 28, 2004.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 04–17679 Filed 8–3–04; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4837–D–50]

Consolidated Delegation of Authority for the Office of Public and Indian Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Delegation of authority.

SUMMARY: This notice is a comprehensive delegation of authority for administration of HUD's Public and Indian Housing programs from the Secretary of Housing and Urban Development to the Assistant Secretary for Public and Indian Housing.

EFFECTIVE DATE: July 27, 2004.

FOR FURTHER INFORMATION CONTACT: Robert Dalzell, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4228, Washington, DC 20410–5000, telephone (202) 708–0440. (This is not a toll-free number.) For those needing assistance, this number may be accessed through TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Under this delegation, which supersedes all prior delegations to the Assistant Secretary for Public and Indian Housing, the Secretary delegates to the Assistant Secretary for Public and Indian Housing all powers and authorities with respect to HUD's Public and Indian Housing programs, except for those powers and authorities that are specifically excepted from this delegation.

Section A. Authority Delegated

The Secretary delegates to the Assistant Secretary for Public and Indian Housing the power and authority of the Secretary to:

1. Administer programs under the jurisdiction of the Secretary that are carried out pursuant to the authority transferred from the Public Housing Administration under section 5(a) of the Department of Housing and Urban Development Act (42 U.S.C. 3534);

2. Administer each program of the Department that is authorized pursuant to the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*), including but not limited to the Public Housing program, Section 8 programs (except the following Section 8 Project-Based programs: New Construction, Substantial Rehabilitation, Loan Management Set-Aside and Property Disposition), the HOPE VI program, and predecessor programs that are no longer funded but have ongoing commitments;

3. Administer such other programs for which assistance is provided for or on behalf of public housing agencies or public housing residents;

4. Administer each program of the Department that is authorized pursuant to the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*);

5. Administer the Community Development Block Grant Program for Indian Tribes and Alaska Native Villages authorized by section 106 of the Housing and Community Development Act of 1974 (42 U.S.C. 5306);

6. Administer the Indian Home Loan Guarantee Program authorized by section 184 of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z–13a);

7. Administer the Native Hawaiian Loan Guarantee Fund authorized by section 184A of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z–13b);

8. Administer Rural Housing and Economic Development Grants awarded to Indian tribes and tribal entities by the Assistant Secretary for Community Planning and Development;

9. Administer the HOME Investment Partnerships Program for Indian tribes; and

10. Administer such other programs for which assistance is provided for or on behalf of Indian tribes, tribally designated housing entities, or tribal housing resident organizations.

Section B. Authority Excepted

The authority delegated under Section A does not include the power to sue and be sued.

Section C. Authority To Redelegate

The authority delegated in Section A may be redelegated to employees of the Department through written delegations of authority, except for the authority to issue and waive regulations.

Section D. Authority Revoked

All authority previously delegated to the Assistant Secretary for Public and Indian Housing is revoked and is superseded by this delegation of authority.

Section E.

This notice of delegation of authority shall be conclusive evidence of the authority of the Assistant Secretary for Public and Indian Housing or a delegate to execute, in the name of the Secretary, any instrument or document relinquishing or transferring any right, title or interest of the Department in real or personal property.

Authority: Section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: July 27, 2004.

Alphonso Jackson,

Secretary.

[FR Doc. 04–17680 Filed 8–3–04; 8:45 am]

BILLING CODE 4210–33–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by September 3, 2004.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax 703/358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone 703/358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, *as*

amended (16 U.S.C. 1531, *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

Applicant: Lee Richardson Zoo, Garden City, KS, PRT–088538.

The applicant requests a permit to export one live male captive-born tapir (*Tapirus bairdii*) to the Leon Zoo, Leon, Mexico, for the purpose of enhancement of the survival of the species.

Applicant: International Snow Leopard Trust, Seattle, WA, PRT–088337.

The applicant requests a permit to export biological samples from snow leopards (*Uncia uncia*) collected from captive animals for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

Applicant: John Malison, Clark Fork, ID, PRT–090124.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Clyde Bros Johnson Circus Corp., Seagoville, TX, PRT–085457 and 085459.

The applicant request a permit to export, re-export, and re-import one captive born female tiger (*Panthera tigris*) to worldwide locations for the purpose of enhancement of the species through conservation education. The permit numbers and animals are: 085457, Kia; 085459, Sheba. This notification covers activities to be conducted by the applicant over a three-year period and the import of any potential progeny born while overseas.

Marine Mammals

The public is invited to comment on the following applications for a permit to conduct certain activities with marine mammals. The applications were submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*), and the regulations governing marine mammals (50 CFR part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Applicant: Patrick A. Scott, Colville, WA, PRT–088606.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Northern Beaufort Sea polar bear population in Canada for personal use.

Applicant: John C. Burgess, Middleville, MI, PRT–089564.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Lancaster Sound polar bear population in Canada for personal use.

Applicant: Larry P. Carlson, Muskegon, MI, PRT–090007.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Southern Beaufort Sea polar bear population in Canada for personal use.

Dated: July 16, 2004.

Monica Farris,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 04–17726 Filed 8–3–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK963–1410–HY–P; F–14832–B, DYA–3]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*) will be issued to Deloy Ges Incorporated.

SUPPLEMENTARY INFORMATION: The lands requested for conveyance are located in T. 29 N., R. 58 W., and T. 30 N., R. 60 W., Seward Meridian, in the vicinity of Anvik, Alaska and contain 4,801.40 acres. Notice of the decision will also be published four times in the *Fairbanks Daily News-Miner.*

DATE: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until September 3, 2004, to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMATION CONTACT: Barbara Waldal, by phone at 907–271–5669, or by e-mail at *Barbara_Waldal@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8330, 24 hours a day, seven days a week, to contact Ms. Waldal.

Barbara Opp Waldal,

Land Law Examiner, Branch of Adjudication I.

[FR Doc. 04–17738 Filed 8–3–04; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Notice Implementing Third Conservation Helium Sale

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this action is to continue implementation of the terms of the Helium Privatization Act (HPA) of 1996 dealing with the disposal of the Conservation Helium Reserve. The HPA requires the Department of the Interior (DOI) to *offer for sale,* beginning no later than 2005, a portion of the Conservation Helium stored underground at the Cliffside Field, north of Amarillo, Texas. The DOI, in consultation with the private helium industry, has determined that private companies, with refining capacity along the crude helium pipeline, will need a supply of helium in excess of that available from their own storage accounts and that available from crude helium extractors in the region. Given the current market, Conservation Helium sold in this sale will cause minimal market disruption. If this offering of Conservation Helium is not fully subscribed, then a Supplemental Sale will be held in March 2005 for the excess amount of helium to give an extended opportunity for the helium to be sold.

DATES: Submit bids and other documentation as required in notice on or before September 30, 2004.

ADDRESSES: You may submit your bids and other documentation as required in this notice to the Bureau of Land Management; Amarillo Field Office; 810

S. Fillmore, Suite 500; Amarillo, TX 79101–3545; Attention: Crude Helium Sales Analyst.

FOR FURTHER INFORMATION CONTACT: Connie H. Neely, (806) 356–1027. Individuals who use a telecommunications device for the deaf may call the Federal Information Relay Service at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

1.01 What Is the Purpose of the Sale?

The purpose of this sale is to continue implementation of the terms of the HPA of 1996 dealing with the disposal of the Conservation Helium Reserve. The HPA requires the DOI to *offer for sale,* beginning no later than 2005, a portion of the Conservation Helium stored underground at the Cliffside Field, north of Amarillo, Texas. The DOI, in consultation with the private helium industry, has determined that private companies, with refining capacity along the crude helium pipeline, will need a supply of helium in excess of that available from their own storage accounts and that available from crude helium extractors in the region. This is the third in a series of sales that the Department will conduct to dispose of the Conservation Helium stored underground at the Cliffside Field. The annual sales (and Supplemental Sale, if needed) are being conducted in a manner intended to prevent pure helium market disruptions from occurring to end users; shortages of crude helium to pure helium refiners; and an oversupply of crude helium on the market for crude helium extractors. Subsequent sales may be adjusted as needed.

1.02 What Terms Do I Need To Know To Understand This Sale?

Allocated Sale—That portion of the annual sale volume of Conservation Helium that will be set aside for purchase by the Crude Helium Refiners.

Annual Conservation Helium Sale—The sale of a certain volume of Conservation Helium to private entities conducted annually beginning no later than 2005.

Bidder—Any entity or person who submits a request for purchase of a volume of the Annual Conservation Helium Sale and has met the qualifications contained in part 1.05 in this notice.

BLM—The Bureau of Land Management.

Conservation Helium—The crude helium purchased by the U.S. Government under the authority of the Helium Act of 1960 and stored underground in the Cliffside Field.

Crude Helium—A partially refined gas containing about 70 percent helium and 30 percent nitrogen. However, the helium concentration may vary from 50 to 95 percent.

Crude Helium Refiners—Those entities with a capability of refining crude helium and having a connection point on the crude helium pipeline and a valid Helium Storage Contract as of the date of a Conservation Helium Sale.

Excess Volumes—Allocated sale volumes not requested by the Crude Helium Refiners.

Helium Storage Contract—A contract between the BLM and a private entity allowing the private entity to store crude helium in underground storage at the Cliffside Field.

HPA—The Helium Privatization Act of 1996.

In-Kind Crude Helium—Conservation Helium purchased by private refiners in exchange for like amounts of pure helium sold to Federal Agencies and their contractors in accordance with the HPA.

MMcf—One million cubic feet of gas measured at standard conditions of 14.65 pounds per square inch (psi) and 60 °F.

Mcf—One thousand cubic feet of gas measured at standard conditions of 14.65 psi and 60 °F.

Non-Allocated Sale—That portion of the annual sale volume of Conservation Helium that will be offered to all qualified Bidders.

Supplemental Sale—If all the Conservation Helium offered for sale is not sold during this sale, then an additional sale will be conducted to offer for sale the remaining volumes not purchased during this sale.

1.03 What Volume of Conservation Helium Will Be Offered in the Fiscal Year 2005 Annual Conservation Helium Sale?

The volume of helium available for this sale is 2,100 MMcf. In accordance with the HPA, this volume was determined by dividing the total volume of stored Conservation Helium less the statutory required reservation of 600 MMcf for Government purposes less estimated In-Kind Crude Helium transfers for 12 years divided by 12. This volume represents a straight-line basis for offering the helium for sale in accordance with the HPA.

1.04 At What Price Will the Conservation Helium Be Sold?

The Conservation Helium will be sold at the same price as In-Kind Crude Helium. In accordance with the HPA, this price covers helium debt repayment and its escalation by the Consumer Price Index since the helium debt was frozen in 1995. Additionally, the price includes administrative and storage costs associated with the Conservation Helium calculated on a per Mcf basis. For Fiscal Year 2005 that price is $54.50 per Mcf.

1.05 Am I Qualified To Purchase Conservation Helium at This Sale?

Any person, firm, partnership, joint stock association, corporation, or other domestic or foreign organization operating partially or wholly within the United States who meets one or more of the following requirements is qualified to submit a purchase request:

- Operates a helium purification plant within the U.S., or
- Operates a crude helium extraction plant within the U.S., or
- Is a wholesaler of pure helium or purchases helium for resale within the U.S., or
- Is a consumer of pure helium within the U.S., or
- Has an agreement with a helium refiner to provide its helium processing needs, commonly referred to as a ''tolling agreement.''

All entities requesting participation in the Non-Allocated Sale must submit proof of being qualified to purchase Conservation Helium and must either have a Helium Storage Contract with the BLM or have a third party agreement in place with a valid storage contract holder so that all Conservation Helium sold to the Bidder will be properly covered by a Helium Storage Contract (including associated storage charges).

1.06 When Will the Conservation Helium Be Offered for Sale?

The BLM, Amarillo Field Office, will accept requests for purchase of Conservation Helium from final publication of this notice until September 30, 2004. On October 1, 2004 requests to purchase Conservation Helium will be opened and evaluated. Upon evaluation, volumes of this Conservation Helium Sale will be apportioned and allocated according to the sale rules described in this notice.

1.07 What Must I Do To Submit a Request for Purchase?

You must submit the following information to the BLM, Amarillo Field Office:

- Billing address information and name(s) of principle officers of the company.
- Proof of being an entity qualified to purchase Conservation Helium at this sale as defined in part 1.05 above.

Documents such as invoices for sale or purchase of helium, Helium Storage Contracts, or other relevant documents may be submitted as proof of qualification.

- The amount (in Mcf) of Conservation Helium requested.
- Certified check or money order in the amount of $1,000 made payable to the Bureau of Land Management. This money will be used to cover administrative expenses to conduct this sale and is nonrefundable.

1.08 Where Do I Send my Request for Purchase?

All requests for purchase of helium as part of this sale must be sent by certified mail to: Bureau of Land Management, Amarillo Field Office, 810 S. Fillmore, Suite 500, Amarillo, TX 79101–3545. Attention: Crude Helium Sales Analyst.

1.09 When Do I Need To Submit Payment for any Conservation Helium Sold to Me?

Successful purchasers will submit payments according to the following schedule:

- 25% by October 30, 2004, or 30 days after notification of the award volumes, whichever is later.
- 25% by January 30, 2005.
- 25% by April 30, 2005.
- 25% by July 30, 2005.

Conservation Helium will not be transferred to the purchaser's storage account until payment is received for that portion. Successful purchasers may, at their option, accelerate the purchase schedule.

1.10 To Whom Do I Make Payments for Awarded Conservation Helium Volumes?

Make checks payable to the Bureau of Land Management at the address listed in part 1.08 in this notice.

1.11 What Are the Penalties for Not Paying for the Conservation Helium in a Timely Manner?

If BLM does not receive a payment by the original due date or by the deadline established on a written late notice, the purchaser will forfeit the remainder of its allotment unless the purchaser can show that payment was late through no fault of its own. However, penalty interest will be assessed in accordance with the Debt Collection Act of 1982, 31 U.S.C. 951–953.

1.12 How Will I Know if I Have Been Successful in my Purchase Request?

Successful purchasers will be notified in writing by BLM no later than two weeks after the close of this notice with the awarded volumes and payment schedule.

Allocated Sale

2.01 What Is the Allocated Sale?

That portion of the annual sale volume of Conservation Helium that will be set aside for purchase by the Crude Helium Refiners.

2.02 Who Will Be allowed To Purchase Conservation Helium in the Allocated Sale?

Only those who meet the definition of Crude Helium Refiners as defined in part 1.02 in this notice.

2.03 What Volume of Conservation Helium Is Available in the Allocated Sale?

The amount available will be 90 percent of the total volume of the Annual Conservation Helium Sale—1,890 MMcf.

2.04 How Will the Conservation Helium Be Apportioned Among the refiners?

The apportionment to each Crude Helium Refiner will be based on its percentage share (rounded to the nearest 1/10th of 1 percent) of the total refining capacity as of October 1, 2000 connected to the BLM crude helium pipeline.

2.05 What Will Happen if a Refiner or Refiners Request an Amount Other Than Their Share of What Is Offered for Sale?

- If one or more refiners request less than their allocated share, any other refiner(s) that requested more than their share will be allowed to purchase the excess volume based on proportionate shares of remaining refining capacities.
- Requests by the Crude Helium Refiners that are in excess of the amount available above will be carried over to the Non-Allocated Sale and considered a separate bid under the Non-Allocated Sale rules.

2.06 What Will Happen if the Total Amount Requested by the Crude Helium Refiners Is Less Than the 1,890 MMcf Offered in the Allocated Sale?

Any excess volume not sold to the Crude Helium Refiners will be added to the Non-Allocated Sale volume.

2.07 Do You Have a Hypothetical Example of How an Allocated Sale Would Be Conducted?

2,100 MMcf available for total sale with 90 percent available for Allocated Sale (1,890 MMcf).

Bidder—allocated sale	Installed refining capacity (percent)	Refiner bid volume*	Allocated volume*	Excess volume requested*	Proration percent	Excess allocated*	Total allocated*	Carry over to non-allocated sale*
Refiner A	10	225	189	36	20	36	225	0
Refiner B	50	750	750	0	0	0	750	0
Refiner C	40	985	756	229	80	156+3	915	70
Total	100	1,960	1,695	265	100	195	1,890	0

*All volumes in MMcf.

After the initial allocation, Refiner B has received all requested. However, 265 MMcf is deemed excess of the total in the first iteration of the Allocated Sale and reallocated to the two remaining refiners based on the refining capacity between them. With the reallocation, Refiner A gets all requested, but Refiner C is still short by 73 MMcf. Additionally, 3 MMcf remains unallocated and without any other Refiners is awarded to Refiner C, who now has a remaining request of 70 MMcf that is posted into the Non-Allocated Sale. All percentages used in the calculation will be rounded to the nearest 1/10th of 1 percent. All volumes calculated will be rounded to the nearest 1 Mcf.

Non-Allocated Sale

3.01 What Is the Non-Allocated Sale?

That portion of the annual sale volume of Conservation Helium that will be offered to all qualified Bidders.

3.02 What Is the Minimum Volume I Can Request?

The minimum request is 5 MMcf.

3.03 What Volume of Conservation Helium Is Available for the Non-Allocated Sale?

The total volume of Conservation Helium available for this portion of the sale is 210 MMcf plus any additional helium that is not sold as part of the Allocated Sale.

3.04 How Is the Ratio of Allocated to Non-Allocated Sale Volumes Determined?

According to the terms of the HPA, the BLM must conduct the Annual Conservation Helium Sales in a manner not to cause undue helium market disruptions; and therefore, the majority of the Conservation Helium is being offered as part of the Allocated Sale. Currently, the *Crude Helium Refiners have refining capacity roughly double what can be supplied* through the Annual Conservation Helium Sales. Although there are other crude helium supplies available to the Crude Helium Refiners, these supplies are declining each year. The BLM must be sensitive to the Crude Helium Refiners requirements while maintaining a balance with other helium industry requirements. The exact ratio of Allocated to Non-Allocated Sale volumes may change for subsequent Annual Conservation Helium Sales.

3.05 How Will the Non-Allocated Conservation Helium Be Apportioned Among the Bidders?

The Conservation Helium will be apportioned equally in 1 Mcf increments among the Bidders with no prospective Bidder receiving more than its request.

3.06 What Will Happen if the Bidders Request More Than What Is Made Available for Sale in Part 3.03 of This Notice?

- If one or more Bidders request less than their apportioned amount, any other Bidder(s) that requested more than its apportioned amount will be allowed to purchase equally apportioned amounts of the remaining volume available for this sale.
- If all Bidders request more than their apportioned amount each Bidder will receive its apportioned amount as determined in part 3.05 in this notice.

3.07 What Will Happen if a Bidder Requests Less Than Its Apportioned Amount?

Any Bidder requesting less than the calculated apportioned volume will receive the amount of its request and amounts remaining will be reapportioned in accordance with part 3.05 in this notice.

3.08 What Will Happen if the Total Requests From all Bidders Are Less Than That Offered for Sale in the Non-Allocated Sale?

If the total non-allocated volume requested is less than the non-allocated volume offered for this portion of the sale, any excess amount from the Allocated or Non-Allocated Sale will be offered in a Supplemental Sale held in March 2005. If there is any excess amount after the Supplement Sale then it will not be sold and will be held in storage for future sales.

3.09 Do You Have a Hypothetical Example of How a Non-Allocated Sale Would Be Conducted?

2,100 MMcf available for total sale with 10 percent available for Non-Allocated Sale (210 MMcf).

Bidder—Non-allocated sale	Bid volume*	Apportioned volume*	Excess volume requested*	Proration percent	Excess apportioned*	Total apportioned*	Amount requested not received*
Refiner C	70	52.5	17.5	50	15	67.5	2.5
Company D	100	52.5	47.5	50	15	67.5	32.5
Company E	50	50	0	0	0	50	0
Company F	25	25	0	0	0	25	0
Total	245	180	65	100	30	210	35

*All volumes in MMcf.

In this example, three companies submit a request and there is a carryover amount from one of the Crude Helium Refiners in the Allocated Sale that is considered as a separate request. Each Bidder would be apportioned 52.5 MMcf, (*i.e.*, 210 MMcf of Non-Allocated Conservation Helium 4 Bidders = 52.5 MMcf per Bidder).

After the initial allocation, Companies E and F have received all the helium they requested. However, 30 MMcf is deemed excess in the first iteration of the Non-Allocated Sale and reallocated to the two remaining Bidders. With the reallocation, Refiner C and Company D each receives an additional 15 MMcf. No more helium is available, Refiner C and Company D do not receive all that they requested, and the sale is complete. All percentages used in the calculation will be rounded to the nearest 1/10th of 1 percent. All volumes calculated will be rounded to the nearest 1 Mcf.

Dated: June 28, 2004.

Linda S.C. Rundell,

State Director, New Mexico.

[FR Doc. 04–17736 Filed 8–3–04; 8:45 am]

BILLING CODE 4310–AG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–200–0777–XM–241A]

Notice of Amendment of Meeting Date, Front Range 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) Front Range Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting will be held on September 2, 2004 at the Cripple Creek and Victor Meeting Room, 100 N. Third Street, Victor, Colorado beginning at 10 a.m. The public comment period will begin at approximately 10:15 a.m. and the meeting will adjourn at approximately 4 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 the Royal Gorge Field Office and San Luis Valley, Colorado. Planned agenda topics include Manager updates on current land management issues and the Gold Belt Travel Management Plan.

All meetings are open to the public. The public is encouraged to make oral comments to the Council at 10:15 a.m. or written statements may be submitted for the Council's consideration. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. The public is also welcome to attend the tour of the Cripple Creek and Victor Gold Mine if space is available, however they will need to call the Royal Gorge Field Office at (719) 269–8500 before August 23 to make arrangements. Summary minutes for the Council Meeting will be maintained in the Front Range Center Office and will be available for public inspection and reproduction during regular business hours and can also be viewed at *http://www.blm.gov/rac/co/frrac/co_fr* within thirty (30) days following the meeting.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management (BLM), Attn: Ken Smith, 3170 East Main Street, Canon City, Colorado 81212. Phone (719) 269–8500.

Dated: July 28, 2004.

Linda McGlothlen,

Acting Associate Front Range Center Manager.

[FR Doc. 04–17754 Filed 8–3–04; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[(NM–920–1310–04); (NMNM 91505)]

Proposed Reinstatement of Terminated Oil and Gas Lease NMNM 91505

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of Public Law 97–451, a petition for reinstatement of oil and gas lease NMNM 91505 for lands in Eddy County, New Mexico, was timely filed and was accompanied by all required rentals and royalties accruing from September 1, 2003, the date of termination.

FOR FURTHER INFORMATION CONTACT: Lourdes B. Ortiz , BLM, New Mexico State Office, (505) 438–7586.

SUPPLEMENTARY INFORMATION: No valid lease has been *issued* affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10.00 per acre or fraction thereof and 16⅔ percent, respectively. The lessee has paid the required $500.00 administrative fee and has reimbursed the Bureau of Land Management for the cost of this **Federal Register** notice.

The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lease Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate the lease effective September 1, 2003, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Lourdes B. Ortiz,

Land Law Examiner, Fluids Adjudication Team.

[FR Doc. 04–17735 Filed 8–3–04; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–920–1310–01; WYW129669]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188 (d) and (e), and 43 CFR 3108.2–3 (a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease WYW129669 for lands in Natrona County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Fluid Chief Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5 per acre, or fraction thereof, per year and 16–⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $166 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW129669 effective August 1, 2003, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Fluid Minerals Adjudication.

[FR Doc. 04–17734 Filed 8–3–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV020–1430–EQ; N–31078]

Terminating the Segregative Effect on Land That Was Previously Leased for Airport Purposes and Opens the Land to Operation Under the Public Land Laws and the Mining Laws

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice terminates the segregative effect on land that was previously leased for airport purposes and opens the land to operation under the public land laws and the mining laws.

EFFECTIVE DATE: At 9 a.m. on September 3, 2004.

FOR FURTHER INFORMATION CONTACT: M. Lynn Trost, Realty Specialist, Bureau of Land Management, Winnemucca Field Office, 5100 East Winnemucca Boulevard, Winnemucca, Nevada 89445, (775) 623–1500.

SUPPLEMENTARY INFORMATION: Airport Lease N–31078 was applied for by Pinson Mining Company on October 15, 1980, under the act of May 24, 1928 (49 U.S.C. 211–214). On that date, the land was segregated from all other forms of appropriation under the public land laws. Notice to this effect was published in the **Federal Register** on November 17, 1980. The Public Airport Lease was granted to Pinson Mining Company on

April 1, 1981, under the terms and conditions of the Act of May 24, 1928, as amended, (49 U.S.C. 211–214) and the regulations there under 43 CFR 2911. Notice is hereby given that Airport Lease N–31078, involving the following described lands, has been terminated: T. 38 N., R. 42 E., Sec. 34: N½N½ (within); Sec. 35: N½N½NW¼ (within); Mt. Diablo Meridian, Nevada. The lease area described contains 12.63 acres in Humboldt County, Nevada.

At 9 a.m. on September 3, 2004, the land described in this notice, will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on September 3, 2004, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

At 9 a.m. on September 3, 2004, the land described in this notice, will be opened to location and entry under the United States mining laws, the operation of the mineral leasing laws, and the mineral material laws subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of any of the land described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (2000), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: May 28, 2004.

Terry A. Reed,

Field Manager, Winnemucca.

[FR Doc. 04–17737 Filed 8–3–04; 8:45 am]

BILLING CODE 4310–HC–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1047 (Final)]

Ironing Tables and Certain Parts Thereof From China

Determination

On the basis of the record [1] developed in the subject investigation, the United States International Trade Commission (Commission) determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from China of ironing tables and certain parts thereof, provided for in subheadings 9403.20.00 and 9403.90.80 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).[2]

Background

The Commission instituted this investigation effective June 30, 2003, following receipt of a petition filed with the Commission and Commerce by Home Products International, Inc. (HPI), Chicago, IL. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of ironing tables and certain parts thereof from China were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of March 8, 2004 (69 FR 10753) and March 8, 2004 (69 FR 16954). The hearing was held in Washington, DC, on June 16, 2004, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 28, 2004. The views of the Commission are contained in USITC Publication 3711 (July 2004), entitled Ironing Tables and Certain Parts Thereof from China: Investigation No. 731–1047 (Final).

Issued: July 29, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–17694 Filed 8–3–04; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioner Daniel R. Pearson determines that the domestic industry is threatened with material injury by reason of subject imports from China.

INTERNATIONAL TRADE COMMISSION

[Investigation No. NAFTA–103–6]

Probable Effect of Certain Modifications to the North American Free Trade Agreement Rules of Origin

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and request for written submissions.

EFFECTIVE DATE: July 29, 2004.

SUMMARY: Following receipt of a request on July 26, 2004, from the United States Trade Representative (USTR) under authority delegated by the President and pursuant to section 103 of the North American Free Trade Agreement (NAFTA) Implementation Act (19 U.S.C. 3313), the Commission instituted investigation No. NAFTA–103–6, *Probable Effect of Certain Modifications to the North American Free Trade Agreement Rules of Origin,* to provide advice to the President on the probable effect on U.S. trade under the NAFTA and on domestic industries of certain modifications to the rules of origin in NAFTA Annexes 401 and 403.

FOR FURTHER INFORMATION CONTACT: Information may be obtained from Laura Polly, Office of Industries (202–205–3408, *laura.polly@usitc.gov*), or Warren Payne, Office of Industries (202–205–3317, *warren.payne@usitc.gov*). For information on the legal aspects of this investigation, contact William Gearhart of the Office of the General Counsel (202–205–3091, *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of Public Affairs (202–205–1819, *margaret.olaughlin@usitc.gov*).

Background: According to the USTR's letter, U.S. negotiators have recently reached agreement in principle with representatives of the governments of Canada and Mexico on proposed modifications to Annexes 401 and 403 of the NAFTA. Chapter 4 and Annexes 401 and 403 of the NAFTA contain the rules of origin for application of the tariff provisions of the NAFTA to trade in goods. Section 202(q) of the North American Free Trade Agreement Implementation Act (the Act) authorizes

the President, subject to the consultation and layover requirements of section 103 of the Act, to proclaim such modifications to the rules as may from time to time be agreed to by the NAFTA countries. One of the requirements set out in section 103 of the Act is that the President obtain advice from the United States International Trade Commission.

A list of the proposed modifications to Annexes 401 and 403 is available from the Office of the Secretary to the Commission or by accessing the electronic version of this notice at the Commission's Internet site (*http://www.usitc.gov*). The current U.S. rules of origin can be found in General Note 12 of the 2004 Harmonized Tariff Schedule of the United States (see ''General Notes'' link at *http://hotdocs.usitc.gov/tariff_chapters_current/toc.html*).

As requested, the Commission will forward its advice by September 24, 2004. This investigation, although the first to be formally designated as a ''NAFTA–103'' investigation, has been designated as investigation No. NAFTA–103–6 because the Commission has previously provided NAFTA rules of origin advice to the President pursuant to section 103. For docketing and record keeping purposes, we are designating advice provided on September 5, 1995 as investigation No. NAFTA–103–1 (also docketed as investigation No. 332–363, see description in the **Federal Register** of June 7, 1995 (60 FR 30099)); advice provided on September 29, 1995 as investigation No. NAFTA–103–2 (also docketed as investigation No. 332–364, see description in the **Federal Register** of September 7, 1995 (60 FR 46626)); advice provided on September 10, 1999 as investigation No. NAFTA–103–3 (see description in the **Federal Register** of August 6, 1999 (64 FR 42961)); advice provided on September 14, 2001 as investigation No. NAFTA–103–4 (see description in the **Federal Register** of August 7, 2001 (66 FR 41268)); and advice provided on October 24, 2001 as investigation No. NAFTA–103–5 (see description in the **Federal Register** of October 4, 2001 (66 FR 50680)).

Written Submissions: No public hearing is being scheduled in connection with preparing this advice. However, interested parties are invited to submit written statements (original and 14 copies) concerning any economic effect of the modifications. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8); any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). Section 201.8 of the rules require that a signed original (or a copy designated as an original) and fourteen (14) copies of each document to be filed. In the event that confidential treatment of the document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted. Section 201.6 of the rules require that the cover of the document and the individual pages clearly be marked as to whether they are the ''confidential'' or ''nonconfidential'' versions, and that the confidential business information be clearly identified by means of brackets.

All written submissions, except for confidential business information, will be made available for inspection by interested parties. The Commission may include confidential business information submitted in the course of this investigation in the report that it sends to the President. The USTR has also requested that the Commission prepare and make available a public version of its report; the Commission will not publish confidential business information in the public version of its report in a manner that would reveal the operations of the firm supplying the information.

To be assured of consideration by the Commission, written statements relating to the Commission's report should be submitted to the Commission at the earliest practical date and must be received no later than the close of business on August 27, 2004. All submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The Commission's rules do not authorize filing submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules (19 CFR 201.8) (see Handbook for Electronic Filing Procedures, *ftp://ftp.usitc.gov/pub/reports/electronic_filing_handbook.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000 or *edis@usitc.gov*).

The public record for this report may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

List of Subjects

NAFTA, rules of origin.

By order of the Commission.

Issued: July 29, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–17812 Filed 8–3–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1046 (Final)]

Tetrahydrofurfuryl Alcohol From China

Determination

On the basis of the record [1] developed in the subject investigation, the United States International Trade Commission (Commission) determines[2], pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from China of tetrahydrofurfuryl alcohol (THFA), provided for in subheading 2932.13.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce (Commerce) to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted this investigation effective June 23, 2003, following receipt of a petition filed with the Commission and Commerce by Penn Specialty Chemicals, Inc., Plymouth Meeting, PA. The final phase of the investigation was scheduled by the Commission following notification of a preliminary determination by Commerce that imports of THFA from China were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of February 9, 2004 (69 FR 6005). Subsequent to Commerce's postponement of its final determination, the Commission gave notice of the

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] Vice Chairman Okun and Commissioners Lane and Pearson dissenting.

revised schedule for the final phase of its investigation and the related public hearing (69 FR 15380, March 25, 2004). The hearing was held in Washington, DC, on June 14, 2004, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on July 29, 2004. The views of the Commission are contained in USITC Publication 3709 (July 2004), entitled Tetrahydrofurfuryl Alcohol From China: Investigation No. 731–TA–1046 (Final).

By order of the Commission.

Issued: July 29, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–17811 Filed 8–3–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[AAG/A Order No. 010–2004]

Privacy Act of 1974, Systems of Records

The Department of Justice (DOJ) is modifying notices for two Privacy Act systems of records, to make minor address changes in the notices. The first system is entitled ''Department of Justice Grievance Records, DOJ–008,'' last published in the **Federal Register** October 29, 2003 (68 FR 61696). The second system is entitled ''Leave Sharing Systems, DOJ–010,'' last published in the **Federal Register** on April 26, 2004 (69 FR 22557).

In the ''Department of Justice Grievance Records, DOJ–008'', in the section named ''System Manager(s) and Address,'' the addresses are modified for the United States Marshals Service and for the Bureau of Alcohol, Tobacco, Firearms and Explosives. In the ''Leave Sharing Systems, DOJ–010,'' in the section named ''System Manager(s) and Address,'' the address is modified for the Bureau of Alcohol, Tobacco, Firearms and Explosives.

These minor changes do not require notification to the Office of Management and Budget and Congress. The change will be effective on August 4, 2004. Questions regarding the modifications may be directed to Mary Cahill, Management Analyst, Management and Planning Staff, Justice Management Division, Department of Justice, Washington, DC 20530.

The modifications to the system descriptions are set forth below.

Dated: July 27, 2004.

Paul R. Corts,

Assistant Attorney General for Administration.

DEPARTMENT OF JUSTICE

SYSTEM NAME

Department of Justice Grievance Records, Justice/DOJ–008.

* * * * *

SYSTEM MANAGER(S) AND ADDRESS

* * * * *

[Delete current entries at (m) and (o) and substitute the following.]

(m) United States Marshals Service Headquarters, Assistant Director for Human Resources, Washington, DC 20530–1000.

* * * * *

(o) Bureau of Alcohol, Tobacco, Firearms and Explosives, Personnel Division, Employee and Labor Relations Team, 650 Massachusetts Ave., NW., Room 4300, Washington, DC 20226 * * *

* * * * *

SYSTEM NAME

Leave Sharing Systems, JUSTICE/DOJ–010.

* * * * *

SYSTEM MANAGER(S) AND ADDRESS

* * * * *

[Delete current entry for Bureau of Alcohol, Tobacco, Firearms and Explosives, and substitute the following.]

Bureau of Alcohol, Tobacco, Firearms and Explosives, Personnel Division, Employee Services Team, Room 4150, Washington, DC 20226 * * *

* * * * *

[FR Doc. 04–17798 Filed 8–3–04; 8:45 am]

BILLING CODE 4410–FB–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

July 29, 2004.

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 contacting the Department of Labor (DOL). To obtain documentation, contact Darrin King at 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 Employment Standards Administration (ESA), 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: Employment Standards Administration.

Type of Review: Extension of currently approved collection.

Title: OFCCP Recordkeeping and Reporting Requirements—Supply and Service.

OMB Number: 1215–0072.

Frequency: Annually.

Type of Response: Reporting and recordkeeping.

Affected Public: Business or other for-profit; not-for-profit institutions; and State, local, or tribal government.

Number of Respondents: 94,900.

Annual Responses: 94,900.

Information collection requirement	Responses	Average response time (hours)	Annual burden hours
Recordkeeping Burden:			
Initial Development of Affirmative Action Plan (AAP)	949	113.06	107,294
Annual Update of AAP	93,951	51.47	4,835,823
Maintenance of AAP	94,900	51.47	4,884,670
Uniform Guidelines on Employees Selection Procedures	5,750	2.18	12,535
Reporting Burden:			
Standard Form 100	36,187	3.70	133,892
Scheduling Letter	6,092	28.35	172,708
Compliance Check Letter	1,660	0.40	664
Total			10,147,586

Total Annualized capital/startup costs: $0.

Total Annual Costs (operating/maintaining systems or purchasing services): $60,798.

Description: Recordkeeping and reporting requirements incurred by Federal contractors under Executive Order 11246, section 503 of the Rehabilitation Act of 1973, and section 4212 of the Vietnam Era Veterans' Readjustment Act are necessary to substantiate compliance with nondiscrimination and affirmative action requirements enforced by the ESA's Office of Contract Compliance Programs.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–17712 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–CM–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

July 27, 2004.

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 each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Ira Mills on 202–693–4122 (this is not a toll-free number) or e-mail: *mills.ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, 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: Employment and Training Administration.

Type of Review: Extension of a currently approved collection.

Title: Program Monitoring Report and Job Service Complaint Form.

OMB Number: 1205–0039.

Frequency: On occasion; quarterly; annually.

Total number of Respondents : 52.

Number of Responses: 208.

Form	Affected public	Respondents	Average time per response	Total hours
ETA 8429:				
Recordkeeping	Local Office	639	30 minutes	324
Processing	Local Offices	2,142	8 minutes	286
ETA 5148:				
Recordkeeping	Local Offices	639	1.12 hours	713
Processing	State government	208 reports	70 minutes	243

Total hours: 5,537.

Total annualized capital startup cost: $0.

Total annual costs (operating/maintaining systems or purchasing services: $0.

Description: The Job Service forms are necessary as part of Federal Regulations at 20 CFR parts 651, 653 and 658 published as a result of NAACP vs. Brock. The forms allow the U.S. Employment Service to track regulatory compliance of services provided to MSFWs by the State Employment Service Agencies.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–17713 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

July 26, 2004.

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 contacting the Department of Labor (DOL). 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 Bureau of Labor Statistics (BLS), 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: Bureau of Labor Statistics.

Type of Review: Revision of a currently approved collection.

Title: The Consumer Expenditure Surveys: The Quarterly Interview and the Diary.

OMB Number: 1220–0050.

Frequency: Quarterly and weekly.

Type of Response: Reporting and recordkeeping.

Affected Public: Individuals or households.

Number of Respondents: 18,700.

Collection of information	Annual responses	Average response time (hours)	Annual burden hours
Quarterly Interview Survey:			
Interview	44,096	1.17	51,445
Re-interview	3,528	0.25	882
Diary Survey (CE–801):			
Interview	23,028	0.42	9,595
Re-interview	921	0.25	230
Weekly Diary	15,352	1.75	26,866
Total	86,925	.....	89,018

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs (Operating/Maintaining Systems or Purchasing Services): $0.

Description: The Consumer Expenditure (CE) Surveys collect data on consumer expenditures, demographic information, and related data needed by the Consumer Price Index (CPI) and other public and private data users. The continuing surveys provide a constant measurement of changes in consumer expenditure patterns for economic analysis and to obtain data for future CPI revisions. The data from the CE Surveys are used (1) For CPI revisions, (2) to provide a continuous flow of data on income and expenditure patterns for use in economic analysis and policy formulation, and (3) to provide a flexible consumer survey vehicle that is available for use by other Federal government agencies.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–17714 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

July 28, 2004.

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 each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Ira Mills on 202–693–4122 (this is not a toll-free number) or E-Mail: *mills.ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, 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: Employment and Training Administration.

Type of Review: Extension of a currently approved collection.

Title: Forms for Agricultural Recruitment System of Services to Migratory Workers.

OMB Number: 1205–0134.

Frequency: On occasion.

Affected Public: State, Local or Tribal Government; Individuals or household.

Number of Respondents: 3000.

Number of Annual Responses: 5600.

Form	Volume per year	Hours per response (minutes)	Annual hours
790	4,600	60	4,600
795	1,000	15	250
Total	5,600	.....	4,850

Total Burden Hours: 4850.

Total Annualized Capital/Start Costs: $0.

Total Annual costs operating/maintaining systems or purchasing service): $0.

Description: State Employment Service Agencies (SESAs) use these forms to recruit domestic workers and comply with regulations at 20 CFR 653.500.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–17715 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,785]

AVX Corp., Advance Planning Administration, Myrtle Beach, South Carolina; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at AVX Corporation, Advance Planning Administration, Myrtle Beach, South Carolina. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–54,785; AVX Corporation, Advance Planning Administration Myrtle Beach, South Carolina (July 21, 2004).

Signed at Washington, DC, this 26th day of July, 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–17718 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,950]

Continental Retail Service, LLC, Bellbrook, Ohio; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Continental Retail Service, LLC, Bellbrook, Ohio. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–54,950; Continental Retail Service, LLC, Bellbrook, Ohio (July 21, 2004)

Signed at Washington, DC, this 26th day of July, 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–17719 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,674]

Major League, Inc., Mount Airy, NC; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18(C) an application for administrative reconsideration was filed with the Director of the Division of Trade Adjustment Assistance for workers at Major League, Inc., Mount Airy, North Carolina. The application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA–W–54,674; Major League, Inc., Mount Airy, North Carolina (July 21, 2004)

Signed at Washington, DC, this 26th day of July 2004.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 04–17722 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,629]

Motorola, Inc., Information Technology, Semiconductor Products Sector, Tempe, AZ; Notice of Affirmative Determination Regarding Application for Reconsideration

By letter of June 23, 2004, a petitioner requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers of the subject firm. The Department's negative determination was signed on June 15, 2004. The Notice of determination was published in the **Federal Register** on July 7, 2004 (69 FR 40983).

The Department has reviewed the request for reconsideration and will conduct further investigation to determine whether the subject worker group meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 22nd day of July, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–17723 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,708]

Novellus System, Inc., San Jose, CA; Notice of Affirmative Determination Regarding Application for Reconsideration

By letter of June 10, 2004, a petitioner requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers of the subject firm. The Department's determination notice was signed on May 25, 2004. The Notice was published in the **Federal Register** on June 17, 2004 (69 FR 33941).

The Department reviewed the request for reconsideration and has determined that the original investigation requires further investigation. Therefore, the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 19th day of July, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–17721 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,709]

Summitville Tiles, Inc., Minerva, OH; Notice of Affirmative Determination Regarding Application for Reconsideration

By letter of June 30, 2004, the company official requested administrative reconsideration of the Department's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers of the subject firm. The Notice was signed on May 24, 2004 and published in the **FEDERAL REGISTER** on June 17, 2004 (69 FR 33941).

The Department reviewed the request for reconsideration and has determined that the petitioner has provided additional information. Therefore, the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 21st day of July, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–17720 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,957]

Union Carbide Corp., a Subsidiary of Dow Chemical Co., West Virginia Operations, South Charleston, West Virginia; Notice of Revised Determination on Reopening

On July 9, 2004, the Department, on its own motion, reopened its investigation for the former workers of the subject firm.

The initial investigation resulted in a negative determination issued on June 30, 2004, applicable to workers of the subject firm in the Control Group. The investigation findings showed that the workers performing global engineering and support services did not support the domestic production of the firm. The denial notice will soon be published in the **Federal Register**.

The Department obtained new information that warranted a reexamination of the findings of the investigation. Furthermore, the Department is expanding the worker group to include the total of the West Virginia Operations, South Charleston, West Virginia. The findings of the investigation on reopening determined that production, employment and sales have declined over the relevant period. In relation, company imports of chemicals and the derivatives thereof that are like or directly competitive with those produced at the West Virginia Operations have increased.

In accordance with section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor herein presents the results of its investigation regarding certification of eligibility to apply for alternative trade adjustment assistance (ATAA) for older workers.

In order for the Department to issue a certification of eligibility to apply for ATAA, the group eligibility requirements of section 246 of the Trade Act must be met. The Department has determined in this case that the requirements of section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful consideration of the new facts obtained on reopening, it is concluded that increased imports of articles like or directly competitive with the chemicals or derivatives thereof produced by Union Carbide, a subsidiary of Dow Chemical Company, West Virginia Operations, South Charleston, West Virginia contributed importantly to the decline in sales or production and to the total or partial separation of workers of the subject firm. In accordance with the provisions of the Trade Act of 1974, I make the following revised determination:

All workers of Union Carbide, a subsidiary of Dow Chemical Company, West Virginia Operations, South Charleston, West Virginia, who became totally or partially separated from employment on or after May 20, 2003, through two years from the date of certification, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974.

Signed in Washington, DC, this 26th day of July, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–17716 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,527 and TA–W–53,527A]

Van Dorn Demag Corp., a Division of Demag Products Group, Strongsville, Ohio, Including Employees of Van Dorn Demag Corp., a Division of Demag Products Group, Strongsville, Ohio Located in Atlanta, Georgia; Amended Notice of Revised Determination on Reconsideration Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Notice of Revised Determination on Reconsideration Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on February 5, 2004, applicable to workers of Van Dorn Demag Corporation, a division of Demag Products Group, Strongsville, Ohio. The notice was published in the **Federal Register** on February 24, 2004 (69 FR 8493).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. New information shows that workers were separated involving employees of the Strongsville, Ohio facility of Van Dorn Demag Corporation, a division of Demag Products Group located in Atlanta, Georgia. These employees provided sales support services for the production of plastic injection molding machinery at the Strongsville, Ohio location of the subject firm.

Based on these findings, the Department is amending this certification to include employees of the Strongsville, Ohio facility of Van Dorn Demag Corporation, a division of Demag Products Group, located in Atlanta, Georgia.

The intent of the Department's certification is to include all workers of Van Dorn Demag Corporation, a division of Demag Products Group, Strongsville, Ohio, who were adversely affected by increased imports.

The amended notice applicable to TA–W–53,527 is hereby issued as follows:

All workers of Van Dorn Demag Corporation, A Division of Demag Products Group, Strongsville, Ohio (TA–W–53,527), including employees of Van Dorn Corporation, A Division of Demag Products Group, Strongsville, Ohio, located in Atlanta, Georgia (TA–W–53,527A), who became totally or partially separated from employment on or after November 12, 2002, through February 5, 2006, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 21st day of July, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–17725 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,952]

VF Intimates, LP, Johnstown, PA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 15, 2004, applicable to workers of VF Intimates, LP, Johnstown, Pennsylvania. The notice will be published soon in the **Federal Register**.

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of ladies' intimate apparel.

New findings show that there was a previous certification, TA–W–40,563A, issued on March 5, 2002, for workers of Bestform, Inc., Johnstown Distribution Center, Johnstown, Pennsylvania, (Johnstown operation name was changed in January 2003 to VF Intimates, LP), who were engaged in employment related to the production and distribution of ladies' intimate apparel. That certification expired on March 5, 2004. To avoid an overlap in worker group coverage, the certification is being amended to change the impact date from May 18, 2003 to March 6, 2004, for workers of the subject firm.

The amended notice applicable to TA–W–54,952 is hereby issued as follows:

All workers of VF Intimates, LP, Johnstown, Pennsylvania, who became totally or partially separated from employment on or after March 6, 2004, through June 15, 2006, are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 21st day of July, 2004.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–17717 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–54,455]

Weirton Steel Corporation, Weirton, West Virginia; Notice of Negative Determination Regarding Application for Reconsideration

By application of June 18, 2004, a company representative requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA). The denial notice was signed on May 14, 2004, and published in the **Federal Register** on June 2, 2004 (69 FR 31135).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) if in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The TAA petition, which was filed on behalf of workers at Weirton Steel Corporation, Weirton, West Virginia engaged in the production of hot-rolled, cold-rolled, tin-plate and hot dipped, and electrolytic galvanized steel, was denied because the ''contributed importantly'' group eligibility requirement of section 222 of the Trade Act of 1974, as amended, was not met. The subject firm did not increase its reliance on imports of hot-rolled, cold-

rolled, tin-plate and hot dipped and electrolytic galvanized steel during the relevant time period, nor did they shift production to a foreign source. The ''contributed importantly'' test is generally demonstrated through a survey of the workers' firm's customers to determine the correlation between customers' increased reliance on imports and the subject firm's decreased sales during the relevant period. The investigation revealed that sales of hot-rolled, cold-rolled, tin-plate and hot dipped, and electrolytic galvanized steel at the subject firm increased from 2002 to 2003 and from January through February, 2004 compared with the same period in 2003. Even though the survey of the subject firm's major customers would have been irrelevant in this case, the Department conducted a survey of the subject firm's major customers regarding their purchases of competitive products in 2002, 2003, and January through February of 2004. The survey revealed that imports did not contribute importantly to layoffs at the subject firm.

In the request for reconsideration, the company representative requests to extend the period for investigation beyond the relevant time period in order to include the circumstances bearing evidence of sales declines and import impact, registered by the Department during a previous investigation which resulted in TAA certification granted to workers of the subject firm in April of 2002, TA–W–39,657.

The Department considers import impact in terms of the relevant period of the current investigation; therefore sales declines and import impact as established in a previous investigation that is outside the relevant period are irrelevant. The Department must conform to the Trade Act and associated regulations.

Should conditions change in the future, the company is encouraged to file a new petition on behalf of the worker group which will encompass an investigative period that will include these changing conditions.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 23rd day of July, 2004.

Elliott Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–17724 Filed 8–3–04; 8:45 am]

BILLING CODE 4510–30–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–220 and 50–410]

Constellation Energy Group; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR–63 and NPF–69; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Individual notice; correction.

SUMMARY: This document corrects a notice appearing in the **Federal Register** on July 21, 2004 (69 FR 43633), that contained an incorrect Name of Attorney for the Applicant. This action is necessary to correct the Name of Attorney for the Applicant.

FOR FURTHER INFORMATION CONTACT: Tommy Le, Project Manager, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone (301) 415–1458, e-mail: *nbl@nrc.gov*.

SUPPLEMENTARY INFORMATION: On page 43633, in the first column, in the first paragraph, twenty-first line, the text should be corrected from ''[Attorney for the Applicant: David R. Lewis, Esq., Shaw Pittman, 2300 N Street, NW. Washington, DC 20037]'' to read ''[Attorney for the Applicant: Kathryn M. Sutton, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502]''

Dated in Rockville, Maryland, this 28th day of July, 2004.

For the Nuclear Regulatory Commission.

Samson S. Lee,

Acting Program Director, License Renewal and Environmental Impacts Program Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 04–17708 Filed 8–3–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–05004]

Notice of Consideration of Amendment Request To Decommission Northern States Power Company D.B.A. Xcel Energy Pathfinder Site at Sioux Falls, South Dakota, and Opportunity To Provide Comments and Request a Hearing

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of a license amendment request and opportunity to provide public comments and request a hearing. Notice of Public Meeting.

DATES: Comments must be sent by September 3, 2004. A request for a hearing must be filed by October 4, 2004. Public meeting will be held on August 31, 2004.

FOR FURTHER INFORMATION CONTACT: Chad Glenn, Project Manager, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone (301) 415–6722; fax (301) 415–5398; or email at *cjg1@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of a license amendment to Byproduct Material License No. 22–08799–02 issued to Northern States Power Company D.B.A. Xcel Energy (the licensee), to authorize decommissioning of its Pathfinder Site in Minnehaha County, South Dakota, and to allow termination of this license.

On February 12, 2004, Xcel Energy submitted the Pathfinder Decommissioning Plan (DP) for NRC for review, approval, and incorporation by amendment in License 22–08799–02. A detailed NRC administrative review, documented in a letter to Xcel Energy, dated July 16, 2004, found the DP acceptable to begin a technical review.

If the NRC approves the DP, the approval will be documented in an amendment to NRC License No. 22–08799–02. However, before approving the proposed amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended, and NRC's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment.

II. Opportunity to Provide Comments

In accordance with 10 CFR 20.1405, the NRC is providing notice to individuals in the vicinity of the site that the NRC is in receipt of a DP, and will accept comments concerning this decommissioning proposal and its associated environmental impacts. Comments with respect to this amendment should be provided in writing by September 3, 2004 and addressed to Chad Glenn, Project Manager, Mail Stop: T–7F27, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6722, fax number (301) 415–5398 or e-mail *cjg1@nrc.gov.*

Because of possible disruptions in the delivery of mail to United States Government offices, it is requested that comments mailed also be transmitted to the Project Manager by means of facsimile transmission or by e-mail. Comments received after 30 days will be considered if practicable to do so, but only those comments received on or before the due date can be assured consideration.

III. Public Meeting

A public meeting will be held in Minnehaha County, South Dakota, to solicit comments from individuals in the vicinity of the site and answer any questions about NRC's review of the DP for Xcel Energy's Pathfinder Site. The public meeting will be held August 31, 2004, on the 2nd Floor of the County Administration Building, 415 N. Dakota Avenue, Sioux Falls, South Dakota, 57104.

IV. Opportunity to Request a Hearing

The NRC hereby provides notice that this is a proceeding on an application for a license amendment. In accordance with the general requirements in Subpart C of 10 CFR Part 2, as amended on January 14, 2004 (69 FR 2182), any person whose interest may be affected by this proceeding and who desires to participate as a party must file a written request for a hearing and a specification of the contentions which the person seeks to have litigated in the hearing.

In accordance with 10 CFR 2.302 (a), a request for a hearing must be filed with the Commission either by:

1. First class mail addressed to: Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications;

2. Courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, Attention Rulemakings and Adjudications Staff between 7:45 a.m. and 4:15 p.m., Federal workdays;

3. E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV;* or

4. By facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff, at (301) 415–1101; verification number is (301) 415–1966.

In accordance with 10 CFR 2.302 (b), all documents offered for filing must be accompanied by proof of service on all parties to the proceeding or their attorneys of record as required by law or by rule or order of the Commission, including:

1. The applicant, by delivery to [Insert Contact and Contact Information]; and,

2. The NRC staff, by delivery to the Office of the General Counsel, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, or by mail addressed to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Hearing requests should also be transmitted to the Office of the General Counsel, either by means of facsimile transmission to (301) 415–3725, or by e-mail to *ogcmailcenter@nrc.gov.*

The formal requirements for documents are contained in 10 CFR 2.304 (b), (c), (d), and (e), and must be met. However, in accordance with 10 CFR 2.304 (f), a document filed by electronic mail or facsimile transmission need not comply with the formal requirements of 10 CFR 2.304 (b), (c), and (d), if an original and two (2) copies otherwise complying with all of the requirements of 10 CFR 2.304 (b), (c), and (d) are mailed within two (2) days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff.

In accordance with 10 CFR 2.309 (b), a request for a hearing must be filed by October 4, 2004.

In addition to meeting other applicable requirements of 10 CFR part 2 of the NRC's regulations, the general requirements involving a request for a hearing filed by a person other than an applicant must state:

1. The name, address and telephone number of the requester;

2. The nature of the requester's right under the Act to be made a party to the proceeding;

3. The nature and extent of the requester's property, financial or other interest in the proceeding;

4. The possible effect of any decision or order that may be issued in the proceeding on the requester's interest; and

5. The circumstances establishing that the request for a hearing is timely in accordance with 10 CFR 2.309 (b).

In accordance with 10 CFR 2.309 (f)(1), a request for hearing or petitions for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

1. Provide a specific statement of the issue of law or fact to be raised or controverted;

2. Provide a brief explanation of the basis for the contention;

3. Demonstrate that the issue raised in the contention is within the scope of the proceeding;

4. Demonstrate that the issue raised in the contention is material to the findings that the NRC must make to support the action that is involved in the proceeding;

5. Provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the requester/petitioner intends to rely to support its position on the issue; and

6. Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must include references to specific portions of the application that the requester/petitioner disputes and the supporting reasons for each dispute, or, if the requester/petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the requester's/petitioner's belief.

In addition, in accordance with 10 CFR 2.309 (f)(2), contentions must be based on documents or other information available at the time the petition is to be filed, such as the application or other supporting documents filed by the applicant, or otherwise available to the petitioner. Contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer.

Requesters/petitioners should, when possible, consult with each other in preparing contentions and combine similar subject matter concerns into a joint contention, for which one of the co-sponsoring requesters/petitioners is designated the lead representative. Further, in accordance with 10 CFR 2.309 (f)(3), any requester/petitioner that

wishes to adopt a contention proposed by another requester/petitioner must do so in writing within ten days of the date the contention is filed, and designate a representative who shall have the authority to act for the requester/petitioner.

In accordance with 10 CFR 2.309 (g), a request for hearing and/or petition for leave to intervene may also address the selection of the hearing procedures, taking into account the provisions of 10 CFR 2.310.

I. Further Information

Documents related to this action, including the applications for renewals and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this Notice are: ML040630549, which contains Xcel Energy's February 17, 2004 application for license amendment and the DP for the Pathfinder Site; ML041910319, which contains the July 16, 2004 NRC acceptance review letter; ML041900197, which contains Attachment 1–4 to the Characterization Survey Report; and ML041960307, which contains the Final Status Survey design for the Pathfinder site. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at (800) 397–4209 or (301) 415–4737, or by email to *pdr@nrc.gov.* These documents may also be examined, and/or copied for a fee, at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (First Floor), Rockville, MD 20852. The PDR is open from 7:45 a.m. to 4:15 p.m., Monday through Friday, except on Federal holidays. Xcel Energy's amendment request and Pathfinder DP may also be examined at the Siouxland Libraries in Sioux Falls, South Dakota. To view this information at the Siouxland Libraries, request access to the ''Pathfinder Decommissioning Plan'' prepared by Xcel Energy, dated February 2004.

Dated at Rockville, Maryland, this 28th day of July, 2004.

For the Nuclear Regulatory Commission.

Daniel M. Gillen,

Deputy Director, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 04–17709 Filed 8–3–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards Subcommittee Meeting on Thermal-Hydraulic Phenomena; Postponed

The meeting of the ACRS Subcommittee on Thermal-Hydraulic Phenomena scheduled to be held on August 17–18, 2004 in Room T–2B3, 11545 Rockville Pike, Rockville, Maryland has been postponed at the request of the NRC staff due to delays in the completion of certain technical reviews. Notice of this meeting was published in the **Federal Register** on Monday, July 26, 2004 (69 FR 44553). Rescheduling of this meeting will be announced in a future **Federal Register** Notice.

For further information contact: Mr. Ralph Caruso, cognizant ACRS staff engineer (telephone 301–415–8065) between 7:30 a.m. and 5 p.m. (ET) or by e-mail *rxc@nrc.gov.*

Dated: July 28, 2004.

Michael R. Snodderly,

Acting Associate Director for Technical Support, ACRS/ACNW.

[FR Doc. 04–17706 Filed 8–3–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

NUREG–1792, Good Practices for Implementing Human Reliability Analysis (HRA), Draft Report for Comment

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of availability of Draft NUREG–1792 ''Good Practices for Implementing Human Reliability Analysis (HRA) for comment, and notice of public meeting.

SUMMARY: The Nuclear Regulatory Commission is announcing the availability of and is seeking comments on NUREG–1792, ''Good Practices for Implementing Human Reliability Analysis (HRA), Draft Report for Public Comment.''

DATES: Comments on this document should be submitted by October 4, 2004. Comments received after that date will be considered to the extent practicable. To ensure efficient and complete comment resolution, comments should include references to the section, page, and line numbers of the document to which the comment applies, if possible.

ADDRESSES: Members of the public are invited and encouraged to submit written comments to Michael Lesar, Chief, Rules and Directives Branch, Office of Administration, Mail Stop T6–D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Hand-deliver comments attention to Michael Lesar, 11545 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m. on Federal workdays. Comments may also be sent electronically to *NRCREP@nrc.gov*.

This document is available at the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* under Accession No. ML041980358; on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/docs4comment*; and at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. The PDR's mailing address is USNRC PDR, Washington, DC 20555; telephone (301) 415–4737 or (800) 397–4205; fax (301) 415–3548; e-mail *PDR@NRC.GOV*.

FOR FURTHER INFORMATION, CONTACT: Erasmia Lois, Probability Risk Assessment Branch, Office of Nuclear Regulatory Research, telephone (301) 415–6560, e-mail *exl1@nrc.gov*, or Susan Cooper, Probability Risk Assessment Branch, Office of Nuclear Regulatory Research, telephone (301) 415–5183 or (302) 234–4423, e-mail *sec1@nrc.gov*.

SUPPLEMENTARY INFORMATION:

NUREG–1792, ''Good Practices for Implementing Human Reliability Analysis (HRA), Draft Report for Comment''

The purpose of Good Practices for Implementing Human Reliability Analysis (HRA) Draft Report for Comment is to provide guidance for performing HRA and reviewing HRAs to assess the quality of analyses. This report supports the NRC's activities for addressing probabilistic risk assessment (PRA) quality issues and supports the implementation of Regulatory Guide (RG) 1.200, ''An Approach for Determining the Technical Adequacy of Probabilistic Risk Assessment Results For Risk-Informed Activities.''

The HRA good practices described in NUREG–1792 are generic; that is, they

are not tied to any specific methods or tools that could be used for doing HRAs. The document provides guidance for implementing the RG 1.200 when performing a Level 1 and a limited Level 2 PRA for internal events (excluding fire) with the reactor at full power. The good practices are directly linked to RG 1.200, which reflects and endorses, with certain clarifications and substitutions, the American Society of Mechanical Engineers (ASME) standard RA–Sa–2003, ''Addenda to ASME Standard for Probabilistic Risk Assessment for Nuclear Power Plant Applications,'' and Revision A3 of the Nuclear Energy Institute (NEI) document ''Probabilistic Risk (PRA) Peer Review Process Guidance'' (NEI–00–02).

The NRC will hold a public meeting on August 16, 2004, at the NRC headquarters, 11545 Rockville Pike, Rockville, Maryland, Room T–10A1 (8:30 am—5 pm, preliminary agenda attached). The purpose of the meeting is to present and discuss the HRA good practices and to allow stakeholders to address issues needing clarification. The NRC is not soliciting comments on the draft NUREG as part of this meeting. Public comments on the draft NUREG can be provided as discussed above.

The NRC is seeking public comment in order to receive feedback from the widest range of interested parties and to ensure that all information relevant to developing this document is available to the NRC staff. This document is issued for comment only and is not intended for interim use. The NRC will review public comments received on the document, incorporate suggested changes as necessary, and issue the final NUREG–1792 for use.

Dated at Rockville, MD, this 28th day of July 2004.

For the Nuclear Regulatory Commission.

Charles Ader,

Director, Division of Risk Analysis and Applications, Office of Nuclear Regulatory Research.

Attachment

Public Meeting on NUREG–1792: ''Good Practices for Implementing Human Reliability Analysis (HRA), Draft Report for Comment''

U.S. NRC Headquarters, 11555 Rockville Pike, Rockville, MD 20852, Room T–10A1 August 16, 2004

Preliminary Agenda

Time and Topic

9 to 9:15 a.m.—Introduction and Overview of HRA Good Practices
9:15 to 9:30 a.m.—General HRA Good Practices
9:30 to 10:30 a.m.—Post-Initiator Human Events
10:30 a.m.—to 10:45 a.m.—BREAK
10:45 a.m.—to 11:45 a.m.—Post-Initiator Human Events (continued)
11:45 to 1 p.m.—LUNCH
1 to 2:45 p.m.—Pre-Initiator Human Events
2:45 to 3 p.m.—BREAK
3 to 3:45 p.m.—Errors of Commission
3:45 to 4:30 p.m.—HRA Documentation
4:30 to 5 p.m.—Wrap-up

[FR Doc. 04–17707 Filed 8–3–04; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER: Citation of Previous Announcement:

[69 FR 45856, July 30, 2004].

STATUS: Closed Meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

ANNOUNCEMENT OF ADDITIONAL MEETING: Additional meeting.

A Closed Meeting will be held on Monday, August 2, 2004 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matter may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(5), (7), (9) and (10) and 17 CFR 200.402(a)(5), (7), 9(ii) and (10) permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Goldschmid, as duty officer, voted to consider the item listed for the closed meeting in a closed session, determined that Commission business required the above change and that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Monday, August 2, 2004 will be:

Institution and settlement of an administrative proceeding of an enforcement nature; and

Settlement of an injunctive action;

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 942–7070.

Dated: July 30, 2004.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–17844 Filed 7–30–04; 4:06 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27879]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

July 29, 2004.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by August 23, 2004, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After August 23, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Columbia Energy Group (70–9421)

Columbia Energy Group (''Columbia Energy''), a registered holding company, and a wholly-owned subsidiary of NiSource Inc., also a registered holding company, of 801 East 86th Avenue, Merrillville, Indiana 46410, and Columbia Gas of Ohio, Inc., (''Columbia Ohio'') a wholly-owned public utility subsidiary of Columbia Energy, of 200 Civic Center Drive, Columbus, Ohio 43215, (Columbia Energy and Columbia Ohio together referred to as ''Columbia''), have filed with the Commission a post-effective amendment (''Amendment'') to an application-declaration previously filed under sections 6(a), 7, 9(a), 10, and 12(b) of the Act and rules 45 and 54 under the Act.

Columbia Energy's public utility subsidiaries are Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Ohio,

Columbia Gas of Pennsylvania, Inc. and Columbia Gas of Virginia, Inc. Together, these companies provide gas utility service to approximately 2.2 million residential, commercial and industrial customers in portions of Ohio, Virginia, Pennsylvania, Maryland and Kentucky. Columbia Energy also directly or indirectly owns all of the outstanding securities of non-utility subsidiaries that are engaged in natural gas transportation and storage and other energy and gas-related activities.

By prior Commission order dated August 23, 1999 (HCAR No. 27064) (''Prior Order''), Columbia Energy was authorized to engage in the business of factoring customer accounts receivable (''Receivables'') through one or more existing or newly formed or acquired, direct or indirect subsidiaries (''Factoring Subsidiaries'') to supplement customer financings and other intrasystem financing activities, which are not deemed to require additional Commission approval. Columbia Energy was also authorized to capitalize the Factoring Subsidiaries with any combination of debt or equity or to provide guarantees for their obligations, in amounts that, in the aggregate do not exceed $25 million. In addition, Columbia Energy was permitted to factor the Receivables of associate and certain types of non-associate companies in the energy industry, subject to certain limitations. To date, the Factoring Subsidiaries have not factored Receivables for non-associate companies, and Columbia states that the Factoring Subsidiaries will not be used to purchase Receivables originated by non-associate companies, without prior Commission order. Under the Prior Order, the Factoring Subsidiaries were required to resell the Receivables to third party financial institutions (''Purchasers'') on the date the Receivables were acquired. Under the Prior Order, Columbia is also required to report the acquisition and sale of all Receivables as ''sales'' under generally accepted accounting principles. In order to achieve true ''sale'' treatment, Columbia states that a Factoring Subsidiary must be capitalized with a sufficient level of equity.

Pursuant to the Prior Order, in September 1999, Columbia Energy, through its financing subsidiary, Columbia Finance Corporation, organized and acquired the common stock of Columbia Accounts Receivable Corporation (''CARC'') to handle the sale of Receivables by Columbia Ohio. Under its agreement with CARC, Columbia Ohio sold, without recourse, all of its trade receivables, other than certain low-income payment plan receivables, as they were originated. CARC, in turn, entered into an agreement under which it sold an undivided ownership interest in the Receivables to a commercial paper conduit formed by Canadian Imperial Bank of Commerce (''CIBC'').

Effective May 13, 2004, Columbia Ohio, CARC and CIBC terminated the existing Receivables sale program, and all right, title and interest of CARC and the CIBC conduit in the Receivables were transferred back to Columbia Ohio. The next day, Columbia Ohio sold the same Receivable pool to a new Factoring Subsidiary of Columbia Ohio, Columbia of Ohio Receivables Corporation (''CORC''), which in turn sold an undivided interest in such Receivables to Beethoven Funding Corporation (''BFC''), as Purchaser. BFC is a commercial paper funding conduit formed by Dresdner Bank AG, New York Branch, as agent. Columbia Energy states that the new Receivables sale program operates substantially similar to the CIBC program that it replaced.

Pursuant to the terms of the sale agreement between Columbia Ohio and CORC, on the initial closing date, Columbia Ohio made a capital contribution of Receivables having an aggregate outstanding balance of $25 million. On or before November 14, 2004, Columbia Ohio is obligated to make an additional $15 million capital contribution, in the form of a contribution of Receivables.

Columbia now requests a supplemental order authorizing an increase in the maximum aggregate capitalization that Columbia may have, directly or indirectly, in all Factoring Subsidiaries from the current $25 million to $85 million. Columbia requests that the Commission authorize Columbia Ohio to make an incremental $15 million investment in CORC and reserve jurisdiction over the additional requested investment of $45 million whether in CORC or in any other Factoring Subsidiary, pending completion of the record. In addition, without further order of the Commission in this proceeding, Columbia states it will not, directly or indirectly, form or acquire the securities of any Factoring Subsidiary other than CORC, nor will CORC be used to purchase receivables originated by any company other than Columbia Ohio. Columbia requests that the Commission reserve jurisdiction, pending completion of the record, over (i) the formation and acquisition of any securities of any Factoring Subsidiary other than CORC and (ii) the factoring by CORC of receivables originated by any company other than Columbia Ohio.

Columbia states that the increase in the maximum aggregate capitalization for CORC is warranted in part due to the dramatic increase in the cost of gas since 1999, when the Prior Order was issued. Columbia states that it expects that the price of gas will continue to increase. All other terms, conditions and restrictions under the Prior Order will continue to apply to Columbia Energy and its subsidiaries.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–17770 Filed 8–3–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50119; File No. SR–NASD–2004–113]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Modify Nasdaq Market Center Pricing

July 29, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 26, 2004, 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 this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b-4(f)(2) thereunder,[4] which renders the rule effective upon Commission receipt of this filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to modify the pricing for trading of Nasdaq-listed securities in the Nasdaq Market Center. Nasdaq plans to implement the proposed rule change on August 2, 2004.

The text of the proposed rule change is below.[5] Proposed new language is in italics; proposed deletions are in brackets.

Rule 7010. System Services

(a)—(h) No change.

(i) Nasdaq Market Center order execution.

(1) The following charges shall apply to the use of the order execution services of the Nasdaq Market Center by members for Nasdaq-listed securities:

Order Entry:	
Non-Directed Orders (excluding Preferenced Orders)	No charge.
Preferenced Orders:	
Preferenced Orders that access a Quote/Order of the member that entered the Preferenced Order.	No charge.
Other Preferenced Orders	$0.02 per order entry.
Directed Orders	$0.10 per order entry.
Order Execution:	
Non-Directed or Preferenced Order that accesses the Quote/Order of a market participant that does not charge an access fee to market participants accessing its Quotes/Orders through the Nasdaq Market Center:	
Charge to member entering order:	
Average daily shares of liquidity provided through the Nasdaq Market Center by the member during the month:	
400,000 or less	$0.003 per share executed (but no more than $120 per trade for trades in securities executed at $1.00 or less per share).
400,001 to 5,000,000	$0.0027 per share executed (but no more than $108 per trade for trades in securities executed at $1.00 or less per share).
5,000,001 or more	$0.0026 per share executed (but no more than $104 per trade for trades in securities executed at $1.00 or less per share).
Credit to member providing liquidity:	
Average daily shares of liquidity provided through the Nasdaq Market Center by the member [from April 15 to April 30, 2004, or] during [any] *the* month [thereafter]:	
[20]*18,*000,000 or less	$0.002 per share executed (but no more than $80 per trade for trades in securities executed at $1.00 or less per share).
[20]*18,*000,001 or more	$0.0025 per share executed (but no more than $100 per trade for trades in securities executed at $1.00 or less per share).
Non-Directed or Preferenced Order that accesses the Quote/Order of a market participant that charges an access fee to market participants accessing its Quotes/Orders through the Nasdaq Market Center:	
Charge to member entering order:	
Average daily shares of liquidity provided through the Nasdaq Market Center by the member during the month:	
400,000 or less	$0.001 per share executed (but no more than $40 per trade for trades in securities executed at $1.00 or less per share).
400,001 or more	$0.001 per share executed (but no more than $40 per trade for trades in securities executed at $1.00 or less per share, and no more than $10,000 per month).
Directed Order	$0.003 per share executed.
Non-Directed or Preferenced Order entered by a member that accesses its own Quote/Order submitted under the same or a different market participant identifier of the member.	No charge.
Order Cancellation:	
Non-Directed and Preferenced Orders	No charge.
Directed Orders	$0.10 per order cancelled.

(2)–(3) No change.

(j)–(u) 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.

[5] The proposed rule change is marked to show changes from the rule as it appears in the NASD Manual available at *www.nasd.com,* and also reflects the proposed rule changes in SR–NASD–2004–076. *See* Securities Exchange Act Release No. 50074 (July 23, 2004).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq recently implemented reduced pricing for execution of Non-Directed and Preferenced Orders for Nasdaq-listed securities in the Nasdaq Market Center, by reducing order execution fees and increasing liquidity provider credits for members that provide significant liquidity through the Nasdaq Market Center.[6] Under the fee schedule currently in effect, the per share fee charged to a member to access liquidity and the credit for providing liquidity during a particular month both depend on the extent to which such member provided liquidity through the Nasdaq Market Center during that month. Thus, if a member provides a daily average of more than 5,000,000 shares of liquidity through the Nasdaq Market Center during a month, the member currently pays $0.0026 per share executed in trades during that month in which the member accesses liquidity provided by a market participant that does not charge an access fee (*i.e.*, in which the member's Non-Directed or Preferenced Orders access the Quotes/Orders of other market participants).[7] If a member provides a daily average of 400,001 to 5,000,000 shares of liquidity during a month, the member pays $0.0027 per share executed in trades executed during the month in which the member accesses liquidity provided by a market participant that does not charge an access fee.[8] Finally, if a member provides a daily average of 400,000 or fewer shares during a month, the member pays $0.003 per share executed during the month.[9]

Similarly, the fee paid by a member to access the Quote/Order of a market participant that charges an access fee depends upon the shares of liquidity provided by the member during that month. If a member provides a daily average of more than 400,000 shares of liquidity during a month, the member will pay $0.001 per share executed for trades during the month in which the member accesses liquidity provided by a market participant that charges an access fee;[10] however, the member's total charge for that month will be capped at $10,000. If a member provides a daily average of 400,000 shares of liquidity or less during a month, the member will also pay $0.001 per share, but no monthly cap will be applicable.[11]

Finally, the credit provided to a member that provides the liquidity for an execution and does not charge an access fee also depends upon the shares of liquidity provided by the member during the month. Under the current fee schedule, during a month in which a member that does not charge an access fee provides a daily average of more than 20,000,000 shares of liquidity, the credit for transactions in which the member provided liquidity is $0.0025 per share executed.[12] For firms providing lower levels of liquidity, the credit is $0.002 per share executed.[13]

During the course of 2004, the volume of trades in Nasdaq-listed securities through all venues that trade them has been steadily decreasing. Thus, marketwide volumes have decreased from an average daily volume of approximately 2.3 billion shares in January 2004, to approximately 1.9 billion shares in April, to 1.7 billion shares during the second week of July. As a result, it has become increasingly difficult for members to achieve the average daily volume requirement of more than 20 million shares required for the enhanced liquidity provider credit. In response, Nasdaq is proposing to change the threshold at which the $0.0025 per share credit becomes available from 20,000,001 shares per day to 18,000,001 shares per day. Nasdaq is also deleting references to the last half of April 2004 in the current rule text, which were originally needed to allow the implementation of SR–NASD–2004–062 during the middle of the month of April.[14] Because SR–NASD–2004–113 will take effect at the beginning of August 2004 and will therefore be in effect for an entire month, similar references are not needed.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[15] in general, and with section 15A(b)(5) of the Act,[16] 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 proposed rule change bases the level of credits for providing liquidity through the Nasdaq Market Center on the extent to which a member provides liquidity during the month, thereby taking account of the lower per share costs and enhanced revenue opportunities associated with higher volumes of liquidity provision. The change will adjust the level of liquidity provision at which an enhanced credit of $0.0025 per share is made available, to take account of a decrease in marketwide trading volumes.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[17] and subparagraph (f)(2) of Rule 19b–4 thereunder,[18] because it establishes or changes 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

[6] Securities Exchange Act Release No. 49603 (April 22, 2004), 69 FR 23844 (April 30, 2004) (SR–NASD–2004–062); Securities Exchange Act Release No. 48972 (December 22, 2003), 68 FR 75301 (December 30, 2003) (SR–NASD–2003–185).

[7] Transactions in a security priced under $1.00 (''low-priced trades'') are subject to fee caps applicable to trades in excess of 40,000 shares. Accordingly, when the fee that the member pays is $0.0026, the maximum per transaction charge for a low-priced trade is $104.

[8] When the fee that the member pays is $0.0027, the maximum per transaction charge for a low-priced trade is $108.

[9] When the fee that the member pays is $0.003, the maximum per transaction charge for a low-priced trade is $120.

[10] The maximum per transaction charge for a low-priced trade is $40.

[11] The maximum per transaction charge for a low-priced trade is $40.

[12] When the credit is $0.0025, the maximum credit for a low-priced trade is $100.

[13] When the credit is $0.002, the maximum credit for a low-priced trade is $80.

[14] *See* note 6, *supra*.

[15] 15 U.S.C. 78o–3.

[16] 15 U.S.C. 78o–3(b)(5).

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 240.19b-4(f)(2).

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–113 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–113. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–113 and should be submitted on or before August 25, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–17771 Filed 8–3–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 50109; File No. SR–NYSE–2004–35]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc., Relating to a Specialist License Fee for Investment Company Units

July 28, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, (''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on June 30, 2004, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE proposes to charge a Specialist License Fee to the specialist allocated an issue of investment company units (''ICUs'') for which the Exchange pays a license fee to a third party in connection with trading of such series on the Exchange pursuant to unlisted trading privileges.[3] The text of the proposed rule change is provided below. Proposed new language is *italicized.*

* * * * *

PRICE LIST

Specialist License Fee	
Specialist License Fee—payment by the specialist allocated an issue of Investment Company Units of any license fee payable by the Exchange to a third party in connection with trading on the Exchange of such issue pursuant to unlisted trading privileges—billed quarterly..*	*As of July 1, 2004 through December 31, 2004, 100% of the amount payable by the Exchange, provided that the amount billed to the specialist for the third and fourth quarters of 2004 will not exceed the amount payable by the Exchange for the first and second quarters of 2004; as of January 1, 2005, 50% of the amount payable by the Exchange.*

** A license fee applicable to multiple issues of Investment Company Units allocated to more than one specialist will be apportioned to such specialists based on the consolidated share volume represented by each issue subject to such license fee.*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for the proposed rule change 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 NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently trades a number of issues of ICUs, also known as exchange-traded funds, for which the

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The NYSE represents that currently it does not incur third-party license fees for listed ICUs. Telephone conversation between Michael Cavalier, Assistant General Counsel, NYSE, and Frank N. Genco, Division of Market Regulation, Commission, on July 27, 2004.

Exchange pays a license fee to a third party in connection with Exchange trading. The Exchange proposes to impose a Specialist License Fee on each specialist allocated an ICU issue that trades on the Exchange pursuant to unlisted trading privileges (''UTP'') for which the Exchange pays a license fee. Between July 1, 2004, and December 31, 2004, the Exchange proposes to bill each such specialist quarterly for 100% of the applicable license fee payable by the Exchange, provided that the total amount billed to such specialist for the third and fourth quarters of 2004 will not exceed the amount of license fees payable by the Exchange for the first and second quarters of 2004. As of January 1, 2005, the Specialist License Fee will be billed to the specialist quarterly at 50% of the amount payable by the Exchange.

A license fee applicable to multiple issues of ICUs allocated to more than one specialist will be apportioned among such specialists based on the consolidated share volume represented by each issue subject to such license fee.

The Exchange believes it is appropriate to pass through to the specialist a portion of the ICU license fees payable by the Exchange in order to alleviate part of the financial obligation incurred by the Exchange in connection with trading ICUs for which third parties require licenses. The Specialist License Fee will operate on a partial cost recovery basis. The fee will apply to all ICUs currently traded on the Exchange pursuant to UTP for which the Exchange is required to pay a license fee, and to all such ICUs that may trade pursuant to UTP in the future.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b)(4) of the Act,[4] which requires that the rules of an exchange be designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilitates.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[4] 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act [5] and subparagraph (f)(2) of Rule 19b-4[6] thereunder, because it establishes or changes a due, fee, or other charge.

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.[7]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR-NYSE–2004–35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NYSE–2004–35. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE–2004–35 and should be submitted on or before August 25, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–17772 Filed 8–3–04; 8:45 am]

BILLING CODE 8010–01–P

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b–4(f)(2).

[7] *See* 15 U.S.C. 78s(b)(3)(C).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50114; File No. SR–NYSE–2004–34]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the New York Stock Exchange, Inc. To Amend NYSE Rule 103B With Respect to the Allocation Panel

July 29, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 29, 2004 the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has filed the proposal as a ''non-controversial'' rule change pursuant to section 19(b)(3)(A)(iii) 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE proposes to amend Exchange Rule 103B (Specialist Stock Allocation) to update the composition of the Allocation Panel. The Allocation Panel is the group of individuals from which an Allocation Committee is drawn. The Allocation Committee is the group involved in the assignment to specialist organizations of the companies listing on the Exchange. The Exchange proposes to change the number of persons on the Allocation Panel. The text of the proposed rule change appears below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

Rule 103B

Specialist Stock Allocation

Securities listing on the Exchange will be allocated to specialist units according to such policies as are established and made known to the membership from time to time. These policies are stated below.

Allocation Policy and Procedures

I.–II.—No change.

III. ALLOCATION PANEL

Composition

The composition of the Allocation Panel reflects the committee structure and includes 28 Floor brokers, [13] *15* allied members (including the [5] *7* allied members serving on the Market Performance Committee), [9] *11* representatives of institutional investor organizations (including the [5] *7* representatives of institutional investor organizations serving on the Market Performance Committee), the 10 Floor broker Governors who are part of the panel by virtue of their appointment as Governors, and a minimum of 5 Senior Floor Official or Executive Floor Official brokers that have been appointed to the panel.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Stocks listing on the Exchange are allocated to specialist organizations by the Allocation Committee pursuant to procedures contained in Exchange Rule 103B. The Allocation Panel is the resource from which the Allocation Committee is assembled. The Allocation Panel is appointed by the Exchange's Board of Directors from among individuals nominated by the Exchange's membership.

Exchange Rule 103B(III) sets forth the composition of the Allocation Panel. The rule currently provides for 13 allied members (including the five allied members serving on the Market Performance Committee (''MPC'')) and nine representatives of institutional investor organizations (including the five representatives of institutional investor organizations serving on the MPC). However, the MPC Charter currently authorizes seven allied members and seven representatives of institutional investor organizations to serve on the MPC. In light of this, the Allocation Committee charter also provides for the seven allied members and seven representatives of institutional investor organizations serving on the MPC to be part of the Allocation Panel.

Accordingly, the Exchange proposes a technical amendment to NYSE Rule 103B(III) to conform the number of allied members and representatives of institutional investor organizations authorized in its rule with the number authorized by the Allocation Committee charter. The Exchange represents that the proposed amendment is not substantive in nature and does not change the way in which allocations are made.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirement under Section 6(b)(5) of the Act[5] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change is consistent with these objectives in that it enables the Exchange to further enhance the process by which stocks are allocated to ensure fairness and equal opportunity in the process.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of filing (or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest), the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such proposed 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.[8]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an E-mail to *rule-comments@sec.gov.* Please include File

[5] 5 15 U.S.C. 78f(b)(5).

[6] 6 15 U.S.C. 78s(b)(3)(A).

[7] 7 17 CFR 240.19b–4(f)(6).

[8] *See* Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

No. SR–NYSE–2004–34 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NYSE–2004–34. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2004–34 and should be submitted by August 25, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–17774 Filed 8–3–04; 8:45 am]

BILLING CODE 8010–01–PSEB NW,

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50101; File No. SR–PCX–2004–51]

Self-Regulatory Organizations; Pacific Exchange, Inc; Order Granting Approval to a Proposed Rule Change Amending the Designated Options Examination Authority Fee on a Retroactive Basis

July 28, 2004.

On June 1, 2004, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its Schedule of Fees and Charges by changing the Designated Options Examination Authority (''DOEA'') fee charged to its members. The Exchange proposed to apply the fee changes on a retroactive basis effective as of January 2004.[3] The proposed rule change was published for comment in the **Federal Register** on June 18, 2004.[4] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange [5] and, particularly, section 6(b)(4) of the Act, which requires that the rules of an exchange provides for the equitable allocation of reasonable fees among its members.[6] The current DOEA fee is a pass through of the costs the Exchange pays the National Association of Securities Dealers for conducting DOEA examinations plus a 17% administrative charge. The Commission believes that the Exchange's proposal to apply its current DOEA fee on a retroactive basis to January 2004 is equitable because it allows the Exchange to charge members the actual costs of the examinations.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On April 15, 2004, the Exchange filed an identical amendment to its Schedule of Fees and Charges, as immediately effective. *See* Securities Exchange Act Release No. 49671 (May 7, 2004), 69 FR 27665 (May 17, 2004) (File No. SR–PCX 2004–32). Because the Exchange also sought to apply the amendment to the DOEA fee on a retroactive basis, the Exchange submitted the proposed rule change for notice and comment.

[4] *See* Securities Exchange Act Release No. 49828 (June 8, 2004), 69 FR 34210.

[5] In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(4).

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–PCX–2004–51) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–17773 Filed 8–3–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50108; File No. SR–PCX–2004–66]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the Pacific Exchange, Inc. To Implement Price Collars on its Archipelago Exchange Facility During the Closing Auction

July 28, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 13, 2004, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by PCX. On July 27, 2004, the PCX filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, has been filed by PCX under Rule 19b–4(f)(6) under the Act.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Letter from Mai Shiver, Director and Senior Counsel, Regulatory Policy, PCX to Alton Harvey, Assistant Director, Division of Market Regulation, Commission, dated July 22, 2004. (''Amendment No. 1''). In Amendment No. 1, the PCX explained that in certain instances where the Closing Auction is priced at the midpoint of the NBBO, and where the price collars would otherwise be invoked, the Closing Auction would be priced at the midpoint of the NBBO.

[4] 17 CFR 240.19b-4(f)(6). For purposes of determining the effective date and calculating the sixty-day period within which the Commission may summarily abrogate the proposed rule change under section 19(b)(3)(C) of the Act, the Commission considers that period to commence on July 27, 2004, the date PCX filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PCX, through its wholly owned subsidiary PCX Equities, Inc. (''PCXE''), proposes to amend its Closing Auction rules to implement price collars in order to improve the Closing Auction pricing mechanism on the Archipelago Exchange facility (''ArcaEx''). Under the proposed rule change, in certain instances, the Closing Auction price would be limited by pre-established thresholds.

Proposed new language is italicized; deleted language is in [brackets].

* * * * *

PCX Equities, Inc.

Rule 7

Auctions

Rule 7.35 (a)–(e)(3)(B)—(No change).

(C) If the Closing Auction Price established by subsections 7.35(e)(3)(A)–(B) is outside the benchmarks established by the Corporation by a threshold amount, the Closing Auction Price will occur at a price within the threshold amounts that best satisfies the conditions of subsections 7.35(e)(3)(A)–(B). The Corporation shall set and modify such benchmarks and thresholds from time to time upon prior notice to ETP Holders.

* * * * *

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 PCX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of its continuing efforts to enhance participation on ArcaEx, the PCX is proposing to improve the process associated with pricing the Closing Auction. The proposal is based on a similar standard currently in place at the Nasdaq Stock Market, Inc. (''Nasdaq'') for the Nasdaq Closing Cross which was previously approved by the Commission.[5]

Currently, PCXE Rule 7.35 describes the ArcaEx Closing Auction rules. The Closing Auction price is generally determined based on the Indicative Match Price[6] that is the price at which the maximum volume of shares is executable. To improve the pricing mechanism, ArcaEx proposes to implement price collars that would limit the price at which the Indicative Match Price could be set. These price collars would be established by PCX and would be communicated to ETP Holders via the ArcaEx website. Initially, these price collar thresholds would be consistent with the PCXE Demonstrable Erroneous Execution Policy.[7] That is, the Indicative Match Price would not be permitted to be greater than $1.00 or 10% away from the consolidated last sale price. Other than utilizing the pre-established price collars to limit the Closing Auction Indicative Match Price and changing the threshold parameters with prior written notice to ETP Holders, the Corporation would not have any discretion to modify the auction process and the calculation of the Indicative Match Price.

Following is an example of how the Closing Auction price collars would function:

Consolidated last sale price: 12.00.

ArcaEx Orders:

Buy 50,000 MOC.
Sell 30,000 LOC @ 12.50.
Sell 20,000 LOC @ 13.01.]

Closing Auction results: Indicative Match Price = 12.50; Matched Volume = 30,000; Total Imbalance = 20,000. The 20,000 limit sell order at 13.01 is outside of the price collar and would not be used to determine the Indicative Match Price.

PCX believes that implementing these price collars would help ensure that the ArcaEx Closing Auction will execute at prices within range of where the stock is currently trading. Further, it would provide ETP Holders and investors with greater price certainty when entering orders into the ArcaEx Closing Auction.

In Amendment No. 1, the Exchange sought to clarify a particular scenario with respect to the collars. Specifically, in certain instances, it may not be appropriate for PCX to institute a price collar. For example, pursuant to PCXE Rule 7.35(e)(3)(B), there may be cases in which the Closing Auction is priced at the midpoint of the NBBO. The NBBO is a fair representation of then-available prices and accordingly provides for an appropriate auction pricing mechanism. In such instances, when the price collars proposed in the instant filing would otherwise be invoked (*i.e.* the Closing Auction price established by the midpoint of the NBBO is greater than $1.00 or 10% away from the consolidated last sale price), it would not be appropriate for PCX to utilize such collars and as such, the Closing Auction would be priced at the midpoint of the NBBO.[8]

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b) of the Act,[9] in general, and section 6(b)(5) of the Act,[10] in particular, in that it will promote just and equitable principles of trade, facilitate transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and national market system, and protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has been filed by the Exchange pursuant to section 19(b)(3)(A) of the Act[11] and subparagraph (f)(6) of Rule 19b–4 thereunder.[12] PCX has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and

[5] *See* Securities and Exchange Act Release No. 49406 (March 11, 2004), 69 FR 12879 (March 18, 2004) (SR–NASD–2003–173).

[6] *See* PCXE Rule 1.1(r).

[7] *See* Archipelago Exchange Web site *www.arcaex.com,* Orders and Trade Processing, Erroneous Execution Policy. Any changes to the thresholds of the price collars will be communicated to ETP Holders with reasonable notice prior to the closing auction.

[8] *See* Amendment No. 1, *supra* note 3.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

(iii) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate. Therefore, the foregoing rule change, as amended, has become effective pursuant to section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.

Pursuant to Rule 19b–4(f)(6)(iii) under the Act,[15] the proposal may not become operative for 30 days after the date of its filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the self-regulatory organization must file notice of its intent to file the proposed rule change at least five business days beforehand. PCX, through its facility, ArcaEx, provided the Commission with notice of its intent to file the proposed rule change at least five days before filing the proposal with the Commission.[16] The Exchange has requested that the Commission waive the 30–day operative delay so that the proposed rule change will become immediately effective upon filing.

The Commission believes that waiving the 30–day operative delay is consistent with the protection of investors and the public interest. The Commission believes that accelerating the operative date does not raise any new regulatory issues, significantly affect the protection of investors or the public interest, or impose any significant burden on competition. The Commission notes that it recently approved a similar proposal by Nasdaq on which the Exchange's proposal is based.[17] For these reasons, the Commission designates the proposed rule change as effective and operative immediately.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–PCX–2004–66 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–PCX–2004–66. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–PCX–2004–66 and should be submitted on or before August 25, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–17776 Filed 8–3–04; 8:45 am]

BILLING CODE 8010–01–P

[13] *See supra* note 11.

[14] *See supra* note 12.

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] *See* e-mail from Janet Angstadt, Deputy General Counsel, Archipelago Holdings L.L.C. to Alton Harvey, Assistant Director, Commission, dated June 30, 2004.

[17] *See supra* note 5.

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50106; File No. SR–PHLX–2004–40]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the Philadelphia Stock Exchange, Inc. To Replace the Total Shares per Transaction Charge With a Single Per Share Charge

July 28, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On July 19, 2004, the Phlx submitted Amendment No. 1 to the proposal.[3] The Phlx has designated this proposal as one changing a fee imposed by the Phlx under Section 19(b)(3)(A)(ii) of the Act[4] and Rule 19b–4(f)(2) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend its equity transaction charge to replace the total shares per transaction charge with a single per share charge, as described further below. Below is the text of the proposed rule change. Proposed new language is in italics; deletions are in brackets.

* * * * *

Philadelphia Stock Exchange Fee Schedule Summary of Equity Charges

SUMMARY OF EQUITY CHARGES (p 1/3)*

EQUITY TRANSACTION CHARGE

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Angela Saccomandi Dunn, Counsel, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated July 16, 2004 and accompanying Form 19b–4 (''Amendment No. 1''). Amendment No. 1 replaces and supercedes the originally filed proposed rule change.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).

Based on total shares per transaction with the exception of specialist trades and PACE trades.[1]

Transaction fee	$.0035 per share [Rate per share]
[First 500 shares	$ 0.00
Next 2,000 shares	0.0075
Remaining shares	0.005]

$50 maximum fee per trade side.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Phlx states that the purpose of the proposed rule change is to remain competitive and foster growth of the equity floor brokerage business by seeking to increase volume. The proposal seeks to replace the current tiered fee schedule for equity transaction charges with a single per share charge of $.0035, subject to a cap of $50 per trade side. Presently, equity transaction charges are based on total shares per transaction. For example, for the first 500 shares the transaction fee is $0, for the next 2,000 shares the transaction fee is $.0075 on a per share basis, and thereafter, for any remaining shares the transaction fee is $.005 on a per share basis. The proposal would increase the fee for the first 500 shares transacted and decrease the fee for subsequent share volume.[6]

In addition, the current fee schedule excludes specialist trades and Phlx Automated Communication and Execution System (''PACE'')[7] trades from the equity transaction charge.[8] Under the proposal, these aforementioned exceptions would remain.

2. Basis

The Exchange believes that its proposal to amend its schedule of dues, fees and charges is consistent with Section 6(b) of the Act[9] in general, and furthers the objectives of Section 6(b)(4) of the Act[10] in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among Exchange members and will allow the equity floor to remain competitive and encourage growth.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or 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)(ii) of the Act[11] and Rule 19b–4(f)(2)[12] thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form(*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–PHLX–2004–40 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–PHLX–2004–40. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PHLX–2004–40 and should be submitted on or before August 25, 2004.

[1] However, this charge applies where an order, after being delivered to the Exchange by the PACE system is executed by the specialist by way of an outbound ITS commitment, when such outbound ITS commitment reflects the PACE order's clearing information, but does not apply where a PACE trade was executed against an inbound ITS commitment.

[6] The fee is charged only to members of the Phlx. Telephone conversation between Angela Saccomandi Dunn, Counsel, Phlx, and David Liu, Attorney, Division of Market Regulation, Commission, on July 28, 2004.

[7] PACE is the Exchange's automated order entry, routing and execution system. *See* Phlx Rules 229 and 229A.

[8] Although it does not apply to PACE trades, the equity transaction charge applies where an order, after being delivered to the Exchange by the PACE system, is executed by the specialist by way of an outbound ITS commitment, when such outbound ITS commitment reflects the PACE order's clearing information. However, the equity transaction charge does not apply where a PACE trade was executed against an inbound ITS commitment.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 04–17775 Filed 8–3–04; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice: 4794]

60-Day Notice of Proposed Information Collection: DS–60, Affidavit Regarding A Change of Name, OMB Control Number 1405–0133

ACTION: 60-Day notice to the public for comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. This process is conducted in accordance with the Paperwork Reduction Act of 1995.

The following summarized the information collection proposal to be submitted to OMB:

Type of Request: Regular—Extension of a currently approved collection.

Originating Office: Bureau of Consular Affairs, Department of State, Passport Services, Office of Field Operations, Field Coordination Division.

Title of Information Collection: Affidavit Regarding A Change of Name.

Frequency: On occasion.

Form Number: DS–60.

Respondents: Individuals or Households.

Estimated Number of Respondents: 113,600 per year.

Estimated Number of Responses: 113,600 per year.

Average Hours Per Response: 15 minutes.

Total Estimated Burden: 28,400 hours per year.

Public comments are being solicited to permit the agency to:

• Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the agency.

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected/

• Minimize the reporting burden on those who are to respond, including through the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: The Affidavit Regarding A Change of Name is used in conjunction with a passport application. It is used by Passport Services to collect information for the purpose of establishing that a passport applicant who has adopted a new name without formal court proceedings or a marriage has publicly and exclusively used the adopted name over a period of time (at least five years).

Methodology: When needed, The Affidavit Regarding A Change of Name is completed at the time a U.S. citizen applies for a U.S. passport.

FOR FURTHER INFORMATION CONTACT: Public comments, or requests for additional information, regarding the collection listed in this notice should be directed to Margaret A. Dickson, U.S. Department of State, CA/PPT/FO/FC, 2100 Pennsylvania Avenue, NW., 3rd Floor /Room 3040/SA–29, Washington, DC 20037, *dicksonma@state.gov* who may be reached at 202.663.2460.

Dated: July 21, 2004.

Frank Moss,

Acting Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 04–17785 Filed 8–3–04; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 4795]

60-Day Notice of Proposed Information Collection: DS–10, Birth Affidavit, OMB Control Number 1405–0132

ACTION: 60-Day notice to the public for comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. This process is conducted in accordance with the Paperwork Reduction Act of 1995.

The following summarizes the information collection proposal to be submitted to OMB:

Type of Request: Regular—Extension of a currently approved collection.

Originating Office: Bureau of Consular Affairs, Department of State, Passport Services, Office of Field Operations, Field Coordination Division.

Title of Information Collection: Birth Affidavit.

Frequency: On occasion.

Form Number: DS–10.

Respondents: Individuals or Households.

Estimated Number of Respondents: 86,500 per year.

Estimated Number of Responses: 86,500 per year.

Average Hours Per Response: 15 minutes.

Total Estimated Burden: 21,625 hours per year.

Public comments are being solicited to permit the agency to:

• Evaluate whether the proposed information collection is necessary for the proper performance of the functions of the agency.

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including through the use of automated collection techniques or other forms of technology.

Abstract of proposed collection: The Birth Affidavit is used in conjunction with a passport application by Passport Services to collect information for the purpose of establishing the citizenship of a passport applicant who has not submitted an acceptable United States birth certificate with his/her passport application.

Methodology: When needed, Birth Affidavit is completed at the time a U.S. citizen applies for a U.S. passport.

FOR FURTHER INFORMATION CONTACT: Public comments, or requests for additional information, regarding the collection listed in this notice should be directed to Margaret A. Dickson, U.S. Department of State, CA/PPT/FO/FC, 2100 Pennsylvania Avenue, NW., 3rd Floor/Room 3040/SA–29, Washington, DC 20037, *dicksonma@state.gov* who may be reached at 202.663.2460.

Dated: July 21, 2004.

Frank Moss,

Acting Deputy Assistant Secretary for Passport Services, Bureau of Consular Affairs, Department of State.

[FR Doc. 04–17786 Filed 8–3–04; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 4779]

Notice of Meeting of the Cultural Property Advisory Committee

In accordance with the provisions of the Convention on Cultural Property

[13] 17 CFR 200.30–3(a)(12).

Implementation Act (19 U.S.C. 2601 *et seq.*) there will be a meeting of the Cultural Property Advisory Committee on Thursday, September 9, 2004, from approximately 9 a.m. to 5 p.m., and on Friday, September 10, from approximately 9 a.m. to 2 p.m., at the Department of State, Annex 44, Room 840, 301 4th St., SW., Washington, DC. During its meeting the Committee will review a request from the Government of the Republic of Colombia to the Government of the United States of America. Concerned that its cultural heritage is in jeopardy from pillage, the Government of the Republic of Colombia made this request under Article 9 of the 1970 UNESCO Convention.

The Committee's responsibilities are carried out in accordance with provisions of the Convention on Cultural Property Implementation Act (19 U.S.C. 2601 *et seq.*). The text of the Act, a public summary of this request, and related information may be found at *http://exchanges.state.gov/culprop.* Portions of the meeting on September 9 and 10 will be closed pursuant to 5 U.S.C. 552b(c)(9)(B) and 19 U.S.C. 2605(h). However, on September 9, the Committee will hold an open session, approximately 10:30 a.m. to 12 noon, to receive oral public comment on the Colombia request. Persons wishing to attend this open session should notify the Cultural Heritage Center of the Department of State at (202) 619–6612 by Thursday, September 2, 2004, 3 p.m. (e.d.t.) to arrange for admission, as seating is limited.

Those who wish to make oral presentations should request to be scheduled and submit a written text of the oral comments by September 2 to allow time for distribution to Committee members prior to the meeting. Oral comments will be limited to five minutes each to allow time for questions from members of the Committee and must specifically address the determinations under section 303(a)(1) of the Convention on Cultural Property Implementation Act, 19 U.S.C. 2602, pursuant to which the Committee must make findings. This citation for the determinations can be found at the Web site noted above.

The Committee also invites written comments and asks that they be submitted no later than September 2. All written materials, including the written texts of oral statements, should be faxed to (202) 260–4893.

Dated: July 27, 2004.

C. Miller Crouch,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 04–17784 Filed 8–3–04; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending July 9, 2004

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (*See* 14 CFR 301.201 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2004–18581–1.

Date Filed: July 6, 2004.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: July 27, 2004.

Description: Application of Atlantic Coast Airlines, requesting the Department; (1) issue the necessary disclaimer over the reincorporation of Atlantic Coast Airlines, and (2) reissue its certificate.

Docket Number: OST–2004–18594–1.

Date Filed: July 8, 2004.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: July 29, 2004.

Description: Application of BNJ Charter Company LLC (BNJC), requesting the Department amend the ownership condition found in BNJC's interstate and foreign charter certificates so that the carrier will only be required to remain under the ownership of NetJets, Inc.

Docket Number: OST–1999–6425–9.

Date Filed: July 9, 2004.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: July 30, 2004.

Description: Application of Polar Air Cargo, Inc., requesting renewal of its certificate authority to engage in scheduled foreign air transportation of property and mail between points in the United States and South Africa, as provided in its certificate of public convenience and necessity for Route 651. Polar further requests that this authority be renewed for a minimum of five years.

Andrea M. Jenkins,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 04–17740 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Dockets OST–04–17451 and OST–04–17452]

Application of Clay Lacy Aviation, Inc. for Certificate Authority

AGENCY: Department of Transportation.

ACTION: Notice of order to show cause (Order 2004–7–25).

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Clay Lacy Aviation, Inc., fit, willing, and able, and awarding it certificates of public convenience and necessity to engage in interstate and foreign charter air transportation of persons, property and mail.

DATES: Persons wishing to file objections should do so no later than August 10, 2004.

ADDRESSES: Objections and answers to objections should be filed in Dockets OST–04–17452 and OST–04–17451 and addressed to the Department of Transportation Dockets (M–30, Room PL–401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Delores King, Air Carrier Fitness Division (X–56, Room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–9721.

Dated: July 27, 2004.

Robert S. Goldner,

Special Assistant to Assistant Secretary for Aviation and International Affairs.

[FR Doc. 04–17681 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of FAA Final Order Directing the Disposition of Certain Overflight Fees Collected by the FAA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of FAA Final Order Directing the Disposition of Certain Overflight Fees Collected by the FAA.

SUMMARY: The FAA is publishing a Final Order issued on July 21, 2004 disposing of certain overflight fees collected by the FAA pursuant to 49 U.S.C. 45301.

SUPPLEMENTARY INFORMATION: The FAA issued a Final Order on July 21, 2004 disposing of certain overflight fees collected by the FAA pursuant to 49 U.S.C. 45301. The Order addresses the manner in which provisions of the recently enacted Vision 100—Century of Aviation Reauthorization Act, Public Law 108–176, affecting overflight fees will be implemented and how overflight fees previously collected shall be treated by the FAA. The final Order follows this notice.

Michael Chase,

Regulations Division, Office of the Chief Counsel.

Overflight Fees

Order Directing the Disposition of Certain Fees Collected by the Federal Aviation Administration Pursuant to 49 U.S.C. Section 45301.

I. Summary

The Federal Aviation Reauthorization Act of 1996 directed the Federal Aviation Administration (FAA) to establish a fee schedule and collection process for air traffic control and related services provided to aircraft, other than military and civilian aircraft of the U.S. Government or of a foreign government, that fly in U.S.-controlled airspace but neither take off from, nor land in, the United States, 49 U.S.C. 45301, as amended by Public Law 104–264. Such flights are commonly referred to as ''Overflights'' and the fees collected for services provided to them are known as ''Overflight Fees''.

Although the courts have vacated the rules adopted by the FAA to implement this statutory directive, Congress has enacted recently Vision 100—Century of Aviation Reauthorization Act, Public Law 108–176 (Vision 100), that legislatively adopts the FAA rules, as well as the fees established by those rules, as of the date of their original issuance. This Order addresses the manner in which the new statute shall be implemented by the FAA and how Overflight Fees previously collected shall be treated by the agency.

II. Background

A. The Judicial Challenge to the Initial Interim Final Rule

The FAA began charging Overflight fees in May 1997 pursuant to an Interim Final Rule issued by the FAA. Those fees were challenged before the United States Court of Appeals for the District of Columbia Circuit by the Air Transport Association of Canada and seven foreign air carriers. On January 30, 1998, the D.C. Circuit vacated the FAA's Interim Final Rule, holding that the FAA's specific methodology for allocating certain costs did not comport with the requirements of the 1996 statute. *Asiana Airlines* v. *FAA,* 134 F.3d 393 (D.C. Cir. 1998). Following that decision, the FAA refunded approximately $40 million in Overflight Fees that it had collected under its Interim Final Rule.

B. The May 2000 Interim Final Rule and August 2001 Final Rule

On May 30, 2000, the FAA issued a new Interim Final Rule imposing Overflight Fees beginning on August 1, 2000, derived from cost data produced by the FAA's newly developed Cost Accounting System. The Air Transport Association of Canada and seven foreign air carriers challenged the new Rule before the D.C. Circuit. While the appeal was pending before the D.C. Circuit, on August 13, 2001, the FAA issued a Final Rule that was effective on August 20, 2001. Reflecting accounting adjustments, the Final Rule reduced Overflight Fees by more than 15%. The Air Transport Association of Canada and the seven foreign air carriers challenged the Final Rule as well, and the two challenges were consolidated before the D.C. Circuit.

On April 8, 2003, the D.C. Circuit set aside the Interim Final Rule and the Final Rule, holding that the FAA had failed to demonstrate that the Overflight fees established in the Rules met what the Court read to be the applicable statutory requirement, that is, that Overflight Fees must be ''directly related'' to the FAA's costs. *Air Transport Association of Canada* v. *FAA,* 323 F.3d 1093 (D.C. Cir. 2003). The Court declined to use the congressionally modified ''reasonably related'' standard set forth in a recently enacted amendment to the FAA's statutory authority, finding that the more flexible ''reasonably related'' standard was inapplicable to litigation pending at the time the new standard was enacted.

C. Section 229 of Vision 100

In response to the D.C. Circuit's decision, Congress enacted a specific provision in Vision 100 that directly addresses Overflight Fees. Vision 100 was signed into law by the President on December 12, 2003. Section 229 of that Act provides as follows:

(a) Adoption and Legalization of Certain Rules—

(1) Applicability and Effect of Certain Law—Notwithstanding section 141(d)(1) of the Aviation and Transportation Security Act (49 U.S.C. 44901 note), section 45301(b)(1)(B) of title 49, United States Code, is deemed to apply to and to have effect with respect to the authority of the Administrator of the Federal Aviation Administration with respect to the interim final rule and final rule, relating to overflight fees, issued by the Administrator on May 30, 2000, and August 13, 2001, respectively.

(2) Adoption and Legalization—The interim final rule and final rule referred to in subsection (a), including the fees issued pursuant to those rules, are adopted, legalized, and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically adopted, authorized, and directed as of the date those rules were originally issued.

(3) Fees to Which Applicable—This subsection applies to fees assessed after November 19, 2001, and before April 8, 2003, and fees collected after the requirements of subsection (b) have been met.

(b) Deferred Collection of Fees—The Administrator shall defer collecting fees under section 45301(a)(1) of title 49, United States Code, until the Administrator (1) reports to Congress responding to the issues raised by the court in *Air Transport Association of Canada* v. *Federal Aviation Administration and Administrator, FAA,* decided on April 8, 2003, and (2) consults with users and other interested parties regarding the consistency of the fees established under such section with the international obligations of the United States.

(c) Enforcement—The Administrator shall take an appropriate enforcement action under subtitle VII of title 49, United States Code, against any user that does not pay a fee under section 45301(a)(1) of such title.

Section 229 has a direct impact on the Overflight Fees that FAA has collected since August 1, 2000. First, in subsection (a)(1) it establishes that the ''reasonably related'' standard for evaluating Overflight Fees applies to

both the Interim Final Rule and Final Rule. Second, in subsection (a)(2), it adopts *legislatively* the Interim Final Rule and accompanying fees, in effect from August 1, 2000 to August 20, 2001; and the Final Rule and accompanying fees, in effect from August 20, 2001 to the present. Third, subsection (a)(3) provides that subsection (a) applies to fees assessed after November 19, 2001, the date on which the Aviation Transportation and Security Act was adopted, and before April 8, 2003, the date of the Court of Appeals decision setting aside the Interim Final Rule and Final Rule. Fourth, section 229 defers actual collection of Overflight Fees until the FAA Administrator has reported to Congress on the issues raised by the court in its April 8th decision and consults with users and interested parties regarding consistency of the FAA's fees with the international obligations of the United States.

First and foremost, section 229 express Congress' determinations to put back into place, by means of legislation, the rules adopted administratively by the FAA for the assessment and collection of Overflight Fees. Section 229 does raise an interpretive question, however, because while subsection (a)(2) adopts the FAA's Interim Final Rule and Final Rule ''as of the date those rules were originally issued,'' subsection (a)(3) states that subsection (a) ''applies to fees assessed after November 19, 2001 and before April 9, 2003. * * * '' If the intended meaning of subsection (a)(3) is that all of subsection (a) applies only to fees ''assessed after November 19, 2001,'' the first half of subsection (a)(2) would become a nullity; *all* of the fees assessed under the Interim Final Rule were assessed *before* November 19, 2001, since the rule expired on August 20, 2001, when the Final Rule took effect. If subsection (a)(3) were to be interpreted as limiting the reach of the entire subsection to the period of time post November 19, 2001, the legislative adoption of an Interim Final Rule and fees under subsection (a)(2) would have no meaning. Clearly, one section of the statute, subsection (a)(3), should not be read to nullify the express provisions of another subsection, subsection (a)(2), that legislatively adopts the Interim Final Rule and fees without limitation from the date of its issuance.

The dichotomy found in the text of section 229 is mirrored in the Conference Report accompanying the provision. There, Congress explained that it ''agreed to ratify the interim final rule and final rule issued by the FAA on May 30, 2000, and August 13, 2001'' but then states that ''[t]his ratification applies to fees collected after the date of enactment of [ATSA],'' *i.e.*, November 19, 2001. Importantly, however, Congress goes on to state that ''to clarify that the FAA has complied with its statutory mandate regarding overflight fees in the Interim Final Rule and Final Rule,'' Congress ''retroactively as well as prospectively'' in section 229 has proceeded to ''legalize and ratify both the Interim Final Rule and the Final Rule, *effective as of the dates those rules were originally issued by the FAA*.'' (Emphasis supplied.)

Following adoption of Section 229, FAA renewed its efforts to resolve an ongoing and lengthy dispute with regard to the overflight fees that were subject of litigation in the D.C. Circuit, *Air Transport Association of Canada* v. *FAA*. FAA has entered into a settlement agreement with the Air Transport Association of Canada and all of the foreign air carriers in that suit that will resolve all of the claims in the litigation made by these parties, and disputed by the FAA, for refunds of overflight fees, as well as potential claims by these carriers challenging the FAA's ability to impose and collect overflight fees authorized by the provisions of Section 229. Under the terms of the settlement agreement, the FAA would make payments to the litigating carries from previously collected fees (and in some instances receive payments from such carriers), in addition to whatever refunds and credits these carriers are to receive pursuant to this Order. Each of these carriers has signed a complete release in which they agree to forgo any further litigation on these claims and also they have agreed not to challenge the imposition and collection of the current overflight fees as described in this Order and authorized by Section 229.

III. Determination

The FAA must if possible accomplish the clear intent of Section 229, which is to impose new fees at the levels previously set in the FAA Overflight Fees rules set aside by the D.C. Circuit's April 8, 2003 decision. It could be argued under the terms of section 229 that, notwithstanding the D.C. Circuit's decision, all Overflight Fees previously paid to and collected by the United Stats should be retained by the FAA pursuant to the rules and fees enacted by Congress and signed into law last December. However, as noted above, section 229 contains specific, but arguably ambiguous directions as to when the fees authorized and approved by the statute may be collected.

In light of the ambiguous and potentially conflicting provisions of the statute, and in order to fashion a fair and reasonable approach to applying section 229, it is my judgment that this issue should be resolved by interpreting the statute to permit the FAA to retain only those fees collected for services provided after November 19, 2001. I have therefore decided that the FAA shall credit or refund: (1) All Overflight Fees paid under the Interim Final Rule, and (2) those fees paid under the Final Rule for services rendered prior to November 20, 2001.

As to those fees previously collected under the Final Rule for services provided after November 19, 2001, section 229 is clear and unambiguous: Congress has mandated under its legislatively enacted rule that fees matching those imposed under the FAA's Final Rule are due and collectible. Given this, and at the direction of Congress, I hereby determine that, except as otherwise ordered by the Administrator, the FAA will not refund any fees collected for services received after November 19, 2001.

Additionally, I have determined that the FAA will begin collecting Overflight Fees for the time period beginning March 1, 2003, the first day for which Overflight Fees have not yet been billed, as soon as the agency has complied with the requirements of subsection (b) of section 229, that is, as soon as the FAA ''(1) reports to Congress'' concerning matters raised in the most recent D.C. Circuit decision, and ''(2) consults with users and other interested parties regarding the consistency of the fees established * * * with the international obligations of the United States.'' In the meantime, the FAA will issue invoices to all affected air carriers that reflect the Overflight Fees assessed by FAA for services provided between March 1, 2003, and February 29, 2004. FAA will begin collection of such assessed fees upon completion of the Report to Congress and the consultation process.

Accordingly, once the requirements of subsection (b) have been completed, FAA will use the following procedure to implement this Order:

Each air carrier or system user (hereafter ''air carrier'') who paid fees under the Interim Final Rule and/or the Final Rule will receive a refund or credit in an amount equal to the fees paid for services provided through November 19, 2001, offset or reduced by: (1) The amount due for any Overflight Fees invoices that remain unpaid by that air carrier for flights operated after November 19, 2001 through February 28, 2003; and (2) the amount due for new Overflight Fees

assessments for flights operated between march 1, 2003 and February 29, 2004.

If the amount of the air carrier's credit exceeds the amounts of unpaid liability in (1) and (2), the air carrier may request a direct refund in lieu of a credit. If it does not have a net credit, than the FAA will invoice the air carrier for the remaining amount owed for the period ending February 29, 2004. Any air carrier that does not pay any remaining invovice amount owed for the period ending February 29, 2004, may be subject to enforcement action by the FAA as authorized by section 229(c) of Vision 100. Overflight Fees for services provided beginning on March 1, 2004 will be separately assessed and invoiced.

This determination is administratively final. Any person seeking judicial review of this order must file a petition for review within 60 days of the date of issuance of this order in the United States Court of Appeals for the District of Columbia Circuit, or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

Dated: July 21, 2004.

Marion C. Blakey,

Administrator.

[FR Doc. 04–17744 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of the Federal Aviation Administration Overflight Fee Aviation Rulemaking Committee Charter

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of the Federal Aviation Administration Overflight Fee Aviation Rulemaking Committee Charter.

SUMMARY: The FAA is publishing the Charter of the Overflight Fee Aviation Rulemaking Committee recently created after the FAA issued a final order on July 21, 2004, directing the disposition of certain fees.

SUPPLEMENTARY INFORMATION: The FAA created an Overflight Fee Aviation Rulemaking Committee on July 21, 2004 pursuant to the Administrator's authority under 49 U.S.C. 106(p)(5). The Charter of this Committee is published to provide the public notice as to the objectives, scope of activities, duties, organization and administration of the Committee. The Charter follows this notice.

Michael Chase,

Regulations Division, Office of the Chief Counsel.

Federal Aviation Administration Overflight Fee Aviation Rulemaking Committee Charter

1. *Purpose.* This order constitutes the charter for the Overflight Fee Aviation Rulemaking Committee (the ''Committee'') that is designated and established pursuant to the Administrator's authority under 49 U.S.C. 106(p)(5).

2. *Distribution.* This order is distributed at the director level in Washington headquarters and throughout the Office of the Associate Administrator for Financial Services and the Air Traffic Organization.

3. *Background.* a. Section 273 of the Federal Aviation Reauthorization Act of 1996, 49 U.S.C. 45301 (the ''1996 Act''), authorized the FAA to impose fees on aircraft that traverse U.S.-controlled airspace but neither take off nor land in the United States. Under the 1996 Act, ''[s]ervices for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States.'' 49 U.S.C. 45301(b)(1)(B). At the time of its enactment, section 273 provided that the FAA Administrator ''shall ensure that each of the [overflight] fees * * * is directly related to the Administration's costs * * * of providing the service rendered.'' 49 U.S.C. 45301(b)(1)(B)(1996). In November 2001, Section 273 was amended to state that the Administrator ''shall ensure that each of the fees * * * is reasonably related to the Administration's costs, as determined by the Administrator, of providing the service rendered * * *.'' Section 119(d) of the Aviation and Transportation Security Act of 2001, Pub. L. 107–71.

b. In the years following enactment of the 1996 Act the FAA has issued two Interim Final Rules and a Final Rule attempting to establish those fees. In each instance, affected users successfully challenged the FAA's action in court. Additionally, the Congress has twice made changes to the basic statutory requirements related to overflight Fees. The most recent statutory change directly addressed the issue of overflight Fees. Section 229 of Vision 100 provides as follows:

(a) Adoption and Legalization of Certain Rules—

(1) Applicability and Effect of Certain Law—Notwithstanding section 141(d)(1) of the Aviation and Transportation Security Act (49 U.S.C. 44901 note), section 45301(b)(1)(B) of title 49, United States Code, is deemed to apply to and to have effect with respect to the authority of the Administrator of the Federal Aviation Administration with respect to the interim final rule and final rule, relating to overflight fees, issued by the Administrator on May 30, 2000, and August 13, 2001, respectively.

(2) Adoption and Legalization—The interim final rule and final rule referred to in subsection (a), including the fees issued pursuant to those rules, are adopted, legalized, and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically adopted, authorized, and directed as of the date those rules were originally issued.

(3) Fees to Which Applicable—This subsection applies to fees assessed after November 19, 2001, and before April 8, 2003, and fees collected after the requirements of subsection (b) have been met.

(b) Deferred Collection of Fees—The Administrator shall defer collecting fees under section 45301(a)(1) of title 49, United States Code, until the Administrator (1) reports to Congress responding to the issues raised by the court in *Air Transport Association of Canada v. Federal Aviation Administration and Administrator, FAA,* decided on April 8, 2003, and (2) consults with users and other interested parties regarding the consistency of the fees established under such section with the international obligations of the United States.

(c) Enforcement—The Administrator shall take an appropriate enforcement action under subtitle VII of title 49, United States Code, against any user that does not pay a fee under section 45301(a)(1) of such title.

c. Only July 21, 2004, the FAA issued a Final Order that (i) addresses the FAA's authority to impose overflight fees under Section 229 and other relevant law; (ii) provides, subject to conditions, refunds and/or credits for certain overflight fees previously paid; and (iii) assesses new overflight fees under the August 2001 Final Rule on both a retroactive and prospective basis.

d. The Administrator deems it appropriate to create the Overflight Fees Aviation Rulemaking Committee to provide users an in-depth opportunity to evaluate the data supporting the fee

amounts and provide advice and recommendations on the appropriate amounts for future Overflight Fees.

4. *Objectives and Scope of Activities.* The Committee's primary task is to identify the services rendered to overflights by the FAA, to determine the FAA's costs of providing services to overflights, and, based upon that determination, to make recommendations to the Administrator regarding the level of future overflight fees that would be consistent with the provisions of the 1996 Act, as amended.

5. *Duties.* a. The Committee is to evaluate information regarding the services rendered to overflights by the FAA and the costs of providing those services to overflights, and, based on that evaluation, to make recommendations regarding future overflight fees, including possible modifications to, or replacement of, the fees currently being charged by the FAA.

b. The Committee, and any working group thereof, shall be given access to FAA's financial and accounting system and records, and to personnel within the financial department, for the purpose of examining and analyzing the issues and data pertaining to the costs incurred by the FAA to provide air traffic control and related services to overflights. The committee, and any working group thereof, also shall have access to personnel of the Air Traffic Organization with knowledge pertaining to the nature and level of services provided to aircraft generally, and specifically with respect to overflights, and relevant documents and information possessed by the Air Traffic Organization, to assist the committee in its examination and analysis of the actual costs incurred by the agency to render services to overflights.

c. The Committee and any working group thereof, may request relevant information and views from entities outside the FAA pertaining to the tasks undertaken by the Committee.

d. At the discretion of the Chair, the Committee may conduct public meeting(s) to provide interested parties outside the Committee an opportunity to present information and views relevant to the tasks undertaken by the Committee.

e. The Committee shall provide its recommendations to the Administrator by December 30, 2005, unless that deadline is extended by the Administrator.

6. *Organization and Administration.* a. Except for the Chair, the Committee shall consist of representatives of the airline industry and other system users that are subject to the FAA's imposition of overflight fees. The Committee shall be led by:

(i) A Chair, who shall be appointed by the Associate Administrator for Financial Services, and shall be a full-time employee of the FAA; and

(ii) A Vice Chair, who shall not be employed by the FAA and who shall be a representative of foreign air carriers or trade associations of those carriers, or other system users who are subject to Overflight Fees.

b. In addition to the Chair and Vice Chair, the Committee shall be comprised of at least 15 but not more than 25 employees or other representatives of the foreign air carriers (or trade associations of those carriers) or other system users that are subject to the FAA's overflight fees. The members shall be selected by the FAA and, to the extent possible, the membership also shall be geographically diverse and include representatives that conduct primarily enroute overflights and primarily oceanic overflights. Further, the members should include persons possessing relevant knowledge and experience with regard to (i) the nature of enroute and/or oceanic overflights; (ii) air traffic control procedures; (iii) air navigation systems; (iv) cost accounting matters; and/or (v) legal and regulatory issues pertaining to the FAA and overflight fees. Each organization or entity, selected for membership on the Committee may designate one representative and one alternate to serve on the Committee. Each member of the Committee shall have one vote.

c. Members may permit their employees and consultants (including financial, technical and legal professionals) to attend any Committee meeting and review Committee documents.

d. Additional FAA personnel may participate, as directed by the Associate Administrator for Financial Services, as adjunct non-members of the Committee.

e. The Committee may retain the services of a non-government economic consultant selected by the Committee Chair and Vice Chair.

f. The Associate Administrator for Financial Services is the sponsor of the Committee. The Associate Administrator for Financial Services shall receive all Committee recommendations and reports. The Associate Administrator shall also be responsible for providing administrative support for the Committee and shall provide a secretariat. The Chair and Vice Chair shall jointly be responsible for establishment of the procedures, consistent with this charter, under which the Committee shall operate. The Chair and Vice Chair may jointly establish working groups. These working groups will report to the Committee at each regular Committee meeting, and will be established for the length of the specific assigned task only.

g. Meetings shall be held as frequently as needed, but no less than once each quarter, unless the Chair and Vice Chair agree. The Chair and Vice Chair shall jointly determine when a meeting is required and where it will be held. Meetings shall not be conducted in the absence of the Chair and the Vice Chair, unless the Chair or Vice Chair designates another individual to represent that respective person at the meeting.

h. The Chair and Vice Chair shall jointly formulate an agenda for each meeting. The Chair shall arrange notification to all members of the time, place and agenda for any meeting through the secretariat and shall ensure that, to the extent practicable, any materials to be considered at the meeting are distributed to Committee members in advance. The Chair and Vice Chair shall jointly conduct the meeting. The Committee is not required to keep minutes, but may elect to do so. Committee recommendations to the Administrator must be approved by at least a two-thirds vote of the members. The Chair shall have the right to submit a separate report or recommendation to the Administrator.

7. *Compensation.* All non-government Committee members shall serve without compensation from the U.S. government, and shall bear all costs related to their participation on the Committee.

8. *Public Participation.* Unless otherwise decided by the Chair, all meetings of the Committee shall be closed. Interested persons wishing to attend a meeting who are not members of the Committee (or employees or consultants invited by a member) must request and receive approval in advance of the meeting from the Chair.

9. *Availability of Records.* Subject to the provisions of the Freedom of Information Act, Title 5 U.S.C. 522, records, reports, agendas, working papers, and other documents that are made available to, prepared by, or prepared for the Committee shall be available for public inspection and copying at the FAA Office of Rulemaking, 800 Independence Avenue, SW., Washington, DC 20591. Fees shall be charged for the information furnished to the public in accordance with the fee schedule published in part 7 of title 49, Code of Federal Regulations.

10. *Public Interest.* The formation of the Committee is determined to be in the public interest in connection with

the performance of duties imposed on the FAA by law.

11. *Effective Date and Duration.* This Committee is effective on August 1, 2004. The Committee shall remain in existence for two years after that date unless sooner terminated or extended by the Administrator.

Dated: July 21, 2004.

Marion C. Blakey,

Administrator.

[FR Doc. 04–17745 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2004–60]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption, part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before August 24, 2004.

ADDRESSES: Send comments on any petition to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2003–16770, FAA–2002–13872, FAA–2002–14091, FAA–2002–14092, FAA–2002–14093, FAA–2002–14094, FAA–2004–17083, FAA–2004–17084, FAA–2004–17085, or FAA–2004–18020, at the beginning of your comments. If you wish to receive confirmation that the FAA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to *http://dms.dot.gov*. You may review the public docket containing the petition, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office (telephone 1–800–647–5527) is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Susan Boylon, (425–227–1152), Transport Airplane Directorate (ANM–113), Federal Aviation Administration, 1601 Lind Ave, SW., Renton, WA 98055–4056; or John Linsenmeyer (202–267–5174), Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on July 26, 2004.

Anthony F. Fazio,

Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2003–16770.
Petitioner: Maryland Air Industries, Inc.
Section of 14 CFR Affected: SFAR 88.
Description of Relief Sought: To permit Fairchild Model F27 and FH227 airplanes to operate without meeting the requirements of SFAR–88.

Docket No.: FAA–2002–13872.
Petitioner: Airbus UK.
Section of 14 CFR Affected: SFAR 88.
Description of Relief Sought: To permit Airbus Model BAC–1–11 –200/400 airplanes to operate without meeting the requirements of SFAR–88.

Docket No.: FAA–2002–14091.
Petitioner: Rogerson Aircraft Corp.
Section of 14 CFR Affected: SFAR 88.
Description of Relief Sought: To permit Boeing Model 707 airplanes to operate without meeting the requirements of SFAR–88.

Docket No.: FAA–2002–14092.
Petitioner: Rogerson Aircraft Company.
Section of 14 CFR Affected: SFAR 88.
Description of Relief Sought: To permit Boeing Model 767 airplanes to operate without meeting the requirements of SFAR–88.

Docket No.: FAA–2002–14093.
Petitioner: Rogerson Aircraft Company.
Section of 14 CFR Affected: SFAR 88.
Description of Relief Sought: To permit Boeing Model DC9–30 (C9–B) airplanes to operate without meeting the requirements of SFAR–88.

Docket No.: FAA–2002–14094.
Petitioner: Rogerson Aircraft Company.
Section of 14 CFR Affected: SFAR 88.
Description of Relief Sought: To permit Boeing Model 707 airplanes to operate without meeting the requirements of SFAR–88.

Docket No.: FAA–2004–18020.
Petitioner: Omega Air.
Section of 14 CFR Affected: SFAR 88.
Description of Relief Sought: To permit Boeing Model 707 airplanes to operate without meeting the requirements of SFAR–88.

[FR Doc. 04–17689 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2004–61]

Petitions for Exemption; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains the dispositions of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

FOR FURTHER INFORMATION CONTACT: Susan Boylon, (425–227–1152), Transport Airplane Directorate (ANM–113), Federal Aviation Administration, 1601 Lind Ave, SW., Renton, WA 98055–4056; or John Linsenmeyer (202–267–5174), Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on July 26, 2004.

Anthony F. Fazio,

Director, Office of Rulemaking.

Dispositions of Petitions

Docket No.: FAA–2004–17909.
Petitioner: The Boeing Company.
Section of 14 CFR Affected: 14 CFR 25.301, 25.303, 25.305 and 25.901(c).

Description of Relief Sought/ Disposition: To permit type certification of the modifications to the thrust reverser type designs of Boeing Model 777 airplanes without a complete showing of compliance. These requirements relate to the structural strength, deformation and failure of the thrust reverser inner wall panels during a rejected takeoff related thrust reverser deployment at high engine power.

Time Limited Partial Grant of Exemption, 07/15/2004, Exemption No. 8329A.

[FR Doc. 04–17690 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2004–62]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption, part 11 of title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before August 24, 2004.

ADDRESSES: You may submit comments identified by DOT DMS Docket Number FAA–200X–XXXXX 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 20590–0001.
- *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.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

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.

FOR FURTHER INFORMATION CONTACT: John Linsenmeyer (202) 267–5174, Tim Adams (202) 267–8033, or Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on July 26, 2004.

Anthony F. Fazio,

Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2004–18242.
Petitioner: U.S. Airways, Inc.
Sections of 14 CFR Affected: 14 CFR 121.703(d).
Description of Relief Sought: To allow U.S. Airways to submit the report of major repairs, cracks, permanent deformation, or corrosion of aircraft structure, as required by 14 CFR 121.703, within 72 hours of the aircraft airworthiness release. U.S. Airways proposes to use this schedule instead of the reporting schedule required by the regulation.

Docket No.: FAA–2004–18662.
Petitioner: U.S. Department of Homeland Security.
Sections of 14 CFR Affected: 14 CFR 45.21, 45.23, 45.25, 45.27, 45.29.
Description of Relief Sought: To allow use of nationality and registration marks that conform to a livery developed by the Department of Homeland Security for their aircraft and which may not meet the location and size requirements of part 45.

[FR Doc. 04–17691 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Overflight Fee Notice

AGENCY: Federal Aviation Administration.

ACTION: Notice of agency plans to consult with users on Overflight Fees.

SUMMARY: The recently enacted statute reauthorizing the Federal Aviation Administration (FAA) contains a provision that, among other things, directs the FAA to consult with users and other interested parties regarding the consistency of the FAA's Overflight Fees with the international obligations of the United States. This Notice announces the FAA's plans for conducting those consultations, including the specific date(s), location, and advance registration procedures.

Registering for Consultations

These consultations will be held on Tuesday, September 14, 2004, and if necessary on Wednesday, September 15, 2004, in Washington, DC at the Holiday Inn Capitol, 550 C Street, SW., Washington DC, 20024. To facilitate discussion and allow for a meaningful dialogue, the FAA will limit the number of attendees at any one session to no more than 50 to 60, but will schedule an additional session if necessary to satisfy demand and accommodate all registered participants. The first, and possibly only, meeting will be held on Tuesday, September 14, 2004. A second meeting will be held if needed the following day.

We are uncertain as to the level of interest and the number of people who will want to participate. For this reason, although the consultations are open to all users and other interested parties, the FAA reserves the right to limit attendance to no more than two persons representing any one organization. Parties wishing to attend should register as soon as possible—and no later than Friday, August 20, 2004—by sending an e-mail reply to *9-AWA-ABA-Overflight-Fee-Consultations@FAA.Gov* or, if e-mail is not available, by calling Kristin Terrell at Phaneuf Associates at (703) 412–9100. Please provide your name and title and the name of the company or organization on whose behalf you will be attending. In the case of attorneys or consultants attending on behalf of clients, please provide (1) the name of your law firm or company; (2) the name of your client; and (3) the names and titles of those wishing to attend.

It is essential that anyone wishing to attend these consultations respond to this Notice so we can plan properly for the expected number of attendees. Whether or not a second session will be necessary will depend upon the number of interested parties requesting to attend. We will, as promptly as possible, inform all who have registered of the

exact date, time and location of the session they can attend, as well as other information about the Holiday Inn Capitol in case they want to stay there overnight. (The Hotel's phone number for reservations is (202) 479–4000.) We cannot guarantee that anyone not registered for the consultations in advance will be able to attend a session.

FOR FURTHER INFORMATION CONTACT: David Lawhead, Overflight Fee Program Manager (ABU–40), Federal Aviation Administration, 800 Independence Avenue, SW., Washington DC 20591, (202) 267–9759.

SUPPLEMENTARY INFORMATION:

History

The Federal Aviation Reauthorization Act of 1996 directs the FAA to establish by Interim Final Rule (IFR) a fee schedule and collection process for air traffic control and related services provided to aircraft, other than military and civilian aircraft of the U.S. Government or of a foreign government, that fly in U.S.-controlled airspace but neither take off from, nor land in, the United States (49 U.S.C. 45301, as amended by Pub. L. 104–264). Such flights are commonly referred to as ''Overflights.''

The FAA began charging Overflight Fees in May 1997. The IFR under which the fees were established was challenged in court by the Air Transport Association of Canada (ATAC) and seven foreign air carriers. On January 30, 1998, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *Asiana Airlines* v. *FAA*, 134 F.3d 393 (D.C. Cir. 1998), vacating the IFR, finding that FAA's methodology for allocating certain costs did not comport with statutory requirements. The FAA subsequently refunded all fees (nearly $40 million) collected under the IFR.

Although the 1997 IFR was withdrawn, the statutory requirement that FAA establish Overflight Fees by IFR remained in effect. In 1998, the FAA began developing a new IFR on Overflight Fees using a different methodology. The fees were derived from cost data produced by the FAA's new Cost Accounting System. FAA issued a new IFR in May 2000 and began charging fees again on August 1, 2000. Thereafter, the ATAC and seven foreign air carriers (six of the original seven, plus one new one) challenged the IFR and the legality of the fees assessed thereunder and petitioned the U.S. Court of Appeals for the District of Columbia Circuit to invalidate the new IFR. The petitions were consolidated into a single case (*ATAC* v. *FAA*, No. 00–1334).

While this case was ongoing, the FAA issued a Final Rule that became effective on August 20, 2001. The rule reduced fees more than 15%, reflecting accounting adjustments, and provided additional information that the Court had stated should appear in the administrative record to support the agency's schedule of Overflight Fees. The eight Petitioners sought judicial review to invalidate the Final Rule, which became the second case captioned *ATAC* v. *FAA* (No. 01–1446) and was combined with the first. On April 8, 2003, the Court of Appeals issued a decision setting aside both the IFR and the Final Rule, finding that the FAA had failed to demonstrate that the Overflight Fees were directly related to FAA's costs (*ATAC* v. *FAA*, 323 F.3d 1093 (D.C. Cir. 2003)). The decision did not address any international agreements or commitments of the United States.

Vision 100 Legislation

On December 12, 2003, the President signed into law H.R. 2115, the ''Vision 100—Century of Aviation Reauthorization Act'' (Pub. L. 108–176; 117 Stat. 2490). Section 229 of that Act contains several provisions relating to Overflight Fees. One of those provisions in effect clarifies that, under earlier legislation the Overflight Fees need only be ''reasonably,'' not ''directly'' related to FAA's costs of providing the services, and shields the Administrator's determinations of such costs from judicial review. Another provision of section 229 provides that the IFR and Final Rule are ''adopted, legalized, and confirmed'' by Congress ''as of the date those rules were originally issued,'' that is, May 30, 2000, and August 13, 2001, respectively.

Section 229 of the Act also provides that before the FAA may resume the actual collection of Overflight Fees, it must first report to Congress on the issues raised by the Court in *ATAC* v. *FAA* and ''consult with users and other interested parties regarding the consistency of the fees under such section with the international obligations of the United States.'' With this Notice, the FAA is establishing the process of consultation required by the new statute.

Future Actions

In addition to the September 2004 consultations announced in this Notice, which will be narrowly focused on the consistency of the current fees with the international obligations of the United States, the FAA is now in the process of establishing an aviation rulemaking committee (ARC) on Overflight Fees. The purpose of the Overflight Fees ARC will be to provide a forum for in-depth review and discussion of the data and analytic framework used by the FAA in establishing Overflight Fees. Representatives of air carriers, foreign air carriers, other system users, and aviation associations will be members of the ARC. The ARC will be tasked with providing advice and recommendations to the FAA regarding possible changes to Overflight Fees in light of methodological improvements, more recent data on costs, changes in the scope of the services provided by the FAA, and other factors that may be relevant to revising fees.

Dated: July 28, 2004.

Ramesh K. Punwani,

Assistant Administrator for Financial Services and Chief Financial Officer.

[FR Doc. 04–17743 Filed 8–3–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Finance Docket No. 34391]

New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co.—Construction, Acquisition, and Operation Exemption—in Wilmington and Woburn, MA

ACTION: Notice of availability of Environmental Assessment and Request for Comments.

SUMMARY: On December 3, 2003, New England Transrail, LLC d/b/a the Wilmington and Woburn Terminal Railroad Company (Applicant or W&WTR) filed a petition with the Surface Transportation Board (Board) pursuant to 49 United States Code (U.S.C.) 10502 seeking exemption from the formal application procedures of 49 U.S.C. 10901 for authority to acquire 1,300 feet of existing track, construct 2,700 feet of new line, and to operate the entire approximately 4,000 feet of track located on and adjacent to a parcel of land owned by Olin Corporation (Olin) in Wilmington, Massachusetts, upon which Olin had in the past operated a chemical plant. The Olin-owned parcel is located in Wilmington, Massachusetts, but a portion of the line to be constructed and operated by W&WTR also would be located in Woburn, Massachusetts. The Board's Section of Environmental Analysis (SEA) has prepared an Environmental Assessment (EA) for this proposed

project. Based on the information provided from all sources to date and its independent analysis, SEA preliminarily concludes that the Proposed Action would have no significant environmental impacts if the Board imposes and the Applicant implements the environmental mitigation conditions recommended in the EA. Accordingly, SEA, recommends that if the Board approves the project, New England Transrail be required to implement the mitigation set forth in the EA. Copies of the EA have been served on all interested parties and will be made available to additional parties upon request. SEA will consider comments received when making its final environmental recommendation to the Board. The Board will consider SEA's final recommendations and the complete environmental record in making its final decision in this proceeding.

DATES: The EA is available for public review and comment for 30 days. Parties should provide written comments to the Board no later than September 3, 2004.

ADDRESSES: Comments (an original and one copy) should be sent to: Case Control Unit, Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423. The lower left-hand corner of the envelope should be marked: Attention: Ms. Phillis Johnson-Ball, Environmental Comments, Finance Docket No. 34391. Environmental comments may also be filed electronically on the Board's Web site, *http://www.stb.dot.gov* by clicking on the ''E-FILING'' link.

FOR FURTHER INFORMATION CONTACT: Questions may be directed to Ms. Phillis Johnson-Ball, Environmental Project Manager, at (202) 565–1530 (hearing impaired 1–800–877–8339). The EA is available on the Board's Web site at *http://www.stb.dot.gov*.

SUPPLEMENTARY INFORMATION: The Applicant proposes to acquire the Olin property, construct a reload facility, and to rehabilitate the 1,300 feet of exiting track on the property, that is the subject of the Applicant's acquisition, to facilitate the transload of various commodities between truck trailers and rail cars.

Decided: July 29, 2004.

By the Board, Victoria J. Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams,

Secretary.

[FR Doc. 04–17641 Filed 8–3–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–55 (Sub–No. 653X)]

CSX Transportation, Inc.—Abandonment Exemption—in Pike County, KY

On July 15, 2004, CSX Transportation, Inc. (CSXT) filed with the Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903–04 to abandon a segment at the end of its line of railroad in its Southern Region, Huntington Division, Big Sandy Subdivision, also known as the Beaver Creek Spur. The 1.43-mile segment extends from milepost CMH 0.00 near Dunleary to the end of the line at milepost CMH 1.43, all in Pike County, KY. The line traverses United States Postal Service ZIP Code 41522 and includes the stations of Praise Dock, Little Beaver, and Little Beaver Dock.

In addition to an exemption from 49 U.S.C. 10903, petitioner seeks exemption from 49 U.S.C. 10904 (offer of financial assistance (OFA) procedures) as clarified in a letter dated July 19, 2004. In support, CSXT states that it has agreed to sell the right-of-way upon abandonment to the Kentucky Transportation Cabinet (KTC) for use in a highway expansion project. Also to assist KTC with this project, CSXT requests that the Board provide expedited handling and issue a decision within 60 days from the filing date of this proceeding, or by September 13, 2004. These requests will be addressed in the final decision.

The line does not contain federally granted rights-of-way. Any documentation in CSXT's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.-Abandonment-Goshen,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by November 2, 2004 (sooner if the request for expedited handling can be accommodated).

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption, unless the Board grants the requested exemption from the OFA process. Each offer must be accompanied by a $1,100 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use, if CSXT does not sell the right-of-way to KTC. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than August 24, 2004. Each trail use request must be accompanied by a $200 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB–55 (Sub-No. 653X) and must be sent to: (1) Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001; and (2) Louis E. Gitomer, 1455 F Street, NW., Suite 225, Washington, DC 20005. Replies to the CSXT petition are due on or before August 24, 2004.

Persons seeking further information concerning abandonment procedures may contact the Board?s Office of Public Services at (202) 565–1592 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board?s Section of Environmental Analysis (SEA) at (202) 565–1539. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.) An environmental assessment (EA) (or environmental impact statement (EIS), if necessary), prepared by SEA, will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). The EA in an abandonment proceeding normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service. Here, SEA anticipates issuing the EA on August 4, 2004, and making comments due by August 24, 2004, to help put the Board in a position to accommodate petitioner's request for expedited handling.

Board decisions and notices are available on the Board's Web site at *http://www.stb.dot.gov.*

Decided: July 28, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–17655 Filed 8–3–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF VETERANS AFFAIRS

Performance Review Board Members

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Under the provisions of 5 U.S.C. 4314(c)(4) agencies are required to publish a notice in the **Federal Register** of the appointment of Performance Review Board (PRB) members. This notice revises the list of members of the Department of Veterans Affairs (VA) Performance Review Board, which was published in the **Federal Register** (Vol. 68, No. 198), on October 14, 2003.

EFFECTIVE DATES: August 4, 2004.

FOR FURTHER INFORMATION CONTACT: Charlotte Moment, Office of Human Resources Management and Labor Relations (052B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8165.

VA Performance Review Board (PRB)

Tim S. McClain, General Counsel (Chairperson)
Nora E. Egan, Chief of Staff
Ronald R. Aument, Deputy Under Secretary for Benefits, Veterans Benefits Administration
Michael J. Kussman, M.D., Acting Deputy Under Secretary for Health, Veterans Health Administration
John H. Thompson, Deputy General Counsel
D. Mark Catlett, Principal Deputy Assistant Secretary for Management
Lucretia M. McClenney, Special Assistant
Jon A. Wooditch, Deputy Inspector General
Jon A. Wooditch, Deputy Inspector General
Edward F. Meagher, Deputy Assistant Secretary for Information Technology, Management
Pamela M. Iovino, Acting Assistant Secretary for Congressional and Legislative, Affairs
William H. Campbell, Principal Deputy Assistant Secretary for Human Resources, Management (Alternate)
Michael Walcoff, Associate Deputy Under Secretary for Operations, Veterans Benefits, Administration (Alternate)
Laura J. Miller, Assistant Deputy Under Secretary for Health for Operations and Management (Alternate)

Dated: July 29, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

[FR Doc. 04–17821 Filed 8–3–04; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 69, No. 149

Wednesday, August 4, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 04–067–1]

Notice of Request for Extension of Approval of an Information Collection

Correction

In notice document 04–16435 beginning on page 43386 in the issue of Tuesday, July 20, 2004, make the following correction:

On page 43386, in the first column, in the **DATES** section, in the second and third lines ''September 17, 2004'' should read ''September 20, 2004''.

[FR Doc. C4–16435 Filed 8–3–04; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 122, 123, 124, and 125

[FRL–7625–9]

RIN 2040–AD62

National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities

Correction

In rule document 04–4130 beginning on page 41576 in the issue of Friday, July 9, 2004, make the following corrections:

1. On page 41593, in the first column, in the first paragraph, in the eighth and ninth lines, ''[insert four years after date of publication in the FR]'' should read ''July 9, 2008.''

2. On the same page, in the same column, in the same paragraph, in the 12th to 14th lines, ''[insert three years and 180 days after date of publication in the FR]'' should read ''January 7, 2008.''

§125.95 [Corrected]

3. On page 41687, §125.95(a)(2)(ii), in the second column, in the first paragraph, in the second and third lines, ''[insert four years after date of publication in the FR]'' should read ''July 9, 2008.''

4. On the same page, in the same column, in the same section, in the same paragraph, in the seventh to ninth lines, ''[insert three years and 180 days after date of publication in the FR]'' should read ''January 7, 2008.''

[FR Doc. C4–4130 Filed 8–3–04; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Wednesday,
August 4, 2004

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the California Tiger Salamander; and Special Rule Exemption for Existing Routine Ranching Activities; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI68

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the California Tiger Salamander; and Special Rule Exemption for Existing Routine Ranching Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), determine threatened status for the California tiger salamander (*Ambystoma californiense*), under the Endangered Species Act of 1973, as amended (Act). The California tiger salamander, Central population is threatened by habitat destruction, degradation, and fragmentation due to urban development and conversion to intensive agriculture. We also finalize the 4(d) rule for the species rangewide, which exempts existing routine ranching activities.

DATES: This rule is effective September 3, 2004.

ADDRESSES: The complete file for this rule is available at U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (SFWO), 2800 Cottage Way, Suite W–2605, Sacramento, CA 95825.

FOR FURTHER INFORMATION CONTACT: Wayne White, Field Supervisor (Attn: CTS) telephone: 916/414–6600; facsimile: 916/414–6713.

SUPPLEMENTARY INFORMATION:

Background

We, the Fish and Wildlife Service (Service), determine threatened status for the California tiger salamander (*Ambystoma californiense*), under the Endangered Species Act of 1973, as amended (Act). We also finalize the 4(d) rule for the species rangewide.

We will also soon publish a proposed rule designating critical habitat for the Central California tiger salamander in 20 counties in California.

This rule satisfies the final portion of the settlement agreement approved by the Court on June 6, 2002, in *Center for Biological Diversity* v. *U. S. Fish and Wildlife Service* (No. C–02–055-WHA (N.D. Cal.). The settlement agreement required us, among other things, to submit a proposal to list the California tiger salamander throughout its remaining range in California (except for the Santa Barbara County and Sonoma County Distinct Population Segments) for publication in the **Federal Register** on or before May 15, 2003, and to submit a final determination on that proposed rule for publication in the **Federal Register** on or before May 15, 2004. Throughout this rule we will refer to the final population addressed by the settlement agreement as the Central California tiger salamander. References to the rangewide CTS population include the Sonoma and Santa Barbara populations as well as the Central population addressed in the settlement agreement.

On May 14, 2004, the Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior requested from the Court a six-month extension of the May 15, 2004, deadline pursuant to 16 U.S.C. 1533(b)(6)(B)(i). The request was based upon the Assistant Secretary's assessment that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination, including the level of threat due to inadequacy of the existing regulatory structure, projected future habitat losses and their significance, and the sufficiency or accuracy of data concerning extent of population losses and extent of existing populations. The Court granted an extension to July 23, 2004, to allow us time to resolve the issues raised by the information included in the preliminary California Department of Conservation's (CDC) 2004 data on rangeland and agricultural land conversion. This final listing determination has considered the implications of the information in the CDC report for the California tiger salamander. In addition, we have considered all other scientific and commercial information available to us.

Scientific Disagreement Over Availability of Central California Tiger Salamander Habitat Due to Past Conversions

On June 10, 2004, the United States District Court for the Northern District of California granted an extension to the May 15, 2004, deadline for the specific purpose of resolving the issue of whether there was a 14 percent decrease in grazing land versus an increase in such land that would constitute an increase in Central California tiger salamander habitat. The Court also stated that the Service must make its final determination by July 23, 2004. The issue of habitat trend arose from an April 30, 2004, letter from the Central California Tiger Salamander Coalition (Coalition) to the Service stating that new information was available on the California Department of Conservation's (CDC) Farmland Mapping and Monitoring Program (FMMP) website. The Coalition stated that this new information indicated that grazing land increased by 1,678 ha (4,146 ac) from 2000 to 2002 for ten counties located within the range of the Central California tiger salamander. The Coalition proposed that these new grazing land areas would serve as habitat for the California tiger salamander, which would in turn offset the loss of salamander habitat that is being converted to intensive agriculture. In their letter, the Coalition concluded that the loss of Central California tiger salamander habitat to intensive agriculture was not a threat to the species.

In response to the July 23, 2004, extension, the Center for Biological Diversity (Center) sent a letter regarding the issue of grazing land and urbanization trends as determined by the FMMP data. In their letter, the Center provided information from the most recent reporting period (six counties, 2000 to 2002) and information on 13 counties that did not have 100 percent coverage from 1992 to 2002 (data from counties that had 100 percent coverage were presented in their comment letter dated September 22, 2003). From the most recent data (2000 to 2002), the Center determined that grazing land continued to be lost to development and other land use changes. This trend was also observed when the data were analyzed for all other counties that did not have 100 percent coverage. In their comment letter dated September 22, 2003, the Center also concluded that many other adverse indirect impacts to California tiger salamanders would result from the continued expansion of urbanization.

Thus, while the two groups used the same data from FMMP, they each applied different analyses and came up with different results and conclusions regarding the future threat to the Central California tiger salamander from the conversion of grazing land.

Following the June 10, 2004, hearing, representatives from the Service met with members of the Coalition and the Center on June 29, 2004, to receive clarification from the Coalition on the issue of trends in the acreage of grazing land. At this meeting, the Coalition provided the Service with a report entitled, ''Evaluation of Threats to CTS from Agricultural Conversion.'' This report provided additional information on changes in the acreage of grazing land to intensive agriculture using the FMMP data within their suggested range of the Central California tiger

salamander. The Coalition's report also discussed the results of meetings with Agricultural Commissioners from six counties to discuss future conversion of grazing land to intensive agriculture within their respective counties.

After reviewing the information provided by the Coalition, the Center, and our own analysis, we found that all approaches comparing total grazing land lost to total grazing land gained for the 10- to 12-year period indicate a net loss of grazing land for that period. Comparing a different set of figures, however, it appears that intensively farmed lands have been fallowed at a greater rate than they have been reconverted over the last 12 years. It is more difficult to determine what this means to the California tiger salamander. It is unlikely that all of the grazing land converted to intensive agriculture was suitable for salamanders, as some of that could simply be reconversion of previously cultivated land, so the magnitude of the loss likely is not as large as the numbers indicate. Similarly, it is unlikely that the grazing land gained from fallowed agricultural land was all suitable for salamanders.

It is unlikely that the grazing lands formerly under intensive agricultural uses would completely regain all value as California tiger salamander habitat because wetlands that provide breeding habitat would have been destroyed as a result of intensive farming, limiting these areas to potential upland habitat. Fallowed agricultural land might, depending on how it is managed, provide estivation habitat or open space for migration depending on its proximity to breeding habitat. Even though the overall rate of conversion of new lands to intensive agriculture may be decreasing in the future (see below), any expansion of lands under cultivation is most likely to expand into areas adjacent to already cultivated areas. Particularly in the San Joaquin Valley, the lands at greatest risk to this expansion are the fringes of the valley floor which are inhabited by the California tiger salamander. Therefore, we conclude that the majority of these newly created grazing areas may have some utility for migration or estivation to the extent they are adjacent to breeding habitat, but that they do not offset the loss of the portion of grazing lands that were suitable California tiger salamander habitat. In addition, neither the Coalition nor the County Agricultural Commissioners concluded that no California tiger salamander habitat would be converted to intensive agricultural uses in the foreseeable future, only that the future rates of conversion are likely to be lower than they have been in the past. We therefore conclude while it may no longer be the primary source that conversion of suitable habitat to intensive agriculture remains a source of cumulative habitat loss and fragmentation which are primary threats to the California tiger salamander.

The FMMP is a valuable tool for assessing changes in land use over time. However, it is also important to use other sources of information when determining past habitat trends because of continued improvements in mapping technologies and the purpose of each reporting service. We found that grazing land has been lost due to urbanization, conversions to intensive agriculture, and other land uses. We expect these land use trends to continue largely due to the projected increase in human population and development, as well as subsequent expansion of intensive agriculture, as described in this rule.

The areas where acreage of grazing land increased represented 80,267 ha (198,344 ac) over the 10-year period on a county-wide basis. Approximately 60,926 ha (150,552 ac, 76 percent) of this increase is attributable to cultivated agricultural lands that were fallowed. The grazing land increases reported by FMMP are those lands that have been fallowed for at least three reporting periods or 6 years. Other grazing lands had been previously mapped and reported as urbanized areas, mines, or low-density residential developments, which accounted for 17,608 ha (43,511 ac, 22 percent) of the increase in grazing land. Many of these data, including much of the recent data available from FMMP (2000 to 2002), indicate that the increase in grazing land areas are due to improvements in digital imagery that allowed for a more precise distinction between urban boundaries and grazing land (CDC 2002, 2004).

The FMMP data indicate that there was a substantial decline in grazing land in areas, some of which likely represented aquatic and upland habitats for the California tiger salamander and some of which, such as reconverted fallowed agricultural lands, did not. Because of the lower quality of the habitat that may be created from fallowed land, it is unlikely that the increase in grazing land during the 1990s and early 2000s offset the decline in habitat that occurred as a result of the continued trend in grazing land converted to intensive agriculture and development.

Future Conversions to Intensive Agriculture

Using the acreage of grazing land converted to intensive agriculture during this period, the Coalition estimated that 68,119 ha (168,325 ac) of grazing land would be converted to intensive agriculture over the next 25 years based on an estimated rate of loss of 2,725 ha (6,733 ac) per year. The Coalition estimated that this would result in a 4.1 percent loss (68,119 ha, 168,325 ac) of salamander habitat from their estimate of the total amount of available Central California tiger salamander habitat (1.7 million ha, 4.1 million ac). Responses by the Agricultural Commissioners to the interviews indicated that they believed that no more than 405 to 809 ha (1,000 to 2,000 ac) of grazing land would be converted in their counties and that the future loss of grazing land to intensive agriculture would be limited due to lack of water, poor soils, and low crop prices. The Agricultural Commissioners also expected that the majority of future expansions of intensive agriculture would occur around the periphery of other intensive agricultural areas.

Summary

After reviewing data from the 2000–2002 FMMP report, and the supporting information submitted by the Center and the Coalition, we conclude that the newest data set is consistent with trends identified in our habitat analysis for approximately 1990 through 2000, showing that rates of habitat loss for California tiger salamander from all land use changes have been greater than the rate of other land use types ''converting'' to grazing land. We found that between 20 and 25 percent of the observed increase in grazing lands between 2000 and 2002 is attributable to better mapping technology. We also found that rates of agricultural land being fallowed have been greater than rates of fallowed lands being reconverted to cultivation or natural habitat being converted to intensive agricultural uses. We conclude that the majority of these newly created grazing areas may have some utility for migration or estivation, to the extent they are adjacent to breeding habitat, or even potential breeding habitat if stockponds are eventually installed, but they do not offset the loss of the portion of grazing lands that were suitable habitat for the California tiger salamander habitat; however, rates of habitat conversion to intensive agriculture are likely to be lower in the future than they have been in the past.

Description and Life History of the California Tiger Salamander

Systematics and species description. The California tiger salamander was first described as *Ambystoma californiense* by Gray in 1853 based on specimens that had been collected in Monterey, California (Grinnell and Camp 1917). Storer (1925) and Bishop (1943) also considered the California tiger salamander to be a distinct species. Dunn (1940), Gehlbach (1967), and Frost (1985) believed the California tiger salamander was a subspecies of the more widespread tiger salamander (*A. tigrinum*). However, based on recent studies of the genetics, geographic distribution, and ecological differences among the members of the *A. tigrinum* complex, the California tiger salamander has been determined to represent a distinct species (Shaffer and Stanley 1991; Jones 1993; Shaffer *et al.* 1993; Shaffer and McKnight 1996; Irschick and Shaffer 1997; Petranka 1998). The range of this amphibian does not naturally overlap with any other species of tiger salamander (Stebbins 1985; Petranka 1998).

The California tiger salamander is a large and stocky terrestrial salamander with small eyes and a broad, rounded snout. Adults may reach a total length of 208 millimeters (mm) (8.2 inches (in)), with males generally averaging about 203 mm (8 in) in total length, and females averaging about 173 mm (6.8 in) in total length. For both sexes, the average snout-to-vent length is approximately 91 mm (3.6 in). The small eyes have black irises and protrude from the head. Coloration consists of white or pale yellow spots or bars on a black background on the back and sides. The belly varies from almost uniform white or pale yellow to a variegated pattern of white or pale yellow and black. Males can be distinguished from females, especially during the breeding season, by their swollen cloacae (a common chamber into which the intestinal, urinary, and reproductive canals discharge), larger tails, and larger overall size (Stebbins 1962; Loredo and Van Vuren 1996).

Distribution and genetics. California tiger salamander breeding and estivation habitat includes vernal pools, and seasonal and perennial ponds and surrounding upland areas in grassland and oak savannah plant communities from sea level to about 1,067 meters (m) (3,600 feet (ft)) (Stebbins 1989; Shaffer *et al.* 1993; Jennings and Hayes 1994; Petranka 1998; California Natural Diversity Data Base (CNDDB) 2003; Bobzien in litt. 2003; Service 2004). Along the Coast Ranges, the species occurs in the Santa Rosa area of Sonoma County, southern San Mateo County south to San Luis Obispo County, and the vicinity of northwestern Santa Barbara County (CNDDB 2003). In the Central Valley and surrounding Sierra Nevada foothills and Coast Range, the species occurs from northern Yolo County (Dunnigan) southward to northwestern Kern County and northern Tulare and Kings Counties (CNDDB 2003). This final rule lists the California tiger salamander rangewide as threatened including the Central California tiger salamander population as required by the court and the former DPSs located in Sonoma and Santa Barbara counties, which were listed as endangered (see Previous Federal Action section below) as well as the remaining population of the California tiger salamander as required by the court.

Other records of tiger salamanders from Lake and Mono Counties outside the range of the Central California tiger salamander have been identified as non-native tiger salamanders (Shaffer *et al.* 1993). Salamanders at Grass Lake in Siskiyou County (Mullen and Stebbins 1978) have been identified as the northwestern tiger salamander (*A. t. melanostictum*) (H.B. Shaffer, University of California, Davis pers. comm. 1998).

We note several historical occurrences of the salamander outside its current range. In the northeastern Sacramento Valley, there is a single occurrence located at the Gray Lodge Waterfowl Management Area in southern Butte County and northern Sutter County, and there is also a single occurrence located in Glenn County; both of these records are from the mid 1960s (CNDDB 2003). There are two records from 1939 and another, from an unknown date, of salamanders observed on the edge of the range in south western San Luis Obispo County (CNDDB 2003; Shaffer and Trenham 2004). There is also a historic record of the California tiger salamander that occurs outside the species' range, which is from Riverside County recorded in the late 1800s. Subsequent surveys have not been able to verify the presence of tiger salamanders from any of those locations (Stebbins 1989; Shaffer *et al.* 1993; M. Root, USFWS, pers. comm. 2004).

Although the area between Butte County and the Cosumnes River contains suitable vernal pools and has been surveyed extensively, the species has only been recorded along the southern edge of Sacramento County, south of the Cosumnes River (CNDDB 2003). In a survey transect that extended along the west side of the Sacramento Valley from Shasta County to Solano County, containing 35 kilometers (km) (22 miles (mi)) of vernal pool habitat and over 200 pools, California tiger salamanders were recorded only at the Jepson Prairie in Solano County (Simovich *et al.* 1993). In the East Bay area, the California tiger salamander generally does not occur west of Interstate Highway 680, south of Interstate Highway 580, or north of State Highway 4 in Contra Costa or Alameda Counties (LSA Associates, Inc. 2001; CNDDB 2003). It is likely that the species is uncommon or absent in much of the southernmost San Joaquin Valley because of unsuitable habitat. This includes areas to the south of Los Banos in Merced County, and the foothills of the Sierra Nevada south of Visalia in Tulare County (Shaffer *et al.* 1993).

The factors that restrict the California tiger salamander in the northern and southern extent of its range are not fully understood (H.B. Shaffer, pers. comm. 2002), but may include low rainfall in the southern San Joaquin Valley and the greater abundance of non-native predatory fish in the northern Sacramento Valley (Hayes 1977). Studies suggest that the present patchy distribution pattern was caused by a combination of the extreme anthropogenic changes in and around the Central Valley, and the restrictive breeding requirements of the species (Dahl 1990; Fisher and Shaffer 1995; Frayer *et al.* 1989; Holland 1978, 1998; Jones and Stokes 1987; Shaffer *et al.* 1993; Trenham *et al.* 2000). Because there are only a few historic collections of the species made during the 1800s, and the majority of collections have occurred in the last 25 years (CNDDB 2003) subsequent to significant changes in historic habitat types (Shaffer *et al.* 1993), we do not have good documentation of the historic distribution of the California tiger salamander. We have based the analysis in this listing on estimated current distribution and habitat availability and assumed the available habitat is populated.

Reproduction and larval growth. Adult California tiger salamanders mate in vernal pools and similar water bodies, and the females lay their eggs in the water (Twitty 1941; Shaffer *et al.* 1993; Petranka 1998). In the East Bay area, California tiger salamanders may lay eggs twice, once in December and the second time in February (Bobzien in litt. 2003). Females attach their eggs singly or, in rare circumstances, in groups of two to four, to twigs, grass stems, vegetation, or debris (Storer 1925; Twitty 1941). In ponds with little or no vegetation, females may attach eggs to

objects, such as rocks and boards on the bottom (Jennings and Hayes 1994). After breeding, adults leave the pool and return to small mammal burrows in surrounding uplands (Loredo *et al.* 1996; Trenham 1998a), although they may continue to come out nightly for approximately the next two weeks to feed (Shaffer *et al.* 1993). In drought years, the seasonal pools may not form and the adults may not breed (Barry and Shaffer 1994).

The eggs hatch in 10 to 14 days with newly hatched salamanders (larvae) ranging in size from 11.5 to 14.2 mm (0.5 to 0.6 in) in total length (Petranka 1998). The larvae are aquatic. Each is yellowish gray in color and has a broad fat head, large, feathery external gills, and broad dorsal fins that extend well onto its back. The larvae feed on zooplankton, small crustaceans, and aquatic insects for about six weeks after hatching, after which they switch to larger prey (J. Anderson 1968). Larger larvae have been known to consume smaller tadpoles of Pacific treefrogs (*Pseudacris regilla*) and California red-legged frogs (*Rana aurora*) (J. Anderson 1968). The larvae are among the top aquatic predators in the seasonal pool ecosystems. They often rest on the bottom in shallow water, but also may be found at different layers in the water column in deeper water. The young salamanders are wary; when approached by potential predators, they will dart into vegetation on the bottom of the pool (Storer 1925).

The larval stage of the California tiger salamander usually lasts three to six months, because most seasonal ponds and pools dry up during the summer (Petranka 1998), although some larvae in Contra Costa and Alameda Counties may remain in their breeding sites over the summer (Alvarez in litt. 2003; Bobzien in litt. 2003; Shaffer and Trenham 2004). The absence of sexually mature paedomorphic larvae (mature adults that retain larval characteristics) suggests that the California tiger salamander is unable to express this life history trait, presumably because most of their evolutionary history has been spent in seasonal vernal pool habitats (Shaffer and Trenham 2004).

Amphibian larvae must grow to a critical minimum body size before they can metamorphose (change into a different physical form) to the terrestrial stage (Wilbur and Collins 1973). Larvae collected near Stockton in the Central Valley during April varied from 47 to 58 mm (1.9 to 2.3 in) in length (Storer 1925). Feaver (1971) found that larvae metamorphosed and left the breeding pools 60 to 94 days after the eggs had been laid, with larvae developing faster in smaller, more rapidly drying pools. The longer the inundation period, the larger the larvae and metamorphosed juveniles are able to grow, and the more likely they are to survive and reproduce (Semlitsch *et al.* 1988; Pechmann *et al.* 1989; Morey 1998; Trenham 1998b). The larvae perish if a site dries before they complete metamorphosis (P. Anderson 1968; Feaver 1971). Pechmann *et al.* (1989) found a strong positive correlation between inundation period and total number of metamorphosing juvenile amphibians, including tiger salamanders. In Madera County, Feaver (1971) found that only 11 of 30 pools sampled supported larval California tiger salamanders, and five of these dried before metamorphosis could occur. Therefore, out of the original 30 pools, only six (20 percent) provided suitable conditions for successful reproduction that year. Size at metamorphosis is positively correlated with stored body fat and survival of juvenile amphibians, and negatively correlated with age at first reproduction (Semlitsch *et al.* 1988; Scott 1994; Morey 1998).

Lifetime reproductive success for California and other tiger salamanders is low. Trenham *et al.* (2000) found the average female bred 1.4 times and produced 8.5 young that survived to metamorphosis per reproductive effort. This resulted in roughly 11 metamorphic offspring over the lifetime of a female. Most California tiger salamanders in this study did not reach sexual maturity until four or five years old (Trenham *et al.* 2000). While individuals may survive for more than 10 years, many breed only once, and one study estimated that less than five percent of metamorphic juveniles survive to become breeding adults (Trenham 1998b). The mechanisms for recruitment are clearly dependent on a number of factors such as migration, terrestrial survival, and population turnover, whose interaction is not well understood (Trenham 1998b).

Breeding habitat. The salamanders breeding in, and living around, a seasonal or perennial pool or pond and associated uplands utilized during the dry months are said to occupy a breeding site. A breeding site is defined as a location where the animals are able to successfully breed in years of normal rainfall and survive during the dry months of the year. The primary historic breeding sites used by California tiger salamanders included vernal pools and other natural seasonal ponds (Storer 1925; Feaver 1971; Zeiner *et al.* 1988; Trenham *et al.* 2000). The species has been found in 10 of the 17 California vernal pool regions defined by Keeler-Wolf *et al.* (1998). Vernal pools are an important part of the California tiger salamander breeding habitat in the Central Valley and South San Joaquin regions (CNDDB 2003). Currently, the salamander primarily uses stock ponds in the Bay Area and Coast Range regions, largely due to the destruction of vernal pool habitat in these regions. A number of records in the Santa Rosa area document CTS being found in ditches. The extent of the contribution of these intermittent water bodies has not been specifically studied, however there is no evidence that these areas are used for breeding (Cook in. litt. 2003).

Vernal pools typically form in topographic depressions underlain by an impervious layer (such as claypan, hardpan, or volcanic strata) that prevents downward percolation of water. Vernal pool hydrology is characterized by inundation of water during the late fall, winter, and spring, followed by complete desiccation during the summer dry season (Holland and Jain 1998). Vernal pools support diverse flora and fauna that are adapted to the dramatic seasonal changes in moisture and benefit from the lack of predation by non-native fish. Twenty-nine other federally or State listed species within the California tiger salamander's range are vernal pool specialists, including 24 plants, four crustaceans, and one insect (Keeler-Wolf *et al.* 1998). California tiger salamanders, like the listed vernal pool crustaceans, inhabit these seasonally inundated habitats. However, listed vernal pool crustaceans require a relatively short period of inundation to complete their life cycle (59 FR 48136; September 19, 1994); therefore, pools that support some crustaceans may not hold water long enough to allow successful metamorphosis of California tiger salamander larvae. In a study of amphibians located in eastern Merced County, California tiger salamander larvae were only observed in the largest vernal pools (Laabs *et al.* 2001). Unlike vernal pool crustaceans, California tiger salamanders can breed and metamorphose in perennial ponds.

In addition to vernal pools and seasonal ponds, California tiger salamanders also use small artificial water bodies such as stockponds for breeding (Stebbins 1985; Zeiner *et al.* 1988; Shaffer *et al.* 1993; Alvarez in litt. 2003; Bobzien in litt. 2003; CNDDB 2003). Stock ponds for cattle, sheep, horses, and other livestock have been, and continue to be, built to supply local water needs, especially in rural grazing lands in coastal and Sierra foothill areas where inexpensive public water or ground water is not available (Bennett

1970). Stock ponds constructed as water sources for livestock are important habitats for the California tiger salamander throughout its range (H. Shaffer, pers. comm. 2003; P. Trenham, University of California, Davis, pers. comm. 2002). In some areas, stock ponds have largely replaced vernal pools as breeding pools (due to the loss of vernal pools) and provide important habitat for the species. For instance, of the 155 California tiger salamander locality records in the East Bay area (Alameda and Contra Costa Counties) where the wetland type was identified, 85 percent (131 sites) were located in stock ponds (CNDDB 2003).

Management of stock ponds determines their suitability as breeding habitat for California tiger salamanders (Shaffer in litt. 2003). As is true of natural vernal pools, the inundation period of stock ponds can be so short that larvae cannot metamorphose (*e.g.*, when early drawdown of irrigation ponds occurs). However, in contrast to natural vernal pools, stock ponds may contain water throughout the year, or for sufficiently long periods, that predatory fish and bullfrogs (*R. catesbeiana*) can colonize the pond and establish self-sustaining breeding populations (see Factor C below; Shaffer *et al.* 1993; Seymour and Westphal 1994) these populations likely affect California tiger salamanders. The presence of bull frogs and fish are negatively correlated with salamander populations and so it is possible that extirpation of the salamander population is likely if fish and other predators are introduced (Shaffer *et al.* 1993; Seymour and Westphal 1994). Inappropriate management of ponds can threaten California tiger salamander habitat. Natural soil erosion, sometimes increased by pond breaching, berm failure, stock animal impacts, and inadequate management practices can result in increased sedimentation of the pond (Hamilton and Jepson 1940, Prunuske 1987), thereby reducing their quality as salamander habitat. Alternatively, ponds with insufficient turbidity provide inadequate cover for larvae. Stock ponds may be geographically isolated from other seasonal wetlands occupied by California tiger salamanders, and newly created ponds may be located beyond the maximum dispersal distances of juvenile or adult salamanders. However, because the species can live for more than a decade (Trenham *et al.* 2000), and during this time individuals can migrate between aquatic and upland habitats, colonization of newly created and geographically isolated ponds may be possible, provided the intervening habitat can be successfully traversed by dispersing salamanders (Sweet in litt. 2003).

Once fall or winter rains begin, adults emerge from the upland sites on rainy nights to feed and to migrate to the breeding ponds (Stebbins 1985, 1989; Shaffer *et al.* 1993). Males migrate to the breeding ponds before females (Twitty 1941; Shaffer *et al.* 1993; Loredo and Van Vuren 1996; Trenham 1998b). Males usually remain in the ponds for an average of about six to eight weeks, while females stay for approximately one to two weeks. In dry years, both sexes may stay for shorter periods (Loredo and Van Vuren 1996; Trenham 1998b). Most marked salamanders have been recaptured at the pond where they were initially captured; in one study, approximately 80 percent were recaptured at the same pond over the course of three breeding seasons (Trenham 1998b). The rate of natural movement of salamanders among breeding sites depends on the distance between the ponds or complexes of ponds and on the quality of intervening habitat (*e.g.*, salamanders may move more quickly through sparsely covered and open grassland than they can through densely vegetated lands) (Trenham 1998a).

Upland habitat and terrestrial ecology. California tiger salamanders spend the majority of their lives in upland habitats, and cannot persist without them (Trenham and Shaffer *in review*). The upland component of California tiger salamander habitat typically consists of grassland savannah (Shaffer *et al.* 1993; Alvarez in litt. 2003; Bobzien in litt. 2003; Service 2004). However, in Santa Barbara and eastern Contra Costa Counties, some California tiger salamander breeding ponds occur in grasslands with scattered oak trees, and scrub or chaparral habitats (Shaffer *et al.* 1993; Alvarez in litt. 2003; 65 FR 57242). Salamanders most commonly utilize burrows in open grassland or under isolated oaks, and less commonly in oak woodlands (Shaffer *et al.* 1993).

Juvenile and adult California tiger salamanders spend the dry summer and fall months of the year in the burrows of small mammals, such as California ground squirrels (*Spermophilus beecheyi*) and Botta's pocket gopher (*Thomomys bottae*) (Storer 1925; Loredo and Van Vuren 1996; Petranka 1998; Trenham 1998a). Although the upland burrows inhabited by California tiger salamanders have often been referred to as ''aestivation'' sites, which implies a state of inactivity, evidence suggests that California tiger salamanders may remain active in their underground dwellings (Sweet in litt. 2003). Movement within and among burrow systems continues for at least several months after the salamander leaves the breeding site (Trenham 2001; Trenham and Shaffer 2004).

California tiger salamanders cannot dig their own burrows, and as a result their presence is associated with burrowing mammals such as ground squirrels (Seymour and Westphal 1994). The creation of burrow habitat by ground squirrels and utilized by California tiger salamanders suggests a commensal relationship between the two species (Loredo *et al.* 1996). Active ground-burrowing rodent populations probably are required to sustain California tiger salamanders because inactive burrow systems become progressively unsuitable over time. Loredo *et al.* (1996) found that California ground squirrel burrow systems collapsed within 18 months following abandonment by, or loss of, the mammals. California tiger salamanders use both occupied and unoccupied burrows.

Adult California tiger salamanders have been observed up to 2,092 m (1.3 mi) from breeding ponds (S. Sweet, University of California, Santa Barbara, in litt. 1998), which may be vernal pools, stock ponds, or other seasonal or perennial water bodies. A recent trapping effort in Contra Costa County captured California tiger salamanders 805 m (2,641 ft) to 1,207 m (3,960 ft) from the nearest breeding aquatic habitat (Orloff in litt. 2003). Trenham *et al.* (2001) observed California tiger salamanders moving up to 670 m (2,200 ft) between breeding ponds in Monterey County. Similarly, in an experimental study, Shaffer and Trenham (*in review*) found that 95 percent of California tiger salamanders resided within 640 m (2,100 ft) of their breeding pond at Jepson Prairie in Solano County. Based on the Monterey County study, and with the caution that there is limited understanding as regards essential terrestrial habitats and buffer requirements, Trenham *et al.* (2001) recommended that plans to maintain local populations of California tiger salamanders should include pond(s) surrounded by at least 173-m (567-ft) wide buffers of terrestrial habitat occupied by burrowing mammals. The distance between the upland and breeding sites depends on local topography and vegetation, and the distribution of California ground squirrel or other rodent burrows (Stebbins 1989).

Metamorphosed juveniles leave the breeding sites in the late spring or early summer. Before the breeding sites dry

completely, the animals settle in small mammal burrows, to which they return at the end of nightly movements (Zeiner *et al.* 1988; Shaffer *et al.* 1993; Loredo *et al.* 1996). Like the adults, juveniles may emerge from these retreats to feed during nights of high relative humidity (Storer 1925; Shaffer *et al.* 1993) before settling in their selected upland sites for the dry, hot summer months. Juveniles have been observed to migrate up to 1.6 km (1 mi) from breeding pools to upland areas (Austin and Shaffer 1992).

While most California tiger salamanders rely on rodent burrows for shelter, some individuals may utilize soil crevices as temporary shelter during upland migrations (Lorendo *et al.* 1996). Mortality of juveniles during their first summer exceeds 50 percent (Trenham 1998b). Emergence from upland habitat in hot, dry weather occasionally results in mass mortality of juveniles (Holland *et al.* 1990). Juveniles do not typically return to the breeding pools until they reach sexual maturity at two years of age at a minimum (Trenham 1998b; Hunt 1998), and survival to adulthood may be low. Trenham (1998b) estimated survival from metamorphosis to maturity at a site in Monterey County to be less than 5 percent (well below an estimated replacement level of 18 percent). Adult survivorship varies greatly between years, but is a crucial determinant of whether a locality is a source or sink (*i.e.*, whether net productivity exceeds, or fails to reach, the level necessary to maintain the breeding site).

Metapopulation biology may help us predict the effects of future habitat loss and fragmentation for taxa that have a metapopulation structure (Marsh and Trenham 2001 and references cited therein). A metapopulation is a set of local subpopulations within an area, where subpopulations become extinct and are recolonized in the future by migrants from other subpopulations (Hanski and Gilpin 1991; Hanski 1994; McCullough 1996). Regional persistence in such systems depends on the migration of individuals between habitat patches (Trenham 1998b). California tiger salamanders appear to conform to a broadly defined metapopulation structure. In the California tiger salamander system, the spatial arrangement of ponds and the migratory behavior of the animals probably have a substantial influence on pond occupancy and local population persistence (Trenham 1998b). If metapopulation theory is predictive of California tiger salamander behavior, then the direct loss of breeding sites with high production of California tiger salamanders or their isolation from other sites due to habitat fragmentation could result in the loss of other breeding sites that rely on inter-pond dispersal or the metapopulation structure (Trenham 1998b; Marsh and Trenham 2001).

Number of individuals. The total number of individual California tiger salamanders rangewide is not known. Estimating the total number of California tiger salamanders is difficult due to limited data and understanding concerning the life history of the species. Data on numbers of individual California tiger salamanders are lacking for several reasons, first because the species is difficult to detect, second, because the animals spend much of their lives underground (Storer 1925, Feaver 1971, Shaffer *et al.* 1993, van Hattem 2004), and third, because only a portion of the total number of California tiger salamanders migrate to pools to breed each year (Trenham *et al.* 2000). The activity of California tiger salamanders during the majority of the year in these burrows is not well documented and has only recently been studied (van Hattem 2004). In the absence of estimates of the total number of California tiger salamanders, we primarily rely on measures of habitat availability as well as current and future habitat status as an indication of the status of the species.

Previous Federal Action

On September 18, 1985, we published the Vertebrate Notice of Review (NOR) (50 FR 37958), which included the California tiger salamander as a category 2 candidate species for possible future listing as threatened or endangered. Category 2 candidates were those taxa for which information contained in our files indicated that listing may be appropriate but for which additional data were needed to support a listing proposal. The January 6, 1989, and November 21, 1991, candidate NORs (54 FR 554 and 56 FR 58804, respectively) also included the California tiger salamander as a category 2 candidate, soliciting information on the status of the species.

On February 21, 1992, we received a petition from Dr. H. Bradley Shaffer of the University of California at Davis, to list the California tiger salamander as an endangered species. We published a 90-day petition finding on November 19, 1992 (57 FR 54545), concluding that the petition presented substantial information indicating that listing may be warranted. On April 18, 1994, we published a 12-month petition finding (59 FR 18353) that the listing of the California tiger salamander was warranted but precluded by higher priority listing actions. We elevated the species to category 1 status at that time, which was reflected in the November 15, 1994, Animal NOR (59 FR 58982). Category 1 candidates were those taxa for which we had on file sufficient information on biological vulnerability and threats to support preparation of listing proposals. In a memorandum dated November 3, 1994, from the acting Assistant Regional Director of the Pacific Region to the Field Supervisor of the Sacramento Field Office, the recycled 12-month finding on the petition and a proposed rule to list the species under the Act were given a due date of December 15, 1995. However, on April 10, 1995, Public Law 104–6 imposed a moratorium on listings and critical habitat designations and rescinded $1.5 million funding from our listing program. The moratorium was lifted and listing funding was restored through passage of the Omnibus Budget Reconciliation Act on April 26, 1996. In the NOR published February 28, 1996 (61 FR 7596), we discontinued the use of different categories of candidates, and defined ''candidate species'' as those meeting the definition of former category 1. We maintained California tiger salamander as a candidate species in that NOR, as well as in subsequent NORs published on September 19, 1997 (62 FR 49398), October 25, 1999 (64 FR 57534) and October 30, 2001 (66 FR 54808).

On January 19, 2000, the Santa Barbara County DPS of the California tiger salamander was listed as an endangered species under an emergency basis (65 FR 3096) and proposed for listing as endangered (65 FR 3110). On September 21, 2000, we listed the Santa Barbara County DPS of the California tiger salamander as endangered (65 FR 57242). On January 22, 2004, we proposed critical habitat for the Santa Barbara County DPS (69 FR 3064).

On February 27, 2002, the Center for Biological Diversity (CBD) filed a complaint in the Northern District of California for our failure to list the Sonoma County Distinct Population Segment of the California tiger salamander as endangered (*Center for Biological Diversity* v. *U.S. Fish and Wildlife Service* (No. C–02–055–WHA (N.D. Cal.)). On June 6, 2002, the Court approved a settlement agreement requiring us to (1) make 90-day and 12-month petition findings on the Sonoma County DPS of California tiger salamander, or to publish an emergency and proposed rules if the DPS faced an emergency under the meaning of the Act's section 4(b)(7), by July 15, 2002 and (2) submit a proposal to list the California tiger salamander throughout its remaining range in California (except

for the Santa Barbara County and Sonoma County Distinct Population Segments) for publication in the **Federal Register** on or before May 15, 2003, and to submit a final rule for publication in the **Federal Register** on or before May 15, 2004. On July 22, 2002, we listed the Sonoma County DPS of the California tiger salamander as an endangered species on an emergency basis and proposed to list the DPS as endangered permanently (67 FR 47726; 67 FR 47758). On March 19, 2003, we listed the Sonoma County DPS of the California tiger salamander as endangered (68 FR 13498) with notice that the Service would consider downlisting or listing the entire species rangewide. On May 23, 2003, we proposed (1) to list the Central California DPS of the California tiger salamander as threatened, (2) to downlist the Santa Barbara and Sonoma DPSs from endangered to threatened, and (3) a 4(d) rule for the California tiger salamander where listed as threatened (68 FR 28648). We also asked for public comment on a number of issues, including whether the three populations should be consolidated into a single rangewide listing. This final rule completes our obligations under the settlement agreement.

Summary of Comments and Recommendations

In the May 23, 2003, proposed rule, we proposed to list the Central California DPS of the California tiger salamander as threatened, and we proposed reclassification of the Santa Barbara County and Sonoma County populations from endangered to threatened (68 FR 28648). In the same notice we also proposed that the special rule under section 4(d) of the Act for the Central California DPS be extended to the Santa Barbara and Sonoma County DPS.

In the proposed rule and associated notifications, we announced six public hearings and requested that all interested parties submit factual reports or information that might contribute to the development of this final rule. The comment period for the proposed rule was initially open from May 23 through July 22, 2003. On July 3, 2003, we extended the comment period for an additional 60 days until September 22, 2003 (68 FR 39892) to accommodate additional public hearings. On September 30, 2003, we reopened the comment period for 30 days until October 31, 2003 (68 FR 56251).

We held a total of 10 public hearings on our May 23, 2003, proposed rule: two on June 17, 2003, in Livermore, California; two on June 18, 2003, in Monterey, California; two on June 19, 2003, in Merced, California; two on July 29, 2003, in Santa Rosa, California; and two on July 31, 2003, in Santa Maria, California. We also organized six informal workshops to inform the public and answer questions regarding the California tiger salamander and the proposed rule: two on June 10, 2003, in Livermore, California; two on June 11, 2003, in Merced, California; and two on June 12, 2003, in Monterey, California. On June 24, 2003, per the request of the Alameda County Agricultural Commission, we attended a county meeting, gave a presentation to the public on the proposed rule, and answered questions regarding the species and the proposal. In addition to the public hearings and public workshops we organized, we attended community forums in Merced, California, on September 12, 2003, and in Modesto, California, on October 24, 2003, to discuss the proposed rule and answer questions. At the forums, we provided information on where to obtain copies of the proposed rule and maps of the areas considered potential habitat for the species.

We produced news releases on the proposed listing and the public hearings and workshops and distributed them to the news media on May 16, 2003, July 3, 2003, and September 30, 2003. Stories based on the news releases and the meetings were produced by the Associated Press (May 16 and October 1); the Santa Rosa Press Democrat (May 18, July 30); the San Francisco Chronicle (May 17); the Santa Barbara News Press (May 17); the Modesto Bee (June 12); the Merced Sun-Star (June 12 and June 20), and the Stockton Record (June 18).

Written public comments were accepted at all the public hearings, workshops, and the Merced and Modesto meetings and entered into the supporting record for the rulemaking. Oral comments given at the public hearings were also accepted into the supporting record. In making our decision on the proposed rules, written comments were given the same weight as oral comments presented at hearings.

We contacted all appropriate State and Federal agencies, county governments, elected officials, and other interested parties and invited them to comment. This was accomplished through telephone calls, electronic mail correspondence, letters, and news releases faxed and/or mailed to appropriate elected officials, media outlets, local jurisdictions, interest groups, and other interested individuals. We also posted the proposed rule and associated material on both our Sacramento and Ventura Fish and Wildlife Office internet sites following their release on May 16, 2003, July 3, 2003, and September 30, 2003, respectively. We published legal notices on the public hearings and workshops in the Contra Costa Times and Tri-Valley Herald on June 1, 2003; the Merced Sun-Star, Monterey Herald, Santa Barbara News-Press, San Luis Obispo Telegram Tribune, and Salinas Californian on June 2, 2003; the Pinnacle Newspaper on June 5, 2003; and in the Santa Rosa Press Democrat on July 19, 2003.

We received a total of 1,955 comment letters and electronic mail correspondences (e-mails) during the three comment periods. Comments were received from Federal, State, and local agencies, Federal and State lawmakers, and private organizations and individuals. We reviewed all comments received for substantive issues and comments, and new information regarding the Central California tiger salamander, the proposed special rule to exempt routine ranching activities, the proposed downlisting of Santa Barbara County and Sonoma County DPSs, and on the appropriateness of a single rangewide designation or combinations of designations. Similar comments were grouped into several general issue categories relating specifically to the proposed rule and are identified below. Some of the comments expressed support for a listing of the Central California tiger salamander. Others opposed a listing. Substantive information supporting each position was incorporated into this final rule. All comments on the proposed reclassification of the Santa Barbara County and Sonoma County DPSs are addressed in this final determination.

Peer Review

We asked 28 scientists, researchers, and biologists who have knowledge of California tiger salamanders, or amphibians generally, to provide peer review of the proposed rule. Eleven of the 28 individuals who were asked to act as peer reviewers submitted comments on the proposed rulemaking. Based on our analysis, all 11 peer reviewers supported the listing of the Central California tiger salamander as threatened. Two of the peer reviewers stated that the proposed exemption for routine ranching activities as written in the proposed rule lacked sufficient biological rationale or did not provide a conservation benefit to the California tiger salamander and stated that it is inappropriate to consider applying it to the Sonoma and Santa Barbara DPSs, while six were generally in support of

the proposed 4(d) rule. Some peer reviewers suggested ways to improve the conservation aspects of this proposed exemption. Additionally, peer reviewers provided additional documentation of threats to the species and potential conservation measures. This information has been incorporated into the final rule.

Because we relied on unpublished genetics studies for this rule, we also requested peer review from nine universities on the mitochondrial DNA (mtDNA) study of California tiger salamander conducted by Dr. H.B. Shaffer and Dr. P.C. Trenham of the University of California at Davis (report cited as Shaffer and Trenham 2002). Three of the nine agreed to review the report. The peer reviewers had a few technical comments and suggestions; however, all three concluded that the methods and analyses used in this genetic research were appropriate and felt that the conclusions drawn by Dr. Shaffer and Dr. Trenham were appropriate and defensible. One of the peer reviewers also concluded that the data demonstrated that California tiger salamander hybridization with non-native tiger salamanders posed a considerable threat to the species. The study by Shaffer and Trenham has recently been accepted for publication (Shaffer *et al.* in press).

Summary of Comments and Responses for the Proposed Downlisting of the Santa Barbara and Sonoma County Distinct Population Segments

Eight of the 11 peer reviewers who submitted comments on the proposed rule specifically addressed the proposed reclassification of the Santa Barbara and Sonoma County DPSs. Several stated that the proposed reclassification was not consistent with available information on the status and threats to the Santa Barbara and Sonoma County DPSs. One peer reviewer stated that, although it appeared counter-intuitive to change the listing designation without data showing some improvement in status, the reclassification may be warranted if the change would allow routine ranching activities.

State Agencies

We received comments from the California Department of Food and Agriculture (CDFA). The issues raised by CDFA are addressed below.

CDFA Comment 1: The proposed rule to list the Central California tiger salamander should include a full discussion of the potential economic impacts associated with the proposed rule. The proposed listing will likely create a regulatory burden for landowners who convert rangeland to other forms of agriculture. Economic burdens to landowners need to be evaluated and mitigated.

Our Response: Under section 4(b)(1)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), we must base a listing decision solely on the best scientific and commercial data available regarding the likelihood that the species meets the definitions of threatened or endangered as defined in the Act.

CDFA Comment 2: The relative importance of stressors to the Central California tiger salamander should be described.

Our Response: As described in more detail below, the California tiger salamander is at risk due to: (1) Habitat loss, degradation, and modification from land conversion and alteration; and secondarily to: (2) predation from non-native species; (3) inadequacy of existing regulatory mechanisms; and (4) hybridization with non-native tiger salamanders. Thus, the California tiger salamander is appropriately considered to be threatened by conditions identified under four of the five factors and meets the definitions of threatened, regardless of having a relatively extensive distribution. The threat of hybridization with non-native tiger salamanders is a particularly severe threat in the Central Coast Range and Bay Area regions and, to a lesser extent, the Central Valley region. We consider the other threats to be secondary, but still material to the status of the DPS (see Factor E below).

CDFA Comment 3: References in the proposed rule used to describe adverse impacts to the salamander need to be documented. CDFA indicated that it has recently completed a risk assessment of the use of rodenticides on threatened and endangered species.

Our Response: As stated in the proposed rule, the complete file for the rule is available for inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office. In addition, the proposed rule stated that all comments received during the comment period were available for public review. The complete file for this rule is available for inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office.

The Service received a copy of the risk assessment entitled, ''Ecological Risk Assessment for Grain-Based Field-Use Anticoagulant Rodenticides Registered by the California Department of Food and Agriculture for Special Local Needs'' (Silberhorn *et al.* 2003). The study was an ecological risk assessment that focused on four specific anticoagulant rodenticides and their potential for effects to non-target birds and mammals through secondary poisoning (*e.g.*, poisoning through consumption of prey killed by the toxin). The primary target species for these rodenticides is the California ground squirrel, with mortality of exposed squirrels caused by internal hemorrhaging. Secondary poisoning of non-target species, such as canids or raptors, may result from preying on moribund animals or scavenging on carcasses. The ecological risk assessment did not examine potential effects to amphibians, and California tiger salamanders do not consume dead or dying rodents. The Service has determined that the results of this ecological risk assessment provide little information on the potential risk to California tiger salamanders as the result of direct or indirect effects of rodenticide use.

Summary of Public Comments and Responses

We address other substantive comments and accompanying information in the following summary. Many of the public comments on the proposed downlisting of the Santa Barbara and Sonoma DPSs were similar to, and are included in, the summary of public comments and responses for the Central DPS. In addition to those, commenters raised the issues described below regarding the proposed reclassification of the Santa Barbara and Sonoma County DPSs. All substantive information provided by commenters has been evaluated in the process of making this final determination and has been incorporated into the final rule as appropriate.

Issue 1—Distribution, Habitat, Threats, and Use of Science

Comment 1: Numerous commenters stated that the Central California tiger salamander should not be listed as threatened or endangered because the Central California tiger salamander inhabits a large geographical area or is found in many counties. A few commenters, including local governments, stated that the proposed rule did not present scientific evidence that the Central California tiger salamander was threatened, or likely to become endangered in the foreseeable future, as defined by the Act. One commenter questioned how the Central California tiger salamander could be listed if a large portion of its habitat could be deemed as having beneficial land use practices (ranching activities)

and these activities were proposed for exemption under the special 4(d) rule.

Our Response: A wide distribution or one that includes a number of counties does not, in and of itself, preclude the need to list a species, subspecies, or DPS under the Act. When making a listing determination, we carefully consider the best available scientific and commercial information regarding the historic and current ranges of the taxon under consideration, as well as the abundance of the species, and the pattern, imminence, and magnitude of threats relative to the species' distribution. After completing such an analysis for the Central California tiger salamander, we believe that the best available evidence supports a threatened listing. All 11 of the peer reviewers who responded agreed with our assessment.

We believe that one of the primary threats to the Central California tiger salamander is habitat destruction, degradation, and fragmentation. Much of this threat is related to losses of habitat to urban development and conversion to intensive agriculture. We believe routine ranching, as identified in the 4(d) rule, is neutral or beneficial for salamanders. Listing the DPS as threatened, while exempting these ranching practices, concurrently increases protection of rangelands from conversion to land uses which eliminate Central California tiger salamander habitat and allows ranchers to continue conducting business in a way that either does not harm or benefits the salamander. Because one of our primary concerns is elimination of Central California tiger salamander habitat, we believe it is appropriate to exempt routine ranching even though it is practiced throughout a large portion of the range of the salamander. As described in Factor C and E below, the Central California tiger salamander is threatened on rangeland by other factors unrelated to habitat loss.

Comment 2: Many commenters including local governments stated that we did not use adequate science in making our decision to propose the Central California tiger salamander as a threatened species. A few commenters stated that the California tiger salamander records from the CNDDB were insufficient because this database lacked observations of the species on private lands.

Our Response: We used the best scientific and commercial information available during the status review process and preparation of the proposed rule to make our listing determination. We used museum records; CNDDB information; GIS coverages documenting the land use changes; unpublished reports by biologists; and peer-reviewed articles from scientific journals in making that determination. Additionally, the proposed rule was peer-reviewed by 11 scientists, researchers, and biologists with amphibian expertise throughout the United States.

Regarding the lack of occurrence data from private lands, the Service is aware that systematic surveys have not been conducted throughout the range of the species. The CNDDB is the clearinghouse for location and status data collected by State and Federal agencies, consultants, scientists, and other knowledgeable biologists on private, State, and Federal lands. We believe that the data in CNDDB, supplemented by information available in other sources and provided by commenters, represents the best available scientific and commercial information on the distribution of the Central California tiger salamander.

Comment 3: Numerous commenters expressed concern that there was not scientific justification for stating that the California tiger salamander can migrate 1 to 2 miles from aquatic breeding habitat into upland habitat.

Our Response: Adult California tiger salamanders have been observed up to 2.1 km (1.3 mi) from breeding ponds (S. Sweet, University of California, Santa Barbara, in litt. 1998), which may be vernal pools, stock ponds, or other seasonal water bodies. During the comment period, the Service received information about a trapping study of California tiger salamanders in West Pittsburg, California, where, during the first three years of the study, 200 to 446 California tiger salamanders were trapped each year 0.8 km to 1.2 km (0.5 to 0.75 miles) away from potential breeding habitat (S. Orloff, in litt. 2003). Additionally, researchers have marked California tiger salamanders in study ponds and have also captured them using pit fall traps in upland migration studies and have determined that the species can migrate up to 670 m (2,200 ft) from breeding ponds to upland habitat (Trenham *et al.* 2002; Trenham and Shaffer in *review*).

Comment 4: Numerous commenters stated that the Central California tiger salamander should not be listed as threatened or endangered because the proposed rule does not have population information that would indicate that the species is declining. Commenters also believed that it was inappropriate for the Service to rely on habitat loss for determining the species' decline. One commenter, after conducting a population estimate of the Central California tiger salamander, concluded that there were 840,000 individuals.

Our Response: Based on a review of the scientific and commercial data, the total number of individual California tiger salamanders is not known. The difficulty of estimating the total number of California tiger salamanders has been documented by a number of biologists (Jennings and Hayes 1994; Shaffer *et al.* 1993). However, estimates have been made for specific locations in Monterey and Alameda counties (Trenham *et al.* 2000; Kolar in litt. 2003). The fact that this species spends much of its life underground, only a portion of the total number of animals migrate to pools to breed each year, animals do not always breed in their natal pool or pond, and the California tiger salamander's wide distribution make estimating the total number of California tiger salamanders difficult.

To determine the Central California tiger salamander's listing status, we estimated the current distribution and habitat of the species based on known occurrences, and the projected status of the species in the foreseeable future after review of the threats to the DPS from habitat-related and other factors (see Summary of Factors Affecting the Species section below). For habitat-related factors, because of our understanding of the habitat that California tiger salamanders use, and the species' distribution based on known occurrences, we used threats to habitat associated with known occurrences of the Central California tiger salamander as an indication of the status of Central California tiger salamander, in the absence of estimates of the total number of individuals (see Factor A below; Service 2004). The relationship between habitat loss and population decline is further discussed in the Background section above. We also evaluated other threats such as predation from exotic species and the potential threat from disease (see Factor C below), inadequacy of existing regulatory mechanisms (see Factor D below), and hybridization with non-native tiger salamanders (see Factor E below; Service 2004).

The population estimate of 840,000 individuals provided by the commenter is based on an estimate of 1,140 salamanders per pond, which is then extrapolated for the number of breeding sites presented by the commenter. This estimate is largely based on a study conducted by the Loredo and Van Vuren study (1996), which investigated breeding migrations and reproductive traits of California tiger salamanders at a breeding pond in Contra Costa, California. In this study, researchers

marked juveniles during three seasons and recaptured mature adults during two of the seasons. The commenter used the mark recapture information presented in the Loredo and Van Vuren study (1996), in addition to survival data for California tiger salamander (Trenham *et al.* 2000), to conduct the population estimate.

We have determined that the estimate provided by the commenter is speculative and not properly derived because the breeding pond being investigated by Loredo and Van Vuren (1996) may not have been a closed system. At least four other breeding sites were observed in the area (Loredo and Van Vuren 1996). We believe this may have allowed salamanders to migrate into and out of the population being investigated, at unknown rates. Some salamanders also may have lost their marks due to regeneration of clipped toes (Loredo and Van Vuren 1996), and California tiger salamanders that were marked in the first season may not have had an equal opportunity to be recaptured during the following two seasons because salamanders may not mature until four or five years of age (Trenham *et al.* 2000); thus, individuals would not have migrated to the breeding pond during the study period to allow for possible recapture. We have also concluded that the rangewide estimate for the Central California tiger salamander provided by the commenter is speculative because it extrapolates a population estimate derived from a single site to all sites throughout the range of a species that displays different environmental conditions and population sizes associated with such conditions.

Comment 5: Some commenters stated that the proposed rule did not have information on the range or distribution of the California tiger salamander. Another commenter stated that the current range of the Central California tiger salamander was similar to the species' historic range.

Our Response: We used specific locations of the California tiger salamander identified in the California Department of Fish and Game's CNDDB and additional information provided by outside parties in our analysis of the current distribution of the salamander. Maps illustrating the current known distribution of the animal were available to the public during the comment period upon request from the Sacramento Fish and Wildlife Office. They were also available to the public at six workshops and ten public hearings during the comment period.

We agree that the California tiger salamander still occurs throughout much of its historic range (Trenham *et al.* 2000), although we estimate approximately 75 percent of the species' historic natural habitat has been lost within this range (Shaffer *et al.* 1993; see Factor A below). However, we do not believe that the size of the range of the California tiger salamander is the only statistic relevant to an evaluation of listing status. Although the current range of the California tiger salamander approximates its historic range in size, we believe the quality, connectivity, and distribution of the habitat within the range has been substantially altered and degraded.

Comment 6: Several commenters stated that the Service did not conduct population surveys to document in what counties the Central California tiger salamander is located. One commenter stated that the Service did not use best available information on range, abundance, and number of extant populations. Another commenter provided information on additional occurrences of Central California tiger salamander breeding populations and stated that there were more occurrences presently than in the past and that there are 32 percent more occurrences than the Service used in the proposed rule.

Our Response: The Service has determined that the Central California tiger salamander is located within 22 counties, which is based upon CNDDB and other information from biologists, and reports on the species that were available to the Service (see previous response to comment). The CNDDB data base contains information on observations of California tiger salamanders that have been submitted by biologists, researchers, and scientists who have documented the animal's presence at breeding sites and upland habitats. All location information submitted by commenters was used by the Service to make its determination for this final rule. When commenters asserted that additional occurrences exist without providing site-specific information, we attempted to obtain the information independently and/or requested the information from the commenter. If we could not obtain the information or it was not provided to us, we did not evaluate it in our analysis. Therefore, we believe that we used the best available scientific and commercial information in developing this final rule.

Comment 7: One commenter stated that the Central California tiger salamander was not threatened because the species occupies 1.7 million ha (4.1 million ac) of habitat with 737 known breeding populations within its 3.4-million-ha (8.3-million-ac) range.

Our Response: The commenter conducted an independent analysis of the range and habitat of the Central California tiger salamander. Because their methodology differed from ours, their results (*i.e.*, amount of salamander habitat and percentage of habitat likely to be lost) and interpretation also differed substantially from ours. The commenter assumed that all area within a habitat type used by the California tiger salamander was suitable salamander habitat regardless of the location and distribution of suitable aquatic breeding sites within those habitat types (*i.e.*, the sum of grassland, woodland, and other habitat types within the range of the animal). We believe that their approach results in a substantial overestimate of the habitat actually used by extant salamanders.

In contrast, we assessed the amount of salamander habitat based on known salamander location records. These records included all records in the CNDDB, as well as other records provided to us during the comment period. In contrast to the commenters' estimate, we acknowledge that our result is likely to be conservative. Nevertheless, because it is based upon known salamander locations, we believe that our approach yields a more appropriate estimate of the amount of habitat likely to be used by salamanders.

Regarding the 737 California tiger salamander breeding populations presented by the commenter, we used all available information to us for our analysis for this final rule, which represents a total of 711 California tiger salamander records and occurrences. Although the number of breeding populations is important for determining the California tiger salamander's distribution and habitat (as performed in our analysis), the number of breeding sites should not be solely used for assessing the status of the species because the number of breeding sites does not assess the range of the salamander or its distribution relative to historic loss and future threats. Additionally, records within the CNDDB database do not always constitute an observation of a salamander at a breeding site and can be an observation of the species in an upland area.

Details of our approach can be obtained from the Sacramento Fish and Wildlife Office in the document cited here as Service (2004). In addition, the process is described briefly below in the Summary of Factors Affecting the Species section. Based on our analysis, we estimate that there are approximately 378,882 ha (936,204 ac) of Central California tiger salamander

habitat, considerably less than the 1,659,214 ha (4.1 million ac) suggested by the commenter.

Some portion of this area will be lost in the future to development (including low- and very-low-density residential) and conversion of rangeland to intensive agriculture. We estimate that 26 percent of the habitat associated with known salamander locations is threatened by conversion, fragmentation, and degradation from urbanization and low- and very-low-density residential development in the future. This estimated loss of habitat does not include the continued loss of habitat that has occurred as a result of conversion of habitat to intensive agriculture. In addition, California tiger salamanders are at risk from hybridization with non-native tiger salamanders, predation and other factors discussed in the Summary of Factors below.

The primary threats include habitat destruction, degradation, and fragmentation due to urban development, and conversion to intensive agriculture. Other threats include hybridization with non-native salamanders and predation.

Comment 8: Many commenters stated that the Central California tiger salamander did not require listing under the Act because it was already protected by existing regulatory mechanisms. Examples of current regulations cited include the application of the Porter-Cologne Water Quality Control Act, California Environmental Quality Act (CEQA) by CDFG, Clean Water Act, and species listed under the Endangered Species Act, such as vernal pools species, vernal pool critical habitat, California red-legged frog, and the San Joaquin kit fox. One commenter stated that habitat conservation plans provide protection for the California tiger salamander. Many commenters, including local governments in Merced County, stated that the Central California tiger salamander was presently protected in Merced County by a 20,000-acre conservation easement program that acts as an existing regulatory mechanism. A few other commenters indicated that Merced County had existing regulatory mechanisms sufficient to protect the Central California tiger salamander through the Clean Water Act as well as to protect its habitat on waterfowl easements and on the San Luis National Wildlife Refuge. Commenters also mentioned existing protections that occur from local land use laws such as county plans and local ordinances. A few commenters also stated that the Williamson Act provides regulatory protection to the Central California tiger salamander.

Our Response: Existing regulatory mechanisms may afford some regulatory protection to the Central California tiger salamander. However, the protection afforded by these regulations does not sufficiently protect the species to such an extent that listing is not warranted (see Factor D). In addition, the species is threatened by hybridization with non-native tiger salamander, predation, and other threats (see Factors C, D, and E below), that existing regulatory mechanisms do not alleviate. Regarding protected areas in Merced County, San Luis National Wildlife Refuge and other areas, we incorporated these areas into our analysis for estimating the amount of protected Central California tiger salamander habitat (see Factor A). While many of these areas may be protected from habitat destruction, California tiger salamanders on some of these otherwise protected lands are still threatened by hybridization, predation, and other non-habitat based threats (Factors C, D, and E).

Comment 9: Several commenters stated that there are no diseases adversely affecting the Central California tiger salamander and that the discussion on disease as a threat in the proposed rule was speculative. Several commenters stated that the Service was on record that disease did not pose a threat to the California tiger salamander.

Our Response: As stated in the proposed rule, the Service acknowledges that relatively little is known about the diseases of wild amphibians in general (Alford and Richards 1999) and California tiger salamander in particular (see Factor C below). Pathogen outbreaks have not been documented in the Central California tiger salamander, and while two of the peer reviewers expressed concerns that disease could pose a future threat to the California tiger salamander, we currently do not have specific information to consider it a threat.

Comment 10: A few commenters expressed concern about the estimate of 4,451,549 ha (11.1 million ac) of habitat available for the Central California tiger salamander referenced in the proposed rule. These commenters stated that this estimate of potential habitat did not coincide with our estimates of habitat estimated for the four populations that are part of the Central California tiger salamander in the proposed rule. One commenter stated that the Service estimated the amount of habitat for the Central California tiger salamander without correlating potential habitat with distributional data for the species. One commenter stated that the Service did not ground truth California tiger salamander records that were determined to be extirpated as part of the proposed rule's GIS analysis (Service 2003).

Our Response: The 4,451,549 ha (11.1 million ac) referred to in the proposed rule was a typographical error; the correct estimate was 445,155 ha (1.1 million ac), which represents the sum of polygons representing presumed extant records surrounded by an area 2.4 km (1.5 mi) wide to represent additional habitat that could be associated with Central California tiger salamander observations. Records were determined to be extant as recorded by the individual that made the observation, and refined through additional GIS analysis by the Service of records of California tiger salamander observation sites likely destroyed by existing urbanization and intensive agriculture, or where the California tiger salamander is threatened by hybridization with non-native tiger salamanders. Within the 445,155 ha (1.1 million ac), we estimated that there was approximately 283,280 ha (700,000 ac) of Central California tiger salamander habitat.

Our estimate of distribution of existing Central California tiger salamander habitat was based upon the evaluation of California tiger salamander records and observations, together with other information on current land uses and habitat types associated with those locations. Using commenter's suggestions on our methodology and other new information received, we conducted a new analysis for this final rule. Our analysis methodology is described in greater detail below in the Summary of Factors.

With respect to ground-truthing CNDDB records, the commenter is correct. While we visited as many sites as time allowed, our resources limited us to visiting only a fraction of the sites. Additional information from an increased number of site visits would have been useful, but in its absence, we have made this determination based on the best information available to us.

Comment 11: Several commenters expressed concern that the proposed rule made contradictory statements regarding agricultural crops as habitat for the Central California tiger salamander while also discussing agriculture as a threat to the species. Another commenter stated that agriculture is not a threat because the total quantity of agricultural lands in the state is declining with the increasing human population.

Our Response: While intensive agriculture is partially responsible for

removal of historic California tiger salamander habitat, we recognize the contribution that some agricultural practices like rangeland ranching make to California tiger salamander survival. Accordingly, we are promulgating a rule to allow ordinary and usual ranching practices to be exempt from the Act.

Comment 12: Another commenter stated that development was not a threat to the Central California tiger salamander based on an analysis of impacts on Central California tiger salamander potential habitat projected by general plans. The commenter's independent analysis showed that 75 records and 127,192 ha (314,297 ac) of suitable habitat fall within areas designated by general plans for urban development. By this analysis, 88 percent of the localities (567 records) and approximately 92 percent of the suitable habitat (1,537,808 ha (3,800,000 ac)) are not threatened by development. Additionally, the commenter's analysis included review of open space designations and other forms of conservation. This review identified 96 records (15 percent) and 233,103 ha (576,008 ac) of habitat (14 percent) as protected from development. This commenter identified 25 sites that met the requirements of California tiger salamander preserves (Shaffer *et al.* 1993).

Our Response: We discussed above (see Response to Comment 6) a fundamental difference between our analysis and the commenter's analysis. We believe that the commenter's methodology resulted in a substantial overestimate of the amount of California tiger salamander habitat. Their subsequent estimates, such as the amount and percentage of habitat falling within general plan areas or within protected areas, rely on their estimation of salamander habitat. Because we believe the underlying habitat estimate to be inappropriate, we believe the subsequent estimates are questionable as well.

Despite the difference between the commenter's estimate of salamander habitat and our estimate of habitat, these analyses are similar in that both utilized general plans and planned development for estimating habitat loss. Our analysis also included habitat loss, fragmentation, and degradation as a result of low-density and very-low-density development, and we considered habitat conversion to intensive agriculture to also be a threat. The commenter did not use or consider these factors in their analysis (see Factor A below). Regarding the commenter's estimate of protected habitat, their percentage estimate (14 percent) is slightly less than ours (20 percent), despite that fact that we used different information to determine protected habitats.

Our analysis indicated that approximately 28,526 ha (70,489 ac, or 8 percent) of Central California tiger salamander habitat is threatened by development identified in general plans or by other planned development (Factor A). Our 8 percent estimate of Central California tiger salamander habitat threatened by development identified in general plans or by other planned development is similar to the commenter's estimate. Additionally, we determined 24,240 ha (59,897 ac, or 6 percent) of Central California tiger salamander habitat is threatened by low-density housing and 45,880 ha (113,371 ac, 12 percent) by very-low-density housing (Factor A). The general plans that we used for this analysis represent the planning area for local governments. Planning for many areas does not extend beyond 2020, while California's growth rates are projected to continue to grow for at least the next 40 years (see Factor A below). Therefore, our estimate of habitat likely to be converted to land uses incompatible with Central California tiger salamander persistence is likely to be conservative. Our estimate is also conservative because it does not consider the loss of habitat due to conversion to intensive agriculture. Projecting the future loss of Central California tiger salamander habitat from conversion of rangeland to intensive agriculture is difficult because conversion to this land use is largely unregulated by cities and counties and is dependent upon the individual landowner and numerous factors that are difficult to predict, such as economic considerations, markets, and water availability.

We also determined that 76,501 ha (189,032 ac, or 20 percent) are afforded some protection (see Factor A below). The percentage of habitat within protected areas varies across the Central California tiger salamander range from 2 to 27 percent (see Factor A below).

We also evaluated the additional information received after the closing of the comment period regarding the issue of agricultural land conversion back from intensive use to areas no longer in production and determined that our analysis of existing California tiger salamander habitat was correct and that these land conversions are not resulting in an increase in habitat available to the California tiger salamander.

Comment 13: We received information from several commenters on specific projects and their impacts to California tiger salamander.

Our Response: These comments were not accompanied by information we could use to substantiate the status of each project (*e.g.*, photographs, environmental documents). To the extent that we could independently verify the information submitted, we included it in our analysis.

Comment 14: Another commenter stated that planned development areas should not be considered areas of potential impact due to avoidance, minimization, and mitigation. Additionally, this commenter stated that development will not go beyond general plans.

Our Response: Planned development may often provide avoidance, minimization, and mitigation measures which are specifically for, or which may incidentally benefit, California tiger salamander. These measures result from conformance with local land use plans for providing open space, through working with the California Department of Fish and Game under the authority CEQA, or through working with the Service when other federally listed species are present. The avoidance, minimization, and mitigation measures of individual projects, nevertheless, tend to result in fragmented landscapes and a trend of cumulative regional habitat loss and fragmentation. Mitigation does not create new land, it simply balances land converted with land protected for natural values, so even with mitigation, a net loss of habitat results. We tried to reflect the overall effect of this balancing in our Factor A analysis when we looked at the amount of protected lands and lands being converted to urban uses. We did not project development beyond general plans except where we had specific information that indicated otherwise (see Factor A).

Comment 15: A number of commenters stated that the Service should provide a map to landowners, counties, and other local governments with records of California tiger salamanders and their habitat. A few commenters stated that the Service should provide a map with records of California tiger salamanders and their habitat together with designated critical habitat for listed vernal pool species. A few commenters stated that the proposed rule did not present maps with the historic habitat for the Central California tiger salamander.

Our Response: At each of our public workshops and hearings, we provided maps that identified California tiger salamander locations that were available for the public. We also brought larger maps that explained much of our five-factor analysis with respect to the

Central California tiger salamander. At each of these hearings and workshops, biologists were available to discuss the species with interested persons. These maps were also available from the SFWO upon request. Regarding the request for maps to provide the location of historic habitat for the Central California tiger salamander, we provided information on the species' historic range in the proposed rule and in this final rule.

Comment 16: A few commenters stated that the Service was assuming that all vernal pools represented aquatic breeding habitat for the species.

Our Response: The Service is not assuming that all vernal pools represent breeding habitat for the California tiger salamander. We consider vernal pools within the vicinity of known California tiger salamander records likely breeding habitat if they pond for a sufficient amount of time for larvae to metamorphose in some years. A given vernal pool may not hold water for a sufficient amount of time every year due to variability in the duration of pool inundation from one year to another.

Comment 17: One commenter stated that there was no evidence that non-native fish and crayfish or wild pigs pose any threat to the Central California tiger salamander. This commenter also stated that bullfrogs are being eliminated by the control programs that are outlined in the California red-legged frog recovery plan, and, consequently, bullfrog populations will decrease in the future. Another commenter stated that the proposed rule did not quantify the threat of exotic species on the Central California tiger salamander.

Our Response: While predation in and of itself may not threaten California tiger salamander, studies indicate, although not quantitatively, a strong negative correlation between the presence of the California tiger salamander and the presence of various species, including the bullfrog (Shaffer *et al.* 1993; Seymore and Westphal 1994; Laabs *et al.* 2001); mosquitofish (Loredo-Prendeville *et al.* 1994; Leyse and Lawler 2000; Leyse in litt. 2003); non-native fish species (Fisher and Shaffer 1996; Laabs *et al.* 2001); crayfish (Jennings and Hayes 1994); and wild pigs (Waithman *et al.* 1999). These studies suggest that predation can negatively affect the persistence of California tiger salamander populations.

The California tiger salamander may incidentally benefit in some ways from the Act's regulatory protection of the California red-legged frog. However, we believe that these protections will only partially protect the California tiger salamander because the two species only co-occur in certain areas and have differing habitat requirements in some phases of their life cycles.

Comment 18: Several commenters stated that the Service was on record stating that pesticides were not a threat to the California tiger salamander (Service citing Davidson *et al.* 2002). Other commenters stated that pesticides are not a threat and their use in California is declining.

Our Response: We acknowledge that most toxicological studies to date have not been conducted on California tiger salamander, but rather on other amphibian species, in particular Anuran species (frogs and toads). California tiger salamanders may be sensitive to pesticides and other chemicals, which may be found in both the aquatic and terrestrial habitats they use in different stages of their life cycle (Blaustein and Wake 1990) (see factor C below).

We agree information indicates that pesticide use (measured by pounds of active ingredient) in California has declined between 1992 and 2002 (California Department of Pesticide Regulation website). However, in 2002 eight of the top ten pesticide-using counties were in the range of the Central California tiger salamander. We believe that California tiger salamanders may be at risk from the use of pesticides because salamanders occur in the vicinity of agricultural lands where pesticides are often used (*e.g.*, along the east side of the San Joaquin Valley). See also Factor E below.

Comment 19: A few commenters stated that ground squirrel control was not a threat to the California tiger salamander because the control of ground squirrels in the state is declining. Another commenter stated that rodenticides do not pose a threat to the California tiger salamander any more than they do to burrowing owls.

Our Response: California ground squirrel control may be done by trapping, shooting, fumigation of burrows, use of toxic (including anticoagulant) baits, and habitat modification, including deep-ripping of burrow areas (UC IPM internet website 2004). These control programs are still widely conducted by numerous local and state agencies. We received no data to suggest that active rodent control is declining. Two of the most commonly used rodenticides, chlorophacinone and diphacinone, are anticoagulants that cause animals to bleed to death (see Factor E below). These chemicals can be absorbed through the skin and are considered toxic to fish and wildlife (EPA 1985; EXOTONET 1996). These two chemicals, along with strychnine, are used to control rodents (R. Thompson, in litt. 1998). There are no specific studies to determine the direct effects of these poisons on California tiger salamander. However, based on studies of similar amphibian species, any uses in close proximity to occupied Central California tiger salamander habitat could have various direct and indirect toxic effects. Gases, including aluminum phosphide, carbon monoxide, and methyl bromide, are used in rodent fumigation operations and are introduced into burrows by either using cartridges or by pumping. When such fumigants are used, animals inhabiting the fumigated burrow are killed (Salmon and Schmidt 1984).

Comment 20: A few commenters stated that mosquito control did not represent a significant threat to the Central California tiger salamander because other forms of control were being utilized to reduce the use of this fish as a control strategy.

Our Response: We believe that mosquito control activities can be readily adapted to prevent or minimize potential threats to salamanders by appropriate water level management of stock ponds or proper application of bacterial larvicides. As a result, we have exempted some forms of mosquito control undertaken as routine ranching activities from the take prohibitions of the Act (see Special Rule below).

Comment 21: One commenter stated that there is not evidence that roads place California tiger salamander populations at risk, and that minimization measures, such as culverts, are established for safe passage.

Our Response: Significant numbers of various species are killed by vehicular traffic while crossing roads (Hansen and Tremper 1993; S. Sweet in litt. 1993; Joe Medeiros, Sierra College, pers. comm. 1993), including California tiger salamanders (D. Cook, pers. comm. 2002; see Factor E below). Loss of California tiger salamanders to vehicular-caused mortality in the vicinity of breeding sites can range from 25 to 72 percent of the observed salamanders crossing roads (Twitty 1941; S. Sweet, in litt. 1993; Launer and Fee 1996). As vehicular usage on California roads and road density continue to increase with increases in human population and associated urban expansion (California Department of Transportation internet website 2003), the threat to California tiger salamanders from road-kill mortality will increase. Unless there is a means of directing the species to a culvert, we have no data suggesting that a salamander would seek or use a culvert in preference to just crossing a road at

the place they encountered one, or that the presence of culverts reduces crossing risk to salamanders.

Comment 22: Some commenters stated that we did not discuss the usefulness of stock ponds for the species.

Our Response: Stock ponds can be useful aquatic habitats for breeding of the Central California tiger salamander. However, stock ponds require management to ensure their long-term habitat suitability for the species (Shaffer in litt. 2003; see 4(d) rule below). We recognize the usefulness of stock ponds as potential breeding habitat for the California tiger salamander and encourage their continued use through the 4(d) rule that exempts routine ranching activities.

Issue 2. Listing Process

Comment 23: Many commenters stated that the California Fish and Game Commission had reviewed a petition to list the California tiger salamander under the California Endangered Species Act and had determined that the listing was not warranted. Many of these commenters stated that since California Fish and Game Commission made this determination there has been no new scientific information to indicate that the species warrants protection under the Act.

Our Response: California Fish and Game Commission determined that the listing of the California tiger salamander was not warranted under the California Endangered Species Act. The Service has proposed listing the Central California tiger salamander as a threatened species based on our evaluation of the status of the species and five factor analysis, and the best available commercial and scientific information as required by the Federal Endangered Species Act.

Comment 24: A few commenters stated that the information used in the original petition (Shaffer *et al.* 1993) was for the purpose of conducting genetic analysis of the species or that the petition did not provide an adequate argument for the species to be listed.

Our Response: In our evaluation of a listing petition and subsequent status survey and eventual listing determination, we are required to evaluate all information available regarding the status of a species when making a listing determination. Our positive findings for the 90-day, 12-month, proposed listing rule, and this final listing rule use the best scientific and commercial data available, as we are required to use in reaching our conclusions.

Comment 25: Many commenters stated that the information used by the Service in the proposed rule was not shared or available to the public.

Our Response: As stated in the proposed rule, the complete file for the rule is available for inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office. In addition, the proposed rule stated that all comments received during the comment period were available for public review. The complete file for this rule is available for inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office.

Comment 26: Many commenters stated that the proposed listing was a ''rushed process'' and these commenters requested further review and scientific analysis before the Service makes a final determination.

Our Response: The purpose of publishing a proposed rule and soliciting public input during the comment period is to fully involve the public in the listing process. We held six workshops and 10 public hearings in California to encourage agency and public input into the review of the proposed rule. We solicited 28 recognized experts and specialists to review the proposed rule and received responses from 11 of these experts. We utilized this information in making the final determination. In order to receive adequate information from the public, we extended the public comment period twice. In total, the comment period was open for 150 days.

Comment 27: Several commenters stated that the proposed listing should undergo a scientific peer review before the Service makes a final determination. Another commenter stated that the Service did not conduct a meaningful peer review because the Service requested the same information from peer reviewers as it did from the general public.

Our Response: In accordance with our July 1, 1994, Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities (59 FR 34270), we solicited review from 28 experts in the fields of ecology, conservation, genetics, taxonomy and management. The purpose of such a review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analyses, including input from appropriate experts. The 11 peer reviewers who provided comments on the proposed listing supported the listing of the Central California tiger salamander as threatened. Peer reviewers provided additional documentation of threats to the species and potential conservation measures. That information has been incorporated into this final rule. We also requested peer review from nine university scientists on the mitochondrial DNA (mtDNA) study of the California tiger salamander conducted by Dr. H.B. Shaffer and Dr. P.C. Trenham of the University California at Davis (Shaffer and Trenham 2003). Three researchers reviewed the report. Their comments are summarized above in the Peer Review section.

Issue 3. Cost and Regulatory Burden

Comment 28: Many commenters, including local governments, stated that the listing of the Central California tiger salamander would increase regulatory burdens and costs of completing projects and would have a negative impact on the local economy. Several commenters stated that the Service needs to address the economic impact in the proposed listing of the Central California tiger salamander. Several commenters stated that the listing would reduce local government's authority over land use decisions. Commenters also stated that the listing would have a negative impact on the California and national economies. Several commenters stated that if the Central California tiger salamander were listed, it would be expensive to hire consulting biologists and provide mitigation. One commenter requested that if the Central California tiger salamander were listed, then mitigation ratios for projects impacting California tiger salamanders and survey protocols be published simultaneously with the final rule. A few commenters expressed concern about the regulatory burden the proposed Central California tiger salamander listing would place on pesticide application, mosquito control, rodent control, and the relation of these regulated activities to human health. One commenter expressed concern about whether existing agricultural practices would constitute a section 9 violation if the Central California tiger salamander were listed. One commenter requested that all activities that do not constitute a section 9 violation be listed in the final rule.

Our Response: Under section 4(b)(1)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), we must base a listing decision solely on the best scientific and commercial data available. The legislative history of this provision clearly states the intent of Congress to ensure that listing decisions are ''* * * based solely on biological criteria and to prevent non-biological criteria from affecting such decisions

* * * '' (House of Representatives Report Number 97–835, 97th Congress, Second Session 19 (1982)). As further stated in the legislative history, ''* * * economic considerations have no relevance to determinations regarding the status of species * * * '' (Id. at 20). Therefore, we did not consider the economic impacts of listing the Central California tiger salamander.

In our Notice of Interagency Cooperative Policy of Endangered Species Act Section 9 Prohibitions (59 FR 34272, July 1, 1994), we stated our policy to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of Section 9. In accordance with that policy, we have published in this final rule a list of activities we believe will not result in violation of Section 9 of the Act (see Available Conservation Measures below).

Comment 29: One commenter stated that California tiger salamanders that hybridized with non-native tiger salamanders should not be afforded regulatory protections under the Act if the Central California tiger salamander were listed and that we were inconsistent with the recent westslope cutthroat trout determination (68 FR 46989).

Our Response: We do not believe our determination here is inconsistent with the 12-month finding for the listing of the westslope cutthroat trout (*Oncorhynchus clarki lewisi*) (68 FR 46989). We noted in that finding that ''our increasing understanding of the wide range of possible outcomes resulting from exchanges of genetic material between taxonomically distinct species, and between entities within taxonomic species that also can be listed under the Act (*i.e.*, subspecies, DPSs), requires the Service to address these situations on a case-by-case basis'' (68 FR 46992). We also stated our intention to evaluate long-term conservation implications for each taxon separately on a case-by-case basis where introgressive hybridization may have occurred.

Distinguishing between native California tiger salamanders and hybrid animals appears to require some scientific and technical expertise. We understand that it is difficult for non-experts to make the distinction based on morphology alone and that a number of misidentifications have been made as a result (Shaffer and Trenham 2002). The best way to identify hybrid or introgressed individuals at this point appears to be using sophisticated molecular genetic techniques. Because of the difficulty distinguishing hybrid and introgressed individuals from native California tiger salamanders, we believe it is both inappropriate and impractical to distinguish between them under the Act.

Comment 30: A few commenters expressed concern about the potential regulatory protection to ground squirrels that would result from listing the Central California tiger salamander and the ground squirrel's relation to incidences of the plague. Several other commenters also stated that the potential regulatory protection to ground squirrels would result in their inability to conduct rodent control in the interest of public health.

Our Response: In situations where human health and safety are at risk, human health and safety concerns would be a priority in making decisions about appropriate rodent control. We believe that ground squirrel control can occur in a manner that minimally affects California tiger salamander.

Issue 4. Notification and Public Comment

Comment 31: A number of commenters stated that landowners were either not notified, or not notified in a timely manner, and not given an adequate opportunity to comment on the proposed rule. The commenters also stated that the number of public hearings was inadequate to obtain full public input on the proposal and that additional public hearings should be held. A number of commenters also stated that the comment period on the proposed rule should be extended from September 22, 2003, to allow for additional outreach to interested parties as well as to hold more public hearings.

Our Response: We are obligated to hold at least one public hearing on a listing proposal, if requested to do so prior to 15 days before the end of a comment period (16 U.S.C. 1533(b)(5)(E)). We held a total of 10 public hearings on our proposal to list the Central California tiger salamander as a threatened species, the proposed reclassification of the Santa Barbara and Sonoma DPSs from endangered to threatened, and the proposed exemption for routine ranching activities. We also held six public workshops to notify the public of the proposed rule and to answer questions regarding the California tiger salamander and the proposed rule. In addition to the public hearings and public workshops, we attended a public meeting organized by Congressmen Dennis Cardoza and George Radanovich in Merced, California, on June 12, 2003, and in Modesto, California, on October 24, 2003, to discuss the proposed rule and answer questions regarding the California tiger salamander and the proposed rule.

Written public comments were accepted at all the public hearings, workshops, and the Merced and Modesto meetings, and entered into the supporting record for the rulemaking. Oral comments given at the public hearings were also accepted into the supporting record. In making our decision on the proposed rules, written comments were given the same weight as oral comments presented at hearings. We conducted much of our outreach about the proposed listing of the Central California tiger salamander through legal notices in numerous regional newspapers, telephone calls, letters, and news releases faxed and/or mailed to appropriate elected officials, local jurisdictions, and interest groups. We also posted the proposed rule, schedule of workshops and hearings, and other associated material on our Sacramento and Ventura Fish and Wildlife Office internet sites. We believe that our notification and outreach process was sufficient to make the public aware of this proposal. Further, our efforts in this process satisfied the requirements of the Act and the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA) for promulgating Federal regulations regarding listing actions.

The comment period for the proposed rule was initially open for 60 days, closing on July 22, 2003. On July 3, 2003, we extended the comment period until September 22, 2003. The comment period was re-opened on September 30, 2003, for an additional 30 days and closed on October 31, 2003. In total, the comment period was open for 150 days.

Comment 32: A few commenters stated that the Service should provide more information regarding the proposed rule on our website.

Our Response: Information on the California tiger salamander was available on our website (*http://sacramento.fws.gov*) related to the proposed rule, workshops, hearings, the status of the comment period, biological information, and contacts to gather additional information on the species. An e-mail address posted on our website offers the public the opportunity to offer suggestions or request the webmaster to include additional information.

Comment 33: One commenter stated that minority and disadvantaged people were not given the opportunity to comment on the proposed rule.

Our Response: We conducted extensive public outreach (see also comments 26 and 31 above) on the proposed rule to inform all affected

stakeholder groups and populations, with the reasonable expectation that the information would reach minority and disadvantaged populations. For instance, we scheduled 10 workshops and public hearings throughout California and released information to the news media in communities with substantial minority and disadvantaged populations. We also produced news releases that were widely distributed to newspapers and radio and television stations throughout the state; posted information on Fish and Wildlife Service internet sites, and placed notices in newspapers in communities with a large percentage of minority residents. In addition, as stated in the **Federal Register** notice, persons needing reasonable accommodations in order to attend and participate in the public hearings could contact the Sacramento Fish and Wildlife Service Office at least one week prior to the hearing.

Issue 5. Property Rights

Comment 34: Several commenters stated that the listing would result in the loss of property rights and decreased land values.

Our Response: The listing of a species and the functioning of the Act does result in the imposition of land use constraints. However, we have attempted to address only those activities that threaten the continual existence of the California tiger salamander. We have exempted many routine ranching activities from the take prohibitions of Section 9 of the Act through the special rule. We will assist landowners in the identification of proposed activities that could result in take (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct), develop measures to minimize the potential for take, and work with them to obtain authorizations for incidental take through sections 7 and 10 of the Act. Recovery planning for this species may include recommendations for land acquisition or easements involving private landowners. Any such efforts will be undertaken with the full cooperation of the landowners.

Issue 6. Critical Habitat and Recovery Planning

Comment 35: Several commenters expressed concern that the proposed rule included or was a designation of critical habitat for the Central California tiger salamander. Several of these commenters stated that their property did not have the species or its habitat present on their property and that they requested that their property be exempted from the proposed critical habitat designation. A few commenters stated that the Service should designate critical habitat for the California tiger salamander. A few commenters stated that the discussion on critical habitat designation in the proposed rule was inappropriate.

Our Response: We are proposing critical habitat for the Central California tiger salamander population in an upcoming rule. In addition we will finalize critical habitat for the Santa Barbara California tiger salamander population by the court-ordered deadline of November 15, 2004. We intend to publish a proposed rule to designate critical habitat for the Sonoma geographic area in the future. When that rule is finalized, the critical habitat designation for the rangewide California tiger salamander will be complete.

Comment 36: Several commenters stated that the Service should also complete a recovery plan for the species. Several commenters, including local governments, requested that, if the species were listed, then they should be able to review a draft version of the recovery plan.

Our Response: A recovery plan will be developed, in coordination with stakeholders. This plan will identify recovery objectives and describe specific management actions necessary to achieve the conservation and long-term survival of the species. We anticipate that these management actions will include habitat protection and restoration, and efforts to conduct further surveys and research on this species. The draft recovery plan will be made available for public review and comment once it has been prepared.

Issue 7. Designation and Listing Status of the Central California Tiger Salamander

Comment 37: Numerous commenters stated that the Central California tiger salamander should be listed as an endangered species rather than threatened.

Our Response: As discussed in this final rule, we have concluded that the appropriate listing status is threatened. While there are a number of factors that put the population at risk, they are not so imminent that we believe the population is in danger of extinction at this time (*i.e.*, it does not meet the definition of endangered). Rather, we believe the Central California tiger salamander is likely to become endangered throughout all or a significant portion of its range in the foreseeable future (*i.e.*, it meets the definition of threatened).

Comment 38: A few commenters stated that the Central California tiger salamander does not qualify as a Distinct Population Segment or that it is inappropriate to consider it a DPS given the listing of Santa Barbara and Sonoma counties as DPSs (*i.e.*, we should have considered the species range wide instead of piece by piece). Another commenter stated the Central California tiger salamander DPS should be designated as four DPSs corresponding to the four sub-populations of the Central California tiger salamander. In contrast, a different commenter stated that there was no basis to subdivide the Central California tiger salamander into four DPSs.

In addition to these general comments about the appropriateness of considering Central California tiger salamander a DPS, we received several comments about whether the DPS meets the significance criterion of our DPS policy. In part these comments focused on our recent 12–month finding on western gray squirrel and on *National Ass'n of Homebuilders, et al.* v. *Norton, et al.*, No. 00–0903–PHX–SRB (D.Az.), recent litigation about our DPS determination for the cactus ferruginous pygmy owl.

Our Response: We have determined that listing the California tiger salamander rangewide is appropriate in light of the fact that all three populations share the same threatened status and the Congressional direction to use the DPS provision sparingly.

Issue 8. Proposed 4(d) Rule To Exempt Existing Routine Ranching Activities

Comment 39: Several commenters indicated that the proposed 4(d) rule to exempt existing routine ranching activities did not adequately define the activities proposed from exemption in the proposed rule. Many commenters made specific recommendations for additional activities they thought should be exempted in the special rule. Additional activities suggested for exemption included activities such as dairy operations, irrigated agriculture, and ground squirrel control, projects that have received approval from Federal, State, and local governments, and livestock grazing in vernal pools. One commenter stated that the Service should exempt take through conservation plans.

Our Response: The final version of the special rule includes an expanded definition of routine ranching practices and incorporates additional activities we believe are consistent with conservation of the California tiger salamander, which may provide conservation benefits to the California

tiger salamander through private landowner partnerships, and which are associated with largely natural rangeland environments with low, infrequent levels of human activity, in which California tiger salamander persist.

Comment 40: Some commenters stated that they were opposed to the proposed special rule for a variety of reasons, such as (1) it would allow a ''loop hole'' that would result in environmental degradation and allow activities that would harm or kill California tiger salamander, (2) it did not include enforcement and education provisions, and (3) conservation benefits were inadequately described.

Our Response: The primary threat to California tiger salamander is habitat loss and degradation. To the extent ranching activity is compatible with the California tiger salamander, we wish to encourage such activities to continue. We believe that relaxing the general take prohibitions on specific types of non-Federal lands through the special rule is likely to encourage continued responsible ranching, a land use that provide an overall benefit to the California tiger salamander. We also believe that such a special rule will promote the conservation efforts and partnerships critical for the recovery of the species. We have further described these benefits in our final version of the special rule. We have committed to monitor the status of California tiger salamander in areas where exempted activities occur (see section on special rule). We hope to enlist the partnership of the ranching community in education and outreach efforts, subsequent to the listing of the Central California tiger salamander, and throughout the recovery planning process.

Comment 41: Los Padres National Forest stated that California tiger salamanders were not present on the National Forest and that the proposed 4(d) rule should apply to the Los Padres National Forest. The USFS issues grazing permits on the Los Padres NF.

Our Response: Under the 4(d) rule, take of the threatened Central California tiger salamander caused by existing routine ranching activities on private or Tribal lands for activities that do not have a Federal nexus would be exempt from section 9 of the Act. Federal agencies have the responsibility to consult with the Service if a Federal action may affect a federally-listed species because of their section 7 responsibilities under the Act.

Comment 42: One commenter stated that they were unable to perform some of the same activities as included in the proposed 4(d) rule for exemption because they were not conducting those activities as part of routine ranching activities.

Our Response: The special 4(d) rule to exempt routine ranching practices is intended to promote a land use practice that is compatible with the conservation of the California tiger salamander. If an individual or organization seeks to perform the activities that are exempt under this special rule, but are not part of routine ranching activities, then incidental take authorization should be obtained through section 7 or 10 of the Act. If the activities have a net benefit to the California tiger salamander, then take may be authorized through a safe harbor agreement.

Comment 43: Several commenters stated that the proposed rule would place a burden on the ranching industry because ranching is no longer profitable and the ranching industry requires the need to diversify into more intensive agricultural uses that may require destruction of rangeland or Central California tiger salamander habitat.

Our Response: The purpose of the proposed 4(d) rule is to recognize the larger conservation value of maintaining existing rangeland that support California tiger salamander, even though some specific activities may adversely affect them. Activities likely to occur in those landscapes should ongoing ranching be removed, such as irrigated agriculture or urban development, remove and fragment upland and aquatic habitats used for migration, aestivation, and breeding that are essential for the species to complete its life history requirements. We believe that exemption of the ranching activities described in the special rule results in a net benefit to the conservation of the California tiger salamander (see Special Rule section below for specifics).

Comment 44: One commenter stated that they did not support the proposed exemption for activities that may qualify as conservation plans for the California tiger salamander.

Our Response: We have not included other activities, such as conservation plans, as part of a 4(d) rule. We only exempt routine ranching practices from the take prohibitions for the Central California tiger salamander. Conservation plans have many forms and the Act provides for authorization of activities that may take California tiger salamanders but which are consistent with conservation plans meeting our requirements under safe harbor agreements or habitat conservation plans.

Issue 9. Basis for Proposing Threatened Status for Santa Barbara and Sonoma County Populations

Comment 45: Some commenters questioned the soundness of both the scientific and procedural basis for the proposal to reclassify the Santa Barbara and Sonoma County populations of California tiger salamander. Others stated that the Service had failed to demonstrate that one or the other, or both, should be listed at all. Some pointed out that more breeding sites and habitat have been documented within the range of the Santa Barbara DPS since it was listed.

Our Response: Threats faced by the Santa Barbara and Sonoma County California tiger salamander and supporting documentation were reported in the final rules to list them as endangered (65 FR 57242 and 68 FR 13498, respectively). Our analysis of the status of the species rangewide, discussed below, has shed additional light on the status of the Santa Barbara and Sonoma County populations. In addition, once the Santa Barbara population was listed, the number of existing populations in Santa Barbara increased as efforts to locate the species increased. We now conclude that neither of these populations is currently in danger of extinction throughout all or a significant portion of its range. However, like the species as a whole, these populations are subject to a significant threat of additional habitat loss and fragmentation, as well as other secondary threats. Given their smaller ranges and populations, the Santa Barbara and Sonoma populations remain at higher risk that the species as a whole, which, as discussed below, we have determined is threatened. Similarly, we have determined that the Santa Barbara and Sonoma populations are likely to become endangered in the foreseeable future, and are also threatened.

Issue 10. Discreteness and Significance of Santa Barbara and Sonoma Populations

Comment 46: Numerous commenters stated that the Service failed to demonstrate that the Santa Barbara or Sonoma populations of California tiger salamander satisfy the discreteness or significance criteria of the Policy Regarding the Recognition of Distinct Vertebrate Population Segments (61 FR 4722). Other commenters contended that available scientific information on the genetics of the California tiger salamander indicated a significant degree of genetic distinction of the Santa Barbara or Sonoma County

populations. Some commenters maintained that the Service failed to apply the policy ''sparingly'' as instructed by Congress.

Our Response: In this rule, we list the California tiger salamander as threatened throughout its range, and eliminate the separate listings for the Santa Barbara and Sonoma populations.

Summary of Factors Affecting the California Tiger Salamander

Section 4 of the Act, and the regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act, describe the procedures for adding species to the Federal List of Endangered and Threatened Wildlife and Plants. We may determine a species to be endangered or threatened on the basis of one or more of the five factors described in section 4(a)(1) of the Act. These factors, and their application to the California tiger salamander, are described below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Central Population

We conducted a GIS analysis of California tiger salamander habitat in the range of the Central California tiger salamander for the proposed rule. We have modified the analysis for the final rule based on comments we received and specific suggestions for refinement of the analysis. The analysis we conducted for this final rule is described briefly below.

Identification of salamander locations. Intensive biological sampling has occurred in habitats such as vernal pools and stock ponds that represent potential breeding habitat for the California tiger salamander. In addition, the California tiger salamander has been designated as a candidate species since 1994 and has received a great deal of attention by biologists, scientists, and applicants for projects undergoing environmental review. State and Federal environmental laws (see Factor D below) require identification and analysis of impacts of the projects on sensitive species. Public agencies and project proponents have conducted many biological surveys for California tiger salamanders in the course of complying with environmental laws since the species' designation as a Federal candidate species in 1994. As a result, a great deal of information has been gathered on the distribution of the California tiger salamander. It is customary for scientists, consultants, and agency biologists to report the results of biological surveys for special status species to the CNDDB. Unfortunately an unknown amount of potential habitat has not been surveyed and much of the available data is contained in a patchwork of studies performed for various purposes. However,we believe that the location information on California tiger salamanders from CNDDB and information that we have obtained from other biologists and scientists is the best available information on the species' distribution.

We have analyzed threats to the Central California tiger salamander throughout the remaining portions of its range (Bay Area, Central Valley, Central Coast, and South San Joaquin regions) using information from 632 California tiger salamander records identified in the CNDDB, of which 589 records are considered extant by California Department of Fish and Game (CDFG) (CNDDB 2003; Service 2004). The CNDDB database includes the occurrences listed by Shaffer *et al.* (1993), Seymour and Westphal (1994), LSA Associates, Inc. (1994), and numerous other scientists and biologists. The wetlands present at localities in the CNDDB for which one or more wetland types were identified included vernal pools, artificial bermed ponds or stock ponds, or ponds and ditches (CNDDB 2003). Observations reported to CNDDB also include reports of the species in upland areas (CNDDB 2003). In addition, we used information on 79 California tiger salamander breeding sites from Carnegie Off-Road Vehicular Park and the Los Vaqueros watershed (Buckingham in litt. 2003; Alveras in litt. 2003). It is possible that some of these records located at Carnegie Off-Road Vehicular Park and the Los Vaqueros watershed may have already been submitted to the CNDDB database. If records were used twice in this analysis, they would not affect our estimate of California tiger salamander habitat because these overlapping records would fall within existing polygons. At each of these localities, at least one California tiger salamander (adult, juvenile, or larva) has been identified by a biologist. In many cases observations of the species are from breeding sites, although in some instances these records include observations of the California tiger salamander in upland areas (CNDDB 2003). In total, we were aware of 632 CNDDB occurrences in this analysis and 79 additional locations. In response to a comment that we were arbitrarily excluding occurrences or locations, and therefore, underestimating California tiger salamander habitat, we have used all of these 711 occurrences in the analysis described below.

While we have used the best available information to identify California tiger salamander locations, we recognize that the information available to us likely does not encompass all salamander breeding ponds and potential upland habitat because an unknown amount of habitat on private lands have not been surveyed. We believe that additional surveys on private lands would identify additional California tiger salamander.

Estimation of habitat using locality information. Our estimate of Central California tiger salamander habitat is the result of a several step process. We began by identifying known salamander records as described above. We then drew a 2,092-m (1.3-mile) boundary outside the perimeter of each record. We note that some records were points while others were circles or irregular polygons. We used this distance because it is the maximum distance a California tiger salamander has been observed from the nearest breeding pond (see Species Background above). One disadvantage of using this distance is that not all recorded localities represent breeding ponds and the distance is fundamentally based on how far we understand salamanders move away from breeding ponds. Therefore, this approach may result in an overestimate of habitat. We are comfortable that such an overestimate is not a significant error because, as noted above, we believe that additional California tiger salamander breeding locations, that have not been surveyed, are likely to exist within the 2,092-m (1.3-mi) boundary.

The polygons generated from the 2,092-m (1.3-mi) boundary around each record contained 756,470 ha (1,869,276 ac). We refined this estimate of habitat by examining the area within each polygon to determine the area of land that was urbanized, had already been converted to intensive agriculture, or consisted of habitat types unlikely to be inhabited by California tiger salamanders. After these adjustments, our estimate of habitat was 378,882 ha (936,204 ac). This area is our best estimate of the amount of habitat associated with known California tiger salamander records.

We then projected the loss of Central California tiger salamander habitat into the future. We used general plan information and information on future low-density residential development to determine how much of the remaining 378,882 ha (936,204 ac) of habitat is likely to be lost in the future (Service 2004).

Results of Service Analysis of Habitat

The results of our GIS analysis of Central California tiger salamander habitat are discussed below. We discuss the estimated amount of Central California tiger salamander habitat present; habitat projected to be lost in the future to urban development and low-density development; other future development; and our estimate of the amount of habitat that is afforded some protection.

Central California tiger salamander habitat. Our GIS analysis of CNNDB and other records indicates that there are currently approximately 378,882 ha (936,204 ac, 50 percent of the total polygon area, described in the Service Analysis of Central California Tiger Salamander Habitat section above) of Central California tiger salamander upland and aquatic habitat (Service 2004). The remaining land use types (non-habitat) in the Central California tiger salamander polygons included 124,079 ha (306,595 acres, 16 percent of polygon area) of agricultural row crops, and 146,922 ha (363,040 acres, 19 percent of polygon area) of urban areas, and 50,783 ha (125,484 acres, 7 percent of polygon area) of orchards and vineyards (California GAP 1996; Service 2004). The remaining 8 percent of the Central California tiger salamander polygons consisted of other land uses and habitat types that California tiger salamanders are not known to inhabit.

Urban development. Of the 378,882 ha (936,204 ac) of Central California tiger salamander habitat, 28,526 ha (70,489 ac, 8 percent) fall within areas delineated by general plans or other planned development (high-density residential, medium-density residential, industrial, and commercial development) (Service 2004). Because they are within areas that are to be developed, we consider these areas to be threatened by development. These development projects may destroy and fragment upland and/or aquatic breeding habitat, killing California tiger salamanders and reducing the likelihood of long-term persistence and viability at the affected localities.

Low-density development. We determined that an additional 24,240 ha (59,897 ac, 6 percent) of the estimated 378,882 ha (936,204 ac) of Central California tiger salamander habitat is threatened by low-density residential development (2 to 20 acre parcels), and 45,880 ha (113,371 ac, 12 percent) by very-low-density residential development (20 to 160 acre parcels) (R. Johnston, UC Davis, in litt. 2003; Service 2004). The land use data we used to evaluate the threat of low-density and very-low-density development is based on a minimum delineation of these areas in 2000 and represents the current land use rather than the projected land use in the foreseeable future (R. Johnston, UC Davis, in litt. 2003). These areas will likely be further developed resulting in a greater number of houses per area in the future, and in some cases, low-density areas are regions that will become incorporated into high-density urban areas (R. Johnston, UC Davis, in litt. 2003).

Low-density residential development is a greater threat to the Central California tiger salamander than very-low-density residential development because low density has a greater number of houses per acre, which will result in greater habitat destruction and fragmentation. These low-density housing areas and rural residential areas may result in the extirpation of California tiger salamander at some locations due to construction of houses that destroy breeding sites and/or indirectly affect breeding sites by reducing their long-term ability to serve as breeding habitat (by alteration of hydrology and increased sedimentation). Structures, roads, and highways fragment habitat and prevent salamanders from reaching their breeding sites because the upland habitat is eliminated or their migratory corridors are disrupted (Marsh and Trenham 2001). Reduced availability of upland habitat decreases the long-term population viability of California tiger salamander breeding sites (Trenham and Shaffer *in review*). In the eastern United States, 25 percent of the upland habitat within 300 m (984 ft) of a spotted salamander (*Ambystoma maculatum*) vernal pool breeding site was destroyed, resulting in a 53 percent decline in the abundance of the animals (Calhoun and Klemens 2002; Jung in litt. 2003). These studies demonstrate the importance of upland habitat to maintain the long-term viability of California tiger salamanders.

Low-density housing would also further fragment Central California tiger salamander habitats. The Sierra Nevada and Coast Range foothill counties are among the fastest growing counties in California (CGOPR 2003). California tiger salamander is threatened by low-density population expansion farther into the east and west margins of the Central Valley, located in these fast growing counties, and which are the last stronghold of remaining California tiger salamander habitat. California tiger salamanders are known to have high inter-pond dispersal between breeding sites where one pond may produce a large number of individuals that colonize other less productive ponds (Trenham *et al.* 2001). Therefore, the loss of breeding localities, or their isolation due to habitat fragmentation, may result in the extirpation of other breeding locations (Marsh and Trenham 2001). Decreased landscape connectivity and increased habitat fragmentation has had negative effects on other amphibian assemblages, which included the tiger salamander *Ambystoma tigrinum* (Lehtinen *et al.* 1999).

Increased numbers of residents living in low-density residential developments and rural houses may also result in increased introduction of non-native predators (see Factor C below), increased applications of pesticides or agricultural contaminants, and rodent control that may reduce the long-term viability of the California tiger salamander inhabiting these areas (see Factor E below). The California tiger salamander may also be threatened by the construction of new roads or increased mortality due to increased vehicle traffic (see Factor E below).

Other future development. Our estimate of the location and amount of habitat threatened by conversion and fragmentation from urban uses described above does not consider all of the projected human population growth, urbanization, and subsequent habitat loss that will occur in the counties inhabited by the Central California tiger salamander because most city and county general plans have variable planning horizons that do not extend beyond 20 years (R. Johnston, UC Davis, pers. comm. 2004). California developers and builders constructed 2.8 million new housing units between 1980 and 1997, and an additional 220,000 units will be required each year for the next 20 years with the human population of the State almost doubling in less than 40 years (CGOPR 2003). New housing is currently being constructed in low-density developments on the edge of urban areas or beyond such areas (CGOPR 2003). Most of the future growth of California will be outside of the current metropolitan areas (San Francisco, Los Angeles, and San Diego), occurring in the Sacramento, San Joaquin, and Imperial valleys (CGOPR 2003). Two of these valleys are inhabited by salamanders in the Central Valley and South San Joaquin Valley regions.

Conversion to intensive agriculture. Additionally, the projection described above does not consider the loss of the Central California tiger salamander habitat caused by conversion of habitats to intensive agriculture. Projecting the future loss of Central California tiger

salamander habitat from conversion of rangeland to intensive agriculture is difficult because conversion to this land use is largely unregulated by cities and counties. Conversion to intensive agriculture largely depends upon the individual landowner and is based on numerous factors that are difficult to predict, such as economic considerations, markets, and water availability. The loss of rangelands and vernal pool grasslands, portions of which California tiger salamanders occupy, has been well documented in counties within the range of the Central California tiger salamander and annual rates of loss have been estimated (discussed in detail in the Urban and Agricultural Land Use sections above) (CDC 1996, 1998, 2000, 2002; Holland 1978, 1998a, 1998b, 2003; Jones and Stokes Associates 1987; 59 FR 48136; Keeler-Wolf *et al.* 1998; CDFG 2003; CDWR 1998). The cumulative loss of vernal pool grassland has been estimated at 78 percent by the late 1990s, and annual rates of loss have been between 1 and 3 percent during the 1980s and 1990s. Some of the loss of Central California tiger salamander habitat has resulted from conversion to intensive agriculture, and some is attributable to urbanization and other non-agricultural activities that have destroyed the species' habitat.

Even though future conversion of rangeland to intensive agriculture is difficult to estimate and has not been included in our GIS analysis, we believe that the continued loss of Central California tiger salamander habitat due to intensive agriculture represents an important threat to the species. Throughout the range of the Central California tiger salamander there has been a cumulative net loss of irrigated agriculture acreage through conversion to other land uses, such as development; however, there have been additional conversions of rangeland to irrigated agriculture, expanding this land use activity in areas such as the San Joaquin Valley and Central Coast (CDWR 1998; CDC 2002).

This conversion of land use activity has continually occurred throughout the salamander's range and we anticipate this conversion of land use activity will continue to adversely affect additional Central California tiger salamander habitat because of the significant projected increase in human population growth (75 percent increase from 2000 to 2040) in the range of the Central California tiger salamander (CDF 1998). This population growth will continue the trend of conversion of irrigated agriculture conversion to urban use, with a subsequent displacement of intensive agriculture on to rangeland in the foothill areas of the Central Coast or east side of the San Joaquin Valley (CDWR 1998; CDC 2002). However, the rate of displacement and subsequent conversion to intensive agriculture is expected to continue at lower rates than in the past as areas with suitable soils and water availability necessary for intensive agriculture become increasingly scarce. Additionally, there can be a financial incentive for landowners to convert existing rangeland and grasslands areas to irrigated crops. Generally, rangeland is valued much less (value per acre) than all irrigated agricultural crops in the area where Central California tiger salamander occurs (American Society of Farm Managers and Rural Appraisers 2003). Conversion of Central California tiger salamander habitat to intensive agriculture, in addition to the loss of habitat to rural residential housing (see Low-Density Development section above), further fragments the species' habitat. Fragmentation of habitat may not directly impact breeding sites but creates a barrier to inter-pond migration of salamanders and to movement of salamanders between breeding sites and upland habitat landscapes (Marsh and Trenham 2001; Trenham and Shaffer *in review*; Calhoun and Klemens 2002; Jung in litt. 2003).

Protected habitat. The Service has determined that approximately 76,501 ha (189,032 ac, 20 percent) of the total estimated Central California tiger salamander habitat associated with known records is protected to some degree (Service 2004). Protection of the species itself varies in these areas because we included a variety of land use designations that may provide only some protection for the species. Some sites may be managed to benefit the species, such as conservation banks, National Wildlife Refuges, and East Bay Regional Park District (EBRPD). Even if these areas are not specifically managed for the benefit of the species, the areas are protected from development and conversion to intensive agriculture. Many of these same areas are likely not providing protection from possible death, due to non-native predators (see Factor C below), agricultural and landscaping contaminants, rodent control, roads, and hybridization (see Factor E below). We estimated that approximately 24 percent of the 76,501 ha (189,032 ac) of protected habitat have hybridized tiger salamanders inhabiting the habitat or the California tiger salamanders in these habitats are threatened by hybridization (Service 2004; see Factor E below). Therefore our estimate is a liberal estimate of habitat in which the Central California tiger salamander is protected.

Sonoma and Santa Barbara Populations

Habitat loss in the range of the Sonoma and Santa Barbara populations was discussed in the listing rules for the Santa Barbara County DPS of the California tiger salamander (65 FR 57242), and the Sonoma County DPS of the California tiger salamander (67 FR 47726). New information suggests that additional locations of occupied salamander habitat exist in these areas. At the time of the final rule for Santa Barbara County, 27 breeding ponds in six subpopulations had been identified. Since that time, the number of known breeding ponds has increased to 46 within the same six subpopulations in Santa Barbara County as a result of biological surveys conducted for potential projects. These ponds include 23 artificial ponds, 4 human-altered ponds, and 19 natural ponds. The final rule listing the Sonoma County DPS as endangered identified eight known remaining breeding sites. Six additional breeding sites (Gobbi, Duer Road, Haroutunian, Alton Lane, Southwest Community Park, Yuba Drive) are now recognized. All but two (Haroutunian and Alton Lane) of these known breeding sites are distributed in the City of Santa Rosa and immediate associated unincorporated areas, an area approximately 6 km (4 mi) long by 6 km (4 mi) wide.

Urban and Agricultural Land Uses

Destruction, modification, and curtailment of California tiger salamander habitat is caused by conversion of rangeland to a variety of urban and agricultural land uses. We define urban impacts to include a variety of nonagricultural development activities such as building and maintenance of housing, commercial, and industrial developments; construction and widening of roads and highways; golf course construction and maintenance; landfill operation and expansion; operation of gravel mines and quarries; dam building and inundation of habitat by reservoirs; and other infrastructure activities that support urban areas. Agricultural impacts include the conversion of native habitat by discing and deep-ripping; and cultivation, planting, irrigation, and maintenance of row crops, orchards, and vineyards. These impacts threaten both breeding and upland habitat.

Upland habitat. We have concluded that California tiger salamanders have declined due to habitat conversion to

intensive agriculture and urbanization (Davidson *et al.* 2002, Fisher and Shaffer 1996). Researchers believe that even salamanders inhabiting breeding ponds that are protected from development may not persist as viable populations if upland habitat is unavailable or reduced in area, or if breeding ponds become fragmented and isolated from other ponds (Marsh and Trenham 2001; Jung in litt. 2003; Trenham and Shaffer *in review*). Earthmoving operations and cultivation in upland habitat can directly or indirectly kill or injure California tiger salamanders in burrows or on the surface by crushing or trapping them. Such activities render all affected areas unsuitable for salamander breeding, feeding, and sheltering. Earth disturbing practices can also expose salamanders to adverse environmental conditions (increased predation, high temperatures, low humidity, destroy food sources) and alter surface hydrology (potentially affecting breeding ponds). Discing, deep-ripping, or grading of upland habitat also destroys California ground squirrel burrows and crevices utilized by the salamander, making suitable upland sites unavailable and likely reducing long-term adult survival of Central California tiger salamanders (Loredo *et al.* 1996).

Wetland habitat. Filling, discing, or excavating wetland habitat can directly kill or injure larvae, eggs, or breeding adults, and prevent future use of the wetland for reproduction. Additionally, surviving adults may be unable to locate alternative breeding sites in subsequent years if habitat is present but has become highly fragmented by roads, housing, agriculture, and other non-habitat elements. Some changes in vernal pool or pond inundation duration and depth caused by urban and agricultural land use (*e.g.*, digging of drainage/irrigation ditches, construction of permanent ponds or reservoirs, deepening or berming of seasonal wetlands, redirection of runoff from developments) can reduce reproductive success for California tiger salamander by: (1) Prematurely drying wetlands and desiccating larvae; (2) extending the inundation period and facilitating invasion of non-native predators (see Factor C below); (3) creating conditions that are more conducive for hybridization with non-native tiger salamanders (see Factor E below); and (4) increasing vulnerability to disease by increasing isolation and fragmentation (see Factor C below). The actual effect of these activities is dependant on the specifics of the situation.

Loss of habitat. Although the California tiger salamander still occurs throughout the majority of its historic range, estimates of the past and present extent of suitable habitat for the California tiger salamander within its historic range indicate that the area of the species' natural habitat has been substantially reduced and that the species has become increasingly rare in regions of its range (Shaffer *et al.* 1993; Barry and Shaffer 1994; Fisher and Shaffer 1996). Some researchers estimate that as much as 75 percent of the area of California tiger salamander historic natural habitat has been lost (Shaffer *et al.* 1993). Historically, approximately 3.7 million ha (9.1 million ac) of valley and coastal grasslands existed within the range of the Central California tiger salamander (Kuchler 1988). Researchers are of the opinion that valley and coastal grasslands were very likely used by the species. An additional 2.6 million ha (6.5 million ac) supporting an overstory of blue oak/foothill pine, valley oak, or mixed hardwoods (Kuchler 1988) historically existed; some portion of these habitats may have been used by the species. However, urbanization and intensive agriculture have eliminated virtually all valley grassland and oak savanna habitat from the Central Valley floor. Loss of grasslands has exceeded the loss of all other habitats in California (Ewing *et al.* 1988). It has been estimated that less than 10 percent of California's Central Valley grasslands remain (CDFG 2003). Valley grasslands and, consequently, Central California tiger salamanders, are now distributed primarily in a ring around the Central Valley (Heady 1977; Holland 1978).

The relative loss of habitat has also been significant with respect to vernal pool grasslands, the historic breeding habitat of the California tiger salamander (Trenham *et al.* 2000). Approximately 1.68 million ha (4.15 million ac) of grasslands in 20 Central Valley counties are estimated to have supported vernal pools at the time of European settlement (Holland 1978, 1998a, 1998b; Holland and Jain 1988; CDFG 2003) although there is no historical data to substantiate this estimate. Most of this area, except northern Sacramento Valley, was within the California tiger salamander's assumed historic range (Shaffer *et al.* 1993). The remaining vernal pool complexes in California are now fragmented and reduced in area (59 FR 48136). Where vernal pools exist, the habitat is often disturbed and degraded and the natural regime has been affected by drainage modification, off-road vehicle use, gravel mining, non-native plant invasion, road construction, and urban development (Jones and Stokes Associates 1987; 59 FR 48136; Keeler-Wolf *et al.* 1998). Vernal pools in California are now recognized as threatened resources, and many of the species that inhabit them are listed as threatened or endangered species (Jones and Stokes Associates 1987; Wright 1991; 59 FR 48136). Estimates of vernal pool habitat loss through the 1980s were at 2 to 3 percent annually; this rate of loss is compounded continually (Holland 1988). During the 1980s and 1990s, vernal pool grasslands continued to be lost at an estimated rate of 1.5 percent per year (Holland 1998a, 1998b). As of 1997, 377,165 ha (931,991 ac) of vernal pool grasslands remained in the Central Valley, representing a loss of approximately 78 percent (Holland 1998a, 1998b; CDFG 2003). Along the southeastern edge of the Central Valley, from San Joaquin to Fresno counties, at least 25 percent of the 259–ha (640–ac) sections that had contained vernal pools in 1970 (Holland 1978) were wholly converted to agriculture or urban uses by 1994 (Seymour and Westphal 1994). This conversion estimate is probably conservative because it does not include partially converted sections where vernal pool habitat may also have been lost (Seymour and Westphal 1994). Holland (1998a) estimated that at a continued 1.5 percent annual loss of vernal pools in California, 50 percent of the vernal pool habitat present in 1997 would be lost by 2043 (46 years), representing a cumulative loss of 88 percent of vernal pool grasslands.

As part of an evaluation of California tiger salamander status throughout their range, Shaffer *et al.* (1993) detected California tiger salamanders in only 36 of 86 localities (42 percent) that had been previously recorded, and ponds currently occupied by California tiger salamanders were significantly higher in elevation than those that were unoccupied or had been previously occupied; although it should be noted that these decreases may also be the result of low sampling frequency. Some researchers (Shaffer *et al.* 1993; Seymour and Westphal 1994; Fisher and Shaffer 1996; Davidson *et al.* 2002) believe these and other data suggest that many of the low-elevation breeding sites on the valley floor have been eliminated in recent years, reducing habitat used by this species to higher elevations on the margin of its ecological requirements. These higher elevation breeding sites are likely human-created stock ponds or bermed ponds that have benefited the species by offsetting the loss of the California tiger salamander's natural historic vernal pool breeding habitat.

However, these artificial breeding ponds have a shorter life-span than natural vernal pools if not maintained. Additionally, some of these artificial breeding ponds can place California tiger salamanders at risk of predation by holding water for a greater period than vernal pools (see Factor C below), and placing the species at a greater risk of hybridization with non-native tiger salamanders (see Factor E below).

In both our final rules listing the Santa Barbara County DPS of the California tiger salamander (65 FR 57242), and the Sonoma County DPS of the California tiger salamander (67 FR 47726), we described land conversions to more intensive agriculture, especially conversions to grape vineyards, as being a factor in the species' decline. Data from the California Agricultural Statistics Service (CASS) (2002) shows conversion of rangeland to irrigated agriculture as a factor contributing to the species' decline. The data show that the phenomenon of rangeland conversion extends over much of the Central California tiger salamander's current and historic range. As land in irrigated agriculture is lost in the Central Valley due to urbanization, its cumulative loss has been partially offset through expansion of land in irrigated agriculture on the east side of the Central Valley and Coast Range, which in turn results in the loss of rangeland or grasslands which can be inhabited by the California tiger salamander (California Governor's Office of Planning and Research (CGOPR) 2003; California Department of Conservation (CDC) 2002; CNDDB 2003).

Urban and population growth. Urban development poses a similar significant threat to the Central California tiger salamander in particular. As the human population of the State of California continues to increase, there is a concomitant increase in urban and suburban development. According to the 2000 census, the number of people in California has increased by 13.8 percent since 1990 (California Department of Finance (CDF) 2002). The average growth in human population within the counties in the range of the Central California tiger salamander during this period has been 19.5 percent (CDF 1998). Counties in the East Bay region and the Highway 99 corridor in the San Joaquin Valley are also undergoing increases in urbanization related to population growth (CDF 1998; CDC 2002). From 1995 to 2020, the human population in the range of the Central California tiger salamander (Central Valley, Bay Area, and Central Coast counties) is projected to grow by 49 percent (from 12.8 million to 19.1 million people) (California Department of Water Resources (CDWR) 1998). According to the CDF, the human population in the counties inhabited by the Central California tiger salamander is expected to grow by 35 percent from 2000 to 2020 (from 11.2 million to 15.1 million people) and by 75 percent from 2000 to 2040 (from 11.2 million to 19.6 million people) (CDF 1998). Therefore, impacts to the Central California tiger salamander due to conversion of its habitat resulting from urban development are expected to continue (Service 2004).

Loss of rangeland. Rangeland areas which may contain vernal pool grassland habitats, are being lost as a result of rural residential development (CGOPR 2003). Privately owned rangeland in California decreased by 252,524 ha (624,000 ac) from 1982 to 1997, an average loss of 16,997 ha (42,000 ac) per year (U.S. Department of Agriculture 2003), and from 1998 to 2000 the State lost an additional 21,555 ha (53,263 ac) of rangeland (CGOPR 2003). The decline in farm rancher income, the aging of ranchers, tax implications of intergenerational transfers of ranches, and the difficulty of beginning a ranching operation (*e.g.*, in terms of cost and knowledge of ranching) are all reasons California is experiencing the loss of rangeland (CGOPR 2003). The recent protections afforded numerous vernal pool species (*e.g.* vernal pool crustaceans, vernal pool plants) under the Act will assist in slowing future development.

Conclusion for Factor A

In summary, a primary cause of the decline of the California tiger salamander is the loss of habitat due to conversion for residential, commercial, and agricultural activities (D. Wake, University of California, Berkeley, in litt. 1992; T. Jones, University of Michigan, in litt. 1993; Shaffer *et al.* 1993; Jennings and Hayes 1994; Davidson *et al.* 2002; CNDDB 2003; Service 2004). In addition to direct loss of habitat, the widespread conversion of land to residential and agricultural uses has led to the fragmentation of habitat throughout the range of the Central California tiger salamander, and isolation of the remaining populations (Shaffer *et al.* 1993). This fragmentation of the remaining habitat is expected to continue in the foreseeable future as an effect of the rapidly growing human population in these counties within range of the California tiger salamander.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

There is no evidence that overutilization for commercial, recreational, scientific, or educational purposes is causing a decline of the California tiger salamander.

C. Disease or Predation

Disease

The specific effects of disease on the California tiger salamander are not known. We have to date no information indicating disease is prevalent in existing populations in California. Pathogens (fungi, bacteria, and viruses) have been known to adversely affect other tiger salamander species or other amphibians and chytrid fungus infections (chytridiomycosis) have been detected specifically in Central California tiger salamanders (Padgett-Flohr 2004). Two of our peer reviewers identified chytridiomycosis and ranaviruses as a threat to the California tiger salamander because these diseases have been found to adversely affect other amphibians, including tiger salamanders (Longcore, in litt. 2003; Lips, in litt. 2003). Both of these peer reviewers identified non-native species, such as bullfrogs and non-native tiger salamanders, as potential carriers of these diseases. Both bullfrogs and non-native tiger salamanders occur within the range of the California tiger salamander (see Predation and Factor E below). However, we have no information to date indicating this is an imminent threat.

Predation

Bullfrogs prey on California tiger salamanders (Anderson 1968; Lawler *et al.* 1999), which has created an overall pattern of the decline of this species in areas where bullfrogs and other exotic species are present (Fisher and Shaffer 1996). The bullfrog, native to North America east of the Great Plains, was introduced into California in the late-1800s and early-1900s, and it rapidly spread throughout the State (Storer 1925 as cited in Moyle 1973; Hayes and Jennings 1986). Morey and Guinn (1992) documented a shift in amphibian community composition at a vernal pool complex, with salamanders becoming proportionally less abundant as bullfrogs increased in number. Bullfrogs are unable to establish permanent breeding populations in unaltered vernal pools and seasonal ponds because they require more than one year to complete their aquatic larval stage. However, dispersing immature bullfrogs take up residence in such water bodies

during the winter and spring where they prey on native amphibians, including larval salamanders (Laabs *et al.* 2001; Morey and Guinn 1992; Seymour and Westphal 1994).

Bullfrogs are known to travel at least 2.6 km (1.6 mi) from one pond to another (Bury and Whelan 1984), and they have the potential to naturally colonize new areas where they do not currently exist, including areas where Central California tiger salamanders occur. In one study of the eastern San Joaquin Valley, 22 of 23 ponds (96 percent) with California tiger salamanders were within the bullfrogs' potential dispersal range (Seymour and Westphal 1994). In addition, because bullfrogs are still sought within California for sport and as food, and may be taken without limit under a fishing license (CDFG, 2004 Sport Fishing Regulations), the threat of transport for intentional establishment in new habitat suitable for the Central California tiger salamanders is significant.

Western mosquitofish (*Gambusia affinis*) are native to central North America (watersheds tributary to the Gulf of Mexico) and have been introduced throughout the world for mosquito control; they were introduced in California, beginning in 1922. Western mosquitofish now occur throughout California wherever the water does not get too cold for extended periods, and they are still widely planted throughout the State (K. Boyce, Sacramento County/Yolo County Mosquito and Vector Control District, in litt. 1994; Moyle 2002) by about 50 local mosquito abatement districts. Western mosquitofish are ubiquitous because of their tolerance of poor water quality and wide temperature ranges (K. Boyce, in litt. 1994).

Larval salamanders may be especially vulnerable to western mosquitofish predation due to their fluttering external gills, which may attract these visual predators (Graf and Allen-Diaz 1993). Loredo-Prendeville *et al.* (1994) found no California tiger salamanders inhabiting ponds containing western mosquitofish. Leyse and Lawler (2000) found that the survival of California tiger salamander in experimental ponds stocked with western mosquitofish, at densities similar to those found in many stock ponds, was significantly reduced.

Larvae that survived in ponds with western mosquitofish were smaller, took longer to reach metamorphosis, and had injuries such as shortened tails. Additionally, a recent experiment that replicated conditions in vernal pool environments and permanent ponds determined that, at low densities, mosquitofish did not have a significant effect on larval California tiger salamander growth and survival, but that growth and size at metamorphosis was significantly reduced at high fish densities (Leyse, in litt. 2003).

Other non-native fish have either been directly implicated in predation of California tiger salamanders or appear to have the potential to prey upon them (Fisher and Shaffer 1996; Shaffer *et al.* 1993). For example, introductions of sunfish species (*e.g.*, largemouth bass (*Micropterus salmoides*), bluegill (*Lepomis macrochirus*)), catfish (*Ictalurus* spp.), and fathead minnows (*Pimephales promelas*) are believed to have eliminated California tiger salamanders from several breeding sites in Santa Barbara County (65 FR 3096). In eastern Merced County, California tiger salamanders were absent in stock ponds where non-native fish were present, whereas stock ponds absent of non-native fish had California tiger salamanders present (Laabs *et al.* 2001). Non-native sunfish species, catfish, and bullheads (*Ameiurus* spp.) have been, and still are, widely planted in ponds in California to provide for sportfishing. By 1984, the California fish fauna included about 50 such transplanted and exotic species, mostly of eastern North American origin (Hayes and Jennings 1986). The alien species have been introduced for a variety of reasons including ornamental, sport, bait, insect control and food uses. Thus, we consider introductions of such non-native fish species into Central California tiger salamander breeding habitat a threat to the persistence of the species in these locations.

Detrimental effects of wild pigs on the Central California tiger salamander include both predation and habitat modifications.

D. The Inadequacy of Existing Regulatory Mechanisms

One primary cause of Central California tiger salamander decline is the loss, degradation, and fragmentation of habitat due to human activities. Federal, State, and local laws have been insufficient to prevent past and ongoing losses of the limited habitat of the Central California tiger salamander, and are unlikely to prevent further declines of the species.

Federal

Clean Water Act. Pursuant to section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344), the U.S. Army Corps of Engineers (Corps) regulates the discharge of dredged or fill material into all Waters of the United States, including wetlands. In general, the term ''wetland'' refers to areas meeting the Corps criteria of having hydric soils, hydrology (either a defined minimum duration of continuous inundation or saturation of soil during the growing season), and a plant community that is predominantly hydrophytic vegetation (plants specifically adapted for growing in a wetland environment).

Any discharge of dredged or fill material into waters of the United States, including wetlands, requires a permit from the Corps. These include individual permits which would be issued following a review of an individual application, and general permits that authorize a category or categories of activities in a specific geographical location or nationwide (33 CFR parts 320–330). Individual permits are issued by the Corps for actions which are likely to result in greater than minimal individual or cumulative impacts to the human or aquatic environment. General permits are issued by the Corps for actions which are likely to result in minimal individual or cumulative impacts to the human or aquatic environment. It is important to note that in order for an applicant to utilize any general permit, including nationwide permits, the applicant must comply with the general and special conditions of the permit. General and special permit conditions may vary among individual Corps Districts and the various general permits. However, the use of any individual or general permit requires compliance with the Endangered Species Act. Some activities such as normal farming practices and the construction of forestry roads and temporary roads used for moving mining equipment are exempt under CWA and do not require a permit (33 U.S.C 1344)(f)(1).

While the Clean Water Act provides a means for the Corps to regulate the discharge of dredged or fill material into waters and wetlands of the United States, it does not provide complete protection. Nationwide the Corps denies less than one percent of all applications to discharge dredged or fill material into waters or wetlands on an annual basis. While many applicants are required to provide compensation for wetlands losses (*i.e.*, no net loss), many smaller impact projects remain largely unmitigated unless specifically required by other environmental laws such as the Endangered Species Act.

Recent court cases limit the Corps' ability to utilize the CWA to regulate the discharge of fill or dredged material into the aquatic environment within the current range of the California tiger salamander (*Solid Waste Agency of Northern Cook County* v. *U.S. Army*

Corps of Engineers, 531 U.S. 159 (2001) (SWANCC)). The effect of SWANCC on Federal regulation of activities in wetlands in the area of the California tiger salamander has recently become clear by the Corps' decision not to assert its jurisdiction over the discharge of fill material into several wetlands within the range of the California tiger salamander. In a letter from the Corps, dated March 8, 2002, concerning the discharge of fill into 0.18 ha (0.45 ac) of seasonal wetlands southwest of the intersection of Piner and Marlow Roads in Santa Rosa, California (Corps File Number 19736N), the Corps referenced the SWANCC decision and reiterated that the subject wetlands were not ''waters of the United States'' because they were not: (1) Navigable waters; (2) interstate waters; (3) part of a tributary system to 1 or 2; (4) wetlands adjacent to any of the foregoing; and (5) an impoundment of any of the above. The letter further stated that the interstate commerce nexus to these particular waters is insufficient to establish CWA jurisdiction, and therefore, the waters are not subject to regulation by the Corps under Section 404 of the CWA. There may be instances where seasonal wetlands used by California tiger salamander lack sufficient connection to waters of the United States for the Corps to assert jurisdiction under the authority of the Clean Water Act. For example, the Corps also cited the SWANCC decision as their reason for not taking jurisdiction over some seasonal wetlands located in Sonoma County, California, that are California tiger salamander habitat.

We conclude that regulation of wetlands filling by the Corps under Section 404 of the CWA is inadequate to completely protect the Central California tiger salamander from further decline. Section 404 does not reach to isolated wetlands, and it does not regulate the continuing losses of the terrestrial habitat of the amphibian.

Endangered Species Act. Within the range of the Central California tiger salamander there are currently 16 species (1 beetle, 4 species of vernal pool crustaceans, and 11 species of plants) listed under the Act that occur in association with seasonally-flooded vernal pools (45 FR 62807; 59 FR 48136). The California red-legged frog (*Rana aurora draytonii*) is listed as threatened under the Act and is associated with stock ponds, stream drainages, and upland habitats located primarily in the Coastal Range, as well as portions of the foothills in the eastern Central Valley (61 FR 25813). The San Joaquin kit fox (*Vulpes macrotis mutica*) is listed as endangered under the Act and is associated with upland habitat in the San Joaquin Valley and parts of the Coastal Range (32 FR 4001). Critical habitat has been designated for the threatened delta green ground beetle (*Elaphrus viridus*) at Jepson Prairie in Solano County, but this unit covers only a portion of the area (less than 1 percent) that is inhabited by the California tiger salamander (45 FR 52807; Service 2004). We have also designated 740,000 million acres of critical habitat which includes upland areas in 30 California counties and one county in Oregon for four vernal pool shrimp and 11 vernal pool plant species (68 FR 12336). However, due to life history of the California tiger salamander requiring additional upland areas outside those supporting the hydrology of the vernal pool or other pond the regulatory protections for vernal pool species are not adequate to protect the species.

In the Central Valley region (Contra Costa, Mariposa, San Joaquin, Stanislaus, and Tuolumne Counties), South San Joaquin region (Fresno and Tulare Counties), Bay Area region (San Benito County), and Central Coast region (Monterey and San Luis Obispo Counties), some vernal pools supporting the 16 listed vernal pool species (*i.e.*, the 15 listed above and delta green ground beetle), and the critical habitat designated for them, overlap with local occurrences of the Central California tiger salamander; however, such overlap is limited. Approximately 31,625 ha (78,144 ac, 8 percent) of Central California tiger salamander habitat occurred in areas designated as critical habitat for vernal pool species (Service 2004). Most of the requirements of the listed vernal pool plants and crustaceans can be met through maintenance of existing hydrology within the confines of individual vernal pool complexes (68 FR 12336). Vernal pool critical habitat does provide some protection to a limited area of uplands surrounding vernal pools for pollinator species and to protect other vernal pool functions. However, California tiger salamanders spend approximately 20 percent of their lives in vernal pools or ponds, and approximately 80 percent in the confines of small mammal burrows in upland areas, in addition to using upland areas as migratory corridors. Therefore, the protection provided to the listed vernal pool species and their critical habitats provides only partial protection to California tiger salamander upland habitat and movement corridor requirements because listed vernal pool species require substantially less upland habitat than salamanders and the resulting overlap with designated vernal pool species' critical habitat is limited.

The threatened California red-legged frog requires dense, shrubby or emergent riparian vegetation closely associated with deep still or slow moving water, including stock ponds, for breeding habitat (Hayes and Jennings 1998; 61 FR 25813). They also utilize upland areas to migrate between aquatic habitats which they may use as refugia during summer months if aquatic habitats are no longer available in a specific area (Jennings and Hayes 1994; Service 2002).

There are approximately 133,960 ha (331,010 ac, or 35 percent) of Central California tiger salamander habitat that occurs within 3.2 km (2 mi) of all California red-legged frog records in CNDDB (Service 2004). We used 3.2 km (2 mi) as a distance from California red-legged frog records because this is the maximum known dispersal distance of the species (Service 2002). Using this distance surrounding records provided us with an estimate of California red-legged frog habitat that overlapped with salamander habitat. Although some regulatory protections may be afforded to the Central California tiger salamander from the California red-legged frog, these protections do not fully protect the salamander because geographic overlap between the two species is limited.

Approximately 45 percent of the habitat for the Central California tiger salamander is located in the San Joaquin Valley and southern Sacramento Valley where California red-legged frogs no longer persist (Service 2004). California red-legged frogs likely were extirpated from the San Joaquin Valley floor before 1960; the last breeding population on the San Joaquin Valley floor was observed in 1947, and sighting of the species in that area last occurred in 1957 (Jennings *et al.*, in litt. 1992; Service 1996). In the Coastal Range where both species are still present, California tiger salamanders and California red-legged frogs may coexist in the same breeding ponds. Thirty-nine percent of the 61 California tiger salamander breeding ponds in the EBRPD located in Contra Costa and Alameda Counties had California red-legged frogs present. Of these ponds where coexistence between the two species occurred, only 29 percent of the ponds had breeding populations of California tiger salamanders and California red-legged frogs. The remaining ponds had larval salamanders and adult California red-legged frogs (S. Bobzien, in litt. 2003). The EBRPD information shows that, while California tiger salamanders and California red-

legged frogs may occur in the same geographic area, their use of habitat within those areas may differ.

In the northern portion of the range of the endangered San Joaquin kit fox, there is the potential for overlap with the upland habitat of the California tiger salamander because both species inhabit grassland. San Joaquin kit fox habitat overlaps with approximately 133,635 ha (330,209 ac, 35 percent) of the Central California tiger salamander habitat (Service 2004). Where the two species inhabit the same area, the regulatory protections afforded under the Act for the San Joaquin kit fox provide limited protection to Central California tiger salamander breeding habitats. Protected lands for San Joaquin kit fox may incidentally protect California tiger salamanders because San Joaquin kit fox depend on grassland with small mammal burrows for dens (Service 1998). Additionally, the fox preys on the mammals that create these burrows, which may be utilized by California tiger salamanders as upland habitat.

There are three approved habitat conservation plans (HCP) that cover the California tiger salamander. The Natomas Basin HCP provides coverage for the Central California tiger salamander, although these animals have not been documented in the HCP planning area (Service files; CNDDB 2003). California tiger salamander preserves will be created by the Natomas HCP if the species is detected during surveys and impacted by covered activities. The Kern Water Bank HCP provides coverage for the California tiger salamander, although no documented occurrences have been observed in the project area; consequently the conservation strategy for this HCP targets other species known to occur in the project area (Service files). The California tiger salamander is a covered species in the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP). To qualify as a covered species, the plan must address the unlisted species as though it were listed. The SJMSCP will provide habitat preserves totaling 2,592 ha (6,406 ac) for the Central California tiger salamander as a result of the 708 ha (1,749 ac) of converted habitat from SJMSCP covered activities, primarily those associated with urban development. Agricultural activities (conversion of natural or agricultural lands to intensive agriculture) however, are not covered activities in the SJMSCP.and may result in the loss of California tiger salamander habitat. California tiger salamander habitat loss from agricultural activities is discussed in Factor A.

State

Since 1994, the California Department of Fish and Game (CDFG) has designated the California tiger salamander as a ''species of special concern.'' More recently, the California tiger salamander has been placed on the State's list of protected amphibians, which means that it cannot be taken without a special permit issued for scientific collecting or research. In addition, such a designation provides for special protections and considerations under the California Environmental Quality Act (CEQA) (California Public Resources Code section 21000–21177). Also, as stated earlier in Factor C, the California Code of Regulations (2002) specifies California tiger salamanders can no longer be taken, possessed, or used for fishing bait.

On July 6, 2001, the CDFG received a petition from the CBD to list the California tiger salamander under the California Endangered Species Act. The status of the animal and potential threats were evaluated by the CDFG. On October 3, 2001, the Director of the CDFG recommended to the California Fish and Game Commission (Commission) that they accept the petition and designate the animal as a candidate (R. Hight, CDFG, in litt. 2001). On December 7, 2001, the Commission found that the petition was not warranted because the Commissioners felt there was not enough information on the population abundance and trend information of the California tiger salamander (R. Treanor, Commission, in litt. 2001).

CDFG recognizes the importance of California tiger salamander conservation at the local population level and routinely considers and recommends actions to mitigate potential adverse effects to the species during its review of development proposals. However, CDFG's primary regulatory venue is under CEQA.

CEQA requires disclosure of potential environmental impacts ofall discretionary activities proposed to be carried out or approved by all state or local government agencies in California, unless an exemption applies. Under CEQA, a significant effect on the environment means ''a substantial, or potentially substantial, adverse effect on the environment'' (California Public Resources Code section 21068). Any project that affects a protected species results in a mandatory finding of significant effect and all the mitigation requirements appurtenant. The lead agency must then mitigate for unavoidable significant effects or, in rare circumstances and under specified conditions, the lead agency can make a determination that overriding considerations make such mitigation infeasible (California Public Resources Code section 21002) and may then provide for other mitigation. CEQA can provide protections for a species that, although not listed as threatened or endangered, meets one of several criteria for rarity (14 California Code of Regulations section 15380).

Because of State environmental laws such as CEQA, planned development often provides avoidance, minimization, and mitigation measures which are specifically for, or which may incidentally benefit, California tiger salamander, as a result of conformance with local land use plans for providing open space, through working with the California Department of Fish and Game under the authority CEQA. The avoidance, minimization, and mitigation measures of individual projects nevertheless tend to result in fragmented landscapes and a trend of cumulative regional habitat loss and fragmentation. Mitigation does not create new land, it simply balances land converted with land protected for natural values, so even with mitigation, a net loss of habitat results. So while mitigation provided by developments under CEQA may be offered with the intent to benefit California tiger salamander, the resulting fragmentation of regional landscapes over time creates high risk of disrupting or precluding migration patters, isolating small local populations, and subjecting animals to higher risks from road crossing mortality during migration and other risks associated with urban preserves. The threats to California tiger salamander associated with habitat fragmentation are discussed more fully in Factor A.

Neither CEQA nor other statutory mechanisms under CDFG's jurisdiction serves as an effective regulatory mechanism for reducing or eliminating several of the other manmade factors (see Factor C above) which may also adversely affect California tiger salamanders and their habitat. These factors include stocking ponds with non-native fish for recreational fishing and mosquito control. Agencies and individuals may purchase (from CDFG-licensed fish breeders) and stock into such waters sunfish, catfish, and other non-native fish for recreational fishing. Similarly, there is no State regulation of western mosquitofish stocking into stock ponds and waters inhabited by California tiger salamanders by the approximately 50 mosquito abatement districts that routinely stock this

mosquito predator as a means for mosquito control. As a result, California tiger salamanders suffer predation pressure in such environments and may be eliminated from ponds stocked with predatory fish (see Factor C above and E below). In addition, conversion of rangeland to intensive agriculture is not regulated by City or County government and is not subject to CEQA.

Section 1600 *et seq.* of the California Fish and Game Code authorizes the CDFG to regulate streambed alteration. CDFG must be notified of and approve any work that substantially diverts, alters, or obstructs the natural flow or substantially changes the bed, channel, or banks of any river, stream, or lake. If an existing fish or wildlife resource may be substantially adversely affected by a noticed project, CDFG must identify and submit measures to protect the fish and wildlife resources within 60 days to the project proponent (Section 1602 of CDFG Code). However, if CDFG does not respond within 60 days of notification, the applicant may proceed with the work. Section 1600 does not provide protection to upland habitat beyond the bank of the affected waterway (see discussion under CWA and its limitations above), and does not regulate stock ponds that are not constructed on natural streams or vernal pools, which are the breeding habitats for the species. Mitigation under a streambed alteration agreement is entirely voluntary by a project applicant and is typically agreed upon only when compatible with mitigation required by another permit (J. Gan, CDFG, pers. comm. 2004).

The 2002 California Code of Regulations specifies that no salamander may be used as bait and excludes the California tiger salamander from a list of salamanders, newts, toads, and frogs that may legally be taken and possessed under authority of a sport fishing license.

The California Porter-Cologne Act of 1969 (California Water Code section 13000 *et seq.*) is the primary law regulating water quality in California. The Porter-Cologne Act designated the State Water Resources Control Board and the nine Regional Water Quality Control Boards to serve as California's water quality planning agencies with authority over surface and groundwater quality. The State Water Resources Board develops a State Water Quality Control Plan, while the nine Regional Water Quality Control Boards develop Regional Water Quality Control Plans and issue waste discharge requirements (permits).

As part of surface and groundwater quality planning, the Porter-Cologne Water Quality Control Act (Porter-Cologne) regulates the discharge of fill into wetlands and other water bodies and to areas where it could impact those waters (California Water Code section 13260 *et seq.*). If the Corps has jurisdictional authority over waters under the CWA section 404, and a project applicant requires a Corps permit for work in those waters, then that project applicant must also obtain Water Quality Certification from its local Regional Water Quality Control Board (Water Board), pursuant to section 401 of the CWA, that its project will not violate State water quality standards (33 U.S.C. 1341). If the Corps does not have jurisdictional authority, then a project applicant may require a permit under Porter-Cologne. State jurisdiction over waters under Porter-Cologne can be much greater than federal jurisdiction under the CWA. However, the Water Boards generally regulate the fill of State waters where fill occurs within waters that would normally fall under Corps regulation, but have been excluded due to various reasons (*e.g.*, the Supreme Court's SWANCC and Tulloch Rule decisions). We believe that Porter-Cologne has the same shortcomings as the Clean Water Act as a regulatory mechanism that effectively protect California tiger salamander, that is, it provides State authority to regulate, and therefore protect, when deemed appropriate, wetlands, but does not provide authority to substantially regulate surrounding uplands that also may be essential to wetland dependent organisms such as the California tiger salamander.

Local

We are not aware of any specific county or city ordinances or regulations that provide direct protection for the California tiger salamander. The California tiger salamander may be indirectly benefiting from the increased attention being given to conversions of grasslands, oak woodlands, row-crops, and other agricultural uses to vineyards and orchards. Although some counties have begun regulating such conversions, counties within the Central California tiger salamander's range do not regulate conversions to vineyards and orchards. Such conversion has significant potential to adversely affect the Central California tiger salamander. The California tiger salamander may also directly and indirectly benefit through some city and county open space designations that coincide with salamanders and their habitats or mitigation plans for special status species that have been developed as part of their general plans.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Several other factors may threaten California tiger salamanders. These factors include exposure to various contaminants, rodent population control efforts, mosquito control, direct mortality while they are crossing roads, the species' hybridization with non-native tiger salamanders and future hybridization that is likely to occur, and certain practices associated with livestock grazing.

Contaminants

Little research has been done on the effects of contaminants to the California tiger salamander, especially with respect to agricultural pesticides. This section uses currently available salamander data and surrogate species data as the best available science. Most toxicological studies to date have been conducted on other amphibian species, in particular Anuran species (frogs and toads). These studies however provide insight to the potential risks of contaminants to the California tiger salamander.

Like most amphibians, California tiger salamanders inhabit both aquatic and terrestrial habitats during different stages of their life cycle and may be exposed to a variety of pesticides and other chemicals throughout their range. Due to their permeable skin, amphibians may be particularly vulnerable to environmental stressors such as pesticides (Blaustein and Wake 1990). Toxicants do not have to be present at lethal levels to be harmful. Toxicants at sublethal levels may still cause adverse effects such as developmental abnormalities in larvae and behavioral anomalies in adults, which can be deleterious to the exposed individuals (Hall and Henry 1992; Blaustein and Johnson 2003). Sources of chemical pollution which may adversely affect California tiger salamanders include pesticides used in agricultural, landscaping, roadside maintenance, and rodent and vector control activities, as well as hydrocarbons and other pollutants in stormwater runoff residential and urban lawn and garden care as well as industrial facilities.

Rodent Control

California tiger salamanders spend much of their lives in underground retreats, often in burrowing mammal (ground squirrel, pocket gopher, and other burrowing mammal) burrows (Loredo *et al.* 1996; Trenham 1998a, D. Cook, pers comm. 2001). Therefore,

widespread burrowing mammal control may pose threats to the salamander. California burrowing mammal control, which began in the early 1900s (Marsh 1987), may be done by trapping, shooting, fumigation of burrows, use of toxic (including anticoagulant) baits, and habitat modification, including deep-ripping of burrow areas (UC IPM internet Web site 2004).

Burrowing mammal control programs are widely conducted (frequently via bait stations placed at specific problem sites) on and around various commercial agricultural operations, including grazing/range lands and various cropland including vineyards (R. Thompson, Science Applications International Corporation *in litt.* 1998). Also, agencies, particularly flood control agencies and levee districts, conduct extensive California ground squirrel control programs around levees, canals, and other facilities they manage (Knell in litt. 2003). Pocket gopher control typically is most common around golf courses and other large, landscaped areas, and around residential homes and gardens.

Two of the most commonly used rodenticides, chlorophacinone and diphacinone, are anticoagulants that cause animals to bleed to death. These chemicals can be absorbed through the skin and are considered toxic to fish and wildlife (EPA 1985; EXOTONET 1996). These two chemicals, along with strychnine, are used to control rodents (R. Thompson, in litt. 1998). Although the effects of these poisons on California tiger salamander have not been assessed, any uses in close proximity to occupied Central California tiger salamander habitat may have various direct and indirect toxic effects. Gases, including aluminum phosphide, carbon monoxide, and methyl bromide, are used in rodent fumigation operations and are introduced into burrows by either using cartridges or by pumping. When such fumigants are used, most or all animals inhabiting the fumigated burrow are killed (Salmon and Schmidt 1984).

In addition to possible direct adverse effects of rodent control chemicals and gasses, California ground squirrel and pocket gopher control operations may have the indirect effect of reducing the number of upland burrows available to specific California tiger salamanders (Loredo-Prendeville *et al.* 1994). Because the burrow density required by California tiger salamanders is unknown, the impacts of less than total burrow loss are also unknown.

Active California ground squirrel colonies probably are needed to sustain California tiger salamanders, because inactive burrow systems become progressively unsuitable over time. Loredo *et al.* (1996) found that burrow systems usually collapsed within 18 months following cessation of California ground squirrel use, and did not report California tiger salamanders utilizing any collapsed burrows.

Mosquito Control

In addition to the use of western mosquitofish (see Factor C above), a common chemical method of mosquito control in California involves the use of methoprene. Methoprene is an insect hormone mimic which increases the level of juvenile hormone in insect larvae and disrupts the molting process. Lawrenz (1984, 1985) found that methoprene (Altosoid SR–10) retarded the development of selected crustacea that had the same molting hormones (*i.e.*, juvenile hormone) as insects, and anticipated that the same hormone may control metamorphosis in other arthropods. Because the success of many aquatic vertebrates relies on an abundance of invertebrates in temporary wetlands, any delay in insect growth could reduce the numbers and density of prey available (Lawrenz 1984, 1985). The use of methoprene could have an indirect adverse effect on California tiger salamanders by reducing the availability of prey.

Road-Crossing Mortality

Although no systematic studies of road mortality of the California tiger salamander have been conducted, we know that salamanders are killed by vehicular traffic while crossing roads (Hansen and Tremper 1993; S. Sweet, in litt. 1993; Joe Medeiros, Sierra College, pers. comm. 1993). For example, during one 15-day period in 2001 at a Sonoma County location, 26 road-killed California tiger salamanders were found (D. Cook, pers. comm. 2002). Loss of salamanders to vehicular-caused mortality in the vicinity of breeding sites can range from 25 to 72 percent of the observed salamanders crossing roads (Twitty 1941; S. Sweet, in litt. 1993; Launer and Fee l996). Mortality may be increased by associated roadway curbs and berms as low as 9 to 12 centimeters (3 to 5 in), which allow California tiger salamanders access to roadways but prevent their exit from them (Launer and Fee 1996; S. Sweet, in litt. 1998).

Vehicular usage on California roads is increasing rapidly and directly with human population growth and urban expansion. During November 2002, California's estimated total vehicular travel on State highway system roads alone was 23 billion km (14.27 billion mi) (this figure and subsequent vehicular-use data from California Department of Transportation's internet website 2003). From 1972 to 2001, the State highway system total vehicular usage rose steadily from 108.6 km to 270 billion km (67.1 to 167.8 billion mi) annually. For the California Counties in which the Central California tiger salamander may occur, State highway system total annual vehicular usage in 1999, 2000, and 2001 was 86.0, 90.0, and 92.1 billion km (53.3, 55.9, and 57.2 billion mi), respectively. Moreover, in those areas of the State in which the Central California tiger salamander occurs, road densities due to past urbanization are already high. Overall, these areas have 5,860.2 km (3,641.5 mi) of roads (and rail tracks) of all types. The range of current road (and rail) density is from 1.01 km per 100 ha (0.25 mi per 100 ac) in the Southern San Joaquin Valley, to 1.64 km per 100 ha (0.41 mi per 100 ac) in San Francisco Bay Area counties. We believe such relatively high road-use and road-density values make road-kill mortality a threat to the species, a threat that is likely continuing to grow in concert with the State's rapid growth of human population and urbanization.

Hybridization With Non-native Salamanders

Hybridization has been defined by Rhymer and Simberloff (1996) as ''interbreeding of individuals from what are believed to be genetically distinct populations, regardless of taxonomic status.'' Hybridization between species may lead to introgression, which occurs when hybrid individuals repeatedly backcross to one or both parental types so that genetic material is transferred between the two species. Natural hybridization can be an important component of evolutionary processes. However, hybridization and introgression can be cause for concern, particularly if they are the result of human activities such as the introduction of non-native taxa. In the extreme, hybridization between native and non-native taxa can lead to loss of the native taxon through ''genetic assimilation'' (Rhymer and Simberloff 1996, Allendorf *et al.* 2001). Hybridization has been implicated in the extinction of populations and species of many animal and plant taxa (Rhymer and Simberloff 1996, Allendorf *et al.* 2001), including Tecopa pupfish (*Cyprinodon nevadensis calidae*), Amistad gambusia (*Gambusia amistadensis*), and longjaw cisco (*Coregonus alpenae*) (Rhymer and Simberloff 1996).

We are concerned about the threat of genetic contamination and assimilation

of California tiger salamanders by non-native tiger salamanders. Non-native tiger salamanders (*Ambystoma tigrinum mavortium*) were introduced into central California as bass bait in the mid-1900s (Riley *et al.* 2003, Fitzpatrick and Shaffer *in review*). Two studies (Riley *et al.* 2003, Fitzpatrick and Shaffer *in review*) have dealt with hybridization between these two species relative to habitat types commonly used by the species. The authors identified diagnostic genetic markers from mtDNA and nuclear DNA (*i.e.*, markers that distinguish between *A. tigrinum* and California tiger salamander). These markers were used to study the course of hybridization between these species in various situations.

Riley *et al.* (2003) examined hybridization between California tiger salamanders and non-native tiger salamanders at a study site in Monterey County. They found clear evidence that the two species are interbreeding in the wild and that they are producing viable and fertile hybrid offspring. The authors suggest, however, that the extent of genetic mixing depends on the breeding habitat, with pure California tiger salamanders more likely to occur in natural habitats than in artificial or disturbed ones. Vernal pools contained significantly fewer larvae with hybrid genotypes (genetic composition) and significantly more pure parental genotypes than expected. In contrast, there was little evidence of barriers to gene exchange in artificial breeding ponds. Since many available breeding ponds are artificial or highly modified, the authors believe that barriers preventing genetic exchange in natural breeding ponds are unlikely by themselves to prevent merging of the two taxa. This result indicates that concern about contamination, and possibly assimilation, of California tiger salamanders by non-native salamanders is not unfounded because barriers which might prevent genetic exchange do not appear absolute, particularly in artificial or highly modified habitats.

Fitzpatrick and Shaffer (*in review*) further analyzed the frequencies of hybrid genotypes in breeding habitats, focusing on natural vernal pools, ephemeral man-made cattle pools and perennial man-made ponds. They found that perennial ponds contained a preponderance of non-native alleles (alternative forms of a gene). They suggested that this may be because *A. tigrinum* (1) has a more flexible breeding phenology than California tiger salamander (and therefore, can take advantage of perennial ponds by breeding earlier in the fall) and (2) exhibits facultative paedomorphosis (retention of larval characteristics as an adult). These two characteristics of *A. tigrinum* may increase the relative ability of non-native alleles to persist in perennial ponds.

Riley *et al.* (2003) and Fitzpatrick and Shaffer (*in review*) show that the extent of hybridization between *A. tigrinum* and California tiger salamander may depend on the breeding habitat used (*i.e.*, artificial and highly modified habitats may facilitate hybridization) and that, in at least some circumstances (*e.g.*, where there are perennial ponds), non-native genes may be more likely to persist than native genes.

Using mtDNA and nuclear DNA markers as described above, researchers have examined the geographic extent of hybridization between *A. tigrinum* and California tiger salamander (Shaffer and Trenham 2002, H.B. Shaffer in litt. 2003). Hybridization has been found to varying degrees in the Central Coast, Bay Area, and the Central Valley portions of the California tiger salamander's range (Shaffer and Trenham 2002, H.B. Shaffer in litt. 2003, Service 2004). Of particular concern is the widespread hybridization within the Central Coast. Introduced genes have been found from southern Santa Clara County throughout most of Monterey County down to Fort Hunter Liggett on the San Luis Obispo County line, and east across all of San Benito County where California tiger salamanders occur (H.B. Shaffer in litt. 2003). We believe hybridization is a serious threat in the Central Coast region of California tiger salamander. Within this region, virtually all Monterey County populations of the California tiger salamander have been compromised by non-native genes, and every population of the California tiger salamander at Fort Hunter Liggett is either introduced or a hybrid mixture (H.B. Shaffer in litt. 2003).

Also of concern is the advancement of hybrid genes observed over the last decade. Salamander tissues collected ten or more years ago at the former Fort Ord and in the upper Carmel Valley were all pure California tiger salamander. However, material collected in May, 2003, at the former Fort Ord, and two years ago in the Carmel Valley contained introduced genes, suggesting that introduced genes are moving into new areas. In addition, introduced genes were recently detected from material collected in eastern Merced County, suggesting that human-mediated movement of introduced salamanders may still be occurring (Shaffer in litt. 2003). These changes in the distribution of hybridization indicate that the threat from hybridization is likely to increase in the future.

Using GIS, we estimated the number of Central California tiger salamander records (presumably California tiger salamanders without non-native genes present) that were threatened by hybridization (Service 2004). We considered a California tiger salamander record threatened by hybridization if the record was within 2.1 km (1.3 mi) of a hybridized or nonnative tiger salamander observation. Locations of hybridized or non-native tiger salamander locations were provided by Dr. H. Bradley Shaffer of University of California at Davis. Other records also were considered threatened if they were part of a larger polygon that consisted of multiple records (see Service Analysis of Central California Tiger Salamander Habitat above), located within 2.1 km (1.3 mi) of a hybridized or nonnative tiger salamander observation. Our assumptions were that if a nonnative or hybridized tiger salamander was within 2.1 km (1.3 mi) (based on the maximum observed migration distance of a tiger salamander, Sweet in litt. 1998) of a California tiger salamander record, then the nonnative or hybridized tiger salamander would be able to migrate to the pure salamander breeding site and breed with the California tiger salamanders at that location. Additionally, if the non-native or hybrid was located within 2.1 km (1.3 mi) of a polygon consisting of multiple records, then there would be sufficient intervening breeding habitat located within the polygon to allow for the nonnative or hybrid tiger salamanders to migrate to and breed with the California tiger salamander records within the polygon.

Using this analysis, we determined that 48 records (22 percent) in the Bay Area region, 56 records (78 percent) in the Central Coast region, and 27 records (8 percent) in the Central Valley region were threatened by hybridization because of their close proximity to nonnative and hybridized tiger salamanders (Service 2004).

Nonnative salamanders are not known to occur within the range of the California tiger salamander in Sonoma County. In Santa Barbara County, nonnative tiger salamanders are known from the Lompoc Federal Penitentiary. The closest known California tiger salamander breeding pond is approximately 8 mi (12.9 km) from the Penitentiary.

In summary, we believe that the available information indicates that the California tiger salamander is at risk from genetic contamination, and possibly genetic assimilation. The

course of hybridization and introgression appears particularly aggressive in artificial and highly modified habitats and perennial ponds (Riley *et al.* 2003, Fitzpatrick and Shaffer *in review*). Evidence of hybridization has been found in three geographic areas (*i.e.*, Central Coast, Bay Area and Central Valley) within the Central California tiger salamander's range (Shaffer and Trenham 2002, Shaffer in litt. 2003, Service 2004). In areas where hybrid individuals are already prevalent, such as the Central Coast, we believe it is not unreasonable to consider that the California tiger salamander portion of the genome may be reduced and could even be lost entirely.

Livestock Grazing

Suitably managed livestock (cattle, sheep, and horses) ranch land is generally thought to be compatible in many cases with the successful use of rangelands by the California tiger salamander (T. Jones, in litt. 1993; Shaffer *et al.* 1993; Loredo *et al.* 1996; S. Sweet, pers. comm. 1998; H. B. Shaffer and P. Trenham, pers. comm. 2003; Alveraz in litt. 2003; Barry in litt. 2003; Bobzien in litt. 2003; Kolar in litt. 2003). By maintaining shorter vegetation, grazing may make areas more suitable for California ground squirrels whose burrows are essential to California tiger salamanders.

The long-term effect of ranching on the species is either neutral or beneficial, as long as burrowing rodents are not completely eradicated, because the California tiger salamander would have likely been extirpated from many areas if stock ponds had not been built and maintained for livestock production (see also Special Rule below.)

Conclusion

As discussed in the Summary of Factors Affecting the Species above, we have identified a number of threats to the California tiger salamander. In earlier actions we listed the Santa Barbara and Sonoma County DPSs of the species and identified the threats to those populations. Here we identify threats to the Central population of the species as well as re-evaluate the threats to the Santa Barbara and Sonoma populations and conclude that the California tiger salamander is threatened throughout its range. The primary threats throughout the range are habitat destruction, degradation, and fragmentation due to urbanization and conversion of habitat to intensive agriculture. Other circumstances that contribute to threatening the species include hybridization with non-native tiger salamanders and predation from non-native species.

While the California tiger salamander still occurs throughout much of its historic range (Trenham *et al.* 2000), researchers estimate that approximately 75 percent of the species' historic natural habitat has been lost within this range (Shaffer *et al.* 1993; see Factor A below). For example, loss of vernal pool habitat, the natural breeding habitat of California tiger salamanders, had reached 78 percent by 1997 (Holland 1998a, 1998b; CDFG 2003) and, at a continued 1.5 percent annual loss (the rate of loss during the 1980s and 1990s), is projected to reach 88 percent by 2043 (Holland 1998a). The Central California tiger salamander has been able to persist despite these losses, probably because of the presence of artificial water bodies, such as stockponds. Although the current range of the California tiger salamander approximates its historic range in size, the quality, connectivity and distribution of the habitat within the range has been substantially altered and degraded.

The past habitat loss, alteration, and degradation, along with projected future losses and further degradation, is the primary factor in our determination that the California tiger salamander meets the definition of threatened under the Act. Urban and agricultural land uses have destroyed, degraded, and altered both aquatic breeding habitat and upland estivation and dispersal habitat of the salamander, and we have reason to believe these impacts will continue in the future. Between 1990 and 2000 human population growth in the counties inhabited by California tiger salamander increased by almost 20 percent, is projected to increase by 35 percent between 2000 and 2020, and by 75 percent between 2000 and 2040 (CDF 1998, 2002). Although current data from general plans and other planned development incorporate planning over a limited time horizon (many general plans only project out to 2020), our analysis suggests that eight percent of the remaining California tiger salamander habitat will be lost in the future to such activities. Because of the limited time horizon associated with these data, and because planning for development, and development itself, is a dynamic process, we believe that eight percent is an underestimate of the likely loss of habitat to high-intensity development. Our data also suggest that an additional 18 percent of remaining Central California tiger salamander habitat is threatened by low- and very-low-density development. In addition, habitat proximate to developed areas is subject to degradation and fragmentation from human uses, including increased size and number of roads. Of the four geographic areas in the Central California population identified by Shaffer and Trenham (2002), the South San Joaquin area is the most threatened, with 14 percent of the remaining habitat projected to be lost to planned development and 35 percent threatened by low- and very-low-density development. In addition, we believe conversion of rangeland to intensive agriculture, though difficult to quantify, will result in a substantial loss of Central California tiger salamander habitat in the future.

In sum, we conclude that 75 percent of California tiger salamander habitat has already been lost and that at least 26 percent of the remaining habitat of the Central California tiger salamander is under threat from urban development and low- and very-low-density residential development. Additional habitat will also be lost as rangeland is converted to intensive agriculture.

Additionally, the Central California tiger salamander is at great risk from genetic contamination, and possibly genetic assimilation. Hybridization and introgression appear more likely in artificial and highly modified habitats and perennial ponds (Riley *et al.* 2003, Fitzpatrick and Shaffer *in review*). Hybridization has been found to varying degrees in the Central Coast, Bay Area, and the Central Valley regions of California tiger salamander (Shaffer and Trenham 2002, H.B. Shaffer in litt. 2003, Service 2004). Of particular concern is the widespread hybridization within the Central Coast. In areas where hybrid individuals are already prevalent, such as the Central Coast region, we believe it is not unreasonable to expect that the California tiger salamander portion of the genome may continue to be reduced.

A number of non-native California species, especially bullfrogs, western mosquitofish, and other non-native fish, may be adversely affecting the California tiger salamander through predation (Fisher and Shaffer 1996, Factor C). The data suggest that when these non-natives are present, California tiger salamanders and/or other native amphibians are either less abundant or completely absent (Shaffer *et al.* 1993; Loredo-Prendeville *et al.* 1994; Seymour and Westphal 1994; Laabs *et al.* 2001). Other non-native fish have either been directly implicated in predation of California tiger salamanders or appear to have the potential to prey upon them (Fisher and Shaffer 1996).

Our analysis indicates that, while existing Federal, State, or local regulatory mechanisms currently offset some of the various threats to California

tiger salamander, the protections are insufficient.

The Act defines an endangered species as one that is in danger of extinction throughout all or a significant portion of its range. The Act defines a threatened species as any species likely to become endangered within the foreseeable future throughout all or a significant portion of its range. In making this determination, we have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats faced by the California tiger salamander. Based on this evaluation, we are listing the California tiger salamander as a threatened species, as it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

Having determined that the California tiger salamander is threatened rangewide, we turn to the issue of the status of the Santa Barbara, Sonoma, and Central California populations. Our analysis of the status of the species rangewide has shed additional light on the status of the Santa Barbara and Sonoma County populations. In addition, once the Santa Barbara population was listed, the number of existing populations in Santa Barbara increased as efforts to locate the species increased. We now conclude that neither of these populations is currently in danger of extinction throughout all or a significant portion of its range. However, like the species as a whole, these populations are subject to a significant threat of additional habitat loss and fragmentation, as well as other secondary threats. Given their smaller ranges and populations, the Santa Barbara and Sonoma County populations remain at higher risk than the species as a whole, which as discussed above, we have determined is threatened. Similarly, we have determined that the Santa Barbara and Sonoma County populations are likely to become endangered in the foreseeable future, and are also threatened. Having determined that the Santa Barbara and Sonoma populations have the same listing status as the taxon as a whole, we are removing these populations as separately listed DPSs.

Special Rule

Section 4(d) of the Act imparts the authority to issue regulations necessary and advisable to provide for the conservation of threatened species. Under section 4(d), the Secretary may publish a special rule that modifies the standard protections for threatened species found under section 9 of the Act and Service regulations at 50 CFR 17.31 with special measures tailored to the conservation of the species. We believe that, in certain instances, easing the general take prohibitions on non-Federal lands may encourage continued responsible land uses that provide an overall benefit to the species. We also believe that such a special rule will promote the conservation efforts and private lands partnerships critical for species recovery (Bean, 2002; Conner and Matthews, 2002; Crouse *et al.*, 2002; James, 2002; Knight, 1999; Koch, 2002; Main *et al.*, 1999; Norton, 2000; Wilcove *et al.*, 1996). However, in easing the take prohibitions under section 9, the measures developed in the special rule must also contain prohibitions necessary and appropriate to conserve the species.

As discussed elsewhere in this final rule, the California tiger salamander faces many threats. Foremost among these is the continuing loss of California's vernal pool habitats. Historically, California's vernal pools served as the predominant breeding habitat for the California tiger salamander and were essential components for the species' stability throughout its range (Storer 1925; Feaver 1971; Zeiner *et al.* 1988; Shaffer *et al.* 1993; Jennings and Hayes 1994; Thelander 1994). With the loss of these natural habitats during the last century, alternative breeding sites have become more critical for the continued survival of the California tiger salamander.

Stock ponds created for livestock ranching are important alternative breeding sites for the California tiger salamander, as evidenced by the substantial number of salamander locality records from these artificial habitats (CNDDB 2002). While various activities associated with livestock operations may result in inadvertent take of salamander adults, juveniles, or eggs, livestock ranching stock ponds with suitable adjacent upland habitat provide valuable refugia for the remaining California tiger salamander. Maintaining California tiger salamander use of stock ponds on livestock ranches for breeding appears to be a critical link in the conservation and recovery of this species. For this reason, we are today finalizing a special rule under section 4(d) of the Act which would exempt routine livestock ranching activities on private or Tribal lands, where there is no Federal nexus, from the take prohibitions under section 9 of the Act. The special rule applies to those situations, whether currently existing or that may develop in the future, where livestock ranching is the primary land use or livelihood and where the routine activities are essential for the continued operation of the livestock ranch.

Special rules developed under section 4(d) of the Act are published in the **Federal Register** concurrent or subsequent to the listing of a species. With the finalization of this special rule, the general regulations at 50 CFR 17.31 will not apply to the California tiger salamander. Our rationale behind the development of the special rule is discussed below.

Livestock ranching is a dynamic process, which requires the ability to adapt to changing environmental and economic conditions. However, many of the activities essential to successful ranching are considered routine, and are undertaken at various times and places throughout the year as need dictates. Although this special rule is not intended to provide a comprehensive list of those ranching activities considered routine, some examples include: maintenance of stock ponds; fence construction for grazing management; planting, harvest, and rotation of unirrigated forage crops; maintenance and construction of corrals, ranch buildings, and roads; discing of field sections for fire prevention management; control of noxious weeds by prescribed fire or by herbicides; placement of mineral supplements; and rodent control.

Routine activities associated with livestock ranching have the potential to affect California tiger salamander. Some routine activities have the potential to positively affect salamanders (*e.g.*, creation of suitable stock pond breeding habitats), while other activities may be neutral with respect to salamander effects (*e.g.*, construction of ranch buildings in areas unsuitable for salamander occupation). However, other routine ranching activities have the potential to negatively affect salamanders, depending on when and where the activities are conducted (*e.g.*, direct take from discing and/or grading of salamander-occupied upland aestivation habitat).

While section 9 of the Act provides general prohibitions on activities that would result in take of a threatened species, the Service recognizes that routine ranching activities, even those with the potential to inadvertently take salamanders, may be necessary components of livestock operations. The Service also recognizes that it is, in the long-term, a benefit to the California tiger salamander to maintain, as much as possible, those aspects of the ranching landscape that can aid in the recovery of the species. We believe this special rule will further conservation of the species by discouraging further

conversions of the ranching landscape into habitats unsuitable for the California tiger salamander and encouraging landowners and ranchers to continue managing the remaining landscape in ways that meet the needs of their operation and provide suitable habitat for the California tiger salamander.

Routine Livestock Ranching Activities Exempted by the Special Rule

The activities mentioned above and discussed below are merely examples of routine ranching activities that would be exempted by the special rule, with the exception of use of burrow fumigants. Routine activities may vary from one ranching operation to another, and vary with changing environmental and economic conditions. Routine ranching activities include the activities described below, and any others that a rancher may undertake to maintain a sustainable ranching operation. Our premise for not attempting to regulate routine activities is that, ultimately, we believe that a rancher acting in the best interest of maintaining a sustainable ranching operation also is providing incidental but significant conservation benefits for the California tiger salamander.

In this special rule, we describe and recommend best management practices for carrying out routine ranching activities in ways that would minimize take of salamanders, but we do not require these practices. Overall, we believe that minimizing the regulatory restrictions on routine ranching activities will increase the likelihood that more landowners will voluntarily allow salamanders to persist or increase on their private lands, and that the impacts to salamanders from such activities are far outweighed by the benefits of maintaining a rangeland landscape in which salamanders can co-exist with a ranching operation, as opposed to alternative land uses in which salamanders would be eliminated entirely. For reasons discussed below, we did not exempt rodent control by burrow fumigants. We have exempted other methods of rodent control and believe there are enough alternative methods that would be exempt under this special rule that lack of an exemption for burrow fumigants should not constrain a ranching operation or work in a manner contrary to our intent to encourage conservation of California tiger salamanders on private rangelands through this special rule.

Sustainable Livestock Grazing. The act of grazing livestock on rangelands in a sustainable manner (*i.e.*, not overgrazed to the point where rangeland is denuded and compacted) has the potential for take of the California tiger salamander. Grazing livestock in California tiger salamander-occupied areas may trample individual salamanders as they move to and from their upland habitats, or as adults and newly metamorphosed juveniles leave breeding ponds. Salamander eggs and larvae located along a pond edge may also be trampled by livestock. Salamanders of all life stages may also be taken as a result of livestock altering the water quality and physical characteristics of breeding ponds. Physical perturbation of pond edges by milling livestock may increase siltation of the pond, potentially smothering salamander eggs or larvae, and may increase the difficulty for passage of juveniles out of the ponds into upland shelters. Water chemistry parameters of breeding ponds, such as pH or nitrogen levels, may be altered by the introduction of livestock wastes. Such water quality changes may be detrimental to all salamander life stages present in a breeding pond (Worthylake and Hovingh 1989; Ouellet 2000; Rowe and Freda 2000).

In contrast, sustainable grazing may benefit the California tiger salamander in several ways. Sustainable grazing may make areas surrounding potential salamander breeding ponds more suitable for colonization by California ground squirrels, which are commonly found inhabiting well-grazed pasturelands (Jameson and Peeters 1988). Ground squirrel colonization produces burrows that are vitally important in the life cycle of the California tiger salamander, serving as shelters and aestivation sites for the terrestrial adult and juvenile salamanders (Seymour and Westphal 1994). The presence of ground squirrel burrows may be an important factor determining whether ponds can become successful salamander breeding sites. Sustainable grazing around natural pools may also benefit the California tiger salamander by extending the inundation period (Barry, UC Davis, 2003, *in litt.*). Amphibian larvae must grow to a critical minimum body size before they can metamorphose to the terrestrial stage; therefore, the longer a breeding site remains inundated, the greater the likelihood for juvenile production and survival (Semlitsch *et al.* 1988; Pechmann *et al.* 1989; Morey 1998; Trenham 1998b). By cropping fast-growing vegetation around breeding pools, which would otherwise accelerate transpiration, desiccation of the breeding site may be delayed (Barry, UC Davis, 2003, *in litt.*). The potential benefits of sustainable livestock grazing, according to normally acceptable and established levels of intensity to prevent overgrazing, provide justification for including this routine activity in today's special rule.

Stock Pond Management and Maintenance. Stock ponds are necessary components of livestock ranching in many parts of the California tiger salamander range, due to California's dry summer climate and the limited availability of naturally occurring water. As discussed previously, created stock ponds may serve as alternative breeding sites for the California tiger salamander in the absence of natural vernal pool or seasonal pond habitats. Once a stock pond is occupied as a California tiger salamander breeding site, however, salamanders may be vulnerable to take from the routine activities necessary to manage and maintain the stock pond for continued livestock use.

Hydroperiod management (*i.e.*, the amount of time the stock pond contains water) of California tiger salamander-occupied stock ponds may be so short that salamander larvae cannot complete metamorphosis, or so long that species known to prey on salamanders may become naturally established (Shaffer *et al.* 1993; Seymour and Westphal 1994). Stock ponds with suitable hydroperiods for salamander breeding cycles may require ongoing maintenance to protect water supplies and the integrity of the storage system. Routine maintenance activities can include periodic dredging, dam or berm repair, and mechanical or chemical control of aquatic vegetation. If any of these activities are conducted during the California tiger salamander breeding season, take of salamanders may occur. In addition, stock ponds may become infested by mosquitoes, requiring controls in order to protect human or livestock health. Mosquito infestations may be controlled by pesticide applications or by the introduction of non-native fish species that prey on mosquitoes. Take of salamanders may occur if pesticide applications are made during the California tiger salamander breeding season. However, regardless of what time of year non-native fish are introduced for mosquito control, they may become established in the stock pond and prey on salamanders during the breeding season. For the purposes of this special rule, we considered these various activities with regard to whether they could be readily adapted to avoid take of the California tiger salamander.

Hydroperiod management is likely dependent on many factors, including the annual water needs of the livestock operation and the local hydrological

conditions (*e.g.*, annual water availability). In any given year, these variables may cause a ranching operation to adjust a stock pond's hydroperiod in ways that could potentially disrupt the California tiger salamander breeding cycle, resulting in take of salamander adults, juveniles, or eggs. Although stock pond hydroperiods can theoretically be readily adapted to avoid take by maintaining an optimal breeding period for the California tiger salamander, we recognize that the continued viability of a livestock ranching operation may depend on the flexibility to make these hydroperiod adjustments on short notice. We also acknowledge the Service would not be able to provide timely technical assistance to most land managers. For these reasons, routine hydroperiod management of ranching operation stock ponds is included in the special rule.

Periodic dredging to counter the long-term effects of siltation and the maintenance or repair of containment structures (*e.g.*, dams, berms, levees) are activities necessary to maintain stock pond utility and integrity (N. Cremers, 2003, *in litt.*). Although these actions may result in take of salamanders if they coincide with the California tiger salamander breeding season, the need to conduct these maintenance activities is episodic and should not be necessary on a regular basis. In addition, we believe it is unlikely that these activities would be necessary during the California tiger salamander breeding season, except in the case of emergency repairs on a catastrophic breach, as a stock pond's integrity for the spring and summer grazing season should be ensured prior to the previous year's rainy winter season. We believe the infrequent nature of these routine activities, coupled with the likelihood that they will be conducted outside of the California tiger salamander breeding season, will have minimal impacts on salamanders in occupied stock ponds. For these reasons, the routine activities of periodic dredging and containment structure maintenance for ranching operation stock ponds are included in this special rule.

Aquatic vegetation, whether rooted or free-floating, may impede stock pond functionality. Control of this vegetation may be mechanical, (*e.g.*, harvesters, rakes, skimmers), chemical (*e.g.*, aquatic herbicides), or biological (*e.g.*, introduced herbivorous fish). Biological controls, such as the sterile grass carp (*Ctenopharyngodon idella*), would pose no predation threat to salamanders; however, this type of control is only for established year-round ponds which are typically not suitable habitat for California tiger salamander reproduction (Shaffer *et al.* 1993; Seymour and Westphal 1994). Vegetation control may also be necessary in temporary stock ponds which do provide suitable habitat, and both mechanical and chemical control methods may result in inadvertent take of salamanders if conducted during the California tiger salamander breeding and juvenile metamorphosis season. It is unlikely that vegetation control would be needed during the breeding period, as the primary time for explosive vegetative growth is during the warm summer months. However, vegetation control may be necessary prior to juvenile salamander dispersal into summer aestivation sites.

Mechanical controls may perturb the breeding habitat or cause death or injury to resident salamanders; however, these impacts would be restricted in time to singular control events. In contrast, chemical control using aquatic herbicides may have little immediate physical impact on salamanders or breeding habitat, but may negatively impact salamander health or reproductive fitness for an indefinite time beyond the control event. While no definitive link has been made between aquatic herbicide exposure and effects to the California tiger salamander, toxicity data in the scientific literature suggest that amphibians may be susceptible to adverse impacts from both the active and inert ingredients in various herbicide products (see Summary of Factors Affecting the Species). In addition, because aquatic herbicides disperse throughout a water body, all salamanders within the water body may potentially be exposed.

We recognize that routine aquatic vegetation control may be essential for the continued operation of stock ponds, and that this activity may not be readily adapted (*e.g.*, postpone control until after salamander use of stock ponds is discontinued) to avoid take of the California tiger salamander. Although both mechanical and chemical controls have the potential to negatively impact salamanders, we believe mechanical controls pose less long-term risk to breeding populations of California tiger salamander. For the reasons outlined above, the routine activity of aquatic vegetation control in ranching operation stock ponds is included in this special rule. While chemical control of aquatic vegetation in stock ponds is included under the special rule exemption, the Service recommends that this activity only be conducted outside of the general breeding season (November through June) and larval stage of the California tiger salamander.

Mosquito abatement in aquatic systems is similar to vegetation management, in that several control methods exist. The aquatic mosquito larvae can be controlled by chemical larvicides (*e.g.*, temephos and methoprene), bacterial larvicides, or biological organisms (*e.g.*, predaceous mosquitofish). In addition, mosquito larvae can be controlled through breeding source reduction and proper water management. Bacterial larvicides are especially target-specific, and likely pose little risk to salamanders using a stock pond; however, these products must be applied in specific timeframes during larval mosquito development to be efficacious. A broader range of non-target effects may be seen from chemical larvicides, with the potential for direct impacts on higher order taxonomic groups such as salamanders (Ankley *et al.* 1998; Blumberg *et al.* 1998; Sparling 1998). Biological organisms such as mosquitofish may become established in the affected water body and prey on juvenile salamanders (Graf and Allen-Diaz 1993; Leyse and Lawlor 2000).

While mosquito control in stock ponds may be a routine activity on ranching operations, we believe it unlikely that control would be necessary during much of the California tiger salamander breeding season, as this period coincides with the rainy winter and spring months. However, when control cannot be avoided during the latter part of the California tiger salamander breeding season, we believe mosquito control activities can be readily adapted to prevent or minimize potential take of salamanders by appropriate water level management and/or the proper application of bacterial larvicides. For this reason, these routine activities are included in this special rule. Also included in the special rule is the routine activity of properly applying (*i.e.*, following label directions and product precautions) either chemical or bacterial larvicides into ranching operation stock ponds outside of the California tiger salamander general breeding season. This exemption for routine mosquito control activities from the take prohibitions under section 9 does not include the purposeful introduction at any time of non-native biological organisms (*e.g.*, western mosquitofish (*Gambusia affinis*)) that may prey on California tiger salamander adults, larvae, or eggs.

Rodent Control. As discussed previously, the burrow complexes of various ground dwelling mammals are vitally important in the life cycle of the California tiger salamander. These burrows serve as shelters and estivation

sites for the terrestrial adult and juvenile salamanders (Seymour and Westphal 1994). In addition, the presence of these burrows near suitable water bodies may be critical for any water body to become a successful, long-term breeding site for the California tiger salamander. It has been estimated that 95 percent of the adult and subadult salamanders from a large breeding pool would require an area of adjacent upland habitat extending out approximately 650 m (0.4 mi) (H. B. Shaffer, in litt. 2003).

Burrowing rodents, particularly the California ground squirrel, may pose problems for livestock ranching operations to such an extent that control measures are necessary. Ground squirrels in sufficient numbers may deplete livestock forage, while their burrows may be a physical hazard for humans, livestock, and ranching machinery (N. Cremers, in litt. 2003). Common control measures for these rodents include shooting, poisoning with approved pesticides, and mechanical modification of burrow complexes (UCIPM Internet website 2003). While shooting of ground squirrels poses little risk to salamanders, the application of pesticides or the disruption of salamander aestivation sites may result in take of the California tiger salamander. Because the location of burrow complexes cannot be predicted or controlled, rodent control measures must be site-specific and cannot be redirected. Thus, the activity of controlling ground squirrels may not be readily adapted to avoid implementation in salamander habitats. However, because various control options are available that may minimize or prevent the potential for take of California tiger salamander, routine rodent control activities are included in this special rule.

Burrowing Rodent Control by Pesticide Application. Controlling burrowing rodents with pesticides is generally accomplished through the application of toxicant-treated grains, which are ingested by the target animals, or by the introduction of fumigants (*e.g.*, toxic or suffocating gasses) into burrow complexes. Fumigants are not target-specific, and all organisms inhabiting a treated burrow complex will likely be subject to the effects of the pesticide (*i.e.*, toxicant exposure or oxygen depletion). Although specific data are not available on the effects of fumigants on the California tiger salamander, the permeable skin of amphibians is likely to increase a salamander's susceptibility to adverse effects from exposure to toxicants (Henry 2000). We believe it is necessary to reduce the impact of fumigants on sheltering or aestivating salamanders (a March 1993 national consultation on the effects of vertebrate control agents reached jeopardy conclusions for several California species that use rodent burrows), and this control measure should be prohibited in areas used by the California tiger salamander. Based on the habitat requirement estimates presented above, this prohibition should extend 1.1 km (0.7 mi) in any direction from a water body, natural or human-made, suitable for California tiger salamander breeding. The application of fumigants outside of this area restriction is not prohibited.

Toxicant-treated grains, primarily using anticoagulant compounds, may be applied by several methods to control burrowing rodents (Silberhorn *et al.* 2003). Grains may be broadcast over the ground surface at defined rates, placed in confined bait stations, or placed into burrow openings. Ground squirrels and other rodents ingest these baits, and mortality of the exposed animal results from internal hemorrhaging. No data were found on the toxicity of these anticoagulant compounds to salamanders, although it is possible that exposure to these baits may cause similar adverse effects in salamanders. It is highly unlikely that salamanders would directly ingest any grains encountered; however, indirect exposure to the pesticides through dermal contact may occur if the treated grains are placed into salamander-occupied burrows. In addition, there may be potential for secondary exposure from this application method if estivating salamanders consume burrow-dwelling invertebrates that have ingested the treated grains. While no definitive risk assessment can be made for these possible exposures, we believe this application method would result in an increased risk for take of the California tiger salamander and should therefore be avoided whenever possible.

Salamanders may also face these potential indirect and secondary exposures from the broadcast and bait station application methods. However, by widely dispersing the treated grains over the ground surface, the broadcast application method likely reduces the probability of migrating salamanders being exposed through dermal contact or through ingestion of exposed invertebrates. Similarly, it is unlikely that salamanders would enter a confined bait station, further reducing the probability of exposure. While we are not endorsing the use of rodenticides for ground squirrel or other rodent control, we believe these two application methods (*i.e.*, broadcast surface treatments or confined bait stations) present a lower risk to the California tiger salamander than the burrow-placement method. For the reasons outlined above, broadcast and confined bait station application as part of routine livestock ranch operations are included in the special rule.

Burrowing Rodent Control by Habitat Modification. Colonies of ground squirrels and other burrowing rodents are sometimes controlled by using cultivation equipment to destroy or modify burrow complexes. The technique of deep-ripping is likely to result in complete destruction of the burrow complex and eradication of the rodent colony. Any salamanders using these burrows as sheltering or aestivation sites would also likely be killed by this activity. Discing of these burrow systems, followed by surface grading, removes the physical hazard of open holes and may successfully suppress the rodent colony. This process may not destroy the entire burrow complex, with the possibility of some burrows remaining intact. However, sheltering or aestivating salamanders may also suffer substantial mortality from this control method.

While modification of a burrow complex may aid in controlling a rodent colony, the primary benefit of such modification for ranching operations is the elimination of the physical hazards associated with burrows and burrow openings (N. Cremers, in litt. 2003). This may be particularly important for areas where livestock congregate in large numbers, such as corrals and stock pond watering sites. Because stock ponds have become important alternative breeding sites for the California tiger salamander, the extent of potential take may be directly related to the intensity of burrow complex modification around such sites. Large-scale modification of these habitats around a stock pond known to support salamanders would have the potential to eliminate or drastically reduce that localized breeding population of the California tiger salamander. As discussed previously, the majority of a localized breeding salamander population may be found in an area of adjacent upland habitat extending out up to 1.1 km (0.7 mi) in any direction from the breeding pond (H. B. Shaffer, in litt. 2003).

The Service recognizes that physical modification of rodent burrow complexes may be an essential activity to ranching operations. However, while habitat modification may not be a widespread practice for livestock

ranches, we believe that an unmoderated approach to this activity could have the potential for large-scale take of the California tiger salamander in certain locales. Adverse effects upon California tiger salamander that could result from large-scale modifications could include both direct injury or mortality and significant loss of suitable sheltering and aestivation habitats. We believe that a focused approach to burrow habitat modification would serve to achieve the dual goals of minimizing take of the California tiger salamander and reducing livestock ranching losses. To this end, rodent control through burrow modification is included in this special rule; however, the Service recommends that discing and/or grading of burrows should be limited to those areas where livestock congregate or move in large numbers. The Service also recommends that modification by deep-ripping be avoided within 1.1 km (0.7 mi) of known or potential salamander breeding ponds. We recognize that discing and/or grading around stock ponds or other suitable breeding pools may increase the risk to salamanders, and we encourage ranch operators to minimize the modification footprint around these sites as much as possible. We will continue to work with the livestock ranching community in developing and refining ways to attain these dual objectives.

Fire Prevention Management. In order to prevent or minimize the spread of wildfires in rangelands, livestock ranches may need to construct fire breaks in various places throughout the property. These fire breaks may be constructed by using cultivation equipment to create swaths of unvegetated land along property boundaries or between fields. If these fire breaks are constructed over rodent burrow complexes that are suitable sheltering or aestivation habitat for salamanders, there is the potential for take of the California tiger salamander. However, the Service recognizes the critical importance of fire prevention management in rangelands, and is thereby including this routine ranching activity in the special rule.

Monitor Impacts on the California Tiger Salamander. While it appears that the California tiger salamander may be benefiting from the creation of stock ponds and the prevention of rangeland conversion to unsuitable habitat throughout its range, much remains to be learned about the effects of livestock ranching activities on the salamander. We have concluded that developing a conservation partnership with the livestock ranching community will allow us to answer important questions about the impact of various ranching activities, and will provide valuable information to assist in the recovery of the species. We further believe that, where consistent with the discretion provided by the Act, implementing policies that promote such partnerships is an essential component for the recovery of listed species, particularly where the species occur on private lands. Conservation partnerships can provide positive incentives to private landowners to voluntarily conserve natural resources, and can remove or reduce disincentives to conservation (Bean, 2002; Conner and Matthews, 2002; Crouse *et al.*, 2002; James, 2002; Knight, 1999; Koch, 2002; Main *et al.*, 1999; Norton, 2000; Wilcove *et al.*, 1996). The Service will work closely with the ranching community and others in developing ways to monitor impacts on the California tiger salamander from the routine activities described above. We conclude this commitment is necessary and appropriate, and will provide further insights into land stewardship practices that foster the continued use of California's rangelands in ways beneficial to both the California tiger salamander and the livestock ranching community.

Critical Habitat

Critical habitat is defined in section 3 of the Act as the—(i) specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species, and (II) that may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary of the Interior (Secretary) designate critical habitat at the time the species is determined to be endangered or threatened. Our implementing regulations (50 CFR 424.12(a)) state that critical habitat is not determinable if information sufficient to perform the required analysis of impacts of the designation is lacking, or if the biological needs of the species are not sufficiently well known to allow identification of an area as critical habitat. Section 4(b)(2) of the Act requires us to consider economic and other relevant impacts of designating a particular area as critical habitat on the basis of the best scientific data available. The Secretary may exclude any area from critical habitat if she determines that the benefits of such exclusion outweigh the conservation benefits, unless to do so would result in the extinction of the species. In the absence of a finding that critical habitat would increase threats to a species, if any benefits would derive from critical habitat designation, then a prudent finding is warranted. In the case of this species, designation of critical habitat may provide some benefits.

The primary regulatory effect of critical habitat is the section 7 requirement that agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. Examples could include unoccupied habitat or occupied habitat that may become unoccupied in the future. Designating critical habitat may also produce some educational or informational benefits. Therefore, designation of critical habitat for the Central California tiger salamander population is prudent and the proposed designation will be published in an upcoming **Federal Register**. We proposed critical habitat for the Santa Barbara population on January 22, 2003 (69 FR 19364). We will finalize critical habitat for the Santa Barbara California tiger salamander population by the court-ordered deadline of November 15, 2004. We intend to publish a proposed rule to designate critical habitat for the Sonoma population in the future.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages conservation actions by Federal, State, and local agencies. The Act provides for possible land acquisition and

cooperation with the State and requires that recovery actions be carried out for listed species. We discuss the protection from the actions of Federal agencies, considerations for protection and conservation actions, and the prohibitions against taking and harm for the California tiger salamander, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed to be listed or is listed as endangered or threatened, and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Federal agencies are required to confer with us informally on any action that is likely to jeopardize the continued existence of a proposed species, or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal agency action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us. Federal agency actions that may affect the California tiger salamander throughout its range and may require consultation with us include, but are not limited to, those within the jurisdiction of the Corps and Federal Highway Administration (FHA).

We believe that protection and recovery of the California tiger salamander will require reduction of the threats from destruction, fragmentation, and degradation of wetland and associated upland habitats due to urban development, conversion of habitat to intensive agriculture, predation by non-native species, disease, contaminants, agricultural and landscaping contaminants, rodent and mosquito control, road-crossing mortality, hybridization with non-native tiger salamanders, and some livestock grazing practices. Threats from pesticide drift also must be reduced. These threats should be considered when management actions are taken in habitats currently and potentially occupied by the California tiger salamander, and areas deemed important for dispersal and connectivity or corridors between known locations of this species. Monitoring also should be undertaken for any management actions or scientific investigations designed to address these threats or their impacts.

Listing the California tiger salamander as a whole provides for the development and implementation of a rangewide recovery plan. This plan will bring together Federal, State, and regional agency efforts for the conservation of the California tiger salamander. A recovery plan will establish a framework for agencies to coordinate their recovery efforts. The plan will set recovery priorities and estimate the costs of the tasks necessary to accomplish the priorities. It also will describe the site-specific actions necessary to achieve conservation and survival of the species.

Listing also will require us to review any actions that may affect the California tiger salamander as a whole for lands and activities under Federal jurisdiction, State plans developed pursuant to section 6 of the Act, scientific investigations of efforts to enhance the propagation or survival of the animal pursuant to section 10(a)(1)(A) of the Act, and habitat conservation plans prepared for non-Federal lands and activities pursuant to section 10(a)(1)(B) of the Act.

Federal agencies with management responsibility for the California tiger salamander include the Service, in relation to the issuance of section 10(a)(1)(A) and (B) permits for scientific research, habitat conservation plans, and other programs. Occurrences of this species could potentially be affected by projects requiring a permit from the Corps under section 404 of the CWA. The Corps is required to consult with us on applications they receive for projects that may affect listed species. Highway construction and maintenance projects that receive funding from the FHA would be subject to review under section 7 of the Act. In addition, activities that are authorized, funded, or administered by Federal agencies on non-Federal lands will be subject to section 7 review.

The Act and implementing regulations found at 50 CFR 17.31 set forth a series of general prohibitions and exceptions that apply to all threatened wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or attempt any such conduct), import, export, transport in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to our agents and State conservation agencies. In this case, we propose a special rule tailored to this particular species to take the place of the regulations in 50 CFR 17.31. The special rule, though, incorporates most requirements of the general regulations, along with additional exceptions.

Permits may be issued under section 10(a)(1) of the Act to carry out otherwise prohibited activities involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32 for threatened species. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Habitat conservation plans (HCPs) provide one mechanism for reconciling potential conflicts between project actions and incidental take of listed species. The Service is actively working with the Fort Ord Reuse Authority on developing a Habitat Conservation Plan (HCP) in compliance with section 10 of the Act. The California tiger salamander is proposed to be covered under this developing HCP. HCPs reconcile the authorization of incidental take for species, such as the California tiger salamander, with species conservation. Consistent with the Act and its section 10 implementing regulations, a final Fort Ord HCP with an incidental take permit would provide for the conservation of California tiger salamander at Fort Ord, while allowing projects that impact California tiger salamander to move forward.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. We believe that, based on the best available information, the following actions are not likely to result in a violation of section 9, provided these actions are carried out in accordance with any existing regulations and permit requirements:

(1) Possession, delivery, including interstate transport and import or export from the United States, involving no commercial activity, of California tiger salamanders that were collected prior to the date of publication of a final regulation in the **Federal Register** adding the California tiger salamander to the list of endangered and threatened species;

(2) Any actions that may affect the California tiger salamander that are

authorized, funded, or carried out by a Federal agency, when the action is conducted in accordance with the consultation requirements for listed species pursuant to section 7 of the Act, or for which such action will not result in take;

(3) Any action taken for scientific research carried out under a recovery permit issued by the Service pursuant to section 10(a)(1)(A) of the Act;

(4) Land actions or management carried out under an HCP approved by the Service pursuant to section 10(a)(1)(B) of the Act, or an approved conservation agreement; and

(5) Grazing management practices that do not result in degradation or elimination of suitable California tiger salamander habitat and activities described in the 4(d) rule included in this notice.

Activities that we believe could potentially result in a violation of section 9 of the Act include, but are not limited to, the following:

(1) Unauthorized possession, collecting, trapping, capturing, killing, harassing, sale, delivery, or movement, including intrastate, interstate, and foreign commerce, or harming, or attempting any of these actions, of California tiger salamanders. Research activities where salamanders are trapped or captured will require a permit under section 10(a)(1)(A) of the Act;

(2) Activities authorized, funded, or carried out by Federal agencies that may affect the California tiger salamander, or its habitat, when such activities are not conducted in accordance with the consultation for listed species under section 7 of the Act;

(3) Unauthorized discharges or dumping of toxic chemicals, silt, or other pollutants into, or other illegal alteration of the quality of waters supporting California tiger salamanders that results in death or injury of the species or that results in degradation of their occupied habitat to an extent that individuals are killed or injured or essential behaviors such as breeding, feeding, and sheltering are impaired;

(4) Intentional release of exotic species (including, but not limited to, bullfrogs, tiger salamanders, mosquitofish, bass, sunfish, bullhead, catfish, crayfish) into currently occupied California tiger salamander breeding habitat;

(5) Destruction or alteration of the California tiger salamander occupied habitat through discharge of fill materials into breeding sites; draining, ditching, tilling, stream channelization, drilling, pumping, or other activities that interrupt surface or ground water flow into or out of the vernal pool, and seasonal or perennial pond habitats of this species (*i.e.*, due to the construction, installation, or operation and maintenance of roads, impoundments, discharge or drain pipes, storm water detention basins, wells, water diversion structures, etc.);

(6) Destruction or alteration of uplands associated with seasonal pools used by California tiger salamanders during estivation and dispersal, or modification of migration routes such that migration and dispersal are reduced or precluded and actual death or injury to the species results; and

(7) Activities (*e.g.*, habitat conversion, road and trail construction, recreation, development, and application of herbicides and pesticides in violation of label restrictions) that directly or indirectly result in the death or injury of larvae, juvenile, or adult California tiger salamanders, or modify California tiger salamander habitat in such a way that it adversely affects their essential behavioral patterns including breeding, foraging, sheltering, or other life functions. Otherwise lawful activities that incidentally take California tiger salamanders, but have no Federal nexus, will require a permit under section 10(a)(1)(B) of the Act.

Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section). Requests for copies of the regulations regarding listed species and inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Endangered Species Permits, 911 NE 11th Avenue, Portland OR 97232–4181 (503/231–2063; facsimile 503/231–6243).

National Environmental Policy Act

We have determined that an Environmental Assessment and Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any new collections of information other than those already approved by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned control number 1018–0094, which is valid through July 31, 2004. This rule will not impose record keeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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 control number.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ For the reasons given in the preamble, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Salamander, California tiger,'' under AMPHIBIANS, in the List of Endangered and Threatened Wildlife, as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species							
Common Name	Scientific name	Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
*	*	*	*	*	*		*
AMPHIBIANS							
*	*	*	*	*	*		*
Salamander, California tiger.	*Ambystoma californiense*.	U.S.A. (CA)	U.S.A. (CA—California).	T	744	NA	§ 17.43(c)
*	*	*	*	*	*		*

■ 3. Amend § 17.43 by adding a new paragraph (c) to read as follows:

§ 17.43 Special rule—amphibians.

* * * * *

(c) California tiger salamander (*Ambystoma californiense*).

(1) *Which populations of the California tiger salamander are covered by this special rule?* This rule covers the California tiger salamander (*Ambystoma californiense*) rangewide.

(2) *What activities are prohibited?* Except as noted in paragraph (c)(3) of this section, all prohibitions of § 17.31 will apply to the California tiger salamander.

(3) *What activities are allowed on private or Tribal land?* Incidental take of the California tiger salamander will not be a violation of section 9 of the Act, if the incidental take results from routine ranching activities located on private or Tribal lands. Routine ranching activities include, but are not limited to, the following:

(i) Livestock grazing according to normally acceptable and established levels of intensity in terms of the number of head of livestock per acre of rangeland;

(ii) Control of ground-burrowing rodents using poisonous grain according to the labeled directions and local, State, and Federal regulations and guidelines (The use of toxic or suffocating gases is not exempt from the prohibitions due to their nontarget-specific mode of action.);

(iii) Control and management of burrow complexes using discing and grading to destroy burrows and fill openings;

(iv) Routine management and maintenance of stock ponds and berms to maintain livestock water supplies (This exemption does not include the intentional introduction of species into a stock pond that may prey on California tiger salamander adults, larvae, or eggs.);

(v) Routine maintenance or construction of fences for grazing management;

(vi) Planting, harvest, or rotation of unirrigated forage crops as part of a rangeland livestock operation;

(vii) Maintenance and construction of livestock management facilities such as corrals, sheds, and other ranch outbuildings;

(viii) Repair and maintenance of unimproved ranch roads (This exemption does not include improvement, upgrade, or construction of new roads.);

(ix) Discing of fencelines or perimeter areas for fire prevention control;

(x) Placement of mineral supplements; and

(xi) Control and management of noxious weeds.

Dated: July 23, 2004.

Thomas O. Melius,

Acting Director, Fish and Wildlife Service.

[FR Doc. 04–17236 Filed 7–27–04; 3:27 pm]

BILLING CODE 4310–55–P

Federal Register

Wednesday,
August 4, 2004

Part III

Department of Housing and Urban Development

Notice of Regulatory Waiver Requests Granted for the Fourth Quarter of Calendar Year 2003; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4854–N–04]

Notice of Regulatory Waiver Requests Granted for the Fourth Quarter of Calendar Year 2003

AGENCY: Office of the Secretary, HUD.

ACTION: Notice.

SUMMARY: Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (the HUD Reform Act) requires HUD to publish quarterly **Federal Register** notices of all regulatory waivers that HUD has approved. Each notice covers the quarterly period since the previous **Federal Register** notice. The purpose of this notice is to comply with the requirements of section 106 of the HUD Reform Act. This notice contains a list of regulatory waivers granted by HUD during the period beginning on October 1, 2003, and ending on December 31, 2003.

FOR FURTHER INFORMATION CONTACT: For general information about this notice, contact Aaron Santa Anna, Assistant General Counsel for Regulations, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500, telephone (202) 708–3055 (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.

For information concerning a particular waiver that was granted and for which public notice is provided in this document, contact the person whose name and address follow the description of the waiver granted in the accompanying list of waivers that have been granted in the fourth quarter of calendar year 2003.

SUPPLEMENTARY INFORMATION:

Section 106 of the HUD Reform Act added a new section 7(q) to the Department of Housing and Urban Development Act (42 U.S.C. 3535(q)), which provides that:

1. Any waiver of a regulation must be in writing and must specify the grounds for approving the waiver;

2. Authority to approve a waiver of a regulation may be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, and the person to whom authority to waive is delegated must also have authority to issue the particular regulation to be waived;

3. Not less than quarterly, the Secretary must notify the public of all waivers of regulations that HUD has approved by publishing a notice in the **Federal Register**. These notices (each covering the period since the most recent previous notification) shall:

a. Identify the project, activity, or undertaking involved;

b. Describe the nature of the provision waived and the designation of the provision;

c. Indicate the name and title of the person who granted the waiver request;

d. Describe briefly the grounds for approval of the request; and

e. State how additional information about a particular waiver may be obtained.

Section 106 of the HUD Reform Act also contains requirements applicable to waivers of HUD handbook provisions that are not relevant to the purpose of this notice.

This notice follows procedures provided in HUD's Statement of Policy on Waiver of Regulations and Directives issued on April 22, 1991 (56 FR 16337). This notice covers waivers of regulations granted by HUD from October 1, 2003, through December 31, 2003. For ease of reference, the waivers granted by HUD are listed by HUD program office (for example: the Office of Community Planning and Development, the Office of Housing, the Office of Public and Indian Housing). Within each program office grouping, the waivers are listed sequentially by the regulatory section of title 24 of the Code of Federal Regulations (CFR) that is being waived. For example, a waiver of a provision in 24 CFR part 58 would be listed before a waiver of a provision in 24 CFR part 570.

Where more than one regulatory provision is involved in the grant of a particular waiver request, the action is listed under the section number of the first regulatory requirement that appears in 24 CFR and that is being waived. For example, a waiver of both § 58.73 and § 58.74 would appear sequentially in the listing under § 58.73.

Waivers of regulations that involve the same initial regulatory citation are in time sequence beginning with the earliest-dated regulatory waiver.

Should HUD receive additional information about waivers granted during the period covered by this report before the next report is published, the next updated report will include these earlier waivers that were granted, as well as those that occurred during January 1, 2004, through March 31, 2004.

Accordingly, information about approved waiver requests pertaining to HUD regulations is provided in the Appendix that follows this notice.

Dated: July 27, 2004.

Alphonso Jackson,

Secretary.

Appendix—Listing of Waivers of Regulatory Requirements Granted by Offices of the Department of Housing and Urban Development, October 1, 2003, through December 31, 2003

Note to Reader: More information about the granting of these waivers, including a copy of the waiver request and approval, may be obtained by contacting the person whose name is listed as the contact person directly after each regulatory waiver granted.

The regulatory waivers granted appear in the following order:

I. Regulatory waivers granted by the Office of Community Planning and Development.

II. Regulatory waivers granted by the Office of Housing.

III. Regulatory waivers granted by the Office of Public and Indian Housing.

I. Regulatory Waivers Granted by the Office of Community Planning and Development

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 91.520.

Project/Activity: Request for extension of the submission deadline for the 2002 program year for the Consolidated Annual Performance and Evaluation Report (CAPER) of Cook County, Illinois.

Nature of Requirement: The regulation at 24 CFR 91.520 requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year.

Granted By: Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

Date Granted: November 18, 2003.

Reason Waived: Cook County's program year ended on September 30, 2003, and therefore its CAPER was due December 29, 2003. The county experienced a hardship beyond its control. A fire occurred in the county building resulting in the relocation of staff to another site where they shared space with other county employees. Because of the contaminants, the staff did not have ready access to files, documents and most equipment. If an extension of the deadline for submission of the CAPER report had been denied, the county would not have been able to submit a complete and accurate expenditure report on its 2002 program. The performance report provides local residents with information on the county's accomplishments during the year, and the report data goes into

HUD's national database, which is used for various reporting purposes. While HUD desires timely reports, it is also interested in ensuring that the performance reports prepared by grantees are complete and accurate.

Contact: Nanci R. Doherty, Special Assistant to the Deputy Assistant Secretary, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, telephone (202) 708–2565.

- *Regulation:* 24 CFR 91.520.

Project/Activity: Request for extension of the submission deadline for the CAPER of the city of San Angelo, Texas.

Nature of Requirement: The regulation at 24 CFR 91.520 requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year. The city of San Angelo's program year ended on September 30, 2002, and therefore its CAPER was due December 29, 2003.

Granted By: Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

Date Granted: November 18, 2003.

Reason Waived: The city requested an extension of its submission deadline to February 16, 2004. The resignation of a key staff member responsible for preparing the CAPER and the loss of two other staff members, only one of whom could be replaced, left the city with a staff shortage. In addition, the city spent much time providing information to HUD's Office of Inspector General (OIG) regarding a public housing authority investigation, and the city's Community Development office was asked to prepare a response to the OIG report. The city also was asked to provide information to the Department of Labor concerning a labor investigation. Finally, the city's independent auditor was conducting a compliance audit of the city's HOME and CDBG programs. The time that the city spent cooperating with and gathering information for these investigations and audits was extensive and, combined with the staff losses, resulted in the city being unable to expend the time needed to prepare its CAPER. If the request for extension deadline of submission of the CAPER report had been denied, the city would not have been able to submit a complete and accurate expenditure report on its 2002 program. While HUD desires timely reports, it is also interested in ensuring that the performance reports prepared by grantees are complete and accurate.

Contact: Nanci R. Doherty, Special Assistant to the Deputy Assistant Secretary, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, telephone (202) 708–2565.

- *Regulation:* 24 CFR 91.520.

Project/Activity: Request for extension of submission deadline for the CAPER of the city of Des Plaines, Illinois.

Nature of Requirement: The regulation at 24 CFR 91.520 requires each grantee to submit a performance report to HUD within 90 days after the close of the grantee's program year. The city's program year ended September 30, 2003. Therefore, its CAPER was due December 29, 2003.

Granted By: Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

Date Granted: December 17, 2003.

Reason Waived: The city's letter of December 5, 2003, requested an extension of its submission deadline to February 27, 2004. The city's Community Development Block Grant Coordinator resigned in September 2003. The position was filled on an interim basis in October, but the city required additional time to complete the CAPER because of this change. If an extension of the deadline for submission of the CAPER had been denied, the city would not have been able to submit a complete and accurate performance report on its 2002 program. While HUD desires timely reports, it is also interested in ensuring that the performance reports prepared by grantees are complete and accurate.

Contact: Nanci R. Doherty, Special Assistant to the Deputy Assistant Secretary, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, telephone (202) 708–2565.

- *Regulation:* 24 CFR 92.502(d)(2).

Project/Activity: City of Springfield, Ohio—Investment of HOME Funds.

Nature of Requirement: The regulation at 24 CFR 92.502(d)(2) prohibits the investment of additional HOME funds in a project after one year has passed from the date of project completion. The purpose of the prohibition is to ensure that projects are brought up to all applicable standards at the time the HOME-funded work is performed and that HOME funds are not used for on-going maintenance or replacement costs.

Granted By: Roy A. Bernardi, Assistant Secretary of Community Planning and Development.

Date Granted: December 12, 2003.

Reason Waived: Chronic under-occupancy and lack of improvements to the property resulted in multiple sales and eventual foreclosure of the property. The most recent purchaser was willing to rehabilitate and maintain all the HOME-assisted units as affordable units. At HUD's request, the city extended the period of affordability by five years although the additional funding requested in combination with the original investment did not trigger the longer affordability period. The city's efforts to restore the viability of this project over several years, in light of the fact that the regulations permit the restrictions to lapse in the event of foreclosure, constituted good cause for a waiver.

Contact: Nanci R. Doherty, Special Assistant to the Deputy Assistant Secretary, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, telephone (202) 708–2565.

- *Regulation:* 24 CFR 92.503(b).

Project/Activity: State of Colorado—Repayment of HOME Funds.

Nature of Requirement: The regulation at 24 CFR 92.503(b) requires the repayment of HOME funds in the event a property does not meet the HOME affordability requirements for the period of time specified in 24 CFR 92.252 or 92.254.

Granted By: Roy A. Bernardi, Assistant Secretary for Community Planning and Development.

Date Granted: October 6, 2003.

Reasons Waived: Due to insufficient rents, the owner was forced to sell a property containing two HOME-assisted units to stabilize the financial viability of its remaining properties. In an effort to avoid repayment of the entire initial HOME investment, the state of Colorado requested the owner to substitute two one-bedroom units in another property, which was not federally subsidized, at rents significantly below the HOME maximum rent for the area. The proposed units were found to be acceptable comparable unit substitution in lieu of repayment, which also advanced HUD's efforts to preserve the availability of affordable housing in the state of Colorado.

Contact: Nanci R. Doherty, Special Assistant to the Deputy Assistant Secretary, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, telephone (202) 708–2565.

II. Regulatory Waivers Granted by the Office of Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.

• *Regulation:* 24 CFR 200.40 (d)(1) and (h).

Project/Activity: The following projects requested waivers of the application fee in 24 CFR 200.40 (d)(1) and the transfer fee defined in 24 CFR 200.40(h).

FHA No.	Project name	Project city	State
05435505	The Glens	Rock Hill	SC
04635514	Walnut Hills	Cincinnati	OH
08335351	Cumberland Manor Apartments	Cumberland	KY
01411044	Jefferson Village Apartments	Watkins Glen	NY
09135083	Lakeview Apartments	Eureka	SD
09335098	Grandview Place	Missoula	MT
04635551	Cypress Commons	Middletown	OH
05335448	Gateway Village	Hillsborough	NC
05335357	JFK Towers	Durham	NC
05335400	Lynnhaven Apartments	Durham	NC
01435061	Badger Creek Meadow Apartments	Painted Post	NY
10135348	Villa Fourteen	Ault	CO
11335069	River Park Village Apartments	Lampasas	TX
13335057	Garden Apartments	Lubbock	TX
12638021	Knights of Pythias	Vancouver	WA
07135648	Cyril Court Apartments	Chicago	IL
07435136	Autumn House Apartments	Creston	IA
05235370	Monterey Apartments	Baltimore	MD
03135241	Chestnut Street Housing	Passaic	NJ
04235383	Northgate Apartments	Toledo	OH
12235495	Valley View Apartments	Delano	CA
05435403	Clinton Manor	Clinton	SC
11435034	Union Acres Apartments	Center	TX
07335464	Woodland East Apartments III	Michigan City	IN
07135480	325 North Austin Apartments	Chicago	IL
04735103	Park Wood Apartments	Muskegon	MI
04735110	East Glen Apartments	East Lansing	MI
02335276	Dimock-Bragdon Apartments	Boston	MA
01257304	Macombs Village	Bronx	NY
01257283	Sutter Gardens	Brooklyn	NY
06235333	Crossgates Apartments	Demopolis	AL
17635020	Coho Park Apartments	Juneau	AK
06235371	Chalkville Manor Apartments	Birmingham	AL
06235304	Medical Center Terrace	Dothan	AL
06235157	Four Winds West Apartments	Birmingham	AL
06235378	Livingston Meadows	Livingston	AL
06235352	Running Brook Apartments	Tuscaloosa	AL
08235227	Maywood Apartments	Hughes	AR
08235196	White River Apartments	Diaz	AR
12335109	Bonita Vista Apartments	Sierra Vista	AZ
12235509	Adams Blvd. Apartments	Los Angeles	CA
13635647	Deer Creek Apartments	Yreka	CA
12235416	Fernwood Apartments	Lancaster	CA
12235489	Harvard Gardens	Los Angeles	CA
14335034	Sunnyview Villa	Palm Springs	CA
13635643	Valley Heights	Quincy	CA
12235480	Verner Villa	Pico Rivera	CA
10135338	Fountain Townhomes	Fountain	CO
10135341	Ratekin Towers	Grand Junction	CO
01735160	Number One Norton	New Haven	CT
01735210	Village Apartments	South Meriden	CT
01735184	Abbott Towers/Enterprise Apartments	Waterbury	CT
01735185	Waterbury NSA II	Waterbury	CT
06635166	Civic Towers Apartments	Miami	FL
06735255	Cocoa Lakes Apartments	Cocoa	FL
06335205	College Trace Apartments	Pensacola	FL
06735263	Country Oaks Apartments	Tampa	FL
06735253	Crystalwood Apartments	Lakeland	FL
06735271	Dixie Grove Apartments	Orlando	FL
06335206	Harbour Place Apartments	Pensacola	FL
06735196	Little Turtle Apartments	Leesburg	FL
06335204	Mandarine Trace Apartments	Jacksonville	FL
06335200	Pine Meadows Apartments	Gainesville	FL
06735246	Ridgedale Apartments	Avon Park	FL
06735243	Ridgewood Apartments	Winter Haven	FL
06635162	Robert Sharp Towers II	North Miami Beach	FL
06335202	Sand Dunes Apartments	Panama City Beach	FL
06735252	Summit Ridge Apartments	Brandon	FL
06335199	Westwood Homes	Pensacola	FL
06135365	Bull Creek Apartments	Columbus	GA

FHA No.	Project name	Project city	State
06135373	Heatherwood Apartments	Rome	GA
07435184	Greenway of Burlington	Burlington	IA
07435157	Oak Park Village	Cedar Rapids	IA
07435171	River Terrace Apartments	Keokuk	IA
07235081	Bissel Apartments	Venice	IL
07135465	Continental Plaza Apartments	Chicago	IL
07135487	Lafayette Terrace Apartments	Chicago	IL
07135472	North Washington Park Estates	Chicago	IL
07135460	O'Keefe Apartments	Chicago	IL
07135389	South Apartments	Chicago	IL
07135500	South Shore Apartments	Chicago	IL
07235082	Storey Manor Apartments	Cottage Hills	IL
07235064	The Downtowner	Bloomington	IL
07335450	Carriage House of Muncie	Muncie	IN
07335447	Rosewood Apartments	Gary	IN
07335448	The Crossings II Apartments	Evansville	IN
07335454	Town and Country Apartments	Elkhart	IN
10235011	Osage Trails/Westgate Homes	Parsons	KS
08335375	Bella Gardens Apartments	Middlesboro	KY
08335323	Carl D. Perkins Apartments	Pikeville	KY
08335376	College Heights Apartments	Barbourville	KY
08335314	Dupont Manual Apartments	Louisville	KY
08335343	Eastwood Apartments	Sandy Hook	KY
08335301	Happy Hollow Apartments	Middlesborough	KY
08335379	Mountain Breeze Apts (also known as (aka) Valley View)	Jenkins	KY
08335321	Osage Estates	New Castle	KY
08335274	Pride Terrace Apartments	Cumberland	KY
08335338	Vernon Manor Apartments	Clay City	KY
06435231	Auburn Place Apartments	De Ridder	LA
05935213	Benton Manor Apartments	Benton	LA
05935206	Burton Place Apartments	Monroe	LA
05935214	Fair Park Terrace	Shreveport	LA
05935198	Sparta Place Apartments	Ruston	LA
06492002	Villa D'Ames Apartments	Marrero	LA
02335257	Binnall House	Gardner	MA
02335283	Claflin House	Framingham	MA
02335244	Dawson Building	New Bedford	MA
02335271	Kenyon College Estates	Springfield	MA
05235310	Barclay Townhouses	Baltimore	MD
05235029	Bentalou Court	Baltimore	MD
05235337	Cedar Hill Apartments	North East	MD
05235330	Franklin Center	Baltimore	MD
05235397	Franklin Square Apartments	Baltimore	MD
05235050	Garrison Apartments	Baltimore	MD
05235027	Mosher Court Apartments	Baltimore	MD
05235061	Pimlico Apartments	Baltimore	MD
05235300	Washington Gardens	Hagerstown	MD
05235126	Woodlands Apartments III	Baltimore	MD
02435040	Chestnut Place	Lewiston	ME
04735184	Stuyvesant Apartments	Grand Rapids	MI
08435239	Brookfield Village	Brookfield	MO
08535299	Cabool Apartments	Cabool	MO
08535215	DeSoto Apartments I	DeSoto	MO
08535277	Flat River Apartments	Flat River	MO
08535331	Fulton Apartments	Fulton	MO
08535317	Hannibal Manor	Hannibal	MO
08535300	Kennett Apartments	Kennett	MO
08535339	Minerva Place Apartments	St. Louis	MO
08535327	Mountain View Apartments	Mountain View	MO
08535314	Portageville Apartments	Portageville	MO
08535325	Shelbina Apartments	Shelbina	MO
08435134	Springview Gardens	Joplin	MO
08535348	Union Sarah 510 Demonstration	St. Louis	MO
08435126	Wesley Senior Towers	St. Joseph	MO
08535301	West Plains Apartments	West Plains	MO
08535335	Willow Springs Apartments	Willow Springs	MO
06535275	Maureen A.S. Jones Apartments	Greenwood	MS
06535335	Rosewood Apartments	Rosedale	MS
06535317	W.J. Bishop Apartments	Greenwood	MS
09344060	Hearthstone	Anaconda	MT
05335450	Conway Village Apartments	Conway	NC
05335366	Duplin County Housing	Rose Hill	NC
05335372	Pinewood Apartments	Dunn	NC
05335420	Richmond Village Apartments	Hamlet	NC

FHA No.	Project name	Project city	State
05335429	Torhunta Apartments	Fremont	NC
02435052	Sugar River Mills Housing	Claremont	NH
03135259	Corinthian Towers	East Orange	NJ
03135189	Garrett Apartments	Englewood	NJ
03135269	St. Mary's Villa	Newark	NJ
03135167	Van Wagenen II Apartments	Jersey City	NJ
12535081	Walnut Gardens	Las Vegas	NV
01257080	Albany-Decatur Rehabilitation	Brooklyn	NY
01257144	Albert Goodman Plaza	Bronx	NY
01235472	Barkley Gardens	Liberty	NY
01335078	Brick School Terrace (aka 16th Apts.)	Syracuse	NY
01257141	Bruckner Houses	Bronx	NY
01235479	Burt Farms II	Warwick	NY
01435051	Colt Block Apartments	Niagara Falls	NY
01335090	Crestview Gardens	Rouses Point	NY
01257075	Davidson Avenue Rehab II	Bronx	NY
01335108	Genesee Towers	Utica	NY
01257152	Highbridge Concourse II	Bronx	NY
01335123	Huntington Heights (aka Watertown Apts)	Watertown	NY
01257164	Jerome Terrace Apartments	Bronx	NY
01335102	James F. Lettis Apartments	Oneonta	NY
01235410	John Crawford Senior Citizen Housing	Monticello	NY
01257211	Kingsbridge Decatur Phase 1	Bronx	NY
01335117	Lillian Y. Cooper Apartments	Utica	NY
01257168	Lincoln Residence	Brooklyn	NY
01257303	McKenna Square Houses	New York	NY
01257198	Morrisania IV	Bronx	NY
01235312	Marion Avenue Rehabilitation	Bronx	NY
01257202	New West 111th Street Phase II	New York	NY
01235484	Meadowbrook Farms (aka New Paltz)	New Paltz	NY
01335109	Ninth Street NSA II	Troy	NY
01257142	Noonan Plaza	Bronx	NY
01335076	Ogden Mills Apartments (10th Apts.)	Cohoes	NY
01257162	Pennsylvania Avenue Apartments	Brooklyn	NY
01335115	Pontiac Terrace Apartments	Oswego	NY
01335097	Woodsboro Apartments	Baldwinsville	NY
01257113	St. John's Place—Phase I	Brooklyn	NY
01257180	Union Gardens I	Brooklyn	NY
01257161	Unity Apartments	Brooklyn	NY
01257320	Hudson View III	New York	NY
01257076	1988 Davidson Avenue	Bronx	NY
01257169	Rochester Sterling Apartments	Brooklyn	NY
04335280	Barnett Plaza Apartments	Columbus	OH
04235343	Bay Meadows Apartments	Port Clinton	OH
04235342	Bucyrus Plaza	Bucyrus	OH
04635554	Camden Way II	Camden	OH
04235312	Chateau I	East Cleveland	OH
04335291	Colony Terrace II	Zanesville	OH
04235302	Nela Manor	Akron	OH
04635549	Darby Hills	Cincinnati	OH
04235396	Findlay Green Apartments	Findlay	OH
04335176	Hillside Apartments	Mount Vernon	OH
04235365	Lake Avenue Commons	Cleveland	OH
04235344	Little Bark Manor	Fremont	OH
04235345	Little Bark View	Fremont	OH
04635534	Maywood Apartments	Cincinnati	OH
04235373	Newton Woods	Akron	OH
04335282	Rivertown Apartments	Portsmouth	OH
04235397	Salem Acres (aka Salem I)	Salem	OH
04635516	Southland Village	Miamisburg	OH
04235266	Westview Apartments	Youngstown	OH
04235313	William E. Fowler, Sr. Apts, II	Akron	OH
03335144	Charles Street Apartments	Turtle Creek	PA
03435174	Finch Towers	Scranton	PA
03438026	Gray Manor Apartments	Philadelphia	PA
03335217	Heritage Park Apartments	White Oak	PA
03444115	Hugh Carcella Apartments	Reading	PA
03335135	Swissvale Towers	Pittsburgh	PA
05635100	Alturas De Penuelas	Penuelas	PR
05635132	Miramar Housing	Ponce	PR
05635093	Montblanc Housing	Yauco	PR
05635121	Villa Blanca Apartments	Caguas	PR
05635122	Villas De Humacao	Humacao	PR
05635094	Vistas De Jagueyes	Aguas Buenas	PR

FHA No.	Project name	Project city	State
01635066	Hanora Lippitt Mills Apartments	Woonsocket	RI
05411049	Forest Villa Apartments	Manning	SC
05435139	Hickory Heights Apartments	Abbeville	SC
05435466	The Carolina	Columbia	SC
09135076	R & S Village—Scotland	Scotland	SD
09135075	R & S Village—Freeman	Freeman	SD
08635167	Bell Street Apartments	Smithville	TN
08735117	Dunlap Gardens	Dunlap	TN
08635147	Savannah Townhouses	Savannah	TN
08735125	Sneedville Gardens	Sneedville	TN
08735116	Village Apartments	Mountain City	TN
11535193	Meadow Park Village	Lockhart	TX
11535194	Nolan Terrace	Luling	TX
11535233	Poesta Creek Apartments	Beeville	TX
11535197	Sandy Oaks Apartments	Aransas Pass	TX
11535218	Smithville Garden Apartments	Smithville	TX
10535058	Dominguez Park III	Salt Lake City	UT
05135300	John Perry House	Woodstock	VA
05135345	Settlers Point Apartments	Damascus	VA
12735339	Montesano Annex Apartments	Montesano	WA
04535153	Princeton Village	Princeton	WV
10935055	Eastward Court Apartments	Casper	WY
10935050	Stagecoach Apartments	Rawlins	WY
00035341	Southern Hills Apartments	Washington	DC
01411050	Nunda Villager Apartments	Nunda	NY
03535090	Oakland Park Apts. (aka Roger Gardens)	Trenton	NJ
05194004	Pinebrook Village Apartments	Richmond	VA
10111098	Aurora East Apartments	Aurora	CO
10135413	Hanigan Terrace Apartments	Denver	CO
10135422	Fourth and Fox Apartments	Denver	CO
10135514	Windsor Court Apartments	Aurora	CO
12594004	Sierra Pointe Apartments	Las Vegas	NV
12594009	Baltimore Garden Apartments	Las Vegas	NV
12594010	Granada Apartments	Las Vegas	NV
12594011	Cleveland Garden Apartments	Las Vegas	NV
11735191	Rolling Green Apartments	Edmond	OK
04335293	Lawrence Commons	South Point	OH
12735331	Marion Court Apartments	Bremerton	WA
03435201	Lancaster Apartments	Lancaster	PA
04235368	Help-Six Chimneys, Inc.	Cleveland	OH
10144089	Island Grove Village	Greeley	CO
10535066	Windsong II	Clearfield	UT
01335114	Georgian Arms Apartments	Rome	NY
12735349	Fremont Village	Longview	WA
07135524	West End Rehab	Chicago	IL
04335294	Laurel Estates	Belpre	OH
04235346	North Towne Village	Toledo	OH
04235377	Whispering Hills	Toronto	OH
04235385	Vistula Heritage II	Toledo	OH
09144005	Heritage Estates	Brookings	SD
08435263	Village Place	Bethany	MO
06535332	Broadmoor Apartments	Byhalia	MS
05935215	Bayou Galion Apartments	Mer Rouge	LA
05135347	Willow Oaks	South Boston	VA
11435266	Heritage Square	Texas City	TX
06235336	Village Green Apartments	Red Bay	AL
12235570	Plummer Village	Northridge	CA
12235545	Robert Farrell Manor	Los Angeles	CA
12235548	Ethel Arnold Bradley	Los Angeles	CA
12235536	Glenoaks Townhomes	Los Angeles	CA
12235551	Hamlin Estates	North Hollywood	CA
07335456	Centennial Townhomes	Fort Wayne	IN
10135330	Valley Sun Village	Cortez	CO
12735209	Winthrop Apartments	Tacoma	WA
06135380	Renaissance Villa Apartments	Columbus	GA
00035283	Atlantic Gardens	Washington	DC
03435185	Cobbs Creek NSA	Philadelphia	PA
10135241	Summersong Townhouses	Aurora	CO
03335147	Verona Gardens	Verona	PA
12235565	Buckingham Apatments	Los Angeles	CA
10292501	Plaza Apartments	Coffeyville	KS
10135344	Mount Massive Manor	Leadville	CO
13335054	High Plains Apartments	Lubbock	TX
06235350	Hermitage Knoll Apartments	Florence	AL

FHA No.	Project name	Project city	State
04235395	Lawrence Saltis Plaza	Stow	OH
10935048	Village Gardens Apartments	Casper	WY
12135729	Herald Hotel	San Francisco	CA
04235376	Plaza Apartments	Canton	OH
06735267	Clearwater Apartments	Clearwater	FL
06435243	Oakwood Apartments	Leesville	LA
04235512	Chadwick Place Apartments	Elyria	OH
04744017	Kings Community Homes	Jackson	MI
08735150	Ocoee Village Apartments	Cleveland	TN
01257290	MBD III	Bronx	NY
12235530	Sierra Villa East	Lancaster	CA
08335348	Hydreco Apartments	Olive Hill	KY
10535074	Massey Plaza	Ogden	UT
17135196	Three Rivers Retirement Apartments	Richland	WA
05235333	Stonecroft Apartments	Hagerstown	MD
04335298	Lehnert Green Apartments	Galloway	OH
04335288	Carpenter Hall Apartments	Athens	OH
05935218	Park Place Manor Apartments	Shreveport	LA
01735209	Zion Park	Hartford	CT
08235231	Hicky Garden Apartments	Marianna	AR
04335290	Crossgates, Ltd.	Springfield	OH
08335357	Madison Tower	Richmond	KY
08335391	Northside Apartments	Morganfield	KY
01635071	Broadway West Broadway	Newport	RI
05335368	Scotland Manor Apartments	Laurinburg	NC
08335311	Bruce II Apartments	Ashland	KY
12235581	Douglas Park Apartments	Compton	CA
12235569	Pace Villa	Los Angeles	CA
12235506	Nikkei Village	Pacoima	CA
03335150	Hazelwood Towers/Plaza	Pittsburgh	PA
04535138	Alderson Manor	Alderson	WV
05494002	Colony Apartments	Columbia	SC
11435316	Park Place Apartments	Cleveland	TX
06335190	Timuquana Park Apartments	Jacksonville	FL
09344054	Columbus Plaza	Butte	MT
08435258	Ridgewood Hills	Harrisonville	MO
03432045	15th & Jefferson	Philadelphia	PA
05935205	Willow Village Apartments	Bernice	LA
04635552	Heritage Village Apartments	Cincinnati	OH
04735009	Little Blue Lake Cooperative	Twin Lake	MI
10535062	Jefferson Park Apartments	St. George	UT
10535061	Suncrest Park	Provo	UT
01435038	Crestline Villa	Jamestown	NY
06235373	Arrowood Apartments	Boligee	AL
04235347	Lakeshore Village	Cleveland	OH
10535067	St. Benedicts Manor II	Ogden	UT
10538008	R.L. Courts	Ogden	UT
10535057	R.L. Courts II	Ogden	UT
07335292	Capri II Apartments	Bluffton	IN
06235384	Village Square Apartments	Russellville	AL
01335106	Schenectady Forty	Schenectady	NY
05435501	Pageland Place Apartments	Pageland	SC
10135336	Corazon Square	Trinidad	CO
04335281	Park Place	Columbus	OH
01335080	Mid Warren NSA	Hudson	NY
04635531	Fair Park Apartments	Sardina	OH
08335383	Wellesley Apartments	Louisville	KY
08335353	Rolling Ridge Apartments	New Haven	KY
08335361	Greenwood Villa Apartments	Bowling Green	KY
03435186	Williamsport NSA	Williamsport	PA
04544008	Berkeley Gardens	Martinsburg	WV
03135183	King's Row Apartments	Middletown	NJ
05135344	The Meadows Apartments	Lynchburg	VA
11635109	Highland Park Apartments	Las Cruces	NM
08735112	Sunnycrest Apartments	Erwin	TN
05335216	Woodstone Apartments	Charlotte	NC
05335402	Meadow Woods Apartments	Fairmont	NC
06235318	Russel Erskine Apartments	Huntsville	AL
05935216	Northside Villa	Shreveport	LA
05294016	Kingsley Park Apartments	Baltimore	MD
05944053	Towneast Apartments	Bastrop	LA
10535076	Jefferson Circle	Salt Lake City	UT
01335083	Mansions Rehab Project	Albany	NY
10135337	Meeker Family and Elderly Housing	Meeker	CO

FHA No.	Project name	Project city	State
10135343	Creekside Gardens	Loveland	CO
08335374	Bismarck Apartments	Covington	KY
13335056	Spring Terrace Apartments	Amarillo	TX
05935212	Webster Manor Apartments	Minden	LA
01335122	Pastures Preservation (Pastures Redevelopment)	Albany	NY
12144819	Lawrence Moore Manor	Berkeley	CA
12144812	Satellite Senior Homes (Satellite Central Apts)	Oakland	CA
12144817	Otterbein Manor	Oakland	CA
02435046	Centre Ville Commons	Lewiston	ME
06412001	Catholic Presbyterian Apartments	Baton Rouge	LA
08335061	Campton Methodist Housing I	Campton	KY
11835116	West Edison Plaza Apartments	Tulsa	OK
08335277	Holly Point Apartments	Harlan	KY
04235399	Fostoria Green	Fostoria	OH
10135339	Mountan View Apartments	Gunnison	CO
12335132	Casas De Esperanza	Douglas	AZ
12335129	Pioneer Village	Douglas	AZ
02335275	St. James Commons	Springfield	MA
01335116	Champlain Family Housing	Rouses Point	NY
01335095	Faxton Scott House (aka Margaret Knamm Apts)	Utica	NY
05335451	Bay Tree Apartments	Fuquay-Varina	NC
04235400	Findlay I (Findlay Commons)	Findlay	OH
12235542	College Park Apartments	Lancaster	CA
12935078	North River Club	Oceanside	CA
06235355	Oak Trace Apartments	Tuscaloosa	AL
03435213	Breslyn Apartments	Philadelphia	PA
12335121	Myrtle Manor	Phoenix	AZ
14335076	Vista Park Chino	Chino	CA
12235501	Canoga Park	Los Angeles	CA
08535343	Murphy Blair Rehab III	St. Louis	MO
12235528	Antelope Valley Apartments	Lancaster	CA
12335135	Guadalupe Barrio Nuevo	Guadalupe	AZ
08635145	Tiptonville Meadows Apartments	Tiptonville	TN
08135185	Ripley Meadows First Addition	Ripley	TN
09435040	Patterson Place	Bismarck	ND
10335089	Kearney Plaza Townhomes	Kearney	NE
04235323	Hampton Court	Toledo	OH
07335297	Jamestown Square of Vincennes	Vincennes	IN
05935162	Richland Apartments	Rayville	LA
05935179	Trishell Apartments	Monroe	LA
13644054	Filipino Center	Stockton	CA
12235544	Summerfield Place	Bakersfield	CA
04635553	Lake Grant Apartments	Mt. Orab	OH
10535051	Landmark Apartment Village	Tooele	UT
01257285	Penn Gardens I	Brooklyn	NY
12735356	Goldsborough Creek Apartments	Shelton	WA
05435502	Duncan Village Apartments	Duncan	SC
06635161	Lincoln Fields Apartments	Miami	FL
04235391	Springhill Homes	Akron	OH
08335381	Rivertown Apartments	Louisville	KY
03435194	Freeland III Housing	Freeland	PA
08335380	Chenoweth Woods Apartments	Middletown	KY
05335346	Walnut West Apartments	Elizabeth City	NC
12511044	Reno Apartments	Reno	NV
12511046	Willow Creek Apartments	Reno	NV
12511045	Linden Apartments	Reno	NV
06735260	Harbor Court Apartments	Haines City	FL
02435058	Pierce Place/St. Laurent	Lewiston	ME
02435060	Bartlett Court	Lewiston	ME
05235307	Poppleton Place Apartments	Baltimore	MD
11835118	River Bank Plaza	Tulsa	OK
08435257	The Lancelot Apartments	Springfield	MO
07435176	Logan Park Apartments	Des Moines	IA
07435183	LeMars Estates	LeMars	IA
04235360	Shaker Place Apartments	Highland Hills	OH
06411056	Kingsway Apartments	Monroe	LA
06135370	Georgian Woods Apartments	Douglas	GA
01335119	Macartovin Apartments	Utica	NY
08635186	Sunset Village Apartments	Clarksville	TN
06635186	T.M. Alexander Apartments	Miami	FL
06235302	Crooked Creek Apartments	Opelika	AL
01735218	Country Village Apartments	Waterbury	CT
03135228	Avon Hills Apartments	Newark	NJ
03135231	Cathedral Park Apartments	Newark	NJ

FHA No.	Project name	Project city	State
01235566	Ellenville Urban Renew Hsg (aka Canal Lock Apts)	Ellenville	NY
11835106	Hornet Apartments	Vinita	OK
11835097	Twin Villa Apartments	Pryor	OK
01335113	Woodburn Court II	Binghamton	NY
00035168	Parkchester I Apartments	Washington	DC
06535352	Higgins McLaurin Arms Apartments	Clarksdale	MS
06535340	Lower Woodville Heights Apts.	Natchez	MS
06235026	Joel Court Apartments	Prichard	AL
11635107	Montgomery Manor Apartments	Albuquerque	NM
11635110	Lintero Apartments	Silver City	NM
11635104	Gatewood Village Apartments	Clovis	NM
11635101	Northgate Village Apartments	Farmington	NM
11635108	Sagebrush Place Apartments	Gallup	NM
05335387	Northwood Apartments	Burgaw	NC
07135455	Loma Linda Apartments	Silvis	IL
05335426	California Arms Apartments	Marion	NC
06235383	Jefferson Davis Apartments	Montgomery	AL
06444059	Josephine Apartments	New Orleans	LA
02335266	Douglas House	Brockton	MA
10135304	La Alma Housing	Denver	CO
07135481	Corcoran Place Apartments	Chicago	IL
05235593	Sunshine Village Apartments	Pocomoke City	MD
00035320	Southview II Apartments	Washington	DC
00035303	Ritch Homes	Washington	DC
05235359	Charles Landing South	Indian Head	MD
07235085	Dawson Manor	East St. Louis	IL
02335287	Centennial Island Apartments	Lowell	MA
13638040	Auburn Ravine Terrace	Auburn	CA
04235380	Amesbury Rosalind Estate	Cleveland	OH
08535349	Hidden Valley Estates	Wentzville	MO
08411044	John B Hughes II	Springfield	MO
11435315	Rampart Apartments	Port Arthur	TX
04644041	Twin Gables Apartments	Hamilton	OH
04335023	Heritage Court I	Bellefontaine	OH
04344033	Heritage Court II Apartments	Bellefontaine	OH
05435473	Spruce Pines Apartments	Landrum	SC
12335140	Paradise Shadows Apartments	Phoenix	AZ
05335385	Robin Ridge Apartments	Robbinsville	NC
04635568	Walnut Towers	Cincinnati	OH
07335230	Fairington Apartments of Clarksville	Clarksville	IN
04635564	Western Glen Apartments	Cincinnati	OH
01335126	Elizabeth Square Apartments	Waverly	NY
03135237	Arlington Arms Apartments	Jersey City	NJ
06135383	Moultrie Manor Apartments	Moultrie	GA
10535065	Windsong I	Clearfield	UT
08335382	Lynn Acres Apartments	Shelbyville	KY
10135334	Northeast Plaza	Sterling	CO
04235303	Rosaline Apartments	Akron	OH
09435043	The 400	Fargo	ND
08535323	Lakewood Apartments	Columbia	MO
10235164	Tumbleweed Apartments	Lyons	KS
10135332	Silver Spruce Apartments	Kremmling	CO
12135731	Dakota Meadows	Fresno	CA
03135256	Montgomery Village	Jersey City	NJ
01435058	Wedge Point Court	Rochester	NY
01257294	1451 Development	Brooklyn	NY
01257068	Sonia Rivera	Bronx	NY
06535026	St. Francis Apartments	Meridian	MS
11835102	McAlester Plaza	McAlester	OK
08335360	Berrytown Apartments	Louisville	KY
08335356	Lincoln Trail Apartments	Elizabethtown	KY
01657008	Barbara Jordan Apartments I	Providence	RI
01635078	Barbara Jordan Apartments II	Providence	RI
10935054	Shoshone Court	Cody	WY
04235384	The Plaza Apartments	Toledo	OH
03435203	Pheasant Run Apartments	Harleysville	PA
08335359	Colony House Apartments	Barlow	KY
06435239	Chateau Du Lac	Lake Charles	LA
03435188	Catasauqua Apartments	Catasauqua	PA
02335278	Millhouses of Adams	Adams	MA
02335289	Hancock Court	Quincy	MA
10244025	Dale Apartments	Coffeyville	KS
07135649	The Whitmore Apartments	Chicago	IL
05335449	Grier Park Apartments	Charlotte	NC

FHA No.	Project name	Project city	State
05335456	Westside Apartments	Charlotte	NC
12735328	Fern Hill Terrace	Tacoma	WA
07135506	Bennett Apartments	Chicago	IL
11635105	Westwood Village Apartments	Albuquerque	NM
02435059	Bates Terrace	Lewiston	ME
08335371	River Park Apartments	Louisville	KY
07335457	Bremen Village Apartments	Bremen	IN
07335409	Fall Creek Village I	Indianapolis	IN
12235587	Pleasant Hills Home	Los Angeles	CA
08135187	Lexington Village Apartments	Lexington	TN
04535139	Circle Brook Apartments	Cowen	WV
04235381	Stow Kent Gardens	Stow	OH
10135342	Highland South Apartments	Wheat Ridge	CO
08335275	Brown Proctor Apartments	Winchester	KY
08335352	Grand Central Apartments	Somerset	KY
12335131	Sunland Terrace	Phoenix	AZ
01335121	Burns Apartments	Troy	NY
05435475	Lancaster Manor Apartments	Lancaster	SC
05335457	Crestview Apartments	Durham	NC
05335455	Liberty Village Apartments	Liberty	NC
01257299	Beck Street Rehab	Bronx	NY
05135334	Lee Highway Manor Elderly Apartments (Stratford)	Roanoke	VA
01257186	Bedford Stuyvesant NSA I	Brooklyn	NY
10535072	Glenbrook Apartments	Richfield	UT
01235531	Ebony Gardens	Mount Vernon	NY
04735183	Weston Apartments	Grand Rapids	MI
12635190	King Bell Apartments	Milwaukee	OR
01635074	Villa Excelsior	Providence	RI
05935165	Parkview Apartments	Monroe	LA
05935161	Wyche Apartments	Tallulah	LA
06735258	Georgia Arms Apartments	Sanford	FL
12335128	Fillmore I	Phoenix	AZ
12335142	Morningside Villa Apartments	Phoenix	AZ
07335444	Laurel Woods Apartments	South Bend	IN
01435048	Crown Oak Estates	Penfield	NY
03435209	Dorado Village	Philadelphia	PA
02332046	St. Alfio's Villa	Lawrence	MA
06135318	Wild Pines Apartments	Albany	GA
11435350	Bay Terrace Apartments	Baytown	TX
10935053	Rainbow Vista Apartments	Laramie	WY
06135379	Rucker Terrace Apartments	Atlanta	GA
03435167	Freeland Elderly Housing	Freeland	PA
12735323	Olympia Village Apartments	Olympia	WA
01435062	East Court V	Rochester	NY
06235389	Roosevelt Manor	Birmingham	AL
04435497	Himelhoch Apartments	Detroit	MI
06535361	Hawkins Apartments	Okolona	MS
08744032	Townview Towers I	Knoxville	TN
03335146	Coraopolis Gardens	Coraopolis	PA
07135492	Evergreen Terrace II (aka Buff Plaza)	Joliet	IL
06735272	Hudson Estates	Hudson	FL
08335386	Lee Manor Apartments	Owensboro	KY
01257213	Sebco IV	Bronx	NY
01257295	Aldus I (aka Faile Street)	Bronx	NY
07435185	Adams Court	Jefferson	IA
05635065	La Torrecilla Development	Barranquitas	PR
12235533	Wasco Park Apartments	Wasco	CA
11535176	Harrison Manor Apartments	Harlingen	TX
13344039	Childress Manor	Childress	TX
05335404	Gatewood Manor Apartments	Greensboro	NC
05135366	Berkley West Apartments	Newport News	VA
08335339	Town House Apartments	Livermore	KY
03432046	Susquehanna Townhouses	Philadelphia	PA
03135233	Aspen Hamilton Apartments	Paterson	NJ
01257289	Hunts Point I Rehab Project	Bronx	NY
01235579	Richmond Gardens	Staten Island	NY
01257300	Pulaski Manor	Brooklyn	NY
01257241	Bedford Stuyvesant NSA II	Brooklyn	NY
01335118	Village Point Apartments	New Hartford	NY
06135325	Dempsey Apartments	Macon	GA
10935043	Bicentennial Apartment Village II	Rock Springs	WY
10135362	Castle Creek Commons East	Castle Rock	CO
04235401	Douglas Square Apartments	Toledo	OH
12235534	South Real Gardens	Bakersfield	CA

FHA No.	Project name	Project city	State
06535247	Crestview Apartments	Pearl	MS
06535291	Driftwood Apartments	Drew	MS
06535222	Highland View Apartments	Jackson	MS
08535312	Maplewood Loop Apartments	Maplewood	MO
05435476	Woods Edge Apartments	Columbia	SC
04335284	Melford Village	Spencerville	OH
17144802	Lilac Plaza	Spokane	WA
05344119	Oak Hill Apartments	Wadesboro	NC
01257298	Alexander Coprew Apartments	Bronx	NY
01235582	Andpress Plaza	North Amityville	NY
01435053	Seneca Apartments	Geneva	NY
01435060	Lakeside Village Apartments	Canandaigua	NY
06435241	Livingston Manor Apartments	Denham Springs	LA
01735164	Kensington Square I	New Haven	CT
13335050	Win Lin Village Apartments	Amarillo	TX
02336610	Dorchester Bay/Granite #9	Dorchester	MA
01257192	Southern Boulevard IV	Bronx	NY
08335324	Virginia Apartments	Louisville	KY
05435499	Winnfield West Apartments	Winnsboro	SC
05435489	Prescott Manor	Columbia	SC
01232237	Southport Mews Apartments	Port Chester	NY
01235581	Overlook Apartments	Middletown	NY
06235215	Hobson City Apartments	Anniston	AL
10535073	Springhollow Apartments	Logan	UT
05435482	Northbridge Court	Moncks Corner	SC
04735109	Bedford Manor Apartments	Battle Creek	MI
14335092	Smith-Beretania Apartments	Honolulu	HI
06235307	St. Charles Villas	Birmingham	AL
00035309	Southview Apartments I (aka Southview West)	Washington	DC
00036636	Atlantic Terrace Apartments	Washington	DC
08435256	Granada Villa	Belton	MO
04735114	River Apartments	Battle Creek	MI
05944061	Pine Haven Apartments	Marshall	TX
10235180	Brookridge Plaza Apartments	Derby	KS
06135335	Rockland Apartments	Macon	GA
05435507	Redwood Village Apartments	Gaffney	SC
13335055	Sierra Vista Apartments	El Paso	TX
03335119	Grayson Court	Pittsburgh	PA
09135050	South Park Apartments	Belle Fourche	SD
06335203	The Oaks Apartments	St. Augustine	FL
12744116	Chehalis Avenue Apartments	Chehalis	WA
07135482	Bryn Mawr Apartments	Chicago	IL
01257175	Sunset Park NSA Group I	Brooklyn	NY
06535353	Bennie S. Gooden Estates	Clarksdale	MS
05135356	Nansemond Square Apartments	Suffolk	VA
10235139	Mulberry Court Apartments	Abilene	KS
01235527	Highland Falls Housing	Highland Falls	NY
10935036	Bicentennial Apartments Village I	Rock Springs	WY
04235386	Morning Star Towers	Cleveland	OH
08535350	Douglass Manor Apartments	Webster Groves	MO
06135387	Bridge Creek Apartments	Fitzgerald	GA
04535121	Forrest Bluff Apartments	Huntington	WV
05335424	South Village Apartments	Mount Airy	NC
05335452	Carriage House Apartments	Enfield	NC
06635178	New Horizons Apartments	Miami	FL
10935056	Chief Washakie	Evanston	WY

Nature of Requirement: Section 200.40 establishes the fees to be applied to mark-to-market transactions that involve properties with mortgages issued by the Federal Housing Administration (FHA). The intent of this provision is to provide an extra incentive to encourage owner cooperation with the process in a timely manner.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: October 10, 2003.

Reason Waived: The projects listed above were FHA-insured, and incentives were necessary to encourage cooperation.

Contact: Norman Dailey, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410–8000; telephone (202) 708–3856, extension 3786.

- *Regulation:* 24 CFR 401.600

Project/Activity: The following projects requested waiver of the 12-month limit, established at 24 CFR 401.600, for above-market rents:

FHA No.	Project name	City	State
04235385	Vistula Heritage II	Toledo	OH
06235373	Arrowood Apartments	Boligee	AL
06135365	Bull Creek Apartments	Columbus	GA
03335144	Charles Street Apartments	Turtle Creek	PA
04235400	Findlay I (Findlay Commons)	Findlay	OH
06235161	Four Winds East Apartments	Birmingham	AL
05135300	John Perry House	Woodstock	VA
03535090	Oakland Park Apts	Trenton	NJ
07135460	O'Keefe Apartments	Chicago	IL
05235307	Poppleton Place Apartments	Baltimore	MD
10535063	St. Benedicts Manor	Ogden	UT
08435263	Village Place	Bethany	MO

Nature of Requirement: Section 401.600 requires that projects be marked down to market rents within 12 months after their first expiration date following January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring and that the properties will not default on their FHA-insured mortgages during the restructuring process.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: November 4, 2003.

Reason Waived: Either the projects listed above were not assigned to the participating administrative entities (PAEs) in a timely manner, or their restructuring analysis was unavoidably delayed due to no fault of the owner.

Contact: Norman Dailey, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410–8000; telephone (202) 708–3856.

- *Regulation:* 24 CFR 401.600.

Project/Activity: The following projects requested waiver of the 12-month limit, established at 24 CFR 401.600, for above-market rents:

FHA No.	Project name	City	State
01257144	Albert Goodman Plaza	Bronx	NY
02435040	Chestnut Place	Lewiston	ME
03435185	Cobbs Creek NSA	Philadelphia	PA
01257075	Davidson Avenue Rehab II	Bronx	NY
04235336	Eastland Woods	Akron	OH
11744115	Hillcrest Green Apartments	Oklahoma City	OK
01335102	James F. Lettis Apartments	Oneonta	NY
01257164	Jerome Terrace Apartments	Bronx	NY
01235410	John Crawford Senior Citizen Housing	Monticello	NY
11835102	McAlester Plaza	McAlester	OK
06535334	Moorhead Manor Apartments	Moorhead	MS
01257162	Pennsylvania Avenue Apartments	Brooklyn	NY
04235331	Shaker Boulevard Gardens	Cleveland	OH
01255173	Siloam House	Brooklyn	NY
08635177	Southwood Townhouses	Memphis	TN
07135524	West End Rehab	Chicago	IL

Nature of Requirement: Section 401.600 requires that projects be marked down to market rents within 12 months after their first expiration date following January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring, and that the properties will not default on their FHA-insured mortgages during the restructuring process.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: November 4, 2003.

Reason Waived: Either the projects listed above were not assigned to the PAEs in a timely manner, or their restructuring analysis was unavoidably delayed due to no fault of the owner.

Contact: Norman Dailey, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410–8000; telephone (202) 708–3856.

- *Regulation:* 24 CFR 401.600.

Project/Activity: The following projects requested waiver of the 12-month limit, established at 24 CFR 401.600, for above-market rents:

FHA No.	Project name	City	State
1257080	Albany-Decatur Rehabilitation	Columbus	NY
5335451	Bay Tree Apartments	New Bedford	NC
1257186	Bedford Stuyvesant NSA I	New Haven	NY
2335244	Dawson Building	South Point	MA
1257252	Featherbed Lane Restoration	Toledo	NY
1735164	Kensington Sq. I	Casper	CT
4335293	Lawrence Commons	Fuquay-Varina	OH
1235449	Pinecrest Manor	Brooklyn	NY
6135380	Renaissance Villa Apartments	Brooklyn	GA

FHA No.	Project name	City	State
1257068	Sonia Rivera	Bronx	NY
4235384	The Plaza	Mount Kisco	OH
10935048	Village Gardens	Bronx	WY
6235336	Village Green Apartments	Red Bay	AL

Nature of Requirement: Section 401.600 requires that projects be marked down to market rents within 12 months after their first expiration date following January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring and that the properties will not default on their FHA-insured mortgages during the restructuring process.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Either the projects listed above were not assigned to the PAEs in a timely manner, or their restructuring analysis was unavoidably delayed due to no fault of the owner.

Contact: Norman Dailey, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410–8000; telephone (202) 708–3856.

- *Regulation:* 24 CFR 401.600.

Project/Activity: The following projects requested waiver of the 12-month limit, established at 24 CFR 401.600, for above-market rents:

FHA No.	Project name	City	State
1257144	Albert Goodman Plaza	Benton	NY
1335105	Brandegee Gardens	Hagerstown	NY
1257141	Bruckner Houses	Roxbury	NY
7335448	Crossings II	Greenfield	IN
8235225	Eastview Terrace Apartments	Utica	AR
1335108	Genesee Towers	Utica	NY
4235357	Greenview Gardens	Evansville	OH
1257164	Jerome Terrace Apartments	Toledo	NY
8335267	Lakeland Wesley Village I	Little Rock	KY
11535193	Meadow Park Village	Lockhart	TX
12735339	Montesano Harbor Annex	Houston	WA
11435346	Royal Palms Apartments	Bronx	TX
2335172	Schoolhouse 77	Bronx	MA
5235300	Washington Gardens	Bronx	MD
2335239	Weldon, The	Montesano	MA

Nature of Requirement: Section 401.600 requires that projects be marked down to market rents within 12 months after their first expiration date following January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring and that the properties will not default on their FHA-insured mortgages during the restructuring process.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Either the projects listed above were not assigned to the PAEs in a timely manner, or their restructuring analysis was unavoidably delayed due to no fault of the owner.

Contact: Norman Dailey, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410–8000, telephone (202) 708–3856.

- *Regulation:* 24 CFR 401.600.

Project/Activity: The following projects requested waiver of the 12-month limit, established at 24 CFR 401.600, for above-market rents:

FHA No.	Project name	City	State
1257299	Beck Street Rehab	Bronx	NY
1435043	Cedargrove Heights Apartments	Buffalo	NY
5435502	Duncan Village Apartments	Duncan	SC
9335098	Grandview Place	Missoula	MT
7444052	Green Valley Manor	Creston	IA
8335301	Happy Hollow Apartments	Middlesborough	KY
6235367	Janmar Apartments	Birmingham	AL
1335080	Mid Warren NSA	Hudson	NY
5435501	Pageland Place Apartments	Pageland	SC
1257291	Paul Robeson Houses	New York	NY
4235360	Shaker Place Apartments	Highland Hills	OH
5435473	Spruce Pines Apartments	Landrum	SC
4335013	Sunset Hills Apartments	Springfield	OH
11735195	Terrace Apts	Oklahoma City	OK
4235377	Whispering Hills	Toronto	OH

Nature of Requirement: Section 401.600 requires that projects be marked down to market rents within 12 months after their first expiration date following January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring and that the properties will not default on their FHA-insured mortgages during the restructuring process.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: December 22, 2003.

Reason Waived: The projects listed above were either not assigned to the PAEs in a timely manner or their restructuring analysis was unavoidably delayed due to no fault of the owner.

Contact: Norman Dailey, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410–8000, telephone (202) 708–3856.

- *Regulation:* 24 CFR 401.600.

Project/Activity: The following projects requested waiver of the 12-month limit, established at 24 CFR 401.600, for above-market rents:

FHA No.	Project name	City	State
7135458	Armitage Commons	Chicago	IL
4235343	Bay Meadows Apartments	Port Clinton	OH
5235042	Beaufort Crest	Baltimore	MD
7235081	Bissel Apartments	Venice	IL
1444047	Braco-I	Buffalo	NY
6135365	Bull Creek Apartments	Columbus	GA
11435056	Church Village Apartments	Dickinson	TX
4535094	Clarksburg Towers	Clarksburg	WV
1257060	Concourse Plaza	Bronx	NY
1257205	Dean North Apartments	Brooklyn	NY
1257153	East 21st Street Apartments	Brooklyn	NY
7135428	Evergreen Terrace I	Joliet	IL
7335407	Gary NSA I & II	Gary	IN
1335117	Lillian Y. Cooper Apartments	Utica	NY
1235312	Marion Avenue Rehabilitation	Bronx	NY
1257142	Noonan Plaza	Bronx	NY
11335005	Prince Hall Gardens II	Fort Worth	TX
2435052	Sugar River Mills Housing	Claremont	NH
6535245	Sunflower Lane Apartments	Clarksdale	MS
1257159	Sutter Houses	Brooklyn	NY
4535100	Williamson Towers	Williamson	WV

Nature of Requirement: Section 401.600 requires that projects be marked down to market rents within 12 months after their first expiration date following January 1, 1998. The intent of this provision is to ensure timely processing of requests for restructuring and that the properties will not default on their FHA-insured mortgages during the restructuring process.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: December 22, 2003.

Reason Waived: Either the projects listed above were not assigned to the PAEs in a timely manner or their restructuring analysis was unavoidably delayed due to no fault of the owner.

Contact: Norman Dailey, Office of Multifamily Housing Assistance Restructuring, Department of Housing and Urban Development, Portals Building, Suite 400, 1280 Maryland Avenue, SW., Washington, DC 20410–8000, telephone (202) 708–3856.

- *Regulation:* 24 CFR 883.606.

Project/Activity: The 400 Apartments, Bismarck, ND; Project Number: 094–35043.

Nature of Requirement: Section 883.606(b) establishes the procedures by which a state agency is entitled to a reasonable fee, determined by HUD, for administering a contract on newly constructed or substantially rehabilitated units, provided there is no override on the permanent loan granted by the agency to the owner for a project containing assisted units.

Granted By: John C. Weicher, Assistant Secretary for Housing—Federal Housing Commissioner.

Date Granted: November 4, 2003.

Reason Waived: The North Dakota Housing Finance Agency (Issuer) used override revenue to provide very low-income housing assistance in accordance with its refunding agreement under the McKinney-Vento Act. This revenue is pledged to the bondholders of the Series 1993 Multifamily Mortgage Revenue Refunding bonds as a source of additional security for timely payment of bond principal and interest until the bonds are paid in full. It was determined to be in the public interest and consistent with the Secretary's objectives to waive the appropriate regulation in order to enable the Issuer to continue to pledge fee revenues to its bonds and to rely on these revenues to support its publicly chartered affordable housing operations. The Issuer was therefore permitted to continue to collect override and contract administration fees in connection with its outstanding Series 1993, which were issued with HUD's approval.

Contact: Beverly J. Miller, Director, Office of Multifamily Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, telephone (202) 708–3730.

- *Regulation:* 24 CFR 883.606.

Project/Activity: Forty-six Section 8 Assisted Projects, Manchester, NH; Project Number: .

Nature of Requirement: Section 883.606(b) establishes the procedures by which a state agency is entitled to a reasonable fee, determined by HUD, for administering a contract on newly constructed or substantially rehabilitated units, provided there is no override on the permanent loan granted by the agency to the owner for a project containing assisted units.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 4, 2003.

Reason Waived: The New Hampshire Housing Finance Authority (NHHFA) relied on HUD's approval of proposed bond financing terms submitted by NHHFA in 1991, which terms included permission to collect both override and contract administration fees. Subsequently, Series 1991 Multifamily

Housing Refunding Bonds (the Bonds) were issued pursuant to HUD's financing adjustment factor (FAF) procedures and Section 1012 of the McKinney-Vento Act, which authorizes equal sharing between HUD and housing finance agencies of debt service savings and housing subsidy provided by the housing assistance payments (HAP) contract. It was determined to be in the public interest and consistent with the Secretary's objectives to waive the appropriate regulations in order to enable the Issuer to continue to pledge fee revenues to its bonds and to rely on these revenues to support its publicly chartered affordable housing operations. The Issuer was permitted to continue to collect override and contract administration fees in connection with its outstanding Series 1991 bonds, which were issued with HUD's approval.

Contact: Beverly J. Miller, Director, Office of Multifamily Asset Management, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–7000, telephone (202) 708–3730.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Terra Quest, Ashtabula, OH; Project Number: 042–HD084/OH12–Q991–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 3, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Hemet Ability First, Hemet CA, Project Number: 122–HD130/CA16–Q001–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 28, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: MLH Nebraska Housing, Lincoln, NE; Project Number: 103–HD029/NE26–Q021–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Golden Thread Housing, Osceola, IA; Project Number: 074–EE040/IA05–S021–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 26, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: The Sanderling, Chesapeake, VA; Project Number: 051–HD074/VA36–Q981–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: New Dimensions Apartments, Woodland, CA; Project Number: 136–HD012/CA30–Q001–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Psalms 23 Project, Ellenwood, GA; Project Number: 061–EE090/GA06–S991–006.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 12, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Lakewood Apartments, South Hill, VA; Project Number: 051–EE062/VA36–S981–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 12, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Dina Titus Estates, Las Vegas, NV; Project Number: 125–HD069/NV25–Q011–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 15, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d).

Project/Activity: Legion Woods, New Haven, CT; Project Number: 017–HD028/CT26–Q001–004.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 31, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Skyline Apartments, Napa, CA; Project Number: 121–HD074/CA39–Q001–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 20, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was needed to prepare the legal documents for the land transaction and to reach initial closing. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Caribe Towers, Philadelphia, PA; Project Number: 034–EE108/PA26–S001–008.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 29, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding from other sources. The project was delayed due to the complexity of the condominium structure. The project is economically designed and comparable to other similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Minnehaha County Supportive Housing Incorporated, Sioux Falls, SD; Project Number: 091–EE005/SD99–S011–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 4, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was needed to process the firm commitment application. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Sturgis Consumer Home, Edison, NJ; Project Number: 031–HD116/NJ39–Q001–007.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 10, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project experienced delays due to the loss of the original site and the time involved to locate a new site and obtain approval. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Shepherd's Farm Senior Housing, West Deptford, NJ; Project Number: 035–EE045/NJ39–S011–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional

funding from other sources. The project was delayed due to the construction of a sewer line to which the project will be connected and the sponsor's attempt to secure secondary financing. The project is economically designed and comparable in cost to similar projects developed in the jurisdiction.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Nanaikeola Senior Apartments, Waianae, Oahu, HI; Project Number: 140–EE019/HI10–S991–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project experienced delays while the sponsor's development team reviewed options to reduce increased development costs caused by skyrocketing construction costs and secure secondary financing. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Professional Service Centers for the Handicapped (PSCH)-Cypress Housing, Queens, NY; Project Number: 012–HD088/NY36–Q981–009.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 20, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project encountered delays due to local and environmental issues, and additional time was needed to prepare for initial closing. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Honoka'a Knolls Senior Apartments, Honoka'a, HI; Project Number: 140–EE020/HI10–S991–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project was delayed due to difficulties finding a qualified contractor to construct the project with the funds available. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Ka'u Group Home, Na'alehu, HI; Project Number: 140–HD024/HI10–Q001–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. The project was delayed due to difficulties finding a qualified contractor to construct the project with the funds available. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Accessible Space, Inc. (ASI) Fargo, Fargo, ND; Project Number: 094–HD009/ND99–Q011–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was required to obtain a conditional use permit from the city of Fargo. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: New Dimensions Apartment, Woodland, CA; Project Number: 136–HD012/CA30–Q001–002.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was needed to process the firm commitment application. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: The Promise Project, Ellenwood, GA; Project Number: 061–EE098/GA06–S001–006.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 4, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was needed to process the firm commitment application. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: National Church Residences (NCR) of Harborcreek, Harborcreek, PA; Project Number: 033–EE105/PA28–S001–003.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 10, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was needed to issue the firm commitment application. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Cabrini Senior Housing, New York, NY; Project Number: 012–EE307/NY36–S011–001.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 12, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was needed to obtain local approvals. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Wood County Village II, Bowling Green, OH; Project Number: 042–HD102/OH12–Q011–012.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 12, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was required to process the firm commitment application. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.100(d) and 24 CFR 891.165.

Project/Activity: Terra Quest, Ashtabula Township, OH; Project Number: 042–HD084/OH12–Q991–005.

Nature of Requirement: Section 891.100(d) prohibits amendment of the amount of approved capital advance funds prior to initial closing. Section 891.165 provides that the duration of the fund reservation of the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 19, 2003.

Reason Waived: The sponsor exhausted all efforts to obtain additional funding. Additional time was required because of local opposition. The project is economically designed and comparable in cost to similar projects developed in the area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: National Church Residences (NCR) of Harborcreek PA; Harborcreek, PA, Project Number: 033–EE105/PA28–S001–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 2, 2003.

Reason Waived: The sponsor experienced architectural delays in redesigning the building and in securing final approval from the local planning commission.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Legion Woods Apartments, New Haven, CT; Project Number: 017–HD028/CT26–Q001–004.

Nature of Requirement: Section 891.165 provides that the duration of

the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 9, 2003.

Reason Waived: The sponsor experienced delays in obtaining a qualified general contractor and in responding to neighborhood opposition to the project.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Myrtle Davis Senior Complex, Milwaukee, WI; Project Number: 075–EE095/WI39–S001–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 20, 2003.

Reason Waived: Additional time was needed for the sponsor to obtain a building permit from the city of Milwaukee.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Louisville Volunteers of America Elderly Housing, Louisville, KY; Project Number: 083–EE082/KY36–S011–008.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 21, 2003.

Reason Waived: The project was delayed while the owner sought zoning approval.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: The Presbyterian Home at Stafford, Stafford Township, NJ; Project Number: 035–EE037/NJ39–S991–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 21, 2003.

Reason Waived: Stafford Township was unable to execute the deed in time for initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: St. Francis Cabrini Gardens, Coram, NY; Project Number: 012–EE288/NY36–S001–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 21, 2003.

Reason Waived: The project was delayed due to a lengthy rezoning process.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Clark County Supportive Housing, Las Vegas, NV; Project Number: 125–HD069/NV25–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 28, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: The Pavilion at Immaculate Conception, Bronx, NY; Project Number: 012–EE247/NY36–S981–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months be approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 29, 2003.

Reason Waived: Additional time was needed for the general contractor to provide a performance payment bond in accordance with HUD regulations.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Northwood Elderly Housing, Northwood, NH; Project Number: 024–EE064/NH36–S011–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 30, 2003.

Reason Waived: The project was delayed due to an unexpected moratorium imposed by the Northwood Village Water District because of petroleum contaminants discovered in the aquifer.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: The Center on Halsted, Chicago, IL; Project Number: 071–HD122/IL06–Q011–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 31, 2003.

Reason Waived: Additional time was needed for the sponsor to secure secondary financing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Phelps Senior Housing, Phelps, KY; Project Number: 083–EE078/KY36–S011–004.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 31, 2003.

Reason Waived: The sponsor experienced delays due to a change of contractors, and additional time was needed to complete the application process for additional funds.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Ottawa River Estates, Toledo, OH; Project Number: 042–HD072/OH12–Q971–004.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: October 31, 2003.

Reason Waived: The project was delayed while waiting for a federal court judgment concerning the sale of the land designated for the project and to secure secondary financing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Riley House, Hyde Park, MA; Project Number: 023–EE111/MA06–S991–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 3, 2003.

Reason Waived: Additional time was needed to prepare for initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Luther Ridge, Middletown, CT; Project Number: 017–EE053/CT26–S991–004.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 3, 2003.

Reason Waived: Additional time was needed to combine HUD-assisted units with units financed by the Connecticut Housing Finance Authority (CHFA) and to allow CHFA to complete the financing arrangements for its units.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Lancaster Landing, Lancaster, SC; Project Number: 054–HD097/SC16–Q011–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 4, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Windham Willows, Windham, NY; Project Number: 014–EE210/NY06–S011–009.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 4, 2003.

Reason Waived: Additional time was needed for the owner to secure additional funding.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Sterling Oaks, Mt. Sterling, KY; Project Number: 083–HD064/KY36–Q001–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: The project was delayed because of litigation concerning zoning.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: David Coleman Homes, Marion, SC; Project Number: 054–HD095/SC16–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: Additional time was needed to submit the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing

and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Penn Hills Group Home, Penn Hills, PA; Project Number: 033–HD070/PA28–Q011–008.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: Additional time was needed to assure that all easement and maintenance agreements were approved.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: GIBB-Springfield Village, Springfield, FL; Project Number: 063–HD018/FL29–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: Additional time was needed to collect outstanding items that were to be part of the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Eastmont Court, Oakland, CA; Project Number: 121–HD075/CA39–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: Additional time was needed to review the secondary financing documents.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Jewish Community Housing d/b/a Isenstadt Legacy House, Lyndhurst, OH; Project Number: 042–HD092/OH12–Q011–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: Additional time was needed for the sponsor to locate an alternate site.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Hemlock Nob Estates, Tannersville, NY; Project Number: 014–EE209/NY06–S011–008.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: Additional time was needed to review and approve the new site, process the firm commitment application, and secure additional funding.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Halsey Terrace, Portland, OR; Project Number: 126–HD032/OR16–Q011–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 6, 2003.

Reason Waived: Additional time was needed to review the firm commitment application and for the Internal Revenue Service to grant tax-exempt status to the owner's corporation.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Winchester Senior Housing, Elko, NV; Project Number: 125–EE118/NV25–S011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 7, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Bayview Apartments, Miami FL; Project Number: 066–EE085/FL29–S011–009.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 7, 2003.

Reason Waived: Additional time was needed to submit the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Casa Dorada, Ponce, PR; Project Number: 056–EE044/RQ46–S011–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 7, 2003.

Reason Waived: Additional time was needed to secure endorsements from government agencies because the project is located in an historic area.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Villa Regina, West Palm Beach, FL; Project Number: 066–EE086/FL29–S011–010.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 10, 2003.

Reason Waived: Additional time was needed to submit the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: River View Gardens, Queens, NY; Project Number: 012–EE195/NY36–S961–013.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 10, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: East Bay Mental Health Center, East Providence, RI; Project Number: 016–HD033/RI43–Q001–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 13, 2003.

Reason Waived: Additional time was needed to select a new site.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: National Church Residences of Kansas City, Kansas City, MO; Project Number: 084–EE051/MO16–S011–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: Additional time was needed for the owner to secure proper zoning.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Unity Gardens Senior Apartments, Windham, ME; Project Number: 024–EE053/ME36–S0011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: Additional time was needed to secure a site and coordinate the processing requirements of HUD and the U.S. Department of Agriculture.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: New Courtland 811, Philadelphia, PA; Project Number: 034–HD068/PA26–Q011–005.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: Additional time was needed to secure zoning approval and submit the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Victory Gardens, New Haven, CT; Project Number: 017–EE066/CT26–S011–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: Additional time was needed to review the revised plans and specifications.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: New Courtland 202, Philadelphia, PA; Project Number: 034–EE119/PA26–S011–009.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: Additional time was needed to secure zoning approval and

submit the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Westmoreland Apartments, Huntington, WV; Project Number: 045–EE017/WV15–S011–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: Additional time was needed to finalize the initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Gulfport Manor, Gulfport, MS; Project Number: 065–EE0031/MS26–S001–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 14, 2003.

Reason Waived: Additional time was needed for the owner to review the plans and for HUD to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Family Services of Western Pennsylvania II, Apollo, PA; Project Number: 033–HD064/PA28–Q011–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 17, 2003.

Reason Waived: Additional time was needed to select a general contractor and process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Community Options Van Houten, Butler, NJ; Project Number: 031–HD107/NJ39–Q001–013.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 18, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Oriente House, Vista, CA; Project Number: 129–HD021/CA33–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 20, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Family Services of Western Pennsylvania I, Sarver, PA; Project Number: 033–HD063/PA28–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 20, 2003.

Reason Waived: Additional time was needed to select a general contractor and process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Lutheran Homes #12, Oak Harbor, OH; Project Number: 042–EE130/OH12–S011–004.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 20, 2003.

Reason Waived: Additional time was needed to employ a new consultant.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Philip Murray House II, Philadelphia, PA; Project Number: 034–EE102/PA26–S001–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 20, 2003.

Reason Waived: Additional time was needed to select a general contractor and process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Allesandro Apartments, Los Angeles, CA; Project Number: 122–HD141/CA16–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 20, 2003.

Reason Waived: Additional time was needed to review the closing documents.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Casimir House, Gardena, CA; Project Number: 122–HD142/CA16–Q011–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: November 21, 2003.

Reason Waived: Additional time was needed to prepare for initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Harvard Square, Irvine, CA; Project Number: 143–HD011/CA43–Q001–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Additional time was needed to prepare for initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Burbank Accessible Apartments, Burbank, CA; Project Number: 122–HD133/CA16–Q011–004.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Additional time was needed for the lengthy process involved in receiving city approval of project design, for completion of construction documents, and for the sponsor to secure additional funding.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Creekside Gardens, Paso Robles, CA; Project Number: 122–EE162/CA16–S991–013.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Additional time was needed to prepare for initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: 703 Cedar Street Senior Housing, Garberville, CA; Project Number: 121–EE147/CA39–S011–007.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Belmeno Manor, Long Beach, CA; Project Number: 122–HD146/CA16–Q011–006.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Additional time was needed to review the initial closing documents.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Union Seniors, Los Angeles, CA; Project Number: 122–EE133/CA16–S981–002.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Additional time was needed to complete site approval and to review and process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Vermont Seniors, Los Angeles, CA; Project Number: 122–EE148/CA16–S981–017.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 1, 2003.

Reason Waived: Additional time was needed to process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Port City Housing, Mobile, AL; Project Number: 062–HD050/AL09–Q011–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 2, 2003.

Reason Waived: Additional time was needed for plans and specifications to be reviewed and approved as required by the city of Mobile.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: McDowell County Housing Action Network, War, WV; Project Number: 045–EE015/WV15–S011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 3, 2003.

Reason Waived: Additional time was needed to submit the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Senior Residence at Kapolei, Kapolei, HI; Project Number: 140–EE024/HI10–S011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 3, 2003.

Reason Waived: Additional time was needed for the sponsor to secure additional financing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Whalley Housing II, New Haven, CT; Project Number: 017–HD031/CT26–Q011–003.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 3, 2003.

Reason Waived: Additional time was needed to redesign the project and process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Nonantum Village Place, Newton, MA; Project Number: 023–EE126/MA06–S001–011.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 3, 2003.

Reason Waived: Additional time was needed to complete the closing documents.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: BCARC Homes IV, Inc., Palm Bay, FL; Project Number: 067–HD086/FL29–Q011–006.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 3, 2003.

Reason Waived: Additional time was needed to re-bid for a new general contractor, obtain a revised cost analysis, and prepare additional exhibits.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Fayette Hills Unity, Oak Hill, WV; Project Number: 045–HD033/WV15–Q011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 3, 2003.

Reason Waived: Additional time was needed to seek secondary financing and prepare for initial closing.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.

Project/Activity: Peaks Island Volunteers of America Elderly Housing, Peaks Island, ME; Project Number: 024–EE058/ME36–S011–001.

Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.

Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.

Date Granted: December 3, 2003.

Reason Waived: Additional time was needed to redesign the project and process the firm commitment application.

Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

• *Regulation:* 24 CFR 891.165.
Project/Activity: Psalm 23 Project, Ellenwood, GA; Project Number: 061–EE090/GA06–S991–006.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.
Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: December 3, 2003.
Reason Waived: Additional time was needed to complete the processing of the firm commitment application.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.
• *Regulation:* 24 CFR 891.165.
Project/Activity: Parque Platino, Lares, PR; Project Number: 056–EE043/RQ46–S011–001.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.
Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: December 8, 2003.
Reason Waived: Additional time was needed because of the difficulties encountered in obtaining approval to join the two lots that would comprise the property on which the project would be located.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.
• *Regulation:* 24 CFR 891.165.
Project/Activity: Berry Wood, Deerfield Township, OH; Project Number: 046–EE058/OH10–S011–002.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.
Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: December 10, 2003.
Reason Waived: Additional time was needed to finalize site control and prepare the initial closing documents.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.
• *Regulation:* 24 CFR 891.165.
Project/Activity: Kenwood Apartments, Adams, WI; Project Number: 075–HD068/WI39–Q011–001.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.
Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: December 11, 2003.
Reason Waived: Additional time was needed to review the initial closing documents.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.
• *Regulation:* 24 CFR 891.165.
Project/Activity: Neumann Senior Housing, Philadelphia, PA; Project Number: 034–EE118/PA26–S011–008.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.
Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: December 15, 2003.
Reason Waived: Additional time was needed to clean up the asbestos on the site and review new drawings and specifications for commercial/retail space usage.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.
• *Regulation:* 24 CFR 891.165.
Project/Activity: Hayworth Housing, Los Angeles, CA; Project Number: 122–HD118/CA16–Q991–002.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.
Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: December 23, 2003.
Reason Waived: Additional time was needed to process the firm commitment application.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.
• *Regulation:* 24 CFR 891.165.
Project/Activity: NCR North Fairmont, Cincinnati, OH; Project Number: 046–EEO56/OH10–S001–004.
Nature of Requirement: Section 891.165 provides that the duration of the fund reservation for the capital advance be 18 months from the date of issuance, with limited exceptions up to 24 months as approved by HUD on a case-by-case basis.
Granted By: John C. Weicher, Assistant Secretary for Housing-Federal Housing Commissioner.
Date Granted: December 31, 2003.
Reason Waived: Additional time was needed to finalize the firm commitment application.
Contact: Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–8000, telephone (202) 708–3000.

III. Regulatory Waivers Granted by the Office of Public and Indian Housing

For further information about the following regulatory waivers, please see the name of the contact person that immediately follows the description of the waiver granted.
• *Regulation:* 24 CFR 902.33(c).
Project/Activity: Huntsville Housing Authority, AL047 Huntsville, AL.
Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.
Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.
Date Granted: November 6, 2003.
Reason Waived: The housing authority requested an extension of time to file a technical review/database adjustment (TR/DBA). The housing authority's Board of Commissioners exercised a 60-day termination clause in its Executive Director's employment contract and terminated the Director's employment with the housing authority.

The housing authority staff believed that the request for a TR/DBA had been formally submitted by the Executive Director before the Director's departure. It was subsequently discovered that the request had not been submitted. An extension of time was therefore granted.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Jesup Housing Authority, GA066, Jesup, GA.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 6, 2003.

Reason Waived: The housing authority did not perform a financial audit for the fiscal year ending September 30, 2002, because the auditor cancelled the audit. The cancellation was attributed to an investigation of the housing authority's former Executive Director by HUD's Office of the Inspector General (OIG). HUD's OIG had the financial data needed for the audit to be submitted. Additional time was needed to complete the audit.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Kansas City Housing Authority (KS001) Kansas City, KS.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: The housing authority requested an extension of time to submit its unaudited financial data. The housing authority's Executive Director had misfiled the notification letter stating that the unaudited submission had been rejected and that the authority had until June 26, 2002, to resubmit corrected unaudited financial data. Consequently, it was not until September 2003 that the housing authority realized it had received a late penalty fee for failing to resubmit a corrected unaudited submission and must resubmit its unaudited financial data.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: City of Anthony Housing Authority, (KS018); Anthony, KS.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 8, 2003.

Reason Waived: The housing authority requested an extension of time to file its financial data. The housing authority advised that it did not complete the 2002 audited financial resubmission, due on January 23, 2003, because the auditor had retired due to illness. Consequently, the housing authority procured the services of another auditor, who is currently performing the 2003 audit, to complete the housing authority's 2002 audited financial statements.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Wamego Housing Authority, KS042, Wamego, KS.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 17, 2003.

Reason Waived: The housing authority requested a 60-day extension to submit its audited financial submission because of an investigation by HUD and other agencies. As a result of the investigation, the housing authority's auditors could not complete the audit by the due date.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Charles County Government Department of Comm. Svcs., MD024, Port Tobacco, MD.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 19, 2003.

Reason Waived: According to the waiver request, dated September 10, 2003, the housing authority's records, including backups of electronic files, were destroyed in a fire on May 12, 2003, which was documented by newspaper articles.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Tupelo Housing Authority, MS077, Tupelo, MS.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public

housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: The housing authority requested an extension of time to submit its audited financial data. Several factors were cited, including delays caused by audit contract cancellations and an OIG investigation of possible misappropriation of funds by the previous housing authority administration.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: City of Shelby Housing Authority, NC034, Shelby, NC.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 19, 2003.

Reason Waived: The housing authority did not fully understand the filing requirements for the financial audited information, because this was its first time filing an audited submission. Therefore, the housing authority failed to complete the submission process by the due date and additional time as needed.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: City of Albemarle Department of Public Housing, NC075, Albemarle, NC.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: The housing authority was unaware that it had to submit audited financial statements, separate from those of the City of Albemarle. This was the first year in which the audited financial submission was due for the housing authority. The housing authority submitted unaudited financial submissions on a timely basis for fiscal years ending 2000, 2001, 2002, and 2003.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Plattsburgh Housing Authority, NY018, Plattsburgh, NY.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: The housing authority did not submit its audited financial statements, because its newly hired accountant was not familiar with the final step in the submission process. The housing authority thought that the audited report had been successfully transmitted in a timely fashion, but later learned that it had not been submitted.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Housing Authority of the City of Sweetwater, TX061, Sweetwater, TX.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: On April 1, 2003, the housing authority procured auditors for the fiscal year ended March 31, 2003, which was long before the audit due date of December 31, 2003. However, in October 2003, the auditors informed the housing authority that they would be unable to perform the audit. The housing authority needed to procure a new auditor and additional time for the audit to be performed.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Floydada Housing Authority, TX189, Floydada, TX.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 4, 2003.

Reason Waived: Eleven days prior to the audited submission due date, the Executive Director was asked to resign by the housing authority's Board of Directors because of alleged contract violations among other factors. Because this matter may potentially have affected the housing authority's financial position and operating results for Fiscal Year (FY) 2002, the interim Executive Director and the auditors requested additional time to investigate the matter and to report the housing authority's financial posture for the fiscal year ending December 31, 2002.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Kemp Housing Authority, TX387, Kemp, TX.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 4, 2003.

Reason Waived: The housing authority requested an indefinite extension of time to submit its audited financial statements for the fiscal year ended December 31, 2002. The housing authority requested an extension of time because of an on-going OIG investigation in which the Texas State Office of Public Housing obtained the housing authority's financial records on March 26, 2003, and turned them over to the OIG on June 27, 2003.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 902.33(c).

Project/Activity: Kennewick Housing Authority, WA012, Hudson, NY.

Nature of Requirement: The regulation establishes certain reporting compliance dates. In accordance with the Single Audit Act and OMB Circular A–133, unaudited financial statements are required to be submitted two months after the fiscal year end of a public housing agency (PHA), and audited financial statements are required no later than 9 months after the PHA's fiscal year ends.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 17, 2003.

Reason Waived: The housing authority requested an extension of time. A new finance officer, who had began employment with the housing authority only a short time before the submission due date, was new to the housing industry and was not familiar with HUD processes. Therefore, the office did not complete the final step in the submission process.

Contact: Judy Wojciechowski, Director, Office of Troubled Agency Recovery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 708–4932.

• *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: Garden Homes Estates-Phase I HOPE VI Project, GA06URD002I100/Savannah, GA.

Nature of Requirement: The regulation requires that if the partner or owner entity (or any other entity with an identity of interest with such party) wants to serve as a general contractor for a project or development, the partner or owner entity may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest submitted in response to a public request for bids.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: October 31, 2003.

Reason Waived: The waiver of the public bidding requirement was approved in order for Integral Building Group, LLC, whose members are affiliates of Integral Properties, LLC, the project's developer, to complete Phase 1 of the Garden Homes project. The Savannah Housing Authority (SHA) submitted an independent third party cost estimate for the work to be performed by Integral Building Group on Phase 1, which totaled $15,407,230. SHA also submitted the construction contract with Crosland Contracting for the work, which totaled $15,049,197, which satisfied HUD's condition that the construction contract be less than or equal to the independent cost estimate.

Contact: Milan Ozdinec, Deputy Assistant Secretary, Office of Public Housing Investments, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 401–8812.

• *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: South Albany Village Mixed-Finance Project, GA06P023021/ Albany, GA.

Nature of Requirement: The regulation requires that if the partner or owner entity (or any other entity with an identity of interest with such parties) wants to serve as a general contractor for a project or development, the partner or owner entity may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest submitted in response to a public request for bids.

Granted By: Michael Liu, Assistant Secretary Public and Indian Housing.

Date Granted: December 2, 2003.

Reason Waived: The waiver of the public bidding requirement was approved in order for Integral Building Group, LLC, to complete this project. The Albany Housing Authority (AHA) submitted an independent third party cost estimate for the work, which totaled $9,134,641. AHA also submitted the construction contract with Integral Building Group for the work in the amount of $9,092,059, which satisfied HUD's condition that the construction contract be less than or equal to the independent cost estimate.

Contact: Milan Ozdinec, Deputy Assistant Secretary, Office of Public Housing Investments, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 401–8812.

• *Regulation:* 24 CFR 941.606(n)(1)(ii)(B).

Project/Activity: Jazz on the Boulevard (formerly Drexel Homes) Mixed Finance Project IL06–P002–211/ Chicago, IL.

Nature of Requirement: The regulation requires that if the partner or owner entity (or any other entity with an identity of interest with such parties) wants to serve as a general contractor for a project or development, the partner or owner may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest submitted in response to a public request for bids.

Granted By: Michael Liu, Assistant Secretary Public and Indian Housing.

Date Granted: December 3, 2003.

Reason Waived: The waiver of the public bidding requirement cases was approved in order for Thrush Construction, Inc., to serve as General Contractor of the Jazz on the Boulevard project. The Chicago Housing Authority (CHA) submitted an independent third party cost estimate for the work, which totaled $21,850,000. CHA also submitted the construction contract with Thrush Construction for the work in the amount of, which totaled $20,987,265, which satisfied HUD's condition that the construction contract be less than or equal to the independent cost estimate.

Contact: Milan Ozdinec, Deputy Assistant Secretary, Office of Public Housing Investments, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 401–8812.

• *Regulation:* 24 CFR 941.606(n)(1)(ii).

Project/Activity: Pershing Court, Phase 1A (formerly Stateway Gardens) Mixed Finance Project No. IL06–P002–223/Chicago, IL.

Nature of Requirement: The regulation requires that if the partner and/or owner entity (or any other entity with an identity of interest with such parties) wants to serve as a general

contractor for a project or development, the partner or owner entity may award itself the construction contract only if it can demonstrate to HUD's satisfaction that its bid is the lowest submitted in response to a public request for bids.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 17, 2003.

Reason Waived: The waiver of the public bidding requirement was approved in order for Walsh Construction Company to serve as General Contractor for Phase 1A of the Pershing Court project. The Chicago Housing Authority (CHA) submitted an independent third party cost estimate from Tishman Construction Corporation for the work, which totaled $11,647,000. The construction price of $11,013,524 offered by Walsh Construction is approximately five percent less than the total cost estimate prepared by Tishman. This satisfies HUD condition that the construction contact be less than or equal to the independent cost estimate.

Contact: Milan Ozdinec, Deputy Assistant Secretary, Office of Public Housing Investments, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 401–8812.

• *Regulation:* 24 CFR 941.606(n)(1)(ii).

Project/Activity: Dallas, Texas, FY1998 Roseland Homes HOPE VI Grant, Phase IX, Hall Street Corridor.

Nature of Requirement: The regulation requires that a public housing authority use an open and competitive process to select a partner or owner entity to develop a mixed-finance project containing public housing units.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 11, 2003.

Reason Waived: Dallas Housing Authority (DHA) presented compelling arguments that the development effort would be greatly enhanced by involvement of the selected non-profit partner. DHA demonstrated that the award of a contract through competitive means would be infeasible, because the item is available only from a single source. DHA would be unable to procure any other developer with similar experience and commitment to the Roseland community or who would be able to offer site control of the land parcels providing essential links within the community.

Contact: Milan Ozdinec, Deputy Assistant Secretary, Office of Public Housing Investments, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 401–8812.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Boston Housing Authority (BHA), Boston, MA.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary For Public And Indian Housing.

Date Granted: December 22, 2003.

Reason Waived: The BHA requested a waiver of the selection preference regulation in order to select homeless persons who have a serious and persistent mental illness that is severe enough to interfere with one or more activities of daily living to occupy units that will receive project-based voucher assistance for occupancy of a project at 34 Algonquin Street. The waiver was granted because the BHA demonstrated that separate housing and services provided at 34 Algonquin Street would enable the target population to have the same opportunity as others to enjoy the benefits of secure affordable housing. Without units designated for members of the target population, they would not be able to maintain their position on BHA's tenant-based or project-based waiting list, because they do not have a fixed address, do not understand materials sent to them, and are frequently hospitalized. The target population also would not be successful in the housing search process, even if a voucher were issued, due to the stigma inappropriately associated with mental illness and the need for supportive services.

Contact: Gerald Benoit, Director, Housing Vouchers Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Huntsville Housing Authority (HHA), Huntsville, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 22, 2003.

Reason Waived: HHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Castlewood Apartments. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by the Alabama Housing Finance Authority (AHFA) required that a project receiving a tax credit allocation would designate no fewer than 10 percent of the units for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from a Memorandum of Understanding (MOU) between AHFA and the Department of Mental Health/Mental Retardation (DMH/MR) in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, equivalent to six of the 37 existing units in the project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Eufaula Housing Authority (EHA), Eufaula, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 12, 2003.

Reason Waived: EHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Covington Way and Carrington Place. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or two of the 10 units of new construction in each project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: BHA, Boston, MA.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability, such as HIV/AIDS.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 11, 2003.

Reason Waived: BHA requested a waiver of the selection preference regulation in order to select families eligible for Housing Opportunities for Persons with AIDS (HOPWA) families to occupy units at Seton Manor. Since by law only persons with HIV/AIDS may occupy units developed with HOPWA funds, a public housing agency may only authorize occupancy of such units by persons with HIV/AIDS, even if the units also receive project-based voucher assistance. Therefore, in selecting families to refer to the owner for occupancy of these units, BHA would have had to pass over persons on its waiting list until it reached a person with HIV/AIDS interested in moving into one of the units at Seton Manor.

Contact: Gerald Benoit, Director, Housing Vouchers Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: HHA, Huntsville, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 12, 2003.

Reason Waived: HHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units designated for project-based voucher assistance at Sunrise Garden Apartments. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or two of the eight units of new construction in the project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Selma Housing Authority (SHA), Selma, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 12, 2003.

Reason Waived: SHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Hilltop Subdivision. In 2001 and 2002 the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or two of the 14 units of new construction in the project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office

of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: SHA, Selma, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 12, 2003.

Reason Waived: SHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Magnolia Garden Homes. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or eight of the 48 units of new construction in the project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: HHA, Huntsville, AL.

Nature of Requirement: The regulation at 24 CFR 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 12, 2003.

Reason Waived: HHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Garden Park Apartments. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or nine of the 59 units of new construction in the project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Troy Housing Authority (THA), Troy, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: THA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Autumn Ridge. In 2001 and 2002 the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or seven of the 42 units of new construction in each project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Northport Housing Authority (NHA), Northport, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: NHA requested a waiver of the selection preference

regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Grand View Apartments. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or eleven of the 72 units of new construction in each project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Ozark Housing Authority (OHA), Ozark, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: OHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at the Ozark Project. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or two of the ten units of new construction in the project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Housing Authority of Birmingham District (HABD), Birmingham, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 10, 2003.

Reason Waived: HABD requested a waiver of the selection preference regulation in order to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Metropolitan Gardens. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent, or 29 units.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Jefferson County Housing Authority (JCHA), Birmingham, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public And Indian Housing.

Date Granted: November 6, 2003.

Reason Waived: JCHA requested a waiver of the selection preference regulation in order to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Carson Landing. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit

entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or eleven of the 72 units of new construction at this project.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3).

Project/Activity: Gadsden Housing Authority (GHA), Gadsden, AL.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Granted By: Michael Liu, Assistant Secretary for Public And Indian Housing.

Date Granted: November 6, 2003.

Reason Waived: GHA requested a waiver of the selection preference regulation to select persons with mental illness or mental retardation, as verified by a health care professional, to occupy units that will receive project-based voucher assistance at Johnson Apartments and Englewood Apartments. In 2001 and 2002, the Low Income Housing Tax Credit State Qualified Allocation Plans administered by AHFA required that a project receiving a tax credit allocation would have no less than 10 percent of the units designated for individuals with mental illness or mental retardation (with additional points for 15 percent or more). This requirement stemmed from an MOU between AHFA and DMH/MR in which the agencies agreed to require this designation in any project that received an allocation of tax credits from AHFA in 2001 and 2002. The MOU was a result of the settlement by the state of Alabama of a lawsuit entitled *Wyatt* v. *Sawyer* in which the state agreed to eliminate approximately 600 long-term care beds from DMH/MR facilities for the treatment of mental illness or mental retardation. DMH/MR's remedy to replace those beds was the preference requirement for such individuals in projects receiving tax credit allocations from AHFA. The waiver was limited to no more than 15 percent (rounded up) of the units, or nine of the 56 units of new construction in Johnson Apartments and four of the 24 units of new construction in Englewood Apartments.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3) and Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

Project/Activity: BHA, Boston, MA.

Nature of Requirement: Section 982.207(b)(3), which governs tenant-selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability.

Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance, requires that all new project based assistance agreements or HAP contracts be for units in census tracts with poverty rates of less than 20 percent. The law requires that a contract for project-based assistance only be approved by a PHA if it is consistent with the goal of deconcentrating poverty and expanding housing and economic opportunities.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 22, 2003.

Reason Waived: BHA requested a waiver of the selection preference requirements in 24 CFR 982.207(b)(3) in order to select homeless persons who have a serious and persistent mental illness that is severe enough to interfere with one or more activities of daily living to occupy units that will receive project-based voucher assistance at 131 Ziegler Street. BHA demonstrated that separate housing and services provided at 131 Ziegler Street would enable the target population to have the same opportunity as others to enjoy the benefits of secure affordable housing. Without units designated for members of the target population, they would not be able to maintain their position on the BHA's tenant-based or project-based waiting list because they did not have a fixed address, did not understand materials sent to them, and were frequently hospitalized. The target population also would not be successful in the housing search process, even if a voucher were issued, due to the stigma inappropriately associated with mental illness and the need for supportive services.

Approval of the exception to deconcentration was granted, since the project is located in a HUD-designated Empowerment Zone, the purpose of which is to open new businesses, and create jobs, housing, and new educational and healthcare opportunities for thousands of Americans.

Contact: Gerald Benoit, Director, Housing Vouchers Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.207(b)(3) and Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

Project/Activity: St. Paul Public Housing Agency (SPPHA), St. Paul, MN.

Nature of Requirement: Section 982.207(b)(3), which governs tenant selection under the project-based voucher program, states that a housing agency may adopt a preference for admission of families that include a person with disabilities, but may not adopt a preference for persons with a specific disability. Section II, subpart E, of the initial guidance requires that in order to meet the Department's goal of deconcentration and expanding housing and economic opportunities, the projects must be in census tracts with poverty rates of less than 20 percent.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: SPPHA requested a waiver of the selection preference regulation in order to select families eligible for Housing Opportunities for Persons with AIDS (HOPWA) to occupy units that will receive PBA at Martin Luther King Court, as well as an exception to the initial guidance, since the project is located in census tracts with poverty rates of 20.66 percent, 20.72 percent, and 22.75 percent.

Approval to waive selection preference requirements was granted since eight units in this project were developed with HOPWA funds and none will receive rental or operating subsidy under the HOPWA program. Since by law only persons with HIV/AIDS may occupy units developed with HOPWA funds, a public housing agency may only authorize occupancy of such units by persons with HIV/AIDS, even if the units also receive PBA.

Approval of the exception for deconcentration was granted since the first two duplexes are in the St. Paul Enterprise Community and the last duplex is less than one block from its southern border and should derive the same benefits. The purpose of establishing enterprise communities is to open new businesses and create jobs, housing, and new educational and healthcare opportunities for thousands of Americans. These goals are consistent with the goal of deconcentrating poverty and expanding housing and economic opportunities.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Fall River Housing Authority (FRHA), Fall River, MA.

Nature of Requirement: Section 982.505(d) allows a PHA to approve a higher payment standard within the basic range for a family that includes a person with a disability as a reasonable accommodation in accordance with 24 CFR part 8.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: FRHA requested a special exception payment standard that exceeds 120 percent of the fair market rent as a reasonable accommodation for a disabled housing choice voucher program participant. The waiver was granted to allow two disabled housing choice voucher participants to lease in place because they had established relationships with neighbors and friends who had been supportive. Building management had also been supportive by building a handicap ramp, establishing automatic door openers with personalized controllers, and installing low pile carpeting to make movement of their wheelchairs less burdensome in their apartments. If they had been required to move, it would have been extremely disruptive, not only to their personal and support connections, but also to their physical and mental well-being.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d)

Project/Activity: Housing Authority of Washington County (HAWC), Washington County, OR.

Nature of Requirement: Section 982.505(d) allows a PHA to approve a higher payment standard within the basic range for a family that includes a person with a disability as a reasonable accommodation in accordance with 24 CFR part 8.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 8, 2003.

Reason Waived: HAWC requested a special exception payment standard that exceeds 120 percent of the fair market rent as a reasonable accommodation for a disabled housing choice voucher program participant. The waiver was granted to allow a disabled housing choice voucher participant to lease the proposed unit because her doctors believed that the proposed apartment unit would best accommodate her disabilities, based on environmental surroundings, familiarity, security, and its larger size. The participant was struggling to maintain her personal independence while caring for herself, and her doctors believed that the apartment unit would allow her to preserve and improve her quality of life.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d)

Project/Activity: King County Housing Authority (KCHA), Seattle, WA.

Nature of Requirement: Section 982.505(d) allows a PHA to approve a higher payment standard within the basic range for a family that includes a person with a disability as a reasonable accommodation in accordance with 24 CFR part 8.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 10, 2003.

Reason Waived: CHA requested an exception payment standard that exceeds 120 percent of the fair market rent as a reasonable accommodation for a housing choice voucher participant for a manufactured home space rental. The participant suffers from a mental condition that causes severe depression and paranoia. The waiver was granted to allow the housing choice voucher participant to remain at her current location, to maintain a stable lifestyle, and live independently.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 982.505(d).

Project/Activity: Howard County Housing Commission (HCHC), Columbia, MD.

Nature of Requirement: Section 982.505(d) allows a PHA to approve a higher payment standard within the basic range for a family that includes a person with a disability as a reasonable accommodation in accordance with 24 CFR part 8.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 12, 2003.

Reason Waived: HCHC requested an exception payment standard that exceeds 120 percent of the fair market rent as a reasonable accommodation for a housing choice voucher participant with a disability who relies on a wheelchair. The Housing Choice Voucher program participant was the head of the household and was a person with a disability who relies on a wheelchair. The unit in question was wheelchair accessible. According to the Commission only three percent of the units in this area were accessible. In addition, the Commission had been advised by the participant's doctor that relocation from his current unit would be detrimental to his health and possibly cause life-threatening deterioration.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• Regulation: 24 CFR 983.3(a)(2).

Project/Activity: El Dorado County Housing Authority (EDHA), Placerville, CA.

Nature of Requirement: Section 983.3(a)(2) requires that the units to be project-based not be under a tenant-based or project based housing assistance payments (HAP) contract or otherwise committed, *e.g.*, vouchers issued to families searching for housing or units under a HAP contract.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 19, 2003.

Reason Waived: EDHA requested a waiver of requirements regarding the availability of vouchers for project-based assistance, so that it could enter into an agreement for a HAP contract for White Rock Village. At the time EDCHA had a turnover rate of approximately eight vouchers per month. There were 42 vouchers that had project-based assistance attached at White Rock Village. EDCHA's intention was to stop issuing turnover vouchers in the six months immediately preceding the date anticipated for HAP contract execution to ensure that vouchers would be available for this project and that over-leasing will not occur.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 983.51(a), (b), and (c) and Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance Program; Initial Guidance.

Project/Activity: Housing Authority of the City of Tampa (HACT), Tampa, FL.

Nature of Requirement: Section 983.51 requires competitive selection of owner proposals in accordance with a housing authority's HUD-approved advertisement and unit selection policy. Section II, subpart E, of the initial guidance requires that, in order to meet the Department's goal of deconcentration and expanding housing and economic opportunities, the projects be in census tracts with poverty rates of less than 20 percent.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: October 20, 2003.

Reason Waived: HACT requested a waiver of the competitive selection of owner proposals and an exception to the initial guidance to permit it to attach project-based assistance to the Oaks at Riverview located in a census tract with a poverty rate of 34 percent. Approval to waive competitive selection was granted, since the owner/developer, a team of three firms (Mid City Urban, Henson Development company and Russell New Urban Development), was competitively selected by the HACT to develop its HOPE VI units. Approval of the exception for deconcentration was granted, since the project will be a 250-unit new construction development that is part of a HOPE VI revitalization plan to replace 360 demolished public housing units of Riverview Terrace and Tom Dyer Homes. Of the 250 units at the Oaks at Riverview, 45 will receive project-based assistance and 205 units will be public housing. In addition to the units at Oaks at Riverview, the revitalization plan for the site consists of 96 homeownership units, of which 36 will be marketed to families participating in the housing choice voucher homeownership program and 60 will be market rate.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 983.51(a), (b), (c), and (d).

Project/Activity: Lynn Public Housing Agency (LPHA), Lynn, MA.

Nature of Requirement: Section 983.51 requires competitive selection of owner proposals in accordance with a housing authority's HUD-approved advertisement and unit selection policy.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 18, 2003.

Reason Waived: LPHA requested a waiver of competitive selection of owner proposals to permit it to attach project-based assistance to Lynn YMCA Project. Approval to waive competitive selection was granted, since the Lynn YMCA Project was competitively awarded $700,000 in McKinney-Vento Supportive Housing Program funds for the construction of the project, as well as $200,000 in federally apportioned local HOME funds.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 983.51(a), (b), (c), and (d).

Project/Activity: LPHA, Lynn, MA.

Nature of Requirement: Section 983.51 requires competitive selection of owner proposals in accordance with a housing authority's HUD-approved advertisement and unit selection policy.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 18, 2003.

Reason Waived: LPHA requested a waiver of competitive selection of owner proposals to permit it to attach project-based assistance to St. Jean Baptiste Project.

Approval to waive competitive selection was granted, since St. Jean Baptiste Project was competitively awarded low-income housing tax credits through the state of Massachusetts' competitive process. The project also received $550,000 in state HOME funds. Since the project was also awarded funding under two previous federal competitions, the waiver was granted.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 983.51(a), (b), (c), and (d).

Project/Activity: Minneapolis Public Housing Agency (MPHA), Minneapolis, MN.

Nature of Requirement: Section 983.51 requires competitive selection of owner proposals in accordance with a housing authority's HUD-approved advertisement and unit selection policy.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: December 22, 2003.

Reason Waived: MPHA requested a waiver of competitive selection of owner proposals to permit it to attach project-based assistance to Loring Towers. Approval to waive competitive selection was granted, since Loring Towers was competitively awarded low-income housing tax credits to obtain tax-exempt bonds and Preservation Affordable Rental Investment Funds (a ''soft debt'' without interest to be repaid at the end of the 30-year compliance period) by the Minnesota Housing Finance Agency.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing,

Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR 990.107(f) and 990.109.

Project/Activity: Harrisburg, PA, Housing Authority.

Nature of Requirement: Under 24 CFR 990.107 and 990.109, the Operating Fund Formula energy conservation incentive, which relates to energy performance contracting, applies to only PHA-paid utilities.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: October 31, 2003.

Reason Waived: The Harrisburg Housing Authority has resident-paid utilities. The housing authority requested permission to benefit from energy performance contracting for developments that have resident-paid utilities. The housing authority estimated that it could increase energy savings substantially, if it were able to undertake energy performance contracting for its resident-paid utilities. In September 1996, the Oakland Housing Authority was granted a waiver to permit the authority to benefit from energy performance contracting for developments with resident-paid utilities. The waiver was granted on the basis that the authority had presented a sound and reasonable methodology for doing so. In 2003, the Harrisburg Housing Authority requested a waiver based on the same approved methodology. The waiver permits the housing authority to exclude from its calculation of rental income the increased rental income due to the difference between updated baseline utility allowances (before implementation of the energy conservation measures) and revised allowances (after implementation of the measures) for the project(s) involved for the duration of the contract period, which cannot exceed 12 years.

Contact: Chris Kubacki, Director, Public Housing Financial Management Division, Office of Public and Indian Housing Real Estate Assessment Center, 1280 Maryland Ave., SW., Suite 800, Washington, DC 20024–2135, telephone (202) 708–4932.

• *Regulation:* 24 CFR 990.107(f) and 990.109.

Project/Activity: Columbiana, OH, Metropolitan Housing Authority.

Nature of Requirement: Under 24 CFR 990, the Operating Fund Formula energy conservation incentive, which relates to energy performance contracting, currently applies to only PHA-paid utilities. The Columbiana Housing Authority has resident-paid utilities.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: The Columbiana Housing Authority has resident-paid utilities. The housing authority requested permission to benefit from energy performance contracting for developments that have resident-paid utilities. The housing authority requested a waiver based on the same methodology approved for the Oakland Housing Authority in September 1996. The waiver permits the housing authority to exclude from its calculation of rental income the increased rental income due to the difference between updated baseline utility allowances (before implementation of the energy conservation measures) and revised allowances (after implementation of the measures) for the project(s) involved for the duration of the contract period, which cannot exceed 12 years.

Contact: Chris Kubacki, Director, Public Housing Financial Management Division, Office of Public and Indian Housing Real Estate Assessment Center, 1280 Maryland Ave., SW., Suite 800, Washington, DC 20024–2135, telephone (202) 708–4932.

• *Regulation:* 24 CFR 1000.336(b).

Project/Activity: Kickapoo Traditional Tribe of Texas, Eagle Pass, Texas.

Nature of Requirement: Section 1000.336 establishes a provision that a tribe, a tribally designated housing entity (TDHE), or HUD may request a waiver of the June 15 deadline to challenge data used to compute the formula allocation under the Indian Housing Block Grant (IHBG) program established by the Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 10, 2003.

Reason Waived: The Kickapoo Traditional Tribe requested permission to submit a census challenge after the June 15 deadline. The request regarded data used in computing their FY2003 IHBG formula allocation. In accordance with § 1000.336(b), tribes had to submit census challenges to HUD by June 15, 2003, for consideration for the FY2004 funding cycle. The decision to use Census 2000 data for six of the seven needs variables was made immediately prior to September 2003, and the tribe did not receive this information until after September 5, 2003. Therefore, it was not able to review its data in order to comply with this requirement before the June 15 deadline.

Contact: Deborah Lalancette, Director, Grants Management, Denver Program Office of Native American Programs (ONAP), Department of Housing and Urban Development, 1999 Broadway, Suite 3390, Denver, CO 80202–5733, telephone (303) 675–1625.

• *Regulation:* 24 CFR 1000.336(b).

Project/Activity: Calista Region of Alaska, Anchorage, Alaska, for the tribes that have designated the Association of Village Council Presidents Regional Housing Authority (AVCP). These tribes are Akiak Native Community, Alakanuk Traditional Council, Algaaciq Tribal Government, Bill Moore's Slough Elder's Council, Calista Regional Corporation, Chefornak Traditional Council, Chuathbaluk Traditional Council, Chuloonawick Tribe, Crooked Creek Traditional Council, Eek Traditional Council, Georgetown Tribal Council, Hamilton Tribal Council, Hooper Bay, Kasigluk Traditional Council, Kipnuk Traditional Council, Kongiganak Traditional Council, Kotlik Traditional Council, Marshall Traditional Council, Napaskiak Tribal Council, Native Village of Kwigillingok, Native Village of Mekoryuk, Native Village of Napakiak, Native Village of Paimiut, Native Village of Upper Kalskag, Native Village of Tununak, Newtok Traditional Council, Nightmute Traditional Council, Nunam Iqua Tribal Council, Nunakauyak Traditional Council, Nunapitchuk IRA Council, Ohagamiut Traditional Council, Oscarville Tribal Council, Pitka's Point Traditional Council, Red Devil Tribal Council, Scammon Bay Traditional Council, Stony River Traditional Council, Traditional Village of Platinum, Tuntutuliak Traditional Council, Umkumiut Traditional Council, Village of Lower Kalskag, and Yupiit of Andreasfski.

Nature of Requirement: Section 1000.336 establishes a provision that a tribe, a TDHE, or HUD may request a waiver of the June 15 deadline to challenge data used to compute the formula allocation under the IHBG program established by NAHASDA.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 13, 2003.

Reason Waived: The request regarded data used in computing their FY2003 IHBG formula allocation. In accordance with § 1000.336(b), tribes must submit census challenges to HUD by June 15, 2003, for consideration for the FY2004 funding cycle. The decision to use Census 2000 data for six of the seven needs variables was made immediately

prior to September 2003, and the tribes did not receive this information until after September 5, 2003. Therefore, they were not able to review their data in order to comply with this requirement before the June 15 deadline.

Contact: Deborah Lalancette, Director, Grants Management, Denver Program ONAP, Department of Housing and Urban Development, 1999 Broadway, Suite 3390, Denver, CO 80202–5733, telephone (303) 675–1625.

• *Regulation:* 24 CFR 1000.336(b).

Project/Activity: Round Valley Indian Housing Authority (RVIHA) Tribes, Covelo, California. The Round Valley Tribes include Little Lake, Pomo, Pit River, Concow, Wailacki, Nomlacki and Yuki.

Nature of Requirement: Section 1000.336 establishes a provision that a tribe, a TDHE, or HUD may request a waiver of the June 15 deadline to challenge data used to compute the formula allocation under the IHBG program established by NAHASDA.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: The request regarded data used in computing their FY2003 IHBG formula allocation. In accordance with § 1000.336(b), tribes must submit census challenges to HUD by June 15, 2003, for consideration for the FY2004 funding cycle. The decision to use Census 2000 data for six of the seven needs variables was made immediately prior to September 2003, and the tribes did not receive this information until after September 5, 2003. Therefore, they were not able to review their data in order to comply with this requirement before the June 15 deadline.

Contact: Deborah Lalancette, Director, Grants Management, Denver Program ONAP, Department of Housing and Urban Development, 1999 Broadway, Suite 3390, Denver, CO 80202–5733, telephone (303) 675–1625.

• *Regulation:* 24 CFR 1000.336(b).

Project/Activity: Northern Circle Indian Housing Authority, located in Ukiah, California, on behalf of its member tribes. These tribes include Tyme Maidu Tribe of Berry Creek Rancheria, Guidiville Indian Rancheria, Hopland Band of Pomo Indians, Manchester Point Arena Band of Pomo Indians, Mooretown Rancheria, Redwood Valley Little River Band of Pomo Indians, Sherwood Valley Band of Pomo Indians, and Kashia Band of Pomo Indians of the Stewarts Point Rancheria.

Nature of Requirement: Section 1000.336 establishes a provision that a tribe, a TDHE, or HUD may request a waiver of the June 15 deadline to challenge data used to compute the formula allocation under the IHBG program established by NAHASDA.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: The request regarded data used in computing their FY2003 IHBG formula allocation. In accordance with § 1000.336(b), tribes must submit census challenges to HUD by June 15, 2003, for consideration for the FY2004 funding cycle. The decision to use Census 2000 data for six of the seven needs variables was made immediately prior to September 2003, and the tribes did not receive this information until after September 5, 2003. Therefore, they were not able to review their data in order to comply with this requirement before the June 15 deadline.

Contact: Deborah Lalancette, Director, Grants Management, Denver Program ONAP, Department of Housing and Urban Development, 1999 Broadway, Suite 3390, Denver, CO 80202–5733, telephone (303) 675–1625.

• *Regulation:* Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

Project/Activity: BHA, Boston, MA.

Nature of Requirement: Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance Program; Initial Guidance requires that all new project based assistance agreements or HAP contracts be for units in census tracts with poverty rates of less than 20 percent. The law requires that a contract for project-based assistance only be approved by a PHA if it is consistent with the goal of deconcentrating poverty and expanding housing and economic opportunities.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: October 9, 2003.

Reason Waived: BHA requested an exception to the initial guidance to permit it to attach project-based assistance to 5 units located at 2055 Columbus Avenue. Approval of the exception for deconcentration was granted for 2055 Columbus Avenue, since the project is located in a HUD-designated Empowerment Zone, the purpose of which is to open new businesses and create jobs, housing, and new educational and healthcare opportunities.

Contact: Gerald Benoit, Director, Housing Vouchers Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance Program; Initial Guidance.

Project/Activity: BHA, Boston, MA.

Nature of Requirement: Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance Program; Initial Guidance requires that all new project based assistance agreements or HAP contracts be for units in census tracts with poverty rates of less than 20 percent. The law requires that a contract for project-based assistance only be approved by a PHA if it is consistent with the goal of deconcentrating poverty and expanding housing and economic opportunities.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: October 9, 2003.

Reason Waived: BHA requested an exception to the initial guidance to permit it to attach project-based assistance to 11 units located at 3033 and 3089 Washington Street. Approval of the exception for deconcentration was granted for 3033 and 3089 Washington Street, since the project is located in a HUD-designated Empowerment Zone, the purpose of which is to open new businesses and create jobs, housing, and new educational and healthcare opportunities for thousands of Americans.

Contact: Gerald Benoit, Director, Housing Vouchers Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* 24 CFR Section II, subpart F, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance Program; Initial Guidance.

Project/Activity: Housing Authority of the City of Frederick (HACF), Frederick, MD.

Nature of Requirement: Section II, subpart F, of the initial guidance requires no more than 25 percent of the dwelling units in any building be assisted under a HAP contract for project-based assistance, except for dwelling units that are specifically made available for elderly families,

disabled families, or families receiving supportive services. Until regulations are promulgated regarding the category of families receiving supportive services, HUD is authorizing implementation of this aspect of the law on a case-by-case basis.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 4, 2003.

Reason Waived: HACF requested an exception to Section II, subpart F, of the initial guidance to attach project-based assistance to 100 percent of the units at North Market Manor. The approval of the exception to subpart F was based on the economic self-sufficiency nature of the services the families residing at the development would receive. The services included educational classes, health seminars, job skills training, after-school programs, financial workshops, and homeownership training.

Contact: Gerald Benoit, Director, Real Estate and Housing Performance Division, Office of Public and Assisted Housing Delivery, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

• *Regulation:* Section II, subpart E, of the January 16, 2001, **Federal Register** notice, Revisions to PHA Project-Based Assistance (PBA) Program; Initial Guidance.

Project/Activity: New York City Housing Authority (NYCHA), New York, NY.

Nature of Requirement: Section II, subpart E, of the initial guidance requires that, in order to meet the Department's goal of deconcentration and expanding housing and economic opportunities, the projects must be in census tracts with poverty rates of less than 20 percent.

Granted By: Michael Liu, Assistant Secretary for Public and Indian Housing.

Date Granted: November 26, 2003.

Reason Waived: NYCHA requested an exception to the initial guidance for three projects, 500 West 56th Street, 1615 St. John's Place, and 527 Bushwick Avenue.

Approval of the exception for deconcentration was granted for 500 West 56th Street, since the census tract in which the project is located is one of 20 census tracts that comprise Manhattan Community District 4 (CD4). Commercial activities in this district include the 2.1 million square foot AOL-Time Warner center and a 540,000 square foot film and television production facility, Studio City. Specific commercial activity in the census tract includes the Cyber Center and the Image Group Studios. The commercial activity in CD4 will provide significant economic opportunities for its residents and the creation of more than 9,000 housing units, of which the majority will be market-rate housing.

Approval of the exception for deconcentration was granted for 1615 St. John's Place, since the project is located in a census tract that had a reduction of more than 13 percent in its poverty rate since 1990. The project is located in the East New York Empire Zone and, although the census tract in which this project is located is entirely residential, residents can avail themselves of the Empire Zone's services. Empire zones were designed to encourage local business development with government tax and other incentives. To expand their economic opportunities, 1,128 zone residents have participated in a self-sufficiency training program through the city's Department of Employment and Department of Parks and Recreation.

Approval of the exception for deconcentration was granted for 527 Bushwick Avenue, since the project is located in a census tract that had a reduction of more than 13 percent in its poverty rate since 1990. The project is located in the North Brooklyn/Brooklyn Navy Yard Empire Zone 53. The project will include a 15,000 square foot community facility that will be home to the Ridgewood Bushwick Homecare Council, Inc., a nonprofit group that will serve 2,500 area senior residents and employ and train over 1,500 people.

Contact: Gerald Benoit, Director, Housing Voucher Management and Operations Division, Office of Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4210, Washington, DC 20410–5000, telephone (202) 708–0477.

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Federal Register

Wednesday,
August 4, 2004

Part IV

Federal Reserve System

12 CFR Part 229
Availability of Funds and Collection of Checks; Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 229

[Regulation CC; Docket No. R–1176]

Availability of Funds and Collection of Checks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors is publishing final amendments to Regulation CC that add a new subpart D, with commentary, to implement the Check Clearing for the 21st Century Act. These amendments set forth the requirements of the Act that apply to banks, a model consumer awareness disclosure and other model notices, and indorsement and identification requirements for substitute checks. The final amendments also clarify some existing provisions of the rule and commentary.

DATES: This rule is effective on October 28, 2004, except for model form C–5A in appendix C, which is effective August 4, 2004, and paragraph (4) of appendix D, which is effective on January 1, 2006.

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SUPPLEMENTARY INFORMATION:

Background

I. The Need for and General Provisions of the Check 21 Act

Under current law, a bank must present the original paper check for payment unless the paying bank has agreed to accept presentment in some other form.[1] Sections 3–501(b)(2) and 4–110 of the Uniform Commercial Code (U.C.C.) specifically authorize banks and other persons to agree to alternative means of presentment, such as electronic presentment. However, to engage in broad-based electronic presentment, a presenting bank would need electronic presentment agreements with each bank to which it presents checks. This has proven impracticable because of both the large number of paying banks and the unwillingness of some paying banks to receive electronic presentment.[2] The requirement that banks present the original check absent agreement to the contrary and the difficulty of obtaining alternate presentment agreements with all paying banks impedes the ability of banks that want to process checks electronically to take full advantage of that technology. As a result, the payment system as a whole has not achieved the efficiencies and potential cost savings associated with handling checks electronically.

By authorizing the use of a new negotiable instrument called a substitute check, the Check Clearing for the 21st Century Act (the Check 21 Act or the Act) facilitates the broader use of electronic check processing without mandating that any bank change its current check collection practices.[3] A substitute check is a paper reproduction of an original check that contains an image of the front and back of the original check, is suitable for automated processing in the same manner as the original check, and meets other technical requirements. A bank that for consideration transfers, presents, or returns a substitute check (or a paper or electronic representation of a substitute check) warrants that (1) the substitute check contains an accurate image of the front and back of the original check and a legend stating that it is the legal equivalent of the original check, and (2) no depositary bank, drawee, drawer, or indorser will be asked to pay a check that it already has paid. A substitute check that meets the Check 21 Act's requirements regarding accuracy, bears the legend, and for which a bank has made the substitute check warranties is the legal equivalent of the original check for all purposes and all persons.

The use of legally equivalent substitute checks should facilitate collection and return of checks in electronic form. For example, a depositary bank in California that receives a check drawn on a bank in New York now must send the original paper check for collection unless it, or an intermediary collecting bank that presents checks sent by it, has an electronic presentment agreement with the paying bank. Under the Check 21 Act, by contrast, the California bank could transfer check information electronically to a collecting bank in New York with which it had an agreement to do so. The New York collecting bank then could create a substitute check to present to the New York paying bank. The New York paying bank would be required to take presentment of a substitute check that met all the legal equivalence requirements. Thus, instead of processing and transporting the original check across the country, the California bank could collect the substitute check using only local New York transportation.

II. How the Check 21 Act Affects Banks

A. In General

Although the Check 21 Act is designed to enable more efficient use of electronic check processing by allowing use of one piece of paper in place of another, the law does not require any bank to use electronic check processing, receive electronic presentment, or create a substitute check. The Check 21 Act also does not make electronic check images or electronic check information the legal equivalent of an original check. Moreover, the Check 21 Act does not alter existing arrangements under which banks agree to return paid paper checks to account holders with periodic account statements. However, after the effective date of the Check 21 Act, account holders that receive paid checks with their statements may receive a mix of original checks and substitute checks.

The characteristics of a substitute check are such that a bank receiving a substitute check would be able to process that substitute check to the same extent that it could process the original check. As a result, banks would not be required to change their check processing equipment because of the Check 21 Act, and, except as described in the next section, there would be no need for a bank to treat original checks and substitute checks differently during the check collection and return process. Because a legally equivalent substitute check contains an accurate representation of the information on the original check and all indorsement information associated with the check, drawers and other persons should be able to rely on a substitute check just as they would an original check for other purposes, such as proof of payment.

B. Provisions Affecting All Banks

Certain provisions of the Check 21 Act will affect all banks, even those that do not choose to create substitute checks. For example, any bank that transfers, presents, or returns a substitute check (or a paper or electronic representation of a substitute check) for consideration would make

[1] *See, e.g.*, section 3–501(b) of the Uniform Commercial Code.

[2] Some paying banks and bank customers prefer to receive checks in paper form for operational or other reasons.

[3] Pub. L. 108–100, 117 Stat. 1177 (codified at 12 U.S.C. 5001–5018). The Check 21 Act was enacted on October 28, 2003, and takes effect on October 28, 2004.

the substitute check warranties and would be responsible for indemnifying any person that suffered a loss due to the receipt of a substitute check instead of the original check. A bank that transferred a substitute check to a consumer who incurred a loss associated with the substitute check also might be required to provide an expedited recredit to that consumer. A bank that provides paid checks to consumer customers with periodic account statements or that otherwise provides a substitute check to a consumer customer must provide a disclosure that describes substitute checks and substitute check rights.

Although the Check 21 Act does not require banks to make processing changes to receive substitute checks, a bank will be required to qualify a substitute check for return differently than it does an original check. A bank must place a ''2'' in position 44 of the MICR line of a qualified returned original check. A bank that qualifies a substitute check for return instead must encode position 44 of the substitute check's qualified return MICR line with a ''5.''

C. Provisions Affecting Banks That Create Substitute Checks

Although the foregoing provisions of the Check 21 Act would apply to all banks, the law is designed so that losses associated with a substitute check ultimately would be borne by the party that first transferred, presented, or returned the substitute check (the reconverting bank).[4] A bank that paid a warranty claim or provided an indemnity or expedited recredit for a substitute check that it received from another bank could, in turn, bring a warranty, indemnity, or interbank expedited recredit claim against the bank that transferred the substitute check to it and thereby pass the associated loss back to the reconverting bank.[5] Thus, if there is a duplicative check payment involving a substitute check, a substitute check indemnity claim, or a breach of the legal equivalence warranty, the Check 21 Act places ultimate responsibility on the reconverting bank.[6] The Check 21 Act also requires the reconverting bank to identify itself as such and to preserve the indorsements of parties that previously handled the check in any form.

III. Overview of the Board's Proposed Rule

The Board in January 2004 proposed to implement the Check 21 Act by adding to Regulation CC a new subpart D that would incorporate the requirements of the Act applicable to banks that create, receive, or provide substitute checks or paper or electronic representations of substitute checks.[7] The Board proposed that subpart D would contain provisions concerning requirements a substitute check must meet to be the legal equivalent of an original check, reconverting bank duties, the warranties and indemnity associated with substitute checks, expedited recredit procedures for consumers and banks, liability for violations of subpart D, and the interaction between subpart D and existing federal and state laws. The Board proposed new model notices in appendix C for the consumer awareness disclosure and other consumer notices regarding substitute checks.

The Board also proposed amendments to implement the Check 21 Act that would affect some existing provisions of Regulation CC and its commentary. For example, the Board proposed to supplement some existing defined terms in § 229.2 for which the Check 21 Act had slightly different definitions and to define several new terms used in subpart D. The Board also proposed to amend the magnetic ink character recognition (MICR) line requirements for qualified returned checks to allow for differences to facilitate the processing of substitute checks and to amend § 229.35 and appendix D to include indorsement and identification standards for substitute checks.

The Board also proposed revisions to several other provisions of Regulation CC and its commentary that were unrelated to the Check 21 Act. For example, the Board proposed amending the commentary to clarify that a returned check notice need not be written, clarify the application of the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) to consumer disclosures that Regulation CC requires to be in writing, and clarify the time by which a paying bank may extend the return or notice of nonpayment deadline. The Board also sought general comment on several issues, including whether it should include in Regulation CC a new U.C.C. warranty regarding the drawer's authorization of remotely-created demand drafts.

Overview of Comments on the Proposed Rule

The Board received comments on the proposed rule from 168 commenters, including 107 depository institutions and organizations representing depository institutions, 35 consumers and consumer groups, 14 nonbank service providers, and 12 other organizations and persons (including one United States Senator). The vast majority of these commenters generally approved of the Check 21 Act and the Board's proposed rule but expressed views about how the Board could change specific provisions of the rule. Specific substantive comments are discussed in more detail in the portions of the Section-by-Section Analysis that analyze the commented-upon provisions.

I. Comments Expressing General Concerns

Several commenters expressed general disapproval of the Check 21 Act and the Board's proposed rule. These commenters expressed concern that the use of substitute checks would increase fraud, benefit banks at the expense of consumers, and confuse consumers and bank employees.[8]

The commenters concerned about consumer harm argued that the Check 21 Act would shorten the time needed to collect checks and would not reduce fees for consumers.[9] The Board expects that the Check 21 Act ultimately will decrease the time needed to collect checks, which is an outcome that the Board deems desirable, and will result in other benefits to banks and their

[4] A reconverting bank is (1) the bank that creates a substitute check or (2) the first bank that receives a substitute check created by a person that is not a bank and transfers either that substitute check or in lieu thereof the first paper or electronic representation of that substitute check.

[5] Banks may further allocate liability amongst themselves as part of their agreements to handle checks electronically. A reconverting bank that received a check in electronic form therefore could, by agreement, pass back to the sender of that item some or all of the losses the reconverting bank incurred if it used the electronic item to create a substitute check that gave rise to a Check 21 Act warranty, indemnity, or expedited recredit claim.

[6] *But see* footnote 5.

[7] 69 FR 1470 (Jan. 8, 2004).

[8] Some commenters argued that banks would be unable to make an informed decision about whether to process checks physically or switch to electronic processing because of uncertainty about the relative costs of each option. There are a variety of factors in determining the relative costs of check processing options, some of which are institution-specific. The Board expects that most banks should be able to analyze their own cost structures and make informed processing decisions.

[9] Some commenters also expressed concern that existing hold periods for deposited checks were either too long or too short. The existing hold periods in subpart B of Regulation CC are those set forth in the Expedited Funds Availability Act, and the Board is required to shorten (but may not lengthen) those hold periods as the time periods for clearing local and nonlocal checks improve on a widespread basis. The Board will adjust the hold periods in subpart B if and when the check clearing timeframes for checks improve substantially enough to warrant such adjustments.

customers.[10] For example, processing changes that a bank makes in reliance on the Check 21 Act could enable the bank to offer its depositors later cutoff times for certain deposits or to make check images available to consumers online. These changes would allow consumers faster access to deposited funds and to records relating to their check payments, respectively.

Several commenters noted that people already are confused because some checks are used to obtain information to initiate an automated clearing house (ACH) debit rather than to effect the payment transaction by check. These commenters expressed concern that adding substitute checks to the payment system would exacerbate confusion about the rights associated with checks. The Board agrees with commenters that substitute checks could increase confusion about the ways in which checks can be used to process payments and the legal rights associated with each processing choice. The Board plans to prepare guidance on these topics.

II. Comments Urging Action Inconsistent With the Check 21 Act

Several commenters suggested that the Board take actions that would be inconsistent with the language or intent of the Check 21 Act.

Three commenters suggested that the Board delay the effective date of the rule beyond the effective date of the statute. However, to implement the Check 21 Act effectively, the rule generally must take effect no later than the effective date of the statute.[11]

One commenter suggested that the Board establish standards for the exchange of electronic check images. This would go beyond the scope of the provisions of the Check 21 Act, which only relate to substitute checks. Electronic presentment will continue to be governed, as it is today, by agreements between the paying bank and the presenting bank.[12]

Another commenter opined that the costs of using substitute checks should be borne by paying banks and bank customers that demand paper checks. This would be at odds with the Act's intent to allow banks that choose to process checks electronically to do so and create substitute checks in a manner that is transparent to banks and other persons that require paper checks.

Several commenters expressed particular concern that the use of substitute checks would make the original check more difficult to obtain, which in turn would impede law enforcement's ability to obtain physical evidence, such as fingerprints, pen pressure analysis, and other forensic evidence from paper checks.[13] These commenters requested that the Board impose original check retention requirements in subpart D. Original checks are truncated in today's environment, and the U.C.C. requires the person that truncates the check to give the original check to the drawer, keep the original check, or destroy the original check but maintain the ability to provide a legible copy for a specified period of time (usually seven years). The Board expects that, after the Check 21 Act takes effect, more checks potentially will be truncated and destroyed. The Check 21 Act does not impose any additional requirements on original check retention, and the Board is not imposing any such requirements by regulation. Rather, the choice of whether, and after what period of time, to destroy a check will remain a business decision for the bank or other person that removes the check from the collection or return process. Banks and other persons that destroy checks may take fraud risks into account when deciding whether to destroy a truncated check. For example, some banks may choose to keep original checks above a certain dollar amount due to the potentially greater risks associated with those items.

III. Comments That Misunderstood the Check 21 Act or the Board's Proposed Rule

The Board received numerous comments that indicated confusion about the scope, requirements, or effects of the Check 21 Act or the proposed rule.

Fourteen individuals expressed concern that the Act would preclude them from receiving paper checks with their periodic account statements, and four individuals stated that consumers should be able to stop banks from converting their checks to substitute checks. The Check 21 Act does not preclude arrangements whereby customers receive paid checks, although it does make a substitute check acceptable for that purpose.

Two other commenters argued that the Act and the proposed rule would make it more difficult to comply with requirements to produce original checks and suggested that the Board confirm that the Internal Revenue Service (IRS) would accept substitute checks or full-sized photocopies for tax purposes. Substitute checks that meet the legal equivalence requirements of the Check 21 Act can, by the terms of the Act, be used wherever an original check is required. The Board also notes that the IRS currently allows documents other than original checks to be used for tax purposes.[14]

Three commenters asked the Board to ensure that banks' implementation of electronic check processing services as contemplated by the Check 21 Act would not impede nonbanks' ability to arrange for checks deposited at disparate locations to be returned to a single location. A check is returned to the bank whose routing number appears in the depositary bank indorsement on the back of the check. To facilitate banks' ability to receive returned checks at a centralized location, § 229.35(d) of Regulation CC permits banks to agree that the depositary bank indorsement applied to the back of the check can be the indorsement of a bank other than the bank into which the check was deposited. The Check 21 Act and the Board's final rule do not affect § 229.35(d), and the Board accordingly expects centralized returned check arrangements to function with respect to substitute checks just as they do with respect to original checks today. The Board also notes that industry standards include fields within electronic check records that are specifically designed to

[10] The more time needed to collect a check, the greater the risk that the depositary bank will make funds deposited by check available for withdrawal before it knows whether the paying bank will pay or return the check. The Board's policies therefore seek to reduce, rather than preserve, the time for collecting checks. *See, e.g.*, the Board's Policy Statement on Delayed Disbursement, Fed. Res. Reg. Service ¶ 9–750, p. 9–247.

[11] Model disclosure C–5A in appendix C takes effect immediately so that banks need not delay their use of that model in preparing the consumer awareness disclosure required by § 229.57. The requirement in appendix D that all indorsements be printed in black ink does not take effect until January 1, 2006, to give banks a transition period to make necessary processing changes.

[12] One commenter suggested that the Federal Reserve Banks publish a list of banks that have agreed to send or receive checks in electronic form. Reserve Banks and other collecting banks may publish lists of banks that accept electronic presentment from them. However, any such lists will reflect only the agreements of the listed banks to receive presentment electronically from that particular collecting bank and would not indicate a general agreement of the receiving bank to receive presentment electronically.

[13] The commenters did not quantify how often or how many checks are used for forensic purposes by law enforcement; however, the Board understands from staff of the Financial Management Service of the Department of Treasury that cases in which examination of an original Treasury check is necessary to determine a fraud or forgery are relatively rare.

[14] *See, e.g.,* IRS Publication 552—Recordkeeping for Individuals, which discusses the permissibility of account statements to prove payments made by check, credit card, or electronic fund transfers.

facilitate centralized check return programs.

Another commenter was concerned that the Act and subpart D would impede banks' ability to use ''positive pay'' and ''positive payee'' programs to detect fraud. Under a positive pay program, a bank compares the check number and amount of a presented check against a list of check numbers and amount information provided by the drawer. The use of a substitute check should not affect this program. In a positive payee program, the drawer identifies the payee of a check, and the bank scans the payee field of a presented check to verify that the payee information is correct. The payee information on a substitute check will appear in a different location than on an original check, because the image of the original check is reduced and shifted when it is placed on a substitute check. However, position 44 of the MICR line of a substitute check is required to bear a ''4'' for forward collection or a ''5'' for qualified return. This information should allow the paying bank's check-processing equipment to identify the document being scanned as a substitute check and to adjust the location at which it scans the payee field accordingly.

Overview of the Board's Final Rule

The Board's final rule is substantially similar to the rule that the Board proposed for comment. However, the Board has made a number of clarifying changes in response to comments received and its own further analysis. These changes include adjustments to certain definitions, particularly regarding how MICR-line variations affect a document's status as a substitute check. The commentary to the final rule provides further clarification about the flow of responsibility for the warranties and indemnity. In addition, the final rule clarifies the scope of, and timeframes that apply to, expedited recredit claims and the general consumer awareness notice requirement. The Board also has provided additional commentary in response to comments that indicated confusion about the interaction between particular provisions of the Check 21 Act and particular provisions of the U.C.C.

Section-by-Section Analysis

This section-by-section analysis focuses on the provisions of the rule that the Board changed or considered changing in light of comments or the Board's further consideration. This analysis does not discuss provisions of the final rule that are substantially similar to the corresponding provision of the proposed rule and on which the Board received no substantive comment. Regarding the Board's reasoning for those provisions, the section-by-section analysis of the Board's proposed rule is incorporated by reference.

I. Amendments To Implement the Check 21 Act

A. Definitions and Word Usage

1. *In General.* Three commenters suggested that the final rule should use terms that are defined in Articles 3 and 4 of the U.C.C. in a manner consistent with the U.C.C.'s usage of those terms. The commenters argued that to do otherwise would produce uncertainty and increase the likelihood of litigation. In particular, these commenters stated that the commentary of the proposed rule used the terms accept and party in ways not contemplated by the U.C.C. The Board agrees that subpart D's word usage should be consistent with the U.C.C. The final rule and commentary therefore replace the word accept with more appropriate verbs, such as take or receive, and replace the word party with person where subpart D contemplates a meaning of the term party that is different from the meaning in the U.C.C.

2. *Section 229.2(a) Account; Section 229.2(n) Consumer Account.* Four commenters expressed concern about aspects of the Board's proposed definitions of account and consumer account.

One commenter suggested that the Board's expansion of the definition of account to include any deposit account at a bank for purposes of subpart D was inappropriately broad. The broad account definition for purposes of the Check 21 Act and subpart D is statutory, and the final rule retains it. Although the Board has not substantively modified the account definition, it has revised the language of the rule and commentary to distinguish more clearly accounts for purposes of subpart D from accounts for purposes of the other subparts of Regulation CC.

One commenter expressed confusion about when interbank deposits would be excluded from the account definition. Existing Regulation CC excludes interbank accounts for purposes of all subparts of Regulation CC. However, the context in which subpart C uses the term account clearly indicates that interbank accounts are meant to be included within that term. The final rule retains the proposed rule's exclusion of interbank accounts for purposes of only subpart B and, in connection therewith, subpart A. The commentary to the final rule explicitly notes that interbank deposits are included in the account definition for purposes of subparts C and D.

To determine when a consumer awareness notice would be necessary, one commenter asked whether the term consumer account included an omnibus clearing account held by a brokerage firm at a bank for purposes of allowing the brokerage firm to pay checks drawn by consumers. The commentary to the final rule clarifies that this type of account is not a consumer account. The commentary to the consumer account definition also clarifies that a credit card account or home equity line of credit that a consumer can access by check is not a consumer account for purposes of Regulation CC because in those cases the consumer's relationship with the bank is a loan rather than a deposit relationship.

3. *Section 229.2(m) Check Processing Region.* One commenter stated that the commentary to § 229.2(m) erroneously states that there are 46 check processing regions. A check processing region is defined as the area served by a Reserve Bank's main office, branch, or other office for check processing purposes. Because the number of Reserve Bank locations that process checks is not static, the final rule omits any numerical reference.

4. *Section 229.2(z) Paying Bank.* One commenter expressed concern that the proposed rule's definition of paying bank stated that the Treasury of the United States or the U.S. Postal Service was a paying bank for a check payable by that entity and sent to that entity for collection, whereas the statutory definition states that these entities are paying banks to the extent that they act as payors. The commenter expressed concern that the proposed rule's definition could be read to exclude Treasury checks and postal service money orders that are sent to Federal Reserve Banks for collection rather than sent directly to the Treasury or the U.S. Postal Service.

The proposed amendment to the paying bank definition was intended to parallel the construction of the existing definition and not to alter the meaning of the Check 21 Act's definition. The final rule retains the proposed definition. The Board has amended the commentary to the definition to clarify that, because the Federal Reserve Banks act as fiscal agents for the Treasury and U.S. Postal Service, Treasury checks and U.S. Postal Service money orders that are sent to the Reserve Banks for collection are deemed to be sent to the Treasury or the U.S. Postal Service, respectively.

5. *Section 229.2(ww) Original Check.* One commenter expressed confusion about the proposed definition of original check and stated that the definition could be read to mean that only one substitute check could be created with respect to any original check. As indicated in the proposed rule and commentary, the Board defined the term original check to distinguish the first paper item authorized by the drawer from any later electronic file or substitute check that represents that item. The Board has left the definition unchanged but has provided commentary to clarify that multiple substitute checks could be created at various points in the collection and return process to represent the same original check.

6. *Section 229.2(vv) MICR Line.* The final rule identifies the applicable industry standards for MICR-line printing and adds a sentence to the commentary to highlight that those standards can vary the technical aspects of printing the MICR line. This would include, for example, the circumstances under which magnetic ink is not required. This revision responds to comments suggesting that a bank not be required to use magnetic ink when printing a paid substitute check solely for the purpose of providing it to the account holder.

7. *Section 229.2(xx) Paper or Electronic Representation of a Substitute Check.* The phrase ''paper or electronic representation of a substitute check'' was used at many points of the proposed rule and commentary, particularly with respect to the flow of the warranties and indemnity. Several commenters expressed confusion about the need for this phrase or asked that the Board provide more detail about what types of documents or files were included within its scope.

The statute intends that the chain of banks that make the warranties and indemnity will flow uninterrupted from the first reconverting bank to the claimant regardless of how many times the form of the item changed after creation of the first substitute check. The phrase ''paper or electronic representation of a substitute check'' ensures that responsibility for the warranties and indemnity will flow from the reconverting bank to the last bank that for consideration transfers, presents, or returns the substitute check or representation thereof. The phrase also ensures, as contemplated by the statute, that drawers will have the ability to make a warranty claim under the Check 21 Act even if they received a paper or electronic representation of a substitute check instead of a substitute check. The final rule therefore defines the phrase, and the commentary to the new definition provides examples to illustrate its scope.

8. *Section 229.2(zz) Reconverting Bank (corresponding to Section 229.2(yy) of the proposed rule).* Several commenters expressed concern about the proposed definition of reconverting bank and the accompanying commentary.[15] Most of these comments focused on the portion of the definition describing the identity of the reconverting bank when a nonbank created the substitute check.

A few commenters opined that the rule should prohibit a person other than a bank from creating a substitute check. However, the statutory text defining a reconverting bank explicitly contemplates nonbank creation of a substitute check, because it states that a bank can be a reconverting bank if it is the first bank to transfer or present a substitute check created by a person other than a bank. The legislative history also explicitly states that Congress intended to allow nonbanks to create substitute checks.[16] The Board therefore has retained the portion of the definition pertaining to nonbank creation of substitute checks.

One commenter was confused by the provision in the proposed rule that a bank receiving a substitute check for deposit from a nonbank would be the reconverting bank if, in lieu of the substitute check, that bank transferred the first paper or electronic representation of the substitute check. This provision ensures that ultimate responsibility under the Act for the substitute check warranties and indemnity will flow back to the bank that received the substitute check from the nonbank. Without this provision, if a bank received a substitute check but instead transferred an electronic representation of that substitute check and a subsequent bank created a second substitute check, that second bank would not be able to pass back losses under the Act to the initial depositary bank. The final rule therefore retains the proposed provision.

Several commenters expressed concern about the potential for a bank to become a reconverting bank without its knowledge and consent. For example, commenters were concerned that a nonbank customer could create and deposit a substitute check without first consulting the bank about its willingness to accept substitute checks in lieu of original checks. The first bank that transfers, presents, or returns a substitute check created by a nonbank (or in lieu therefore the first paper or electronic representation of that substitute check) is the reconverting bank regardless of whether it explicitly agreed to do so. However, generally only large corporate depositors would be equipped to create and deposit substitute checks. Banks therefore should be able to address this issue through their deposit agreements.

One commenter requested that the commentary to the reconverting bank definition provide an example about the identity of the reconverting bank if a bank used a nonbank service provider to create a substitute check on its behalf. The proposed rule already had such an example and the final rule retains it with minor revisions. The Board also has revised the proposed commentary to describe more clearly how to identify the reconverting bank for a check created by a nonbank and to provide additional examples about when a bank would or would not be a reconverting bank.

9. Section 229.2(aaa) Substitute Check (corresponding to Section 229.2(zz) of the proposed rule).

a. *General Comments*. One commenter stated that the industry standard for substitute checks supported substitute checks as well as other types of ''image replacement documents,'' such as photocopies in lieu of the original check. The commenter requested clarification about whether the other types of documents contemplated by the standard would be substitute checks.

At the time of the proposed rule, the draft standard developed by the Accredited Standards Committee X9 and approved for trial use by the American National Standards Institute

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[15] One commenter was confused that the rule used the term reconverting, rather than converting, bank. Reconverting bank is the statutory term and reflects the fact that the original check is converted to electronic form and then later reconverted back to a paper substitute check.

[16] When discussing circumstances under which the substitute check warranties are made, the House Report on the Check 21 Act states as follows:

The Committee intends that this language allow depositing customers of a bank to create substitute checks with the same legal protections for recipients under this legislation as if they had been converted by a financial institution at the point of first deposit. If a bank allows its depositing customer to create substitute checks, the bank is warrantor for the substitute checks created by its depositing customer. For example, if a grocery store creates a substitute check, the bill makes the grocery store's bank, and not the grocery store, responsible for the section 4 warranties. A bank may choose to pass along, by agreement with the depositor that creates the substitute check, any liability it may incur due to the depositor in this regard. The Committee believes that requiring a bank's credit to stand behind a substitute check will provide strong protections when paper checks are removed from the system at the point of sale or purchase before they are deposited at, or presented to a financial institution. H.R. Rep. No. 108–132, at 17 (2003).

was labeled ANS X9.90 and contemplated three different types of documents, one of which was the substitute check that the Check 21 Act authorizes. Going forward, this standard will be known as ANS X9.100–140 and apply only to substitute checks. However, any document that met all the requirements of 229.2(aaa) would be a substitute check.

Nine commenters expressed concerns about the image standards and other quality standards that apply to substitute checks. Three commenters suggested that the Board identify or give examples of industry standards for substitute checks, and one commenter suggested that the industry standards for substitute checks that the Board identified should not disrupt existing industry standards for checks. The proposed commentary to the substitute check definition identified ANS X9.90 as the industry standard for substitute checks. Because that standard was renamed, the final rule identifies the industry standard for substitute checks as ANS X9.100–140 (unless the Board by rule or order determines that a different standard applies), notes that that standard is exclusive standard, and further notes that ANS X9.100–140 incorporates by reference other existing generally applicable industry standards for checks. The Board has included the ''unless the Board by rule or order determines that a different standard applies'' language to indicate specifically that the Board ultimately determines what standard applies to substitute checks. The Board does not expect to change the identified standard. In the unlikely event that the Board does identify a different standard, it almost certainly would do so by amending Regulation CC. The Board in no case would change the standard without providing notice of such change.

Three commenters requested that the Board establish standards regarding image quality for substitute checks. In particular, these commenters suggested that substitute checks should be required to use gray-scale, as opposed to black-and-white, images. The Board believes that this level of detail is more appropriately left to industry standards. Although ANS X9.100–140 does not prescribe image standards, that standard may evolve as the industry gains more experience with substitute checks.

A few commenters had particular questions about how the image of the original check would be applied to a substitute check. Two of these commenters erroneously believed that a second substitute check would contain an image of the full front and back of the previous substitute check. Persons wishing to obtain detailed information regarding the layout of a substitute check should consult ANS X9.100–140. This standard generally provides that the images of the front and back of the original check will be reduced so that they can be placed on the first substitute check. A subsequent substitute check would not contain an image of the entire first substitute check. Rather, a subsequent substitute check would contain the image of the original check as that image appeared at the time the previous substitute check was converted to electronic form, and the remainder of the front of the second substitute check would contain identification, MICR-line, and legend information applied by the second reconverting bank. By contrast, the back of a subsequent substitute check would contain an image of the full length of the back of the previous substitute check in order to preserve previous indorsements. The commentary to the substitute check definition and the commentary to § 229.35 regarding indorsement requirements explain image and indorsement requirements for later-generation substitute checks in detail.

b. *Substitute Checks and ACH Debits.* Several commenters requested clarification about how, if at all, checks that are used as source documents to create ACH debits are covered under the Check 21 Act, particularly whether such checks can be used to create substitute checks.

A substitute check must be a representation of an original check. Therefore, something that is not an original check cannot be reconverted to a substitute check. The final rule defines an original check as the first paper check issued with respect to a particular payment transaction. Under U.C.C. 3–105, a check is issued when it is delivered by a drawer with the purpose of giving rights on the check to any person.

The drawer's authorization regarding the use of a check it provides to initiate an ACH debit will determine whether the drawer has issued the check within the meaning of Regulation CC and thus whether the check may be used to create a substitute check. If the drawer authorizes the check only to be used as a source document for an ACH debit and does not authorize the check to be collected as a check, then the check has not been issued because it has not been delivered in a manner that gives any person rights on the check. Therefore, a check authorized for use solely as an ACH debit source document is not an original check within the meaning of Regulation CC, and a bank cannot create a substitute check from that document.

c. *MICR-line Requirement.* The Board's proposed rule adopted the statutory definition of substitute check without substantive change, although the commentary provided extensive discussion of how the MICR line of a substitute check could vary from the MICR line of the original check. Specifically, the proposed commentary clarified that (1) position 44 of the MICR line must contain a ''4'' or a ''5,'' (2) a bank could correct an encoding error that appeared on the original check when applying a MICR line to the substitute check, (3) a bank could encode an amount on the substitute check if the original check's MICR line did not contain that information, and (4) no other variation from the original check's MICR line would be permitted. The proposed commentary highlighted that an impermissible error could be caused, for example, if a check reader-sorter misread or failed to read the MICR line of the original check, causing the MICR line applied to the substitute check to contain an error that did not appear on the original check. The proposed rule further provided that a document that failed to meet the substitute check definition only because of a MICR-line error (*i.e.*, a document that ''purported'' to be a substitute check) would be treated as if it were a substitute check for purposes of the liability and consumer-related provisions of subpart D but would not be the legal equivalent of the original check.

The Board received comments on its proposed treatment of the MICR-line component of the substitute definition from numerous commenters, most of which were depository institutions or organizations representing depository institutions. Some of these commenters generally approved of the MICR-line clarifications and the related purported substitute check provision proposed by the Board. However, the vast majority of commenters on these issues disagreed with the proposed approach.

Commenters that disagreed with the proposed rule expressed concern that the proposed commentary would create confusion because it would allow substitute check MICR lines to contain some variations from the original check but not others. These commenters also expressed concern that paying banks could not charge a customer's account for a document that was not a substitute check because of a MICR-line error and therefore not the legal equivalent of the original check. These commenters advocated that a document with any MICR-line error should be a substitute

check that could be the legal equivalent of the original check. Commenters also stated that the proposed rule provided insufficient guidance about (1) the requirement for encoding position 44 of the MICR line on a qualified return substitute check, (2) whether a bank that failed to encode a substitute check properly would be liable under the Check 21 Act or existing encoding warranties, and (3) which bank ultimately would bear liability for substitute check encoding errors. Many of these commenters suggested that encoding of substitute checks should be covered by existing encoding warranties. Commenters opposing the Board's proposed treatment of the MICR-line requirement also expressed concern that the proposed rule inadequately addressed the extent to which banks could repair a MICR-line error. These commenters generally indicated that the rules for repairing the MICR line of a substitute check should parallel as closely as possible the rules for repairing the MICR line of an original check.[17]

The MICR-line component of the substitute check definition in the Check 21 Act provides that a substitute check is a paper representation of an original check that ''bears a MICR line containing all the information appearing on the MICR line of the original check, except as provided under generally applicable industry standards for substitute checks to facilitate the processing of substitute checks.''

ANS X9.100–140 requires a substitute check used for forward collection to bear a ''4'' in position 44 and a qualified returned substitute check to bear a ''5'' in that position. Proper encoding of position 44 ensures that downstream banks will be on notice that the document they have received is a substitute check and can, if converting such an item to electronic form or qualifying it for return, handle it appropriately. The final commentary to the substitute check definition therefore clarifies that a reconverting bank or a bank qualifying a substitute check for return must encode position 44 with a ''4'' or a ''5,'' as appropriate.

The final rule clarifies that a substitute check MICR line must have information in each field of the MICR line that was encoded on the original check at any time before an image of the original check was captured. This would include all of the information preprinted on the original check, plus any additional information, such as the amount, that was encoded prior to the time the image of the original check was captured.

In light of the highly technical nature of the MICR line and its important operational role in check processing, the Board's final rule leaves the details regarding permissible MICR-line variations up to ANS X9.100–140 instead of identifying them in the rule and commentary. The Board believes that allowing the MICR line of a substitute check to vary from the original check's MICR line as specified in ANS X9.100–140 is appropriate because the full range of issues relating to MICR-line errors and the most practical solutions to those issues will be revealed through operational experience with substitute checks.

The Board expects that the variations from the original check's MICR line permitted by ANS X9.100–140 would be kept to the minimum necessary to facilitate substitute check processing in the same manner as the original checks. Such variations could include, for example, allowing reconverting banks to correct errors appearing on the MICR-line of the original check. The commentary to the final rule clarifies, however, that industry standards cannot allow a substitute check MICR line to omit a field that, at any time prior to truncation, was encoded on the original check's MICR line. The Board further expects that, in determining what variations from the original check's MICR line should be permitted, the standards committee will incorporate the overriding goal of the Check 21 Act that substitute checks should function as much as possible like original checks so that paying banks and other persons that demand paper checks will not bear costs associated with receiving a substitute check instead of an original check. If the Board concludes that the variations permitted by ANS X9.100–140 are inconsistent with this or other purposes of the Check 21 Act, the Board will consider identifying permissible MICR-line variations by rule or order instead of relying on ANS X9.100–140.

Through revisions to § 229.34(c)(3) and its commentary, the final rule provides that application of MICR-line information to a substitute check is subject to Regulation CC's encoding warranties. The commentary to the substitute check definition also notes that, once a document that meets the substitute check definition has been created, banks may apply MICR-encoded strips to that document as necessary to complete the collection and return process.

10. *Section 229.2(bbb) Sufficient Copy and Copy (corresponding to § 229.2(aaa) of the proposed rule).* The final rule's definition of sufficient copy more closely tracks the statutory language in the indemnity section of section 6(d)(1) of the Check 21 Act than did the proposed rule. The Board also has reorganized and revised the commentary to illustrate more clearly the definitions of copy and sufficient copy.

Several commenters were confused about the relationship between copy and sufficient copy, which are defined as paper documents, and § 229.58, which allows banks to provide information electronically if the recipient agrees. Although the terms copy and sufficient copy, as well as the term original check, refer only to particular pieces of paper, a bank that is required to provide a paper check or copy may satisfy that requirement by instead providing an electronic image of the check or copy in accordance with § 229.58.

11. *Section 229.2(ccc) Transfer and consideration (corresponding to Section 229.2(bbb) of the proposed rule).* In response to a comment, the Board has revised the definition of consideration to clarify that a bank receives consideration for the substitute check (or paper or electronic representation thereof) that it transfers to a nonbank if the bank has received value for the check in that or any other form.

The proposed rule contained an exception from the consideration definition stating that a bank would not receive consideration for a substitute check solely in response to a warranty, indemnity, expedited recredit, or other claim with respect to the substitute check. The Board proposed this exception so that a bank could respond to an indemnity or expedited recredit claim by providing a substitute check without a legal equivalence legend as a sufficient copy without automatically breaching the legal equivalence warranty. Several commenters were confused about the operation of this exception. The Board has deleted the exception from the final rule. Because industry standards require application of the legal equivalence legend to a substitute check, the problem that the exception was designed to address is not likely to arise in practice. Moreover, on further consideration, the Board believes that it would be appropriate for a substitute check provided in response

[17] In response to the many concerns expressed about the Board's proposed treatment of the MICR-line replication requirement, the Board's staff invited commenters that addressed MICR-line issues to a meeting to explore these issues further. The meeting took place on May 3, 2004, at the Board, and representatives of 53 commenters attended in person or by conference call. A summary of this meeting, including a list of participants, is available at *www.federalreserve.gov/SECRS/2004/May/20040625/R–1176/R–1176_150_1.pdf.*

to a claim to carry full warranty, indemnity, and recredit rights.

12. *Section 229.2(ddd) Truncate; Section 229.2(eee) Truncating Bank (corresponding to sections 229.2(ccc) and 229.2(ddd) of the proposed rule, respectively).* Several commenters expressed concern about the definitions of and commentary to truncate and truncating bank. For example, one commenter expressed concern that the definition of truncate would preclude banks from truncating items that are not handled on a cash basis. Another commenter suggested that the Board clarify that a truncating bank does not make the substitute check warranties and indemnity under §§ 229.52 and 229.53, but that a bank receiving a check electronically could by agreement pass back to the truncating bank losses that the recipient bank incurred under those sections.

The proposed rule used the statutory definition of truncate, and the final rule retains that definition. However, the Board has amended the commentary to truncating bank to clarify that a bank receiving a check electronically from the truncating bank may pass back losses by agreement.

B. Section 229.30(d) Identification of Returned Checks

Section 229.30(d) requires a paying bank to identify its reason for returning a check unpaid on the front of the returned check but does not require a specific location for that information. The Board has revised this section and the accompanying commentary to clarify that a paying bank that returns a substitute check must place the reason for return within the image of the original check. This requirement ensures that the reason for return would be retained on any subsequent substitute check.

C. Issues Relating to Indorsement and Identification Standards—Sections 229.35 and 229.38 and Appendix D

The Board proposed to require all indorsements to be in black ink and to make depositary bank name/location information optional as opposed to mandatory. The Board requested comment about whether returning banks should retain the option to indorse a check on the front. The Board proposed applying to existing substitute checks the indorsement standards in § 229.35 and appendix D, with proposed amendments, that would apply to original checks. The Board proposed separate indorsement and identification requirements that would apply to reconverting banks at the time they create substitute checks.

The Board received a number of comments relating to its proposed treatment of indorsements. Several of these commenters generally questioned whether the proposed changes would improve the legibility of indorsements, particularly because some indorsements on substitute checks would be preserved through images of a previous item. The Board believes that it is too early to determine how the use of substitute checks ultimately will affect the legibility of indorsements. It is likely, as commenters stated, that more indorsements will be preserved through images of previous items. It also is likely that, as the efficiency of the collection process improves through wider use of electronic processing and substitute checks, fewer banks will handle and thus be required to indorse a check. A reduction in the number of indorsements on an item should contribute to greater legibility of the indorsements that are applied.

A few commenters stated that, in some cases, check-handling equipment would first capture an image of a check and then spray a physical indorsement on the check. These commenters requested that the Board clarify that in such cases the indorsement applied after the check image was captured would be conveyed as an electronic indorsement rather than an image of the physical indorsement. The Board agrees with these commenters' analysis of how such an indorsement would be carried forward and has revised the commentary to the substitute check definition and § 229.35 accordingly.[18] The Board has made additional clarifying changes to these portions of the commentary to address questions posed by commenters regarding the application and preservation of indorsements.

Commenters generally agreed with the Board's proposal to require indorsements to be in black ink, although several indicated that requiring banks to switch from purple to black ink immediately would be burdensome and requested a grace period.[19] The final rule retains the black ink requirement but delays the mandatory compliance date until January 1, 2006.

Three commenters stated that name and location information in the indorsement should be optional, while three others stated that many banks relied on that information and recommended that it remain mandatory. Three other commenters indicated that electronic indorsement standards did not provide for name/location information and suggested that the Board make name/location information mandatory for physically-applied indorsements but optional for electronically-applied indorsements. The final rule adopts this suggested approach.

A few commenters opined that indorsement on the front of the check would be useful under some circumstances, although they differed on what those circumstances would be. By contrast, the majority of commenters that addressed this issue stated that any indorsement on the front of the check would clutter the front of the check and potentially obscure other necessary information. To reduce the risk of obscuring information on the front of the check, the final rule provides that all indorsements must appear on the back of the check.

A few commenters stated that the new indorsement and identification standards with which a reconverting bank must comply when creating a substitute check were too detailed. The Board notes that, in general, the level of detail for indorsement location information for substitute checks at the time of creation parallels that for existing paper checks. The Board therefore has retained specific indorsement location information for newly-created substitute checks. However, the Board has removed specific location information for the reconverting and truncating bank identifications that appear on the front of the check and simply provided that such identifications must be outside the image of the original check. For purposes of the Check 21 Act, reconverting banks should be required to place this information on the front of the check in a manner that does not obscure necessary MICR-line and payment information. The Board believes that the precise location of that information is best left to industry standards.

A few commenters expressed concern that the reconverting bank and truncating bank identifications applied to the front of substitute checks would be considered acceptances or indorsements of such checks under the U.C.C. The Board therefore has clarified

[18] One commenter requested clarification about how a second depositary bank should indorse a substitute check that was returned and redeposited. Substitute checks in such a case would be indorsed just as a redeposited original check is indorsed today.

[19] One commenter suggested that the Board should delay the effective date for all the new reconverting bank indorsement and identification requirements. The requirement that a substitute check contain a reconverting bank identification is statutory and takes effect on the effective date of the Check 21 Act.

in the commentary that identifications applied to the front of the check are not acceptances or indorsements. A reconverting bank that is a paying bank must place its routing number on the back of the check to ensure that its identification as a reconverting bank is not lost if there is a subsequent substitute check.[20] The Board also has clarified in the commentary to §§ 229.35(a) and 229.51(b) that this use of the paying/reconverting bank's routing number is for identification only and is not an indorsement.

The proposed rule contained amendments to the text of and commentary to § 229.38(d) to clarify a reconverting bank's liability for indorsements that, although applied in accordance with § 229.35 and appendix D, were illegible because of the reduction in size of the original check image that appeared on the first substitute check and the corresponding shifting in the placement of indorsements preserved within the image of the original check. Several commenters requested clarification about how this provision would work in practice. The final rule clarifies that the reconverting bank is liable if the reduction in size and placement of the original check image on the substitute check caused an indorsement previously applied to the original check in accordance with § 229.35 and appendix D to be rendered illegible by a subsequent indorsement that also was applied to the substitute check in accordance with those standards. The final rule also clarifies that the reconverting bank is liable if the shift in placement on a substitute check of an indorsement that was applied to the original check in accordance with § 229.35 and appendix D precluded the subsequent bank from legibly applying its indorsement to the substitute check in accordance with those standards.[21]

[20] One commenter questioned why a reconverting bank must apply its routing number twice to a substitute check. The routing number on the front of the substitute check identifies the bank as the reconverting bank for that particular check. The front of a subsequent substitute check thus would bear the routing number of the reconverting bank for that substitute check but not the routing number of the reconverting bank for the previous substitute check. A reconverting bank's routing number on the back of the check therefore serves both as its indorsement (except when the reconverting bank also is the paying bank) and also, because it is set off by asterisks, preserves its identity as a reconverting bank on subsequent substitute checks.

[21] Subsequent substitute checks will contain an image of the entire back of the previous substitute check and therefore should not perpetuate the shifting indorsement problem.

D. Section 229.51 General Provisions Governing Substitute Checks

1. *Legal Equivalence.* Section 229.51 combined the legal equivalence and warranty concepts in sections 4(a) and 4(b) of the Check 21 Act by stating that a substitute check would be the legal equivalent of the original check for all purposes and all persons if (1) a bank had made the substitute check warranties in § 229.52 and (2) the substitute check accurately represented all the information on the front and back of the original check as of the time of truncation and bore the required legal equivalence legend.

a. *General Comments about Legal Equivalence.* The Board received several general comments about legal equivalence. One commenter agreed with the concept that a substitute check should not be legally equivalent to an original check unless the substitute check were subject to bank warranties. Two commenters opined that a substitute check created by a nonbank should not be a legal equivalent unless the first bank to transfer that substitute check explicitly agreed to do so. However, the definition of reconverting bank indicates that a bank that transfers a substitute check created by a nonbank thereby becomes the reconverting bank, even if that bank did not explicitly agree to accept the item. If such a substitute check met the accuracy and legend requirements for legal equivalence, it would become a legally equivalent substitute check as of the time the bank transferred it for consideration and thereby made the substitute check warranties. As discussed in the analysis of the reconverting bank definition, banks should be able to work with customers that wish to create and deposit substitute checks so that the banks do not become reconverting banks unwittingly.

b. *Accuracy of Information and Image Quality.* Commenters generally supported the concept that a substitute check must contain an accurate representation of all the information on the original check as a condition of legal equivalence. One commenter requested clarification that a substitute check need not be more legible than an original check to meet the legal equivalence requirements. The Board agrees that a substitute check is not held to a higher standard of accuracy in order to satisfy the legal equivalence requirements. The Board has clarified in the commentary that an accurate image of an illegible original check would, if all other requirements for legal equivalence were satisfied, be a legally equivalent substitute check. This commenter further suggested that, if the back of the original check contained no indorsement information, only an image of the front of that item should be required for a substitute check associated with that item. The Check 21 Act defines a substitute check as a representation of an original checks that bears ''an image of the front and back of the original check.'' A bank that creates a document without an image of the back of the original check and sends that document as if it were a substitute check therefore bears the associated risk of doing so.

Several commenters raised specific concerns about the proposed commentary to the accuracy requirement. The commentary to that requirement generally stated that ''all the information'' on the original check that must be retained includes the information preprinted on the original check, payment information added to the check, and other required information added to the check. Requiring features that do not survive the image capturing process to appear on a substitute check as a condition of legal equivalence would preclude the use of substitute checks, thus undermining the primary purpose of the Check 21 Act. The proposed commentary therefore noted that watermarks, micro printing, and other security features that cannot survive the imaging process need not be represented on a substitute check as a condition of legal equivalence.

Some commenters expressed concern about the loss of security features during the creation of a legally equivalent substitute check. Although the loss of some paper-based security features will be inevitable, the Board expects that the industry will develop additional security features that can survive the image capturing process.[22] Other commenters expressed concern about whether the accuracy requirement for legal equivalence would be met if the drawer or a bank applied payment

[22] One commenter expressed concern because the proposed commentary indicated that a latent security feature that became clearer after an image was captured (such as a void watermark that is faint on an original check but is revealed clearly on a photocopy or other image) would not cause a substitute check to fail the accuracy requirement, provided that it did not render any of the required information illegible. The presence of the void language on the substitute check is problematic to the extent that the recipient of the substitute check is unable to determine if the substitute check reproduced a fraudulent original item that contained clear void language before it was truncated or a legitimate original check on which the void language was latent. A person that suffered a loss because of this uncertainty would have an indemnity claim under § 229.53 and possibly an expedited recredit claim under § 229.54.

information to the check using an ink color or ink type that would not survive the image capturing process. The commentary to the final rule clarifies that payment information always must be accurately represented on a substitute check because that information is an essential element of a negotiable instrument. If a substitute check failed the legal equivalence requirement because of ink choice or some other feature, such as check color or a decorative image, the reconverting bank would be responsible for associated liabilities. However, a reconverting bank could attempt to address this issue through agreements with its depositors and the banks that send checks to it.

Several commenters expressed concern about the lack of uniform standards that apply to the image requirements for substitute checks. The Board understands that some banks intend to capture black and white images of items converted to electronic form, while other banks intend to capture gray scale images that contain a wider range of tones. Any substitute check that is subject to bank warranties, contains an accurate representation of the front and back of the original check, and bears the legal equivalence legend is the legal equivalent of the original check regardless of whether the image is black and white or gray scale. If issues relating to capturing images of checks prove problematic in the creation of substitute checks, the Board expects that industry standards would evolve to address those issues.

2. *Section 229.51(c) Applicable Law.* One commenter requested clarification about whether a substitute check that represented a fraudulent original check would have legal equivalence. The commentary to the final rule clarifies that such a substitute check, if it met the legal equivalence requirements, would be legally equivalent to the underlying check but as such would be treated in the same manner as the original fraudulent item for purposes of other law. For example, a bank could not properly charge a customer's account for a substitute check that represented a fraudulent original check.

This commenter also enquired about the legal status of a substitute check that did not meet the legal equivalence requirements. An item that meets the substitute check definition is a check even if it does not meet the additional requirements for legal equivalence. The proposed commentary to the check definition acknowledged that such substitute checks would be subject to the U.C.C. and Regulation CC. The final rule retains this sentence and, in addition, amends the check definition to state specifically that the term check includes an original check and a substitute check.

3. *Purported Substitute Checks.* In the proposed rule, the Board recognized that some banks attempting to create a substitute check would instead create a document that failed to satisfy the MICR-line replication requirement to be a substitute check. The proposed rule referred to these documents as purported substitute checks. In many cases, a purported substitute check would be processed just like a check but because of the MICR-line error would cause a loss. For example, a document with a MICR-line error only in the amount field or the account number field likely would go through the entire collection process but may be charged for the wrong amount or to the wrong account, respectively. Because purported substitute checks would not be subject to the Check 21 Act, a person suffering such a loss would not have the Act's rights and protections regarding substitute checks. To fill this gap and protect persons who collect, pay, or otherwise receive a purported substitute check, § 229.51(d) of the proposed rule provided that a purported substitute check would be subject to the warranty, indemnity, and consumer-related provisions of the Check 21 Act and subpart D.

Several commenters generally supported the concept of the purported substitute check, although some of these commenters suggested specific revisions to this provision or clarifications about its application. A few commenters that supported the provision requested that it be expanded to apply to a document that failed any of the four substitute check requirements. One commenter neither supported nor opposed the purported substitute check concept but requested clarification about how a document would purport to be a substitute check.

The majority of commenters, however, suggested that the Board delete the purported substitute check provision. These commenters suggested that a document should be a substitute check and a legal equivalent if it contained any MICR-line error, thus obviating the purported substitute check provision.

The final rule leaves the scope of permissible MICR-line variations to ANS X9.100–140. The Board expects this standard to identify the circumstances under which a substitute check's MICR line may vary from the original check in order to facilitate processing of substitute checks. An item that satisfies all the requirements of ANS X9.100–140 is a substitute check that is legally equivalent to the original check (provided all the other requirements for substitute checks and legal equivalency are met).

Regardless of how ANS X9.100–140 addresses permissible MICR-line variations and other substitute check requirements, there inevitably will be instances where a document intended to be a substitute check will fail one or more components of the substitute check definition and thus will not be a substitute check.

The Board notes that there are cases in the current check-processing environment where documents that are not checks or the legal equivalent thereof (for example, photocopies and image replacement documents) nonetheless go through the collection and return process and ultimately are paid, resulting in a charge to a customer's account. It is uncertain how often a bank attempting to create a substitute check instead will create a document with a MICR line that does not satisfy the substitute check definition. The Board therefore has removed the purported substitute check provision from the final rule. If the purported substitute check problem appears broad in scope, creates uncertainty for paying banks regarding whether to make payments, or is detrimental to drawers, the Board will consider addressing those problems by rule or order.

E. Section 229.52 Substitute Check Warranties

The Check 21 Act provides that any bank that transfers, presents, or returns a substitute check for consideration warrants that the substitute check meets the requirements for legal equivalence and that no depositary bank, drawee, drawer, or indorser will be asked to make a duplicative payment.

Section 229.52 of the proposed rule reorganized the statutory language and clarified that the responsibility for the warranties flows with the substitute check and with a paper or electronic representation of that substitute check. The proposed commentary also clarified that warranties associated with the first substitute check continue to flow if a second substitute check is created. These clarifications were intended to ensure that the warranty chain would continue from the first reconverting bank all the way through to the final recipient of a substitute check or representation thereof. The proposed commentary also clarified that a bank's responsibility for the warranties would run only to subsequent parties that received a substitute check or a paper or

electronic representation thereof, not to parties that handled only the original check or that handled the substitute check or representation prior to the warranting bank.

The final rule adopts the text of proposed § 229.52 without revision. However, the Board has revised the commentary to clarify further the issues identified in the previous paragraph and additional issues identified by commenters.

1. *Legal Equivalence Warranty.* Several commenters expressed concern about a reconverting bank being held liable for breaching the legal equivalence warranty because of something that was beyond its control, for example if the drawer wrote payment information on the original check in a type of ink that did not survive the image capturing process well. One commenter suggested that the paying bank should bear the loss for breach of the legal equivalence warranty in such cases because it can control for ink type and the use of security features by agreements with its depositors. This commenter also suggested that the drawer in such cases should not be permitted to make an indemnity claim or expedited recredit claim if the legal equivalence defect was attributable to the drawer's action. Another commenter requested clarification about whether a bank would have an obligation not to convert a check that would not legibly survive the image capturing process.

The Check 21 Act contemplates that a bank can create a substitute check to represent any check as defined in § 229.2(k) and use that substitute check instead of the original check. However, the statute also attempts to place as little burden as possible on those that receive substitute checks, such as a drawer that receives paid checks or a paying bank that demands presentment of a paper check. Because the reconverting bank chose to use a substitute check instead of the original check, the Check 21 Act allocates liability to the reconverting bank for a substitute check that, at the time of its creation, did not meet the legal equivalence requirements. However, a reconverting bank may by agreement pass this liability back to the party that sent the electronic check image to it.

2. *Duplicative Payment Warranty.* One commenter stated that the duplicative payment warranty should apply regardless of the order in which duplicative payment requests occur. The commentary to the final rule makes this point explicitly.

Several commenters acknowledged that the commentary to the proposed rule stated that a reconverting bank would be liable for breach of the duplicative payment warranty even if a duplicative payment was caused by a fraud of which the bank was unaware. However, some of these commenters suggested that the reconverting bank should not be liable for a warranty breach under these circumstances. Responsibility under the Check 21 Act for the duplicative payment warranty does not depend upon the warranting bank's knowledge or fault, although a bank can further allocate such liability by agreement or under provisions of otherwise applicable check law. The final rule therefore contains a fraudulent duplicative payment example.

The Board's proposed rule did not directly address whether a payment made through an ACH debit, as opposed to a check payment made by electronic presentment, would be subject to the duplicative payment warranty. The Board noted that the language of the warranty, which states that a person will not be asked to pay a check it already has paid, could be read to exclude a payment made by ACH debit. The Board specifically requested comment on this issue.

Several commenters stated that an ACH debit should be covered under the duplicative payment warranty because recipients of such debits were not adequately protected by Regulation E and the NACHA rules. Approximately 60 commenters stated that the duplicative payment warranty should not apply to ACH debits because such debits are already adequately covered by existing laws and rules.

The statutory language indicates that the duplicative payment warranty applies to charges initiated by check, and ACH debits are not checks. The Board therefore believes that the best reading of the Check 21 Act is to exclude ACH debits from coverage under the Act's duplicative payment warranty. The Board notes that the U.C.C. applies to unauthorized check payments and the NACHA rules apply to unauthorized ACH debits. In addition, Regulation E applies to unauthorized ACH debits to consumer accounts.

F. Section 229.53 Substitute Check Indemnity

The Check 21 Act indemnity protects against losses that any recipient of a substitute check suffers due to receipt of a substitute check instead of an original check. The Board's proposed rule and commentary clarified that, like the Check 21 warranties, all banks that transfer a substitute check or a paper or electronic representation of a substitute check make the indemnity. This is to ensure that, if an indemnity recipient makes a claim for a loss caused by receipt of a substitute check, that loss would be passed back to the first reconverting bank regardless of the number of times the item changed forms. The proposed rule and commentary also attempted to clarify that, unlike a warranty claim, which can be triggered by receipt of a substitute check or a representation of a substitute check, an indemnity claim is triggered in the first instance only by a loss that is due to receipt of a substitute check instead of the original check. The proposed commentary further clarified the scope of losses recoverable under the indemnity. The Board has adopted the regulatory text of the proposed indemnity section and the accompanying commentary with changes, discussed in the following paragraphs, designed to further clarify operation of that provision.

One commenter indicated that the Board should more clearly distinguish between the flow of responsibility for making the indemnity and the flow of an indemnity claim back up the chain of indemnifying banks. In particular, the commenter requested that the Board better articulate that an indemnity claim must be based on a loss due to any person's receipt of a substitute check. The proposed commentary noted that an indemnity claim must be ''ultimately traceable'' to the receipt of a substitute check, but another commenter objected to that language and preferred that the Board return to the statutory ''due to'' language. The commentary to the final rule addresses these concerns.

Several commenters requested clarification about the interaction between the substitute check indemnity and other law. Two commenters suggested clarification about the measure of damages under the indemnity section and the general liability provision (§ 229.56). The proposed commentary contained examples of the indemnity amount with and without a warranty breach, and the final rule further clarifies this distinction. The Board also has added a paragraph describing how production of the original check or a sufficient copy by the indemnifying bank will limit that bank's damages under § 229.53. Production of that item, however, would not absolve the indemnifying bank from warranty claims under any other law. In response to a comment, the Board has clarified that Regulation CC and the U.C.C. are sources of such other warranties.

Three commenters suggested that the Board establish a time limit for bringing an indemnity claim. The liability

provisions of the Check 21 Act, as implemented at § 229.56 of Regulation CC, already establish a one-year statute of limitations for claims under the Check 21 Act.

Several commenters indicated that the examples the Board provided in the commentary to § 229.53 to illustrate the application of the indemnity provision were useful, although some commenters requested that the Board include additional examples. Although the Board has clarified the existing examples, the final rule does not provide additional examples. If experience indicates that there are particular aspects of the indemnity that call for greater clarification, the Board may add examples.

G. Section 229.54 Expedited Recredit for Consumers

The Board's proposed rule reorganized the structure of the consumer expedited recredit provision and clarified how to calculate the time periods that applied for consumer and bank action. The proposed commentary provided a number of examples about how the expedited recredit provision would work in practice.

1. *General Comments.* Numerous commenters, including consumers and consumer groups, stated that the expedited recredit provision should apply even if the consumer was not provided a substitute check. These commenters argued that the Check 21 Act produces this result because the information a consumer must provide to make a claim does not include a statement that the consumer received a substitute check. These commenters also suggested that the legislative history indicated a congressional intent that the expedited recredit apply any time a substitute check was used to process a check. Several of these commenters further suggested that, if the Board retained the requirement that a consumer must receive a substitute check as a condition of the expedited recredit right, then provision of a substitute check or a paper or electronic representation of a substitute check should meet that requirement.[23]

The requirement that a consumer must receive a substitute check to have an expedited recredit claim comes directly from section 7(a) of the Check 21 Act, which states that a consumer may make an expedited recredit claim if he or she can assert in good faith that, among other things, ''the bank charged the consumer's account for a *substitute check that was provided to the consumer*'' (emphasis added).[24] When the Check 21 Act gives rights to a person that received a paper or electronic representation of a substitute check, it explicitly so indicates. For example, section 5 states that the warranties are given to the listed persons ''regardless of whether the warrantee receives the substitute check or another paper or electronic form of the substitute check or original check.'' The consumer expedited recredit provision contains no language to indicate that receipt of something other than a substitute check is meant to trigger the right. In addition, only those consumers who receive substitute checks are entitled to the consumer awareness disclosure that explains expedited recredit rights, which further demonstrates that the right applies only to recipients of substitute checks.

The expedited recredit procedure is intended to place consumers who receive substitute checks in the same position to the extent practicable as if they had received the original check. The right is not intended to apply to consumers who already have agreed not to receive paper checks. Giving consumers an expedited recredit right in the additional situations suggested by the commenters thus would exceed both the text and the underlying intent of the statute. The Board therefore has not expanded the scope of § 229.54.

Several commenters requested clarification about whether the expedited recredit right would apply to checks that are not drawn on a consumer account, such as travelers' checks, credit card checks, and checks used to access a home equity line of credit. The statute specifically states that a substitute check is subject to the expedited recredit right if the bank holding the consumer's account charged the account for that substitute check. The Act specifically defines the term account to be a deposit account. Therefore, a consumer generally would not have an expedited recredit right associated with a check that was not drawn on his or her deposit account. However, the consumer could have an expedited recredit right for such a check deposited into his or her account if the check was returned to the consumer unpaid in the form of a substitute check for which the bank debited the consumer's account. A consumer who did not have an expedited recredit right for a substitute check that he or she wrote but that was not charged to his or her account nonetheless might have a substitute check warranty or indemnity claim or a U.C.C. claim with respect to that item. The Board has clarified these points in the commentary to § 229.54(a).

Several commenters objected to the portion of the proposed commentary to § 229.54 stating that any warranty claim, not just a claim for a substitute check warranty provided in § 229.52, could trigger an expedited recredit right. The Board notes that the returned check warranties in § 229.34(b) of Regulation CC would run to the drawer of the check. In addition, the Check 21 Act states that a consumer may use the expedited recredit procedure to recover for ''a warranty claim'' and does not limit such claims to the substitute check warranties. The final commentary therefore retains the concept that losses associated with any warranty breach are recoverable under § 229.54, although the Board has provided more detail about the additional warranties contemplated.

Several commenters suggested that, if a consumer requests an original check, then the bank should be required to provide either the original check or a legally equivalent substitute check. Such a requirement is beyond the scope of the Check 21 Act, which does not establish requirements for when an original check or substitute check must be given but rather establishes the circumstances under which a substitute check may be used as the legal equivalent of the original check. Such a requirement also would go beyond the scope of U.C.C. 4–406, which, as adopted in most states, does not require a bank to provide original checks to consumers or to retain original checks.[25] The Board therefore has not adopted the commenters' suggestion.

The Board also has clarified in the commentary that the amount a consumer may claim as a loss under the consumer expedited recredit section includes the amount of the improper charge as well as any resulting fees that the consumer believes were improper, up to the amount of the substitute check. The commentary provides examples about the amount a consumer could claim.

[23] Another commenter understood the rule to mean that the expedited recredit procedure would apply if a consumer received a substitute check that was returned unpaid to the consumer's account but was concerned that the introductory paragraph to the model consumer awareness disclosure (which focused on checks written by consumers) might obscure that point. The Board has amended the model notice to address this concern.

[24] Section 7(h) further provides that ''a consumer *who was provided a substitute check* may make a claim for an expedited recredit under this section with regard to a transaction involving the substitute check whether or not the consumer is in possession of the substitute check'' (emphasis added).

[25] However, State law in New York and Massachusetts requires banks to give their customers the option of receiving paid paper checks with periodic account statements.

2. *Time Period for Consumer Action.* The Check 21 Act states that the consumer must make a claim within 40 days of the later of two dates: either the date on which the relevant account statement was mailed (or delivered by other means to which the consumer agreed) or the date on which the problematic substitute check was made available to the consumer. The proposed rule combined these concepts by stating that the claim was due within 40 days of the date that the relevant account statement or substitute check was mailed or delivered. The accompanying commentary clarified that the term delivery includes making the account statement or substitute check available through various means agreed to by the consumer, including in-person delivery.

The Board received numerous comments expressing concerns about the events that should trigger the 40-day time period within which a consumer must make an expedited recredit claim and what a consumer must do to constitute timely action within that period. A few commenters suggested that the final rule's construction should parallel that of the statute.

The Board has retained the ''mailed or delivered'' language in the rule text because the Board believes this construction clarifies rather than changes the statute's meaning. The Board has amended the final commentary to clarify that delivery includes making the statement or check available at the bank for the customer's retrieval pursuant to the customer's request.

Several commenters suggested that the Board adjust the 40-day time period for consumer action to parallel Regulation E (which gives consumers a 60-day period to make a claim for a disputed electronic fund transfer) or the U.C.C. (which gives consumers a reasonable period to examine a bank statement for errors). These commenters were concerned that having three different yet somewhat related timing requirements for consumer action would be confusing. Some commenters also were concerned that a consumer might receive a substitute check that triggered the time period for making a claim well after the underlying transaction, which could compromise the bank's ability to make a timely interbank expedited recredit claim under § 229.55.

The 40-day period in the proposed rule comes directly from the statute, and the Board has retained it in the final rule. A bank concerned about differences between Regulation E and § 229.54 could choose to give a consumer a longer period than required by § 229.54 to bring a substitute check claim.

Several commenters asked for further clarification about what constituted extenuating circumstances that would require a bank to extend the consumer's 40-day period for making a claim. The proposed rule paralleled the approach in Regulation E by stating the existence of the extenuating circumstances extension in the rule text but moving to the commentary the statutory examples of what might justify an extension. The Board is unaware of any problems in applying the Regulation E extension provision and does not expect problems applying the corresponding provision in § 229.54. The Board therefore is not further clarifying the extenuating circumstances provision at this time.

Several commenters requested further clarification about what action by the consumer would satisfy the requirement to ''submit'' a claim within the specified period. These commenters noted that some portions of the rule and commentary referred to a consumer's making the claim, while others appeared to focus on the bank's receipt of the claim. Other commenters requested further clarification about the interaction between the consumer's ability to make an oral claim and the bank's right to require a consumer to submit a claim in writing.

The Board has clarified in the final rule that a consumer must submit his or her claim such that the bank receives it within the 40-day time period (extended if necessary) described in the regulation. The final rule also clarifies that, if a consumer submits a claim orally and the bank requires a written claim, the bank must inform the consumer of the written claim requirement at that time and may require the consumer to submit that written claim such that the bank receives it within 10 business days of the oral claim. This time period parallels the corresponding period in Regulation E for written confirmation of oral claims. In such a case, the consumer's claim would be timely if the bank received the oral claim within the 40-day period and the written claim within the 10-day period. In addition, the final rule and commentary provide that if a consumer attempts to submit a claim in any form and does not provide all the information required to constitute a claim, the bank must inform the consumer that the claim is incomplete and identify what information is missing.

One commenter requested that the Board clarify that a consumer who fails to bring a timely expedited recredit claim under § 229.54 nonetheless might have claims under other law, such as a warranty or indemnity claim under § 229.52 or § 229.53, respectively, or a claim under the U.C.C. The Board has made this clarification in the commentary.

3. *Form of Claim and Time Period for Bank Action on Consumer Claims.* The statute provides that a bank must act on a consumer expedited recredit claim within 10 business days after the business day on which the consumer submits the claim. The proposed rule changed the latter occurrence of business day to banking day to parallel other provisions of Regulation CC. The Board received numerous comments on this clarification, all but four of which supported the adjustment. The final rule retains the proposed rule's use of the term banking day. The final rule also clarifies that the 10-day period within which the bank must act on the consumer's claim does not begin until the bank receives the claim. The Board believes that it is appropriate to focus on the bank's receipt, rather than the date of the consumer's mailing or delivery to provide certainty to the bank about the time period within which it must take action.

The final rule retains, with some revisions, the proposed rule's provision stating that the time period for bank action is measured from the bank's receipt of the written claim if the bank requires a consumer to submit an initial oral claim in writing. The final rule and commentary also clarify, in response to a comment, that a bank that requires a claim to be in writing must state that requirement in the consumer awareness disclosure it provides under § 229.57 and always must inform a consumer who makes a claim orally of the requirement at the time of the oral claim.

4. *Bank Action on Consumer Claims.*

a. *Bank Action Generally.* The proposed rule reorganized and clarified the provisions of the Check 21 Act related to the bank's options for responding to consumer claims and the notices associated with each of those options. Commenters that addressed the Board's reorganization strongly supported it. The final rule therefore retains the proposed organization of the bank action and notice provisions, but with some specific revisions suggested by commenters.

b. *A Bank's Choices for Responding to a Consumer Claim.* Under the Act and final rule, a bank may grant or deny a consumer's claim or provisionally recredit a consumer's account pending further investigation. The bank may reverse a recredit if it later determines the claim was invalid. A bank must provide a specific notice for each of

these actions. In addition, a bank that denies a claim must demonstrate to the consumer why the claim is not valid and provide the original check or a sufficient copy. One commenter asked whether a bank must retain a copy of expedited recredit claims that it receives. The Check 21 Act does not contain a retention requirement, although other record retention laws and regulations to which the bank is subject might apply.

Regarding provisional recredits, one commenter requested that the Board clarify that the interest due on a provisional recredit would be interest only on the amount of the recredit, rather than on the entire amount claimed by the consumer if that amount is greater than the recredit. The Board agrees that this is the correct result under the rule and therefore has not revised the final rule or commentary to address this point.

A few commenters expressed concern that the Board had diminished the requirement that the bank ''demonstrate to the consumer that the claim is not valid'' because the proposed rule instead stated that the bank must explain to the consumer the basis for its denial. The Board did not intend to deviate from the statutory requirement but rather to describe more specifically how a bank would satisfy it. These commenters also suggested that the consumer, rather than the bank, is the person that should determine whether a copy provided with a denied claim was sufficient to determine that the claim was not valid. In response to these comments, the text of the final rule uses the statutory language, and the commentary provides more detail about how a bank would demonstrate to the consumer that a claim is not valid.

In describing the bank's ability to reverse a recredit on a later determination that a claim was not valid, the proposed rule clarified that the bank could reverse the basic amount of the recredit plus interest on that amount. All commenters that addressed this point supported allowing a bank to reverse associated interest, although some suggested that the Board further clarify that the interest to be reversed included both the interest component of the initial recredit and the interest that accrued on the entire recredited amount. The final rule and commentary make this clarification.

Several commenters expressed concern about the provision of the proposed rule allowing the bank to reverse a recredit, particularly the statement that the bank may reverse a recredit ''at any time.''[26] The Board has removed the quoted language from the text of the final rule and clarified in the commentary that the time period for the bank's reversal is subject to the applicable statute of limitations.

5. *Delayed Availability*. In response to comments, the commentary to the final rule clarifies that the rule allows a bank to delay the availability of both the base amount of the recredit and any interest on that amount. The Board in response to comments also has clarified in the commentary that the new account and repeated overdraft exceptions in subpart D apply as described in the commentary to the corresponding exceptions in subpart B.

6. *Notice Requirements*. Several commenters suggested that a bank should not be required to notify a consumer of a recredit if the bank affirmatively determines that the consumer's claim is valid. Section 7(f)(2) requires a notice for all recredits, not just those that are made provisionally pending further investigation. The Board therefore has retained the requirement in § 229.54 that a bank always notify the consumer of a recredit.

Notices regarding expedited recredit claims are deemed to be given on the business day that they are mailed or otherwise delivered in a manner agreed to by the consumer. One commenter suggested that electronic delivery of the consumer expedited recredit notices should be subject to the E-Sign Act. The E-Sign Act applies to notices that other law requires to be in writing (rather than in electronic form) and requires a consumer to affirmatively consent to electronic delivery of a written notice after the bank provides a detailed notice concerning electronic delivery. The Check 21 Act specifically states that a bank may provide the expedited recredit notices through any means to which the consumer has agreed. The Board believes that because the Check 21 Act specifically addresses alternative means of providing written information required by that Act, the E-Sign Act does not apply. A bank therefore need not comply with E-Sign when providing materials electronically under the Check 21 Act, although a bank voluntarily may choose to do so.

[26] One commenter suggested that the Board clarify that a bank cannot use the recredit reversal provision as a blanket right of set off to recover amounts from the consumer that are unrelated to the recredit claim. The recredit reversal provision of the rule only allows a bank to reverse a previously-provided recredit and does not apply to other amounts that the consumer might owe the bank.

7. *Other Claims Not Affected*. One commenter questioned the need for § 229.54(f) of the proposed rule, which stated that providing a consumer expedited recredit under § 229.54 does not absolve a bank from liability under other law. This provision of the Board's proposed rule came directly from the statute. A consumer may recover only up to the amount of the substitute check under § 229.54, although the consumer's losses associated with the substitute check may exceed that amount. Paragraph (f) is intended to clarify that a consumer may be able to recover those additional losses under other provisions that allow for proximately-caused damages exceeding the amount of the check, such as the substitute check indemnity or U.C.C. 4–402. The Board has added a reference to the U.C.C. in the rule text and a paragraph in the commentary that explains the intent and application of § 229.54(f).

8. *Sufficiency of Commentary and Examples*. The Board specifically requested comment on whether additional commentary to § 229.54 was needed. Commenters' reactions to this request were mixed. Thirteen commenters requested more commentary. Some of these were general requests, while other commenters offered specific examples that they wanted the Board to include. By contrast, ten commenters argued that no additional examples were needed, and some of these commenters even suggested that the Board omit certain of the proposed examples.

The Board has retained the examples from the commentary to the proposed rule with some clarifying changes. The Board has not, however, added examples or commentary except as noted in the preceding paragraphs. The Board expects that use of the consumer expedited recredit provision will be relatively rare and that the commentary addresses the most likely questions that banks might have regarding practical application of that provision. The Board will consider adding or deleting commentary and examples if experience indicates that the level of detail in the commentary is inappropriate.

H. Section 229.55 Expedited Recredit Procedures for Banks

Several banks expressed concern that the interbank recredit right would not work well in practice and identified various reasons for that concern. For example, some commenters stated that a bank that received an interbank expedited recredit claim might not know within the 10-day period for acting on that claim whether it could produce an original check or sufficient

copy. Such a bank might seek to obtain the original check or sufficient copy by submitting its own interbank recredit claim, which also would be subject to a 10-day response time. One commenter requested that the Board identify which transaction gave rise to a bank's claim and thus started the clock for making an interbank expedited recredit claim. A commenter also requested that the Board specify a particular method for calculating interest on a claim.[27] Other commenters requested additional clarification about who would enforce the interbank recredit process. Still another commenter asked how a consumer's receipt of an extension to make a consumer expedited recredit claim would affect the timing requirements for the interbank recredit process.

The Board has amended the time periods in § 229.55(b)–(c) for making and responding to an interbank claim to parallel the Board's amendments to the corresponding provisions of the consumer expedited recredit section. In response to a comment, the final commentary also clarifies which transaction triggers the claimant bank's 120-day period for making a claim. Aside from those changes, the Board has adopted § 229.55 and the accompanying commentary as proposed. The interbank recredit section may be varied by agreement. If banks determine that particular provisions of § 229.55 are problematic, they may agree to modify those provisions by agreement as they deem appropriate.

I. Section 229.56 Liability

The Board has adopted the provisions of proposed § 229.56 with some minor changes suggested by commenters.

In response to a comment, § 229.56(a)(1)(i) now contains language that parallels § 229.53(b)(1)(ii) when describing that losses recoverable under subpart D are, in the absence of a warranty and indemnity claim, limited to the amount of the substitute check plus interest and expenses.

Several commenters expressed concern that the Board's proposed rule included the identity of the party to be sued as an element of accrual of a cause of action under § 229.56. The Board included this clarification in the proposed rule to make the standard for accrual parallel to the standard for making a timely claim. The final rule therefore retains the proposed accrual language regarding the identity of the party to be sued.

Two commenters expressed concern or confusion about the interaction of § 229.54, which requires a consumer to bring an expedited recredit claim within 40 days of the delivery of the relevant account statement or substitute check, with the timing requirements of § 229.56. One commenter noted that § 229.56 generally states that a claim must be made within 30 days of accrual to be timely, whereas § 229.54 provides that a consumer has 40 days from delivery of the relevant account statement or substitute check to make a timely expedited recredit claim. This commenter suggested that a consumer be allowed this same 40-day period to make a timely claim for purposes of § 229.56. The Board notes that the statute and rule produce this result by providing that a timely consumer recredit claim under § 229.54 satisfies the timing requirement of § 229.56.

J. Section 229.57 and Appendix C Consumer Awareness and the Board's Model Language

1. *Consumer Awareness Disclosure in General.* The Board has amended the text of § 229.57 of the rule to parallel the statutory text more closely by providing that the consumer awareness disclosure required by subpart D must be brief.

The proposed rule required banks to provide the disclosure to consumers who received paid checks and consumers who received substitute checks on an occasional basis. Several commenters suggested that banks should be required to provide the disclosure to all consumers, not just those who receive substitute checks. Requiring notice for consumers who do not receive substitute checks would go beyond the requirements of the statute and could confuse consumers who receive a notice describing rights that they do not have. The Board therefore has not altered the basic scope of the consumer disclosure requirement. However, the final rule and commentary clarify that the reference to paid checks means paid original checks and paid substitute checks and does not refer to a statement that contains multiple check images per page.

The proposed rule stated that a bank responding to a request for a check by providing a substitute check must provide the disclosure in connection with that substitute check ''unless [the] bank already has provided the disclosure'' to a consumer who receives paid checks. Some commenters understood the proposed rule to mean that a bank that already had provided the notice to a consumer who received paid checks with account statements would not be required to provide an additional notice when responding to a consumer's request for a check. Other commenters believed that notice upon provision of a substitute check always would be required.

The final rule provides that a bank always is required to provide the disclosure when responding to a request for a check by providing a substitute check. This approach more closely parallels the statutory language, which does not provide an exception to the requirement to provide a disclosure when providing a substitute check on an occasional basis. Moreover, the time that a consumer receives a substitute check in response to a particular request is likely when the disclosure will be most useful.

One commenter suggested that a bank should not be required to provide the substitute check disclosure in a separate mailing but rather should be allowed to provide the disclosure along with other account information. The rule would permit a bank to combine the substitute check disclosure with other information.

One commenter suggested that the consumer awareness disclosure should be required based on the consumer relationship rather than the account relationship, such that a bank need not provide an additional disclosure if an existing consumer customer opened a new account. The text of the final rule incorporates this interpretation. Another commenter suggested that the Board explain how the consumer awareness disclosure would apply in the context of joint account relationships. This commenter stated that notice to one account holder on a joint account should suffice as notice to each consumer on the account. The final rule includes language similar to that in § 229.15(c) regarding notice to joint account holders.

2. *Timing for a Disclosure Provided in Response to a Consumer's Request for a Check.* The statute requires a bank that provides a substitute check in response to a consumer's request for a check to provide the consumer awareness disclosure to the consumer ''at the time of the request.'' There are some cases in which a bank would be able to provide the notice at the time of the consumer's request in a manner that is useful to the consumer, while other requests may

[27] Another commenter questioned why banks had 120 days to make a claim when the corresponding provision of § 229.54 gives consumers only 40 days. As the commentary to the proposed rule explained, the 120-day period for a bank to make a claim allows time for the statement to be delivered to the consumer and for the consumer to make a timely claim, plus it allows for multiple interbank claims with respect to the same substitute check. The Board thinks this explanation is more appropriate in the preamble, which discusses the basis for the rule's provisions, than in the commentary, which clarifies the application of those provisions. The Board accordingly has omitted this text from the commentary to the final rule.

present practical difficulties for banks. For example, a bank may not know at the time of the request what it will provide in response. Ultimately, the bank might provide something other than a substitute check to the consumer. If that bank had given the substitute check disclosure to the consumer at the time of the request, the consumer might be confused by receipt of a disclosure explaining rights that did not apply to the document (s)he received. Moreover, the consumer may make his or her request in such a manner (such as by telephone) that the bank is unable to provide the disclosure at the time of the request.

In light of the foregoing difficulties, the Board proposed two alternatives for when a bank must provide the disclosure to a consumer who requests a substitute check and requested comment on which alternative was preferable. The first alternative used the statutory language, while the second would have allowed the bank in all cases to provide the disclosure at the time it provided a substitute check in response to the consumer's request. Commenters overwhelmingly preferred the second alternative.

The final rule takes an approach that combines elements from the first and second alternatives. The final rule states that a bank must provide the disclosure to a consumer who requests a check or check copy at the time of the request if feasible and otherwise must provide the disclosure no later than the time at which the bank provides a substitute check in response to the request. The commentary provides examples of when it would not be feasible to provide the disclosure at the time of the request.

3. *Model Language for the Disclosure Required by § 229.57.* The Check 21 Act requires the Board to publish model language that banks could use to satisfy the consumer awareness disclosure requirement and that, when used appropriately, would be deemed to comply with that requirement. The Board requested comment on the model language that it proposed to include in existing appendix C.

The Board received numerous comments on the proposed model disclosure. Several commenters generally opined that the proposed language was adequate, although some of these commenters suggested that the model disclosure could be more concise. Numerous commenters expressed concern that the proposed language was so detailed that it would discourage consumers from reading the disclosure. These commenters suggested a specific, alternative model disclosure that was much shorter than the Board's proposed disclosure. By contrast, five commenters suggested that the model disclosure should provide consumers with more detail about expedited recredit rights.[28] Many commenters made specific wording suggestions for the Board's consideration.

The final model disclosure, published as model 5A in appendix C, is shorter than the proposed model. In crafting this model disclosure, the Board has attempted to balance the requirement that the disclosure be brief and the need for the disclosure to contain enough information to enable a consumer to understand and, if necessary, exercise the expedited recredit right in § 229.54. The Board's revisions also reflect its consideration of the specific wording concerns expressed by commenters.

4. *Additional Model Language for Consumer Expedited Recredit Notices.* Although not required to do so by statute, the Board published for comment model notices that banks could use to respond to consumer expedited recredit claims under § 229.54(e). The Check 21 Act does not provide a safe harbor for appropriate use of these model notices, and the Board requested comment on whether having model language would be useful for banks in the absence of a safe harbor. Commenters strongly supported inclusion of the model notices, although many requested that the Board either give the language safe harbor status or specifically state that appropriate use of the models in the Board's view would constitute compliance with the Check 21 Act.

The Board has retained the model consumer expedited recredit notices in appendix C but has revised them. The proposed models focused on responding to claims for an improper charge to a consumer account, but the final models instead focus on whether the consumer's claim is or is not valid. These revisions will allow banks to use the model notices to respond to a consumer's claim regarding an improper charge to his or her account or regarding a warranty breach. Because the statute does not provide safe harbor status to these model notices, the Board has not indicated that appropriate use of the notice constitutes compliance with the rule. However, the Board has revised the language discussing the status of the model notices to indicate that the Board has provided these models to help banks to comply with the rule.

K. Section 229.58 Mode of Delivery of Information Required by This Subpart

One commenter suggested that the Board should delete § 229.58, which contains the rule for electronic delivery of documents that applies to all of subpart D, and instead discuss electronic delivery of documents in each place in the rule where that concept is relevant. The Board has retained the proposed organization because it believes that discussing the issue of electronic delivery in one section and cross-referencing that section when appropriate is straightforward and efficient.

L. Section 229.60 Variation by Agreement

The Check 21 Act and final rule provide that the only provision that may be varied by agreement is the interbank recredit provision at section 8 of the Act and § 229.55 of the rule. The final rule provides commentary clarifying that this provision does not prevent a bank from taking action that is more favorable to the consumer than required by the Check 21 Act or the final rule.

II. Changes Unrelated to the Check 21 Act

In addition to the changes necessary to implement the Check 21 Act, the Board also proposed changes to a number of existing provisions in Regulation CC based on a general review of the rule. Commenters generally supported these proposed changes, although some expressed particular concerns as noted in the following paragraphs. With the exception of the changes discussed in the following paragraphs, the Board is adopting the proposed revisions to existing provisions in substantially the same form as in the Board's proposed rule.

A. Section 229.15 General Disclosure Requirements

The Board proposed to amend the commentary to § 229.15 to require that disclosures under subpart B be clear and conspicuous. The Board proposed this change in Regulation CC to parallel proposed changes to its consumer regulations.[29] However, the Board received numerous comments opposing the proposed changes to the consumer rules, and several commenters opposed inclusion of clear and conspicuous

[28] These commenters also suggested that the Board should require banks to respond accurately to consumer enquiries about how a particular check was processed. The Check 21 Act does not contain such a requirement. However, banks have a business incentive to respond appropriately to consumer enquiries on this and other topics.

[29] *See* 68 FR 68786, 68788, 68791, 68793, 68799 (all dated Dec. 10, 2003).

language in the Regulation CC commentary.

In response to concerns expressed regarding the proposed consumer regulations, the Board recently withdrew all the proposed amendments to the consumer rules.[30] In connection with that action, the Board determined that the goal of ensuring that consumers receive noticeable and understandable information should be achieved by developing proposals that focus on improving individual disclosures rather than the adoption of general definitions and standards applicable across all regulations.

The existing notice requirements in subparts B and C of Regulation CC have been in effect since 1988, and the Board is not aware that recipients of those notices have expressed concerns regarding the manner in which banks provide them. The Board therefore has determined that adding a clear and conspicuous requirement is unnecessary at this time and has not amended the commentary as proposed. The Board will reevaluate this issue in connection with its future periodic reviews of Regulation CC.

B. Section 229.30(c)(1) Paying Bank's Responsibility for Return of Checks

Section 229.30(c)(1) currently provides that a paying bank's midnight deadline for returning a check is extended if it uses a means of delivery that ordinarily would result in receipt by the receiving bank's next banking day. In response to a case holding that Reserve Banks have a 24-hour banking day for processing checks (see *Oak Brook* v. *Northern Trust,* 256 F.3d 638 (7th Cir., 2001)), the Board proposed to amend § 229.30(c)(1) to provide that the deadline would be extended if a paying bank used a means of delivery that ordinarily would result in the receiving bank's receipt of the check before the cutoff hour for its next processing cycle if sent to a returning bank or before its next banking day if sent to a depositary bank.

The Board received several comments on this proposed change, most of which indicated that using the cutoff hour for the next processing cycle would be confusing and difficult to apply. These commenters noted that some banks have more than one such cutoff hour and that paying banks might not know the relevant times for each of the banks to which they return checks.

In response to these comments, the final rule provides that a paying bank must return a check ''on or before the receiving bank's next banking day following the otherwise applicable deadline by the earlier of the close of that banking day or a cutoff hour of 2 p.m. or later set by the receiving bank under U.C.C. 4–108.'' This approach should provide the certainty of identifying a specific cutoff hour but also allow the receiving bank to set a cutoff hour of 2 p.m. or later or to close before 2 p.m.

C. Other Comments Concerning Non-Check 21-Related Changes

1. *Manner of Providing Subpart B notices.* Commenters generally supported the proposed changes to the commentary to §§ 229.13 and 229.15 that clarified the application of the E-Sign Act to notices and disclosures that subpart B requires to be in writing. However, one commenter expressed concern about existing language in the commentary stating that a notice is in a form that the consumer can keep if it can be ''downloaded or printed.'' This commenter suggested that the standard be changed to ''downloaded and printed.'' The Board is not aware of consumer problems associated with this requirement and notes that downloading information on a computer allows the recipient to access and use the information later. The Board also believes that it would be unusual for a bank to send an electronic notice such that it could not be printed. The Board therefore has retained the existing language.

Another commenter expressed concern about the requirement that notices and disclosures required by §§ 229.13(g), 229.16(c)(2), and 229.33(a)-(b) must include an account number, which the commenter interpreted to mean the entire account number. The commenter suggested that a bank should be permitted to redact all but the last four digits for information security purposes. The Board has amended §§ 229.13(g) and 229.16(c)(2) to allow for the proposed redaction. The Board has not amended § 229.33(a)–(b) because the notice required by that section is an interbank notice, and the receiving bank likely would need full account information for the notice to serve its intended purpose.

2. *Section 229.33 Notice of Nonpayment.* The Board received eleven comments concerning its request for comment on whether the time period for giving the notice of nonpayment should be reduced. Only two commenters opined that an adjustment was necessary. The Board therefore has left the time period unchanged. One commenter suggested that the Board amend this section to state that the bank must ''provide or give'' the notice, as opposed to the ''send or give'' language proposed by the Board. This commenter was concerned that the Board's proposed language might be read to exclude providing notice by e-mail. The Board believes that the send or give language is sufficiently broad to allow notice in any form, and the proposed commentary explicitly stated that electronic notice would suffice if sent to the address specified by the recipient for that purpose. The Board therefore has adopted the language as proposed.

Another commenter suggested that the Board amend § 229.33 to provide that a bank could provide notice in the form of a substitute check or another paper or electronic representation of a check. The Board believes that the text of § 229.33(a), when combined with the revised commentary addressing the form of the nonpayment notice, already produces this result.

III. Responses to Specific Requests for Comment

In addition to proposing Check 21-related and non-Check 21-related changes, the Board also requested comment on several specific issues.

A. Remotely-Created Demand Drafts

The Board requested comment on whether Regulation CC should incorporate a U.C.C. warranty that would shift liability for an unauthorized remotely-created demand draft from the paying bank to the depositary bank, although the Board did not propose specific regulatory language. Approximately 76 commenters addressed this issue, all but two of which strongly supported the general idea of covering liability for remotely-created demand drafts in Regulation CC. However, many commenters advocated changes from the uniform version of the warranty. For example, some commenters stated that the warranty should apply to all remotely-created demand drafts instead of only those drafts drawn on consumer accounts, and others suggested that the warranty should extend to all the draft's terms instead of the amount only. Many commenters encouraged the Board to propose specific language for comment in a separate rulemaking. The Board intends to issue a separate proposal regarding remotely-created demand drafts later this year.

B. Treatment of Industry Standards

The Board also received comments regarding whether it should identify specific industry standards in the rule text or the commentary. The vast majority of commenters on this issue preferred the Board's proposed

[30] *See* 69 FR 35541 (June 25, 2004).

approach of placing a general reference to industry standards in the text of the rule and identifying specific standards in the commentary. However, particularly with respect to substitute checks, many commenters preferred that the Board should indicate that a particular standard is exclusive.

In cases where the Board intends that an exclusive industry standard apply, such as the standards relating to MICR-line printing and substitute checks, the Board has identified a specific standard in the text of the final rule. The Board believes that this approach is more transparent for the reader and will better facilitate compliance with the rule.

C. Plain Language

The Board received four comments about whether the proposed rule and commentary were in plain language. Two of these commenters opined that the rule and commentary were in plain language, especially in light of the complexity of some provisions of the law. Another commenter suggested that the rule could be shortened if some elements were moved to an appendix but did not identify specific changes it would make. Another commenter requested that the rule better clarify the application or non-application of the Check 21 Act to non-consumer accounts. The Board has addressed this concern through its revisions to the account and consumer account definitions and through revisions to certain parts of the commentary.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The final rule contains requirements subject to the PRA. The collection of information that is required by this final rule is found in 12 CFR 229.54, 229.55, and 229.57. This information is required to obtain a benefit for consumers and mandatory for depository institutions.

All depository institutions, of which there are approximately 19,280, potentially are affected by this collection of information, and thus are respondents for purposes of the PRA, because all depository institutions may respond to and make expedited recredit claims under §§ 229.54 and 229.55, respectively. In addition, all depository institutions that provide paid checks to consumer customers with periodic account statements or that otherwise provide substitute checks to consumer customers must provide the consumer awareness notice in § 229.57. However, the extent to which this collection of information affects a particular depository institution will depend on whether and under what circumstances that depository institution provides substitute checks to consumers. For example, institutions that do not provide paid checks with account statements or provide substitute checks in response to consumers' occasional requests for paid checks will have significantly fewer consumer awareness disclosures and expedited recredit notices than will depository institutions that routinely provide paid checks to consumers.

The collection of information in this regulation is a new requirement for which the Federal Reserve has no direct method for estimating burden. The following average burden estimates for respondents regulated by the Federal Reserve therefore are based on the Federal Reserve's experience under similar, existing regulations with respect to the 1,244 state member banks and uninsured U.S. branches and agencies of foreign banks for which the Federal Reserve has administrative enforcement authority (collecting referred to in the following paragraphs as respondents regulated by the Federal Reserve) and for consumers who submit claims to those depository institutions. The following average burden estimates for respondents regulated by the Federal Reserve also represent an average across all such respondents and reflect variations between institutions based on their size, complexity, and practices. The Federal Reserve also has estimated the total annual burden associated with each notice both for respondents regulated by the Federal Reserve and for all affected depository institutions. The Federal Reserve estimates that half of all depository institutions affected by this rule do not provide paid checks with account statements or provide substitute checks and thus would have little or no burden for these requirements. The Federal Reserve has taken this fact into account by estimating total burden for all affected depository institutions on a weighted basis. The other banking agencies are responsible for estimating and reporting to OMB the total paperwork burden for the depository institutions for which they have administrative enforcement authority. They may, but are not required to, use the Federal Reserve's burden estimates.

Except as noted in the following paragraphs, the burden estimates for the final rule are the same as those the Federal Reserve identified for the proposed rule. One commenter expressed concern that the Federal Reserve's proposed paperwork burden estimates in its proposed rule were too low. However, that commenter did not suggest specific revisions to those estimates.

The first notice, described in § 229.54(b)(2), is the information a consumer would provide when making an expedited recredit claim in writing. The Federal Reserve estimates that each respondent regulated by the Federal Reserve will receive, on average, 25 of these claims per year. The Federal Reserve estimates that it will take consumers, on average, 15 minutes to complete and send this claim. The Federal Reserve estimates that the total annual burden for consumers submitting claims to respondents regulated by the Federal Reserve is 7,775 hours. Using the Federal Reserve's methodology, the total annual burden for consumers submitting claims to all depository institutions would be approximately 67,300 hours.

The second notice, described in § 229.54(e), is required when a depository institution validates the consumer's claim, denies a consumer's recredit claim, or reverses a consumer's recredit claim. The Federal Reserve estimates that each respondent regulated by the Federal Reserve will send, on average, 35 of these notices per year. The Federal Reserve estimates that it will take each such respondent, on average, 15 minutes to prepare and distribute these notices (the Board has provided a model disclosure that depository institutions may use for this purpose). The estimated total annual burden for the respondents regulated by the Federal Reserve to respond to consumer claims is 10,885 hours. Using the Federal Reserve's, the total annual burden for all depository institutions would be approximately 94,200 hours.

The third notice, described in § 229.55 (b)(2), is required for each depository institution that is required to make a written claim against an indemnifying depository institution for a substitute check. The Federal Reserve estimates that each respondent regulated by the Federal Reserve will submit, on average, 15 of these claims per year. The Federal Reserve estimates that it will take each such respondent, on average, 15 minutes to complete and send each claim. The estimated total annual burden for respondents regulated by the Federal Reserve to submit interbank recredit claims is 4,665 hours. Using the Federal Reserve's methodology, the total annual burden for all depository institutions would be approximately 40,400 hours.

Finally, § 229.57 describes the requirements for depository institutions

to provide consumer awareness disclosures to consumers who receive paid checks with their periodic statements, who receive a substitute check in response to a request for a check, and who receive a returned check in the form of a substitute check. A model disclosure that depository institutions may use is provided in appendix C–5A.

The proposed rule contained an exception to the disclosure requirement for a depository institution that provided a substitute check on an occasional basis to a consumer who already had received the disclosure. The final rule, by contrast, requires that a depository institution always provide the disclosure when providing a substitute check on an occasional basis. The Federal Reserve believes that provision of a substitute check on an occasional basis in response to a consumer's request will be rare and thus does not expect that elimination of the proposed rule's exception will appreciably increase the number of disclosures. The final rule's paperwork burden estimate for notices provided on an occasional basis therefore is only slightly higher than that in the proposed rule.

The Federal Reserve estimates that each respondent regulated by the Federal Reserve will, on average, provide 510 disclosures per year (as compared with 500 disclosures per year in the proposed rule) and that, on average, it will take one minute to prepare and distribute the disclosure to each consumer. The one-minute estimate is a change from the proposed rule due to further analysis. The consumer awareness disclosures are standardized and machine-generated and do not substantively change from one individual account to another; thus, the average time for providing the disclosure to all consumers who are entitled to receive it should be small. The Federal Reserve estimated that the estimated total annual burden for respondents regulated by the Federal Reserve to provide the consumer awareness disclosure is 10,574 hours. Using the Federal Reserve's methodology, the total annual burden for all depository institutions would be approximately 91,500 hours.

The final rule would increase the total burden under Regulation CC for respondents regulated by the Federal Reserve and consumers submitting claims to those respondents by 33,899 hours, from 327,052 to 360,951. Using the methodology explained above, the final rule would increase total burden under Regulation CC for all depository institutions by approximately 293,400 hours.

The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100–0235.

Regulatory Flexibility Act

The Board has prepared a final regulatory flexibility analysis as required by the Regulatory Flexibility Act (*see* 12 U.S.C. 604).

I. Need for and Objective of Rule

The Board is adopting this rule to implement the Check 21 Act. The Act requires the Board to publish a model disclosure that depository institutions may use to satisfy their consumer awareness disclosure requirements. The Act also authorizes the Board to adopt rules necessary to implement, prevent circumvention or evasion of, or facilitate compliance with the Act. The final rule adopts the text of the Check 21 Act with clarifying changes and commentary designed to aid depository institutions' understanding of and compliance with the Act. The final rule is incorporated into existing Regulation CC so that all the Board's generally applicable check collection requirements will be contained within one rule.

II. Summary of Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

The Board received two comments on its initial regulatory flexibility analysis. One commenter opined that the impact of the rule on small depository institutions should be proportional to that on larger depository institutions and should not be adverse to either. The other commenter expressed concern that the use of substitute checks could increase fraud and that small depository institutions would not have sufficient resources to develop fraud prevention techniques to respond to such increased risks. This commenter acknowledged that additional fraud risks associated with substitute checks could not yet be quantified but expressed concern that these risks would be burdensome. These comments did not provide specific information about the impact of the proposed rule on affected small depository institutions. The Board has not made regulatory changes based on the comments.

III. Description of Affected Small Entities

Under section 3 of the Small Business Act, as implemented at 13 CFR part 121, a bank is considered a ''small entity'' or ''small bank'' if it has $150 million or less in assets. Based on March 2004 call report data, the Board estimates that there are approximately 14,251 depository institutions with assets of $150 million or less.

The Check 21 Act does not require any depository institution to create substitute checks or change its general check collection procedures, although after the Act's effective date any depository institution may receive a substitute check instead of an original check. The provisions of the Check 21 Act and the final rule potentially apply to all depository institutions regardless of their size. However, the extent to which any depository institution will be economically affected by the final rule depends on several variables, including how many substitute checks a depository institution handles and whether it creates those substitute checks. Even though all depository institutions that handle a substitute check for value make the substitute check warranties and indemnity and potentially are responsible for providing expedited recredit for a substitute check to a consumer or another depository institution, the final rule allocates most associated losses to the reconverting depository institution that first transferred, presented, or returned the substitute check for value. Thus, a depository institution's costs associated with substitute check-related problems primarily will depend on whether it chooses to create substitute checks. In addition, whether a depository institution must provide the consumer awareness disclosure contained in the final rule will depend on the depository institution's specific practices regarding providing checks to consumers.

Due to current uncertainty about each of the foregoing variables, aside from the burden estimates in the Paperwork Reduction Act section, the Board cannot at this time determine the number of small depository institutions that will be directly affected by the final rule or the rule's overall economic impact on small depository institutions.

IV. Recordkeeping, Reporting, and Compliance Requirements

The final rule does not contain recordkeeping or reporting requirements. However, a depository institution that provides paid checks to consumer customers with account statements or otherwise provides a substitute check to a consumer must provide consumer awareness disclosures. In addition, a depository institution that receives an expedited recredit claim from a consumer or other depository institution must comply with

the requirements of the relevant expedited recredit provision, including the requirements regarding timing for and notification of the depository institution's determination regarding the claim. The final rule allows depository institutions to vary by agreement the terms of the interbank recredit provision, but not the consumer expedited recredit provision.

V. Steps Taken To Minimize the Economic Impact on Small Entities

The requirements of the Check 21 Act that potentially affect small depository institutions are statutory. The Board has minimal flexibility to vary those requirements by regulation, but when possible it has indicated steps depository institutions may take to minimize risks under the Act. The substitute check warranties and indemnity are made as a matter of law when a depository institution transfers, presents, or returns a substitute check, but the final rule and commentary clarify in various places that depository institutions may further allocate liability amongst themselves by agreement. The maximum periods for acting on claims and the notices and other documentation that depository institutions must provide in connection with providing an expedited recredit to a consumer are specifically prescribed by the statute, but § 229.60 of the Board's final rule and the associated commentary clarify that a depository institution may choose to act in a manner more favorable to the consumer than the Act requires. Although the final rule also uses the statute's requirements regarding interbank expedited recredits, § 229.60 specifically notes that depository institutions themselves may vary any of those requirements by agreement. Finally, the statute specifically sets forth the events that trigger provision of and the timing requirements that apply to the consumer awareness disclosure, but § 229.57(b)(2)(i) gives depository institutions flexibility to provide disclosures for a substitute check given in response to specific request for a check at a later date when necessary.

Administrative Procedure Act

In accordance with 12 U.S.C. 553(d)(3), the Board for good cause finds that model disclosure C–5A in appendix C is effective immediately. The Check 21 Act requires the Board to publish model disclosure C–5A three months before the Act's effective date. A bank's appropriate use of model C–5A would constitute compliance with the consumer awareness disclosure requirements in section 12 of the Act and § 229.57 of the final rule. The Board believes that delaying the effective date of model disclosure C–5A would undermine the Act's intent that banks be able to rely on the model language as soon as the Board publishes it.

12 CFR Chapter II

List of Subjects in 12 CFR Part 229

Banks, Banking, Federal Reserve System, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 229 to read as follows:

PART 229—AVAILABILITY OF FUNDS AND COLLECTION OF CHECKS (REGULATION CC)

■ 1. The authority citation for part 229 is amended to read as follows:

Authority: 12 U.S.C. 4001–4010, 12 U.S.C. 5001–5018.

§ 229.1 [Amended]

■ 2. In § 229.1, revise paragraph (a) and add a new paragraph (b)(4) to read as follows:

(a) *Authority and purpose.* This part is issued by the Board of Governors of the Federal Reserve System (Board) to implement the Expedited Funds Availability Act (12 U.S.C. 4001–4010) (the EFA Act) and the Check Clearing for the 21st Century Act (12 U.S.C. 5001–5018) (the Check 21 Act).

(b) *Organization.* * * *

(4) Subpart D of this part contains rules relating to substitute checks. These rules address the creation and legal status of substitute checks; the substitute check warranties and indemnity; expedited recredit procedures for resolving improper charges and warranty claims associated with substitute checks provided to consumers; and the disclosure and notices that banks must provide.

§ 229.2 [Amended]

■ 3. In § 229.2, revise the introductory sentence to read as follows:

As used in this part, and unless the context requires otherwise, the following terms have the meanings set forth in this section, and the terms not defined in this section have the meanings set forth in the Uniform Commercial Code:

* * * * *

■ 4. In § 229.2(a):

■ A. Redesignate existing paragraphs (1), (2), (3), (4), and (5) as paragraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iii), (a)(1)(iv), and (a)(1)(v), respectively;

■ B. Designate paragraph (a) as paragraph (a)(1) and revise the first sentence of that paragraph;

■ C. Designate the undesignated paragraph as paragraph (2) and revise that paragraph; and

■ D. Add a new paragraph (3).

The revisions and addition read as follows:

(a) *Account.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, *account* means a deposit as defined in 12 CFR 204.2(a)(1)(i) that is a transaction account as described in 12 CFR 204.2(e). * * *

(2) For purposes of subpart B of this part and, in connection therewith, this subpart A, *account* does not include an account where the account holder is a bank, where the account holder is an office of an institution described in paragraphs (e)(1) through (e)(6) of this section or an office of a ''foreign bank'' as defined in section 1(b) of the International Banking Act (12 U.S.C. 3101) that is located outside the United States, or where the direct or indirect account holder is the Treasury of the United States.

(3) For purposes of subpart D of this part and, in connection therewith, this subpart A, *account* means any deposit, as defined in 12 CFR 204.2(a)(1)(i), at a bank, including a demand deposit or other transaction account and a savings deposit or other time deposit, as those terms are defined in 12 CFR 204.2.

* * * * *

■ 5. In § 229.2(e), remove the phrase ''subpart C'' from the last, undesignated paragraph and add the phrase ''subparts C and D'' in its place, and after the undesignated paragraph add a new paragraph to read as follows:

(e) * * *

Note: For purposes of subpart D of this part and, in connection therewith, this subpart A, *bank* also includes the Treasury of the United States or the United States Postal Service to the extent that the Treasury or the Postal Service acts as a paying bank.

* * * * *

■ 6. In § 229.2(k):

■ A. After paragraph (6), add a new paragraph (7) to read as follows:

(k) * * *

(7) The term check includes an original check and a substitute check.

■ B. Designate the undesignated paragraph with the word ''Note'' followed by a colon and remove the phrase ''subpart C'' from the last sentence of that paragraph and add the phrase ''subparts C and D'' in its place.

■ 7. In § 229.2(q), add the phrase ''to a collecting bank for settlement or'' between the words ''basis'' and ''to.''

■ 8. In § 229.2(z), remove the phrase ''subpart C'' from the undesignated paragraph and add the phrase ''subparts C and D'' in its place, and after the undesignated paragraph add a new paragraph to read as follows:

* * * * *

Note: For purposes of subpart D of this part and, in connection therewith, this subpart A, *paying bank* also includes the Treasury of the United States or the United States Postal Service for a check that is payable by that entity and that is sent to that entity for payment or collection.

* * * * *

■ 9. In § 229.2(ff), add a new sentence after the first sentence to read as follows:

(ff) * * * For purposes of subpart D of this part and, in connection therewith, this subpart A, *state* also means Guam, American Samoa, the Trust Territory of the Pacific Islands, the Northern Mariana Islands, and any other territory of the United States.

* * * * *

■ 10. In § 229.2, revise paragraph (qq) to read as follows:

* * * * *

(qq) *Claimant bank* means a bank that submits a claim for a recredit for a substitute check to an indemnifying bank under § 229.55.

■ 11. In § 229.2, after paragraph (qq) add the following new paragraphs (rr) through (eee), to read as follows:

* * * * *

(rr) *Collecting bank* means any bank handling a check for forward collection, except the paying bank.

(ss) *Consumer* means a natural person who—

(1) With respect to a check handled for forward collection, draws the check on a consumer account; or

(2) With respect to a check handled for return, deposits the check into or cashes the check against a consumer account.

(tt) *Customer* means a person having an account with a bank.

(uu) *Indemnifying bank* means a bank that provides an indemnity under § 229.53 with respect to a substitute check.

(vv) *Magnetic ink character recognition line* and *MICR line* mean the numbers, which may include the routing number, account number, check number, check amount, and other information, that are printed near the bottom of a check in magnetic ink in accordance with American National Standard Specifications for Placement and Location of MICR Printing, X9.13 (hereinafter ANS X9.13) for an original check and American National Standard Specifications for an Image Replacement Document—IRD, X9.100–140 (hereinafter ANS X9.100–140) for a substitute check (unless the Board by rule or order determines that different standards apply).

(ww) *Original check* means the first paper check issued with respect to a particular payment transaction.

(xx) *Paper or electronic representation of a substitute check* means any copy of or information related to a substitute check that a bank handles for forward collection or return, charges to a customer's account, or provides to a person as a record of a check payment made by the person.

(yy) *Person* means a natural person, corporation, unincorporated company, partnership, government unit or instrumentality, trust, or any other entity or organization.

(zz) *Reconverting bank* means—

(1) The bank that creates a substitute check; or

(2) With respect to a substitute check that was created by a person that is not a bank, the first bank that transfers, presents, or returns that substitute check or, in lieu thereof, the first paper or electronic representation of that substitute check.

(aaa) *Substitute check* means a paper reproduction of an original check that—

(1) Contains an image of the front and back of the original check;

(2) Bears a MICR line that, except as provided under ANS X9.100–140 (unless the Board by rule or order determines that a different standard applies), contains all the information appearing on the MICR line of the original check at the time that the original check was issued and any additional information that was encoded on the original check's MICR line before an image of the original check was captured;

(3) Conforms in paper stock, dimension, and otherwise with ANS X9.100–140 (unless the Board by rule or order determines that a different standard applies); and

(4) Is suitable for automated processing in the same manner as the original check.

(bbb) *Sufficient copy and copy.* (1) A *sufficient copy* is a copy of an original check that accurately represents all of the information on the front and back of the original check as of the time the original check was truncated or is otherwise sufficient to determine whether or not a claim is valid.

(2) A *copy* of an original check means any paper reproduction of an original check, including a paper printout of an electronic image of the original check, a photocopy of the original check, or a substitute check.

(ccc) *Transfer and consideration.* The terms *transfer* and *consideration* have the meanings set forth in the Uniform Commercial Code and in addition, for purposes of subpart D—

(1) The term *transfer* with respect to a substitute check or a paper or electronic representation of a substitute check means delivery of the substitute check or other representation of the substitute check by a bank to a person other than a bank; and

(2) A bank that transfers a substitute check or a paper or electronic representation of a substitute check directly to a person other than a bank has received *consideration* for the substitute check or other paper or electronic representation of the substitute check if it has charged, or has the right to charge, the person's account or otherwise has received value for the original check, a substitute check, or a representation of the original check or substitute check.

(ddd) *Truncate* means to remove an original check from the forward collection or return process and send to a recipient, in lieu of such original check, a substitute check or, by agreement, information relating to the original check (including data taken from the MICR line of the original check or an electronic image of the original check), whether with or without the subsequent delivery of the original check.

(eee) *Truncating bank* means—

(1) The bank that truncates the original check; or

(2) If a person other than a bank truncates the original check, the first bank that transfers, presents, or returns, in lieu of such original check, a substitute check or, by agreement with the recipient, information relating to the original check (including data taken from the MICR line of the original check or an electronic image of the original check), whether with or without the subsequent delivery of the original check.

§ 229.3 [Amended]

■ 12. In § 229.3, remove the phrase ''the Act'' from paragraphs (b)(1) and (c)(2)(ii) and add the phrase ''the EFA Act'' in its place.

§ 229.13 [Amended]

■ 13. Revise § 229.13(g)(1)(i)(A) to read as follows:

(g) * * *

(1) * * *

(i) * * *

(A) A number or code, which need not exceed four digits, that identifies the customer's account;

§ 229.16 [Amended]

■ 14. Revise § 229.16(c)(2)(i)(A) to read as follows:

(c) * * *

(2) * * *

(i) * * *

(A) A number or code, which need not exceed four digits, that identifies the customer's account.

§ 229.20 [Amended]

■ 15. In § 229.20, remove the phrase ''the Act'' wherever it appears and add the phrase ''the EFA Act'' in its place.

§ 229.21 [Amended]

■ 16. In § 229.21(g)(2), remove the phrase ''the Act'' and add the phrase ''the EFA Act'' in its place.

§ 229.30 [Amended]

■ 17. In § 229.30:

■ A. In the undesignated paragraph after paragraph (a)(2)(iii), remove the next-to-last sentence and add two new sentences in its place; and

■ B. Revise paragraphs (c)(1) and (d).

The revisions and addition read as follows.

(a) * * *

(2) * * *

(iii) * * *

* * * A qualified returned check shall be encoded in magnetic ink with the routing number of the depositary bank, the amount of the returned check, and a ''2'' in the case of an original check (or a ''5'' in the case of a substitute check) in position 44 of the qualified return MICR line as a return identifier. A qualified returned original check shall be encoded in accordance with ANS X9.13, and a qualified returned substitute check shall be encoded in accordance with ANS X9.100–140. * * *

* * * * *

(c) * * *

(1) On or before the receiving bank's next banking day following the otherwise applicable deadline by the earlier of the close of that banking day or a cutoff hour of 2 p.m. or later set by the receiving bank under U.C.C. 4–108, for all deadlines other than those described in paragraph (c)(2) of this section; this deadline is extended further if a paying bank uses a highly expeditious means of transportation, even if this means of transportation would ordinarily result in delivery after the receiving bank's next cutoff hour or banking day referred to above; or

* * * * *

(d) *Identification of returned check.* A paying bank returning a check shall clearly indicate on the front of the check that it is a returned check and the reason for return. If the check is a substitute check, the paying bank shall place this information within the image of the original check that appears on the front of the substitute check.

* * * * *

§ 229.31 [Amended]

■ 18. In the undesignated paragraph after § 229.31(a)(2)(iii), remove the third sentence and add the following sentences in its place:

(a) * * *

(2) * * *

(iii) * * *

* * * A qualified returned check shall be encoded in magnetic ink with the routing number of the depositary bank, the amount of the returned check, and a ''2'' in the case of an original check (or a ''5'' in the case of a substitute check) in position 44 of the qualified return MICR line as a return identifier. A qualified returned original check shall be encoded in accordance with ANS X9.13, and a qualified returned substitute check shall be encoded in accordance with ANS X9.100–140. * * *

* * * * *

§ 229.33 [Amended]

■ 19. In § 229.33:

■ A. In paragraph (b), remove the phrase ''with question marks'' from the last sentence of the undesignated paragraph; and

■ B. In paragraph (d), add the phrase ''or give'' between the words ''send'' and ''notice.''

§ 229.34 [Amended]

■ 20. In § 229.34(c), add a new sentence at the end of paragraph (3) to read as follows:

(c) * * *

(3) * * * For purposes of this paragraph, the information encoded after issue on the check or returned check includes any information placed in the MICR line of a substitute check that represents that check or returned check.

* * * * *

§ 229.35 [Amended]

■ 21. In § 229.35, revise paragraph (a) to read as follows:

(a) *Indorsement standards.* A bank (other than a paying bank) that handles a check during forward collection or a returned check shall indorse the check in a manner that permits a person to interpret the indorsement, in accordance with the indorsement standard set forth in appendix D of this part.

* * * * *

§ 229.38 [Amended]

■ 22. In § 229.38(d)(1), designate the last sentence with the word ''Note'' and revise it, and add a new sentence after the second sentence to read as follows:

(d) *Responsibility for certain aspects of checks—(1)* * * * A reconverting bank is responsible for damages under paragraph (a) of this section to the extent that the condition of the back of a substitute check transferred, presented, or returned by it—

(i) Adversely affects the ability of a subsequent bank to indorse the check legibly in accordance with § 229.35; or

(ii) Causes an indorsement that previously was applied in accordance with § 229.35 to become illegible.

Note: Responsibility under this paragraph (d) shall be treated as negligence of the paying bank, depositary bank, or reconverting bank for purposes of paragraph (c) of this section.

* * * * *

■ 23. In § 229.38(f), remove the phrase ''the Act'' and add the phrase ''the EFA Act'' in its place.

■ 24. Add a new subpart D to read as follows:

Subpart D—Substitute Checks

Sec.

229.51 General provisions governing substitute checks.
229.52 Substitute check warranties.
229.53 Substitute check indemnity.
229.54 Expedited recredit for consumers.
229.55 Expedited recredit for banks.
229.56 Liability.
229.57 Consumer awareness.
229.58 Mode of delivery of information.
229.59 Relation to other law.
229.60 Variation by agreement.

Authority: 12 U.S.C. 5001–5018.

Subpart D—Substitute Checks

§ 229.51 General provisions governing substitute checks.

(a) *Legal equivalence.* A substitute check for which a bank has provided the warranties described in § 229.52 is the legal equivalent of an original check for all persons and all purposes, including any provision of federal or state law, if the substitute check—

(1) Accurately represents all of the information on the front and back of the original check as of the time the original check was truncated; and

(2) Bears the legend, ''This is a legal copy of your check. You can use it the same way you would use the original check.''

(b) *Reconverting bank duties.* A bank shall ensure that a substitute check for which it is the reconverting bank—

(1) Bears all indorsements applied by parties that previously handled the

check in any form (including the original check, a substitute check, or another paper or electronic representation of such original check or substitute check) for forward collection or return;

(2) Identifies the reconverting bank in a manner that preserves any previous reconverting bank identifications, in accordance with ANS X9.100–140 and appendix D of this part; and

(3) Identifies the bank that truncated the original check, in accordance with ANS X9.100–140 and appendix D of this part.

(c) *Applicable law.* A substitute check that is the legal equivalent of an original check under paragraph (a) of this section shall be subject to any provision, including any provision relating to the protection of customers, of this part, the U.C.C., and any other applicable federal or state law as if such substitute check were the original check, to the extent such provision of law is not inconsistent with the Check 21 Act or this subpart.

§ 229.52 Substitute check warranties.

(a) *Content and provision of substitute check warranties.* A bank that transfers, presents, or returns a substitute check (or a paper or electronic representation of a substitute check) for which it receives consideration warrants to the parties listed in paragraph (b) of this section that—

(1) The substitute check meets the requirements for legal equivalence described in § 229.51(a)(1)–(2); and

(2) No depositary bank, drawee, drawer, or indorser will receive presentment or return of, or otherwise be charged for, the substitute check, the original check, or a paper or electronic representation of the substitute check or original check such that that person will be asked to make a payment based on a check that it already has paid.

(b) *Warranty recipients.* A bank makes the warranties described in paragraph (a) of this section to the person to which the bank transfers, presents, or returns the substitute check or a paper or electronic representation of such substitute check and to any subsequent recipient, which could include a collecting or returning bank, the depositary bank, the drawer, the drawee, the payee, the depositor, and any indorser. These parties receive the warranties regardless of whether they received the substitute check or a paper or electronic representation of a substitute check.

§ 229.53 Substitute check indemnity.

(a) *Scope of indemnity.* A bank that transfers, presents, or returns a substitute check or a paper or electronic representation of a substitute check for which it receives consideration shall indemnify the recipient and any subsequent recipient (including a collecting or returning bank, the depositary bank, the drawer, the drawee, the payee, the depositor, and any indorser) for any loss incurred by any recipient of a substitute check if that loss occurred due to the receipt of a substitute check instead of the original check.

(b) *Indemnity amount*—(1) *In general.* Unless otherwise indicated by paragraph (b)(2) or (b)(3) of this section, the amount of the indemnity under paragraph (a) of this section is as follows:

(i) If the loss resulted from a breach of a substitute check warranty provided under § 229.52, the amount of the indemnity shall be the amount of any loss (including interest, costs, reasonable attorney's fees, and other expenses of representation) proximately caused by the warranty breach.

(ii) If the loss did not result from a breach of a substitute check warranty provided under § 229.52, the amount of the indemnity shall be the sum of—

(A) The amount of the loss, up to the amount of the substitute check; and

(B) Interest and expenses (including costs and reasonable attorney's fees and other expenses of representation) related to the substitute check.

(2) *Comparative negligence.* (i) If a loss described in paragraph (a) of this section results in whole or in part from the indemnified person's negligence or failure to act in good faith, then the indemnity amount described in paragraph (b)(1) of this section shall be reduced in proportion to the amount of negligence or bad faith attributable to the indemnified person.

(ii) Nothing in this paragraph (b)(2) reduces the rights of a consumer or any other person under the U.C.C. or other applicable provision of state or federal law.

(3) *Effect of producing the original check or a sufficient copy*—

(i) If an indemnifying bank produces the original check or a sufficient copy, the indemnifying bank shall—

(A) Be liable under this section only for losses that are incurred up to the time that the bank provides that original check or sufficient copy to the indemnified person; and

(B) Have a right to the return of any funds it has paid under this section in excess of those losses.

(ii) The production by the indemnifying bank of the original check or a sufficient copy under paragraph (b)(3)(i) of this section shall not absolve the indemnifying bank from any liability under any warranty that the bank has provided under § 229.52 or other applicable law.

(c) *Subrogation of rights*—(1) *In general.* An indemnifying bank shall be subrogated to the rights of the person that it indemnifies to the extent of the indemnity it has provided and may attempt to recover from another person based on a warranty or other claim.

(2) *Duty of indemnified person for subrogated claims.* Each indemnified person shall have a duty to comply with all reasonable requests for assistance from an indemnifying bank in connection with any claim the indemnifying bank brings against a warrantor or other person related to a check that forms the basis for the indemnification.

§ 229.54 Expedited recredit for consumers.

(a) *Circumstances giving rise to a claim.* A consumer may make a claim under this section for a recredit with respect to a substitute check if the consumer asserts in good faith that—

(1) The bank holding the consumer's account charged that account for a substitute check that was provided to the consumer (although the consumer need not be in possession of that substitute check at the time he or she submits a claim);

(2) The substitute check was not properly charged to the consumer account or the consumer has a warranty claim with respect to the substitute check;

(3) The consumer suffered a resulting loss; and

(4) Production of the original check or a sufficient copy is necessary to determine whether or not the substitute check in fact was improperly charged or whether the consumer's warranty claim is valid.

(b) *Procedures for making claims.* A consumer shall make his or her claim for a recredit under this section with the bank that holds the consumer's account in accordance with the timing, content, and form requirements of this section.

(1) *Timing of claim.* (i) The consumer shall submit his or her claim such that the bank receives the claim by the end of the 40th calendar day after the later of the calendar day on which the bank mailed or delivered, by a means agreed to by the consumer—

(A) The periodic account statement that contains information concerning the transaction giving rise to the claim; or

(B) The substitute check giving rise to the claim.

(ii) If the consumer cannot submit his or her claim by the time specified in paragraph (b)(1)(i) of this section

because of extenuating circumstances, the bank shall extend the 40-calendar-day period by an additional reasonable amount of time.

(iii) If a consumer makes a claim orally and the bank requires the claim to be in writing, the consumer's claim is timely if the oral claim was received within the time described in paragraphs (b)(1)(i)–(ii) of this section and the written claim was received within the time described in paragraph (b)(3)(ii) of this section.

(2) *Content of claim.* (i) The consumer's claim shall include the following information:

(A) A description of the consumer's claim, including the reason why the consumer believes his or her account was improperly charged for the substitute check or the nature of his or her warranty claim with respect to such check;

(B) A statement that the consumer suffered a loss and an estimate of the amount of that loss;

(C) The reason why production of the original check or a sufficient copy is necessary to determine whether or not the charge to the consumer's account was proper or the consumer's warranty claim is valid; and

(D) Sufficient information to allow the bank to identify the substitute check and investigate the claim.

(ii) If a consumer attempts to make a claim but fails to provide all the information in paragraph (b)(2)(i) of this section that is required to constitute a claim, the bank shall inform the consumer that the claim is not complete and identify the information that is missing.

(3) *Form and submission of claim; computation of time for bank action.* The bank holding the account that is the subject of the consumer's claim may, in its discretion, require the consumer to submit the information required by this section in writing. A bank that requires a written submission—

(i) May permit the consumer to submit the written claim electronically;

(ii) Shall inform a consumer who submits a claim orally of the written claim requirement at the time of the oral claim and may require such consumer to submit the written claim such that the bank receives the written claim by the 10th business day after the banking day on which the bank received the oral claim; and

(iii) Shall compute the time periods for acting on the consumer's claim described in paragraph (c) of this section from the date on which the bank received the written claim.

(c) *Action on claims.* A bank that receives a claim that meets the requirements of paragraph (b) of this section shall act as follows:

(1) *Valid consumer claim.* If the bank determines that the consumer's claim is valid, the bank shall—

(i) Recredit the consumer's account for the amount of the consumer's loss, up to the amount of the substitute check, plus interest if the account is an interest-bearing account, no later than the end of the business day after the banking day on which the bank makes that determination; and

(ii) Send to the consumer the notice required by paragraph (e)(1) of this section.

(2) *Invalid consumer claim.* If a bank determines that the consumer's claim is not valid, the bank shall send to the consumer the notice described in paragraph (e)(2) of this section.

(3) *Recredit pending investigation.* If the bank has not taken an action described in paragraph (c)(1) or (c)(2) of this section before the end of the 10th business day after the banking day on which the bank received the claim, the bank shall—

(i) By the end of that business day—

(A) Recredit the consumer's account for the amount of the consumer's loss, up to the lesser of the amount of the substitute check or $2,500, plus interest on that amount if the account is an interest-bearing account; and

(B) Send to the consumer the notice required by paragraph (e)(1) of this section; and

(ii) Recredit the consumer's account for the remaining amount of the consumer's loss, if any, up to the amount of the substitute check, plus interest if the account is an interest-bearing account, no later than the end of the 45th calendar day after the banking day on which the bank received the claim and send to the consumer the notice required by paragraph (e)(1) of this section, unless the bank prior to that time has determined that the consumer's claim is or is not valid in accordance with paragraph (c)(1) or (c)(2) of this section.

(4) *Reversal of recredit.* A bank may reverse a recredit that it has made to a consumer account under paragraph (c)(1) or (c)(3) of this section, plus interest that the bank has paid, if any, on that amount, if the bank—

(i) Determines that the consumer's claim was not valid; and

(ii) Notifies the consumer in accordance with paragraph (e)(3) of this section.

(d) *Availability of recredit*—(1) *Next-day availability.* Except as provided in paragraph (d)(2) of this section, a bank shall make any amount that it recredits to a consumer account under this section available for withdrawal no later than the start of the business day after the banking day on which the bank provides the recredit.

(2) *Safeguard exceptions.* A bank may delay availability to a consumer of a recredit provided under paragraph (c)(3)(i) of this section until the start of the earlier of the business day after the banking day on which the bank determines the consumer's claim is valid or the 45th calendar day after the banking day on which the bank received the oral or written claim, as required by paragraph (b) of this section, if—

(i) The consumer submits the claim during the 30-calendar-day period beginning on the banking day on which the consumer account was established;

(ii) Without regard to the charge that gave rise to the recredit claim—

(A) On six or more business days during the six-month period ending on the calendar day on which the consumer submitted the claim, the balance in the consumer account was negative or would have become negative if checks or other charges to the account had been paid; or

(B) On two or more business days during such six-month period, the balance in the consumer account was negative or would have become negative in the amount of $5,000 or more if checks or other charges to the account had been paid; or

(iii) The bank has reasonable cause to believe that the claim is fraudulent, based on facts that would cause a well-grounded belief in the mind of a reasonable person that the claim is fraudulent. The fact that the check in question or the consumer is of a particular class may not be the basis for invoking this exception.

(3) *Overdraft fees.* A bank that delays availability as permitted in paragraph (d)(2) of this section may not impose an overdraft fee with respect to drafts drawn by the consumer on such recredited funds until the fifth calendar day after the calendar day on which the bank sent the notice required by paragraph (e)(1) of this section.

(e) *Notices relating to consumer expedited recredit claims*—(1) *Notice of recredit.* A bank that recredits a consumer account under paragraph (c) of this section shall send notice to the consumer of the recredit no later than the business day after the banking day on which the bank recredits the consumer account. This notice shall describe—

(i) The amount of the recredit; and

(ii) The date on which the recredited funds will be available for withdrawal.

(2) *Notice that the consumer's claim is not valid.* If a bank determines that a

substitute check for which a consumer made a claim under this section was in fact properly charged to the consumer account or that the consumer's warranty claim for that substitute check was not valid, the bank shall send notice to the consumer no later than the business day after the banking day on which the bank makes that determination. This notice shall—

(i) Include the original check or a sufficient copy, except as provided in § 229.58;

(ii) Demonstrate to the consumer that the substitute check was properly charged or the consumer's warranty claim is not valid; and

(iii) Include the information or documents (in addition to the original check or sufficient copy), if any, on which the bank relied in making its determination or a statement that the consumer may request copies of such information or documents.

(3) *Notice of a reversal of recredit.* A bank that reverses an amount it previously recredited to a consumer account shall send notice to the consumer no later than the business day after the banking day on which the bank made the reversal. This notice shall include the information listed in paragraph (e)(2) of this section and also describe—

(i) The amount of the reversal, including both the amount of the recredit (including the interest component, if any) and the amount of interest paid on the recredited amount, if any, being reversed; and

(ii) The date on which the bank made the reversal.

(f) *Other claims not affected.* Providing a recredit in accordance with this section shall not absolve the bank from liability for a claim made under any other provision of law, such as a claim for wrongful dishonor of a check under the U.C.C., or from liability for additional damages, such as damages under § 229.53 or § 229.56 of this subpart or U.C.C. 4–402.

§ 229.55 Expedited recredit for banks.

(a) *Circumstances giving rise to a claim.* A bank that has an indemnity claim under § 229.53 with respect to a substitute check may make an expedited recredit claim against an indemnifying bank if—

(1) The claimant bank or a bank that the claimant bank has indemnified—

(i) Has received a claim for expedited recredit from a consumer under § 229.54; or

(ii) Would have been subject to such a claim if the consumer account had been charged for the substitute check;

(2) The claimant bank is obligated to provide an expedited recredit with respect to such substitute check under § 229.54 or otherwise has suffered a resulting loss; and

(3) The production of the original check or a sufficient copy is necessary to determine the validity of the charge to the consumer account or the validity of any warranty claim connected with such substitute check.

(b) *Procedures for making claims.* A claimant bank shall send its claim to the indemnifying bank, subject to the timing, content, and form requirements of this section.

(1) *Timing of claim.* The claimant bank shall submit its claim such that the indemnifying bank receives the claim by the end of the 120th calendar day after the date of the transaction that gave rise to the claim.

(2) *Content of claim.* The claimant bank's claim shall include the following information—

(i) A description of the consumer's claim or the warranty claim related to the substitute check, including why the bank believes that the substitute check may not be properly charged to the consumer account;

(ii) A statement that the claimant bank is obligated to recredit a consumer account under § 229.54 or otherwise has suffered a loss and an estimate of the amount of that recredit or loss, including interest if applicable;

(iii) The reason why production of the original check or a sufficient copy is necessary to determine the validity of the charge to the consumer account or the warranty claim; and

(iv) Sufficient information to allow the indemnifying bank to identify the substitute check and investigate the claim.

(3) *Requirements relating to copies of substitute checks.* If the information submitted by a claimant bank under paragraph (b)(2) of this section includes a copy of any substitute check, the claimant bank shall take reasonable steps to ensure that the copy cannot be mistaken for the legal equivalent of the check under § 229.51(a) or sent or handled by any bank, including the indemnifying bank, for forward collection or return.

(4) *Form and submission of claim; computation of time.* The indemnifying bank may, in its discretion, require the claimant bank to submit the information required by this section in writing, including a copy of the paper or electronic claim submitted by the consumer, if any. An indemnifying bank that requires a written submission—

(i) May permit the claimant bank to submit the written claim electronically;

(ii) Shall inform a claimant bank that submits a claim orally of the written claim requirement at the time of the oral claim; and

(iii) Shall compute the 10-day time period for acting on the claim described in paragraph (c) of this section from the date on which the bank received the written claim.

(c) *Action on claims.* No later than the 10th business day after the banking day on which the indemnifying bank receives a claim that meets the requirements of paragraph (b) of this section, the indemnifying bank shall—

(1) Recredit the claimant bank for the amount of the claim, up to the amount of the substitute check, plus interest if applicable;

(2) Provide to the claimant bank the original check or a sufficient copy; or

(3) Provide information to the claimant bank regarding why the indemnifying bank is not obligated to comply with paragraph (c)(1) or (c)(2) of this section.

(d) *Recredit does not abrogate other liabilities.* Providing a recredit to a claimant bank under this section does not absolve the indemnifying bank from liability for claims brought under any other law or from additional damages under § 229.53 or § 229.56.

(e) *Indemnifying bank's right to a refund.* (1) If a claimant bank reverses a recredit it previously made to a consumer account under § 229.54 or otherwise receives reimbursement for a substitute check that formed the basis of its claim under this section, the claimant bank shall provide a refund promptly to any indemnifying bank that previously advanced funds to the claimant bank. The amount of the refund to the indemnifying bank shall be the amount of the reversal or reimbursement obtained by the claimant bank, up to the amount previously advanced by the indemnifying bank.

(2) If the indemnifying bank provides the claimant bank with the original check or a sufficient copy under paragraph (c)(2) of this section, § 229.53(b)(3) governs the indemnifying bank's entitlement to repayment of any amount provided to the claimant bank that exceeds the amount of losses the claimant bank incurred up to that time.

§ 229.56 Liability.

(a) *Measure of damages*—(1) *In general.* Except as provided in paragraph (a)(2) or (a)(3) of this section or § 229.53, any person that breaches a warranty described in § 229.52 or fails to comply with any requirement of this subpart with respect to any other person shall be liable to that person for an amount equal to the sum of—

(i) The amount of the loss suffered by the person as a result of the breach or failure, up to the amount of the substitute check; and

(ii) Interest and expenses (including costs and reasonable attorney's fees and other expenses of representation) related to the substitute check.

(2) *Offset of recredits.* The amount of damages a person receives under paragraph (a)(1) of this section shall be reduced by any amount that the person receives and retains as a recredit under § 229.54 or § 229.55.

(3) *Comparative negligence.* (i) If a person incurs damages that resulted in whole or in part from that person's negligence or failure to act in good faith, then the amount of any damages due to that person under paragraph (a)(1) of this section shall be reduced in proportion to the amount of negligence or bad faith attributable to that person.

(ii) Nothing in this paragraph (a)(3) reduces the rights of a consumer or any other person under the U.C.C. or other applicable provision of federal or state law.

(b) *Timeliness of action.* Delay by a bank beyond any time limits prescribed or permitted by this subpart is excused if the delay is caused by interruption of communication or computer facilities, suspension of payments by another bank, war, emergency conditions, failure of equipment, or other circumstances beyond the control of the bank and if the bank uses such diligence as the circumstances require.

(c) *Jurisdiction.* A person may bring an action to enforce a claim under this subpart in any United States district court or in any other court of competent jurisdiction. Such claim shall be brought within one year of the date on which the person's cause of action accrues. For purposes of this paragraph, a cause of action accrues as of the date on which the injured person first learns, or by which such person reasonably should have learned, of the facts and circumstances giving rise to the cause of action, including the identity of the warranting or indemnifying bank against which the action is brought.

(d) *Notice of claims.* Except as otherwise provided in this paragraph (d), unless a person gives notice of a claim under this section to the warranting or indemnifying bank within 30 calendar days after the person has reason to know of both the claim and the identity of the warranting or indemnifying bank, the warranting or indemnifying bank is discharged from liability in an action to enforce a claim under this subpart to the extent of any loss caused by the delay in giving notice of the claim. A timely recredit claim by a consumer under § 229.54 constitutes timely notice under this paragraph.

§ 229.57 Consumer awareness.

(a) *General disclosure requirement and content.* Each bank shall provide, in accordance with paragraph (b) of this section, a brief disclosure to each of its consumer customers that describes—

(1) That a substitute check is the legal equivalent of an original check; and

(2) The consumer recredit rights that apply when a consumer in good faith believes that a substitute check was not properly charged to his or her account.

(b) *Distribution*—(1) *Disclosure to consumers who receive paid checks with periodic account statements.* A bank shall provide the disclosure described in paragraph (a) of this section to a consumer customer who receives paid original checks or paid substitute checks with his or her periodic account statement—

(i) No later than the first regularly scheduled communication with the consumer after October 28, 2004, for each consumer who is a customer of the bank on that date; and

(ii) At the time the customer relationship is initiated, for each customer relationship established after October 28, 2004.

(2) *Disclosure to consumers who receive substitute checks on an occasional basis.*

(i) The bank shall provide the disclosure described in paragraph (a) of this section to a consumer customer of the bank who requests an original check or a copy of a check and receives a substitute check. If feasible, the bank shall provide this disclosure at the time of the consumer's request; otherwise, the bank shall provide this disclosure no later than the time at which the bank provides a substitute check in response to the consumer's request.

(ii) The bank shall provide the disclosure described in paragraph (a) of this section to a consumer customer of the bank who receives a returned substitute check, at the time the bank provides such substitute check.

(3) *Multiple account holders.* A bank need not give separate disclosures to each customer on a jointly held account.

§ 229.58 Mode of delivery of information.

A bank may deliver any notice or other information that it is required to provide under this subpart by United States mail or by any other means through which the recipient has agreed to receive account information. If a bank is required to provide an original check or a sufficient copy, the bank instead may provide an electronic image of the original check or sufficient copy if the recipient has agreed to receive that information electronically.

§ 229.59 Relation to other law.

The Check 21 Act and this subpart supersede any provision of federal or state law, including the Uniform Commercial Code, that is inconsistent with the Check 21 Act or this subpart, but only to the extent of the inconsistency.

§ 229.60 Variation by agreement.

Any provision of § 229.55 may be varied by agreement of the banks involved. No other provision of this subpart may be varied by agreement by any person or persons.

25. In appendix C, revise the title and introductory paragraph and amend the table of contents by adding the new entries to read as follows:

Appendix C to Part 229—Model Availability Policy Disclosures, Clauses, and Notices; Model Substitute Check Policy Disclosure and Notices

This appendix contains model availability policy and substitute check policy disclosures, clauses, and notices to facilitate compliance with the disclosure and notice requirements of Regulation CC (12 CFR part 229). Although use of these models is not required, banks using them properly (with the exception of models C–22 through C–25) to make disclosures required by Regulation CC are deemed to be in compliance.

Model Disclosures

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C–5A Substitute Check Policy Disclosure

* * * * *

Model Notices

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C–22 Expedited Recredit Claim, Valid Claim Refund Notice

C–23 Expedited Recredit Claim, Provisional Refund Notice

C–24 Expedited Recredit Claim, Denial Notice

C–25 Expedited Recredit Claim, Reversal Notice

* * * * *

■ 26. In appendix C, after model C–5 add the following new model C–5A to read as follows:

* * * * *

C–5A—Substitute Check Policy Disclosure

Substitute Checks and Your Rights—[Important Information About Your Checking Account]

Substitute Checks and Your Rights

What Is a Substitute Check?

To make check processing faster, federal law permits banks to replace original checks with ''substitute checks.'' These checks are similar in size to original checks with a slightly reduced image of the front and back of the original check. The front of a substitute

check states: ''This is a legal copy of your check. You can use it the same way you would use the original check.'' You may use a substitute check as proof of payment just like the original check.

Some or all of the checks that you receive back from us may be substitute checks. This notice describes rights you have when you receive substitute checks from us. The rights in this notice do not apply to original checks or to electronic debits to your account. However, you have rights under other law with respect to those transactions.

What Are My Rights Regarding Substitute Checks?

In certain cases, federal law provides a special procedure that allows you to request a refund for losses you suffer if a substitute check is posted to your account (for example, if you think that we withdrew the wrong amount from your account or that we withdrew money from your account more than once for the same check). The losses you may attempt to recover under this procedure may include the amount that was withdrawn from your account and fees that were charged as a result of the withdrawal (for example, bounced check fees).

The amount of your refund under this procedure is limited to the amount of your loss or the amount of the substitute check, whichever is less. You also are entitled to interest on the amount of your refund if your account is an interest-bearing account. If your loss exceeds the amount of the substitute check, you may be able to recover additional amounts under other law.

If you use this procedure, you may receive up to (*amount, not lower than $2,500*) of your refund (plus interest if your account earns interest) within (*number of days, not more than 10*) business days after we received your claim and the remainder of your refund (plus interest if your account earns interest) not later than (*number of days, not more than 45*) calendar days after we received your claim.

We may reverse the refund (including any interest on the refund) if we later are able to demonstrate that the substitute check was correctly posted to your account.

How Do I Make a Claim for a Refund?

If you believe that you have suffered a loss relating to a substitute check that you received and that was posted to your account, please contact us at (*contact information, for example phone number, mailing address, e-mail address*). You must contact us within (*number of days, not less than 40*) calendar days of the date that we mailed (or otherwise delivered by a means to which you agreed) the substitute check in question or the account statement showing that the substitute check was posted to your account, whichever is later. We will extend this time period if you were not able to make a timely claim because of extraordinary circumstances.

Your claim must include—

- A description of why you have suffered a loss (for example, you think the amount withdrawn was incorrect);
- An estimate of the amount of your loss;
- An explanation of why the substitute check you received is insufficient to confirm that you suffered a loss; and
- A copy of the substitute check [and/or] the following information to help us identify the substitute check: (*identifying information, for example the check number, the name of the person to whom you wrote the check, the amount of the check*).

* * * * *

■ 27. In appendix C, after model C–21 add new models C–22 through C–25 to read as follows:

* * * * *

C–2—Expedited Recredit Claim, Valid Claim Refund Notice

Notice of Valid Claim and Refund

We have determined that your substitute check claim is valid. We are refunding (*amount*) [of which [(*amount*) represents fees] [and] [(*amount*) represents accrued interest]] to your account. You may withdraw these funds as of (*date*). [This refund is the amount in excess of the $2,500 [plus interest] that we credited to your account on (*date*).]

C–23—Expedited Recredit Claim, Provisional Refund Notice

Notice of Provisional Refund

In response to your substitute check claim, we are refunding (*amount*) [of which [(*amount*) represents fees] [and] [(*amount*) represents accrued interest]] to your account, while we complete our investigation of your claim. You may withdraw these funds as of (*date*). [Unless we determine that your claim is not valid, we will credit the remaining amount of your refund to your account no later than the 45th calendar day after we received your claim.]

If, based on our investigation, we determine that your claim is not valid, we will reverse the refund by withdrawing the amount of the refund [plus interest that we have paid you on that amount] from your account. We will notify you within one day of any such reversal.

C–24—Expedited Recredit Claim, Denial Notice

Denial of Claim

Based on our review, we are denying your substitute check claim. As the enclosed (*type of document, for example original check or sufficient) shows, (describe reason for denial, for example the check was properly posted, the signature is authentic, there was no warranty breach*).

[We have also enclosed a copy of the other information we used to make our decision.] [Upon your request, we will send you a copy of the other information that we used to make our decision.]

C–25—Expedited Recredit Claim, Reversal Notice

Reversal of Refund

In response to your substitute check claim, we provided a refund of (*amount*) by crediting your account on (*date(s)*). We now have determined that your substitute check claim was not valid. As the enclosed (*type of document, for example original check or sufficient copy*) shows, (*describe reason for reversal, for example the check was properly posted, the signature is authentic, there was no warranty breach*). As a result, we have reversed the refund to your account [plus interest that we have paid you on that amount] by withdrawing (*amount*) from your account on (*date*).

[We have also enclosed a copy of the other information we used to make our decision.] [Upon your request, we will send you a copy of the information we used to make our decision.]

■ 28. In appendix D, revise the title and text to read as follows:

Appendix D to Part 229—Indorsement, Reconverting Bank Identification, and Truncating Bank Identification Standards

(1) The depositary bank shall indorse an original check or substitute check according to the following specifications:

(i) The indorsement shall contain—

(A) The bank's nine-digit routing number, set off by an arrow at each end of the number and pointing toward the number, and, if the depositary bank is a reconverting bank with respect to the check, an asterisk outside the arrow at each end of the routing number to identify the bank as a reconverting bank;

(B) The indorsement date; and

(C) The bank's name or location, if the depositary bank applies the indorsement physically.

(ii) The indorsement also may contain—

(A) A branch identification;

(B) A trace or sequence number;

(C) A telephone number for receipt of notification of large-dollar returned checks; and

(D) Other information, provided that the inclusion of such information does not interfere with the readability of the indorsement.

(iii) The indorsement, if applied to an existing paper check, shall be placed on the back of the check so that the routing number is wholly contained in the area 3.0 inches from the leading edge of the check to 1.5 inches from the trailing edge of the check.[31]

(iv) When printing its depositary bank indorsement (or a depositary bank indorsement that previously was applied electronically) onto a substitute check at the time that the substitute check is created, a reconverting bank shall place the indorsement on the back of the check between 1.88 and 2.74 inches from the leading edge of the check. The reconverting bank may omit the depositary bank's name and location from the indorsement.

(2) Each subsequent collecting bank or returning bank indorser shall protect the identifiability and legibility of the depositary bank indorsement by indorsing an original check or substitute check according to the following specifications:

(i) The indorsement shall contain only—

(A) The bank's nine-digit routing number (without arrows) and, if the collecting bank

[31] The leading edge is definded as the right side of the check looking at it from the front. The trailing edge is defined as the left side of the check looking at it from the front. *See* American National Standards Specifications for the Placement and Location of MICR Printing, X9.13.

or returning bank is a reconverting bank with respect to the check, an asterisk at each end of the number to identify the bank as a reconverting bank;

(B) The indorsement date, and

(C) An optional trace or sequence number.

(ii) The indorsement, if applied to an existing paper check, shall be placed on the back of the check from 0.0 inches to 3.0 inches from the leading edge of the check.

(iii) When printing its collecting bank or returning bank indorsement (or a collecting bank or returning bank indorsement that previously was applied electronically) onto a substitute check at the time that the substitute check is created, a reconverting bank shall place the indorsement on the back of the check between 0.25 and 2.50 inches from the trailing edge of the check.

(3) A reconverting bank shall comply with the following specifications when creating a substitute check:

(i) If it is a depositary bank, collecting bank, or returning bank with respect to the substitute check, the reconverting bank shall place its own indorsement onto the back of the check as specified in this appendix.

(ii) A reconverting bank that also is the paying bank with respect to the substitute check shall so identify itself by placing on the back of the check, between 0.25 and 2.50 inches from the trailing edge of the check, its nine-digit routing number (without arrows) and an asterisk at each end of the number.

(iii) The reconverting bank shall place on the front of the check, outside the image of the original check, its nine-digit routing number (without arrows) and an asterisk at each end of the number, in accordance with ANS X9.100–140.

(iv) The reconverting bank shall place on the front of the check, outside the image of the original check, the truncating bank's nine-digit routing number (without arrows) and a bracket at each end of the number, in accordance with ANS X9.100–140.

(4) Any indorsement, reconverting bank identification, or truncating bank identification placed on an original check or substitute check shall be printed in black ink.

■ 29. In appendix E, paragraph II.B., revise the first, second, third, and last sentences of paragraph 1., revise paragraph 3., and add a new paragraph 4., to read as follows:

II. * * *

B. 229.2(a) Account

1. The EFA Act defines account to mean ''a demand deposit account or similar transaction account at a depository institution.'' The regulation defines account, for purposes other than subpart D, in terms of the definition of ''transaction account'' in the Board's Regulation D (12 CFR part 204). This definition of account, however, excludes certain deposits, such as nondocumentary obligations (see 12 CFR 204.2(a)(1)(vii)), that are covered under the definition of ''transaction account'' in Regulation D. * * * The Board believes that it is appropriate to exclude these accounts because of the reference to demand deposits in the EFA Act, which suggests that the EFA Act is intended to apply only to accounts that permit unlimited third party transfers.

* * * * *

3. Interbank deposits, including accounts of offices of domestic banks or foreign banks located outside the United States, and direct and indirect accounts of the United States Treasury (including Treasury General Accounts and Treasury Tax and Loan deposits) are exempt from subpart B and, in connection therewith, subpart A. However, interbank deposits are included as accounts for purposes of subparts C and D and, in connection therewith, subpart A.

4. The Check 21 Act defines account to mean any deposit account at a bank. Therefore, for purposes of subpart D and, in connection therewith, subpart A, account means any deposit, as that term is defined by § 204.2(a)(1)(i) of Regulation D, at a bank. Many deposits that are not accounts for purposes of the other subparts of Regulation CC, such as savings deposits, are accounts for purposes of subpart D.

* * * * *

■ 30. In appendix E, paragraph II.F., remove the phrase ''subpart C'' wherever it appears and add the phrase ''subparts C and D'' in its place and add a new paragraph 4 to read as follows:

II. * * *

F. * * *

4. For purposes of subpart D and, in connection therewith, subpart A, the term bank also includes the Treasury of the United States and the United States Postal Service to the extent that they act as paying banks because the Check 21 Act includes these two entities in the definition of the term bank to the extent that they act as payors.

* * * * *

■ 31. In appendix E, paragraph II.K., remove the phrase ''subpart C'' in paragraph 8. and add the phrase ''subparts C and D'' in its place, redesignate paragraph 9. as paragraph 10., and add a new paragraph 9. to read as follows:

II. * * *

K. * * *

9. A substitute check as defined in § 229.2(aaa) is a check for purposes of Regulation CC and the U.C.C., even if that substitute check does not meet the requirements for legal equivalence set forth in § 229.51(a).

* * * * *

■ 32. In appendix E, paragraph II.M., remove the number ''46'' in the second sentence.

■ 33. In appendix E, paragraph II.N.1., add new sentences between the second and third sentences to read as follows:

II. * * *

N. * * *

1. * * * A clearing account maintained at a bank directly by a brokerage firm is not a consumer account, even if the account is used to pay checks drawn by consumers using the funds in that account. The bank's relationship is with the brokerage firm, and the account is used by the brokerage firm to facilitate the clearing of its customers' checks. Because for purposes of Regulation CC the term account includes only deposit accounts, a consumer's revolving credit relationship or other line of credit with a bank is not a consumer account, even if the consumer draws on such credit lines by using a check. * * *

* * * * *

■ 34. In appendix E, paragraph II.Q.1., revise the first sentence to read as follows:

II. * * *

Q. * * *

1. Forward collection is defined to mean the process by which a bank sends a check to the paying bank for collection, including sending the check to an intermediary collecting bank for settlement, as distinguished from the process by which the check is returned unpaid. * * *

* * * * *

■ 35. In appendix E, revise paragraph II.S.1.b. and add a new paragraph II.S.1.c. to read as follows:

II. * * *

S. * * *

1. * * * b. The location of the depositary bank is determined by the physical location of the branch or proprietary ATM at which a check is deposited, regardless of whether the deposit is made in person, by mail, or otherwise. For example, if a branch of the depositary bank located in one check-processing region sends a check that was deposited at that branch to the depositary bank's central facility in another check-processing region, and the central facility is in the same check-processing region as the paying bank, the check is still considered nonlocal. (*See* the commentary to the definition of ''paying bank.'')

c. If a person deposits a check to an account by mailing or otherwise sending the check to a facility or office that is not a bank, the check is considered local or nonlocal depending on the location of the bank whose indorsement appears on the check as the depositary bank.

* * * * *

■ 36. In appendix E, paragraph II.Z., revise the second and third sentences of paragraph 1., remove the phrase ''subpart C'' in paragraph 3. and add the phrase ''subparts C and D'' in its place, and add a new paragraph 6. to read as follows:

II. * * *

Z. * * *

1. * * * For purposes of all subparts of Regulation CC, the term paying bank includes the bank by which a check is payable, the payable-at bank to which a check is sent, or, if the check is payable by a nonbank payor, the bank through which the check is payable and to which it is sent for payment or collection. For purposes of subparts C and D, the term paying bank also includes the payable-through bank and the bank whose routing number appears on the check, regardless of whether the check is

payable by a different bank, provided that the check is sent for payment or collection to the payable through bank or the bank whose routing number appears on the check.

* * * * *

6. In accordance with the Check 21 Act, for purposes of subpart D and, in connection therewith, subpart A, paying bank includes the Treasury of the United States or the United States Postal Service with respect to a check payable by that entity and sent to that entity for payment or collection, even though the Treasury and Postal Service are not defined as banks for purposes of subparts B and C. Because the Federal Reserve Banks act as fiscal agents for the Treasury and the U.S. Postal Service and in that capacity are designated as presentment locations for Treasury checks and U.S. Postal Service money orders, a Treasury check or U.S. Postal Service money order presented to a Federal Reserve Bank is considered to be presented to the Treasury or U.S. Postal Service, respectively.

* * * * *

■ 37. In appendix E, paragraph II.BB.1. remove the last two sentences and add the following new sentence in their place to read as follows:

II. * * *

BB. * * *

1. * * * Qualified returned checks are identified by placing a ''2'' in the case of an original check (or a ''5'' in the case of a substitute check) in position 44 of the qualified return MICR line as a return identifier in accordance with American National Standard Specifications for Placement and Location of MICR Printing, X9.13 (hereinafter ''ANS X9.13'') for original checks or American National Standard Specifications for an Image Replacement Document—IRD, X9.100–140 (hereinafter ''ANS X9.100–140'') for substitute checks.

* * * * *

■ 38. In appendix E to part 229, add new paragraphs II.QQ. through II.EEE. to read as follows:

II. Section 229.2 Definitions

* * * * *

QQ. 229.2(qq) [Reserved]

RR. 229.2(rr) [Reserved]

SS. 229.2(ss) [Reserved]

TT. 229.2(tt) [Reserved]

UU. 229.2(uu) [Reserved]

VV. 229.2(vv) MICR Line

1. Information in the MICR line of a check must be printed in accordance with ANS X9.13 for original checks and ANS X9.100–140 for substitute checks. These standards could vary the requirements for printing the MICR line, such as by indicating circumstances under which the use of magnetic ink is not required.

WW. 229.2(ww) Original Check

1. The definition of original check distinguishes the first paper check signed or otherwise authorized by the drawer to effect a particular payment transaction from a substitute check or other paper or electronic representation that is derived from an original check or substitute check. There is only one original check for any particular payment transaction. However, multiple substitute checks could be created to represent that original check at various points in the check collection and return process.

XX. 229.2(xx) Paper or Electronic Representation of a Substitute Check

1. Receipt of a paper or electronic representation of a substitute check does not trigger indemnity or expedited recredit rights, although the recipient nonetheless could have a warranty claim or a claim under other check law with respect to that document or the underlying payment transaction. A paper or electronic representation of a substitute check would include a representation of a substitute check that was drawn on an account, as well as a representation of a substitute traveler's check, credit card check, or other item that meets the substitute check definition. The following examples illustrate the scope of the definition.

Examples.

a. A bank receives electronic presentment of a substitute check that has been converted to electronic form and charges the customer's account for that electronic item. The periodic account statement that the bank provides to the customer includes information about the electronically-presented substitute check in a line-item list describing all the checks the bank charged to the customer's account during the previous month. The electronic file that the bank received for presentment and charged to the customer's account would be an electronic representation of a substitute check, and the line-item appearing on the customer's account statement would be a paper representation of a substitute check.

b. A paying bank receives and settles for a substitute check and then realizes that its settlement was for the wrong amount. The paying bank sends an adjustment request to the presenting bank to correct the error. The adjustment request is not a paper or electronic representation of a substitute check under the definition because it is not being handled for collection or return as a check. Rather, it is a separate request that is related to a check. As a result, no substitute check warranty, indemnity, or expedited recredit rights attach to the adjustment.

YY. 229.2(yy) [Reserved]

ZZ. 229.2(zz) Reconverting Bank

1. A substitute check is ''created'' when and where a paper reproduction of an original check that meets the requirements of § 229.2(aaa) is physically printed. A bank is a reconverting bank if it creates a substitute check directly or if another person by agreement creates a substitute check on the bank's behalf. A bank also is a reconverting bank if it is the first bank that receives a substitute check created by a nonbank and transfers, presents, or returns that substitute check or, in lieu thereof, the first paper or electronic representation of such substitute check.

Examples.

a. Bank A, by agreement, sends an electronic check file for collection to Bank B. Bank B chooses to use that file to print a substitute check that meets the requirements of § 229.2(aaa). Bank B is the reconverting bank as of the time it prints the substitute check.

b. Company A, which is not a bank, by agreement receives check information electronically from Bank A. Bank A becomes the reconverting bank when Company A prints a substitute check on behalf of Bank A in accordance with that agreement.

c. A depositary bank's customer, which is a nonbank business, receives a check for payment, truncates that original check, and creates a substitute check to deposit with its bank. The depositary bank receives that substitute check from its customer and is the first bank to handle the substitute check. The depositary bank becomes the reconverting bank as of the time that it transfers or presents the substitute check (or in lieu thereof the first paper or electronic representation of the substitute check) for forward collection.

d. A bank is the payable-through bank for checks that are drawn on a nonbank payor, which is the bank's customer. When the customer decides not to pay a check that is payable through the bank, the customer creates a substitute check for purposes of return. The payable-through bank becomes the reconverting bank when it returns the substitute check (or in lieu thereof the first paper or electronic representation of the substitute check) to a returning bank or the depositary bank.

e. A paying bank returns a substitute check to the depositary bank, which in turn gives that substitute check back to its nonbank customer. That customer then redeposits the substitute check for collection at a different bank. Because the substitute check was already transferred by a bank, the second depositary bank does not become a reconverting bank when it transfers or presents that substitute check for collection.

2. In some cases there will be one or more banks between the truncating bank and the reconverting bank.

Example.

A depositary bank truncates the original check and sends an electronic representation of the original check for collection to an intermediary bank. The intermediary bank sends the electronic representation of the original check to the presenting bank, which creates a substitute check to present to the paying bank. The presenting bank is the reconverting bank.

3. A check could move from electronic form to substitute check form several times during the collection and return process. It therefore is possible that there could be multiple substitute checks, and thus multiple reconverting banks, with respect to the same underlying payment.

AAA. 229.2(aaa) Substitute Check

1. ''A paper reproduction of an original check'' could include a reproduction created directly from the original check or a reproduction of the original check that is

created from some other source that contains an image of the original check, such as an electronic representation of an original check or substitute check, or a previous substitute check.

2. Because a substitute check must be a piece of paper, an electronic file or electronic check image that has not yet been printed in accordance with the substitute check definition is not a substitute check.

3. Because a substitute check must be a representation of a check, a paper reproduction of something that is not a check cannot be a substitute check. For example, a savings bond or a check drawn on a non-U.S. branch of a foreign bank cannot be reconverted to a substitute check.

4. As described in § 229.51(b) and the commentary thereto, a reconverting bank is required to ensure that a substitute check contains all indorsements applied by previous parties that handled the check in any form. Therefore, the image of the original check that appears on the back of a substitute check would include indorsements that were physically applied to the original check before an image of the original check was captured. An indorsement that was applied physically to the original check after an image of the original check was captured would be conveyed as an electronic indorsement (see paragraph 3 of the commentary to § 229.35(a)). The back of the substitute check would contain a physical representation of any indorsements that were applied electronically to the check after an image of the check was captured but before creation of the substitute check.

Example.

Bank A, which is the depositary bank, captures an image of an original check, indorses it electronically and, by agreement, transmits to Bank B an electronic image of the check accompanied by the electronic indorsement. Bank B then creates a substitute check to send to Bank C. The back of the substitute check created by Bank B must contain a representation of the indorsement previously applied electronically by Bank A and Bank B's own indorsement. (For more information on indorsement requirements, see § 229.35, appendix D, and the commentary thereto.)

5. Some substitute checks will not be created directly from the original check, but rather will be created from a previous substitute check. The back of a subsequent substitute check will contain an image of the full length of the back of the previous substitute check. ANS X9.100–140 requires preservation of the full length of the back of the previous substitute check in order to preserve previous indorsements and reconverting bank identifications. By contrast, the front of a subsequent substitute check will not contain an image of the entire previous substitute check. Rather, the image field of the subsequent substitute check will contain the image of the front of the original check that appeared on the previous substitute check at the time the previous substitute check was converted to electronic form. The portions of the front of the subsequent substitute check other than the image field will contain information applied by the subsequent reconverting bank, such as its reconverting bank identification, the MICR line, the legal equivalence legend, and optional security information.

Examples.

a. The back of a subsequent substitute check would contain the following indorsements, all of which would be preserved through the image of the back of the previous substitute check: (1) The indorsements that were applied physically to the original check before an image of the original check was captured; (2) a physical representation of indorsements that were applied electronically to the original check after an image of the original check was captured but before creation of the first substitute check; and (3) indorsements that were applied physically to the previous substitute check. In addition, the reconverting bank for the subsequent substitute check must overlay onto the back of that substitute check a physical representation of any indorsements that were applied electronically after the previous substitute check was converted to electronic form but before creation of the subsequent substitute check.

b. Because information could have been physically added to the image of the front of the original check that appeared on the previous substitute check, the original check image that appears on the front of a subsequent substitute check could contain information in addition to that which appeared on the original check at the time it was truncated.

6. The MICR line applied to a substitute check must contain information in all fields of the MICR line that were encoded on the original check at any time before an image of the original check was captured. This includes all the MICR-line information that was preprinted on the original check, plus any additional information that was added to the MICR line before the image of the original check was captured (for example, the amount of the check). The information in each field of the substitute check's MICR line must be the same information as in the corresponding field of the MICR line of the original check, except as provided by ANS X9.100–140 (unless the Board by rule or order determines that a different standard applies). Industry standards may not, however, vary the requirement that a substitute check at the time of its creation must bear a full-field MICR line.

7. ANS X9.100–140, provides that a substitute check must have a ''4'' in position 44 and that a qualified returned substitute check must have a ''4'' in position 44 of the forward-collection MICR line as well as a ''5'' in position 44 of the qualified return MICR line. The ''4'' and ''5'' indicate that the document is a substitute check so that the size of the check image remains constant throughout the collection and return process, regardless of the number of substitute checks created that represent the same original check (*see also* §§ 229.30(a)(2) and 229.31(a)(2) and the commentary thereto regarding requirements for qualified returned substitute checks). An original check generally has a blank position 44 for forward collection. Because a reconverting bank must encode position 44 of a substitute check's forward collection MICR line with a ''4,'' the reconverting bank must vary any character that appeared in position 44 of the forward-collection MICR line of the original check. A bank that misencodes or fails to encode position 44 at the time it attempts to create a substitute check has failed to create a substitute check. A bank that receives a properly-encoded substitute check may further encode that item but does so subject to the encoding warranties in Regulation CC and the U.C.C.

8. A substitute check's MICR line could contain information in addition to the information required at the time the substitute check is created. For example, if the amount field of the original check was not encoded and the substitute check therefore did not, when created, have an encoded amount field, the MICR line of the substitute check later could be amount-encoded.

9. A bank may receive a substitute check that contains a MICR-line variation but nonetheless meets the MICR-line replication requirements of § 229.2(aaa)(2) because that variation is permitted by ANS X9.100–140. If such a substitute check contains a MICR-line error, a bank that receives it may, but is not required to, repair that error. Such a repair must be made in accordance with ANS X9.100–140 for repairing a MICR line, which generally allows a bank to correct an error by applying a strip that may or may not contain information in all fields encoded on the check's MICR line. A bank's repair of a MICR-line error on a substitute check is subject to the encoding warranties in Regulation CC and the U.C.C.

10. A substitute check must conform to all the generally applicable industry standards for substitute checks set forth in ANS X9.100–140, which incorporates other industry standards by reference. Thus, multiple substitute check images contained on the same page of an account statement are not substitute checks.

BBB. 229.2(bbb) Sufficient Copy and Copy

1. A copy must be a paper reproduction of a check. An electronic image therefore is not a copy or a sufficient copy. However, if a customer has agreed to receive such information electronically, a bank that is required to provide an original check or sufficient copy may satisfy that requirement by providing an electronic image in accordance with § 229.58 and the commentary thereto.

2. A bank under § 229.53(b)(3) may limit its liability for an indemnity claim and under §§ 229.54(e)(2) and 229.55(c)(2) may respond to an expedited recredit claim by providing the claimant with a copy of a check that accurately represents all of the information on the front and back of the original check as of the time the original check was truncated or that otherwise is sufficient to determine the validity of the claim against the bank.

Examples.

a. A copy of an original check that accurately represents all the information on

the front and back of the original check as of the time of truncation would constitute a sufficient copy if that copy resolved the claim. For example, if resolution of the claim required accurate payment and indorsement information, an accurate copy of the front and back of a legible original check (including but not limited to a substitute check) would be a sufficient copy.

b. A copy of the original check that does not accurately represent all the information on both the front and back of the original check also could be a sufficient copy if such copy contained all the information necessary to determine the validity of the relevant claim. For instance, if a consumer received a substitute check that contained a blurry image of a legible original check, the consumer might seek an expedited recredit because his or her account was charged for $1,000, but he or she believed that the check was written for only $100. If the amount that appeared on the front of the original check was legible, an accurate copy of only the front of the original check that showed the amount of the check would be sufficient to determine whether or not the consumer's claim regarding the amount of the check was valid.

CCC. 229.2(ccc) Transfer and Consideration

1. Under §§ 229.52 and 229.53, a bank is responsible for the warranties and indemnity when it transfers, presents, or returns a substitute check (or a paper or electronic representation thereof) for consideration. Drawers and other nonbank persons that receive checks from a bank are not transferees that receive consideration as those terms are defined in the U.C.C. However, the Check 21 Act clearly contemplates that such nonbank persons that receive substitute checks (or representations thereof) from a bank will receive the warranties and indemnity from all previous banks that handled the check. To ensure that these parties are covered by the substitute check warranties and indemnity in the manner contemplated by the Check 21 Act, § 229.2(ccc) incorporates the U.C.C. definitions of the term transfer and consideration by reference and expands those definitions to cover a broader range of situations. Delivering a check to a nonbank that is acting on behalf of a bank (such as a third-party check processor or presentment point) is a transfer of the check to that bank.

Examples.

a. A paying bank pays a substitute check and then provides that paid substitute check (or a representation thereof) to a drawer with a periodic statement. Under the expanded definitions, the paying bank thereby transfers the substitute check (or representation thereof) to the drawer for consideration and makes the substitute check warranties described in § 229.52. A drawer that suffers a loss due to receipt of a substitute check may have warranty, indemnity, and, if the drawer is a consumer, expedited recredit rights under the Check 21 Act and subpart D. A drawer that suffers a loss due to receipt of a paper or electronic representation of a substitute check would receive the substitute check warranties but would not have indemnity or expedited recredit rights.

b. The expanded definitions also operate such that a paying bank that pays an original check (or a representation thereof) and then creates a substitute check to provide to the drawer with a periodic statement transfers the substitute check for consideration and thereby provides the warranties and indemnity.

c. The expanded definitions ensure that a bank that receives a returned check in any form and then provides a substitute check to the depositor gives the substitute check warranties and indemnity to the depositor.

d. The expanded definitions apply to substitute checks representing original checks that are not drawn on deposit accounts, such as checks used to access a credit card or a home equity line of credit.

DDD. 229.2(ddd) Truncate

1. Truncate means to remove the original check from the forward collection or return process and to send in lieu of the original check either a substitute check or, by agreement, information relating to the original check. Truncation does not include removal of a substitute check from the check collection or return process.

EEE. 229.2(eee) Truncating Bank

1. A bank is a truncating bank if it truncates an original check or if it is the first bank to transfer, present, or return another form of an original check that was truncated by a person that is not a bank.

Example.

a. A bank's customer that is a nonbank business receives a check for payment and deposits either a substitute check or an electronic representation of the original check with its depositary bank instead of the original check. That depositary bank is the truncating bank when it transfers, presents, or returns the substitute check or electronic representation in lieu of the original check. That bank also would be the reconverting bank if it were the first bank to transfer, present, or return a substitute check that it received from (or created from the information given by) its nonbank customer (see § 229.2(yy) and the commentary thereto).

2. A truncating bank does not make the subpart D warranties and indemnity unless it also is the reconverting bank. Therefore, a bank that truncates the original check and sends an electronic file to a collecting bank does not provide subpart D protections to the recipient of that electronic item. However, a recipient of an electronic item may protect itself against losses associated with that item by agreement with the truncating bank.

* * * * *

■ 39. In appendix E, paragraph IV.D.6.e. is amended by adding new sentences between the second and third sentences to read as follows:

IV. * * *
D. * * *
6. * * *

e. * * * Such notice need not be posted at each teller window, but the notice must be posted in a place where consumers seeking to make deposits are likely to see it before making their deposits. For example, the notice might be posted at the point where the line forms for teller service in the lobby. The notice is not required at any drive-through teller windows nor is it required at night depository locations, or at locations where consumer deposits are not accepted. * * *

* * * * *

■ 40. In appendix E, paragraph VII.H.1.a., revise the third sentence and add a new fifth sentence to read as follows:

VII. * * *
H. * * *
1. * * *

a. * * * For a customer that is not a consumer, a depositary bank satisfies the written-notice requirement by sending an electronic notice that displays the text and is in a form that the customer may keep, if the customer agrees to such means of notice. * * * For a customer who is a consumer, a depositary bank satisfies the written-notice requirement by sending an electronic notice in compliance with the requirements of the Electronic Signatures in Global and National Commerce Act (12 U.S.C. 7001 *et seq.*), which include obtaining the consumer's affirmative consent to such means of notice.

* * * * *

■ 41. In appendix E, paragraph IX.A.1., remove the third and fourth sentences and add new sentences in their place to read as follows:

IX. * * *
A. * * *

1. * * * A disclosure is in a form that the customer may keep if, for example, it can be downloaded or printed. For a customer that is not a consumer, a depositary bank satisfies the written-disclosure requirement by sending an electronic disclosure that displays the text and is in a form that the customer may keep, if the customer agrees to such means of disclosure. For a customer who is a consumer, a depositary bank satisfies the written-notice requirement by sending an electronic notice in compliance with the requirements of the Electronic Signatures in Global and National Commerce Act (12 U.S.C. 7001 *et seq.*), which include obtaining the consumer's affirmative consent to such means of notice.

* * * * *

■ 42. In appendix E, paragraph IX.A., add a new paragraph 4. to read as follows:

IX. * * *
A. * * *

4. A bank may, by agreement or at the consumer's request, provide any disclosure or notice required by subpart B in a language other than English, provided that the bank makes a complete disclosure available in English at the customer's request.

■ 43. In appendix E, add a new sentence at the end of paragraph XVI.A.7. to read as follows:

XVI. * * *
A. * * *

7. * * * A check that is converted to a qualified returned check must be encoded in accordance with ANS X9.13 for original checks or ANS X9.100–140 for substitute checks.

* * * * *

■ 44. In appendix E, revise paragraphs XVI.C.1.a. and XVI.D.1. to read as follows:

XVI. * * *
C. * * *
1. * * *

a. A paying bank may have a courier that leaves after midnight (or after any other applicable deadline) to deliver its forward-collection checks. This paragraph removes the constraint of the midnight deadline for returned checks if the returned check reaches the receiving bank on or before the receiving bank's next banking day following the otherwise applicable deadline by the earlier of the close of that banking day or a cutoff hour of 2 p.m. or later set by the receiving bank under U.C.C. 4–108. The extension also applies if the check reaches the bank to which it is sent later than the time described in the previous sentence if highly expeditious means of transportation are used. For example, a West Coast paying bank may use this further extension to ship a returned check by air courier directly to an East Coast returning bank even if the check arrives after the returning bank's cutoff hour. This paragraph applies to the extension of all midnight deadlines except Saturday midnight deadlines (see paragraph XVI.C.1.b of this appendix).

* * * * *

D. * * *

1. The reason for the return must be clearly indicated. A check is identified as a returned check if the front of that check indicates the reason for return, even though it does not specifically state that the check is a returned check. A reason such as ''Refer to Maker'' is permissible in appropriate cases. If the returned check is a substitute check, the reason for return must be placed within the image of the original check that appears on the front of the substitute check so that the information is retained on any subsequent substitute check. If the paying bank places the returned check in a carrier envelope, the carrier envelope should indicate that it is a returned check but need not repeat the reason for return stated on the check if it in fact appears on the check.

* * * * *

■ 45. In appendix E, add a new sentence at the end of paragraph XVII.A.7.a. to read as follows:

XVII. * * *
A. * * *
7. * * *
a. * * * A check that is converted to a qualified returned check must be encoded in accordance with ANS X9.13 for original checks or ANS X9.100–140 for substitute checks.

* * * * *

■ 46. In appendix E, add a new paragraph XIX.B.3. to read as follows:

XIX. * * *
B. * * *

3. A bank must identify an item of information if the bank is uncertain as to that item's accuracy. A bank may make this identification by setting the item off with question marks, asterisks, or other symbols designated for this purpose by generally applicable industry standards.

■ 47. In appendix E, paragraph XIX.D.1., add a new sentence between the next-to-last and last sentences and revise the last sentence to read as follows:

XIX. * * *
D. * * *

1. * * * A bank that chooses to provide the notice required by § 229.33(d) in writing may send the notice by e-mail or facsimile if the bank sends the notice to the e-mail address or facsimile number specified by the customer for that purpose. The notice to the customer required under this paragraph also may satisfy the notice requirement of § 229.13(g) if the depositary bank invokes the reasonable-cause exception of § 229.13(e) due to the receipt of a notice of nonpayment, provided the notice meets all the requirements of § 229.13(g).

* * * * *

■ 48. In appendix E, paragraph XX.C., add new sentences at the end of paragraph 3. to read as follows:

XX. * * *
C. * * *

3. * * * Paragraph (c)(3) applies to all MICR-line encoding on a substitute check.

* * * * *

■ 49. In appendix E, paragraph XXI.A.1., remove the phrase ''are legible'' from the fourth sentence and add the phrase ''can be interpreted by any person'' in its place.

■ 50. In appendix E, paragraph XXI.A:,
■ A. Remove paragraphs 2. through 6. and paragraph 8;
■ B. Redesignate paragraph 7. as paragraph 10. and redesignate paragraphs 9. through 13. as paragraphs 11. through 15., respectively;
■ C. Add new paragraphs 2. through 9; and
■ D. Revise redesignated paragraph 15. by adding the phrase ''collecting banks and'' between the phrases ''standard for'' and ''returning banks'' in the first sentence and adding a new sentence at the end of the paragraph.

These additions and revisions read as follows:

XXI. * * *
A. * * *

2. Banks generally apply indorsements to a paper check in one of two ways: (1) banks print or ''spray'' indorsements onto a check when the check is processed through the banks'' automated check sorters (regardless of whether the checks are original checks or substitute checks), and (2) reconverting banks print or ''overlay'' previously applied electronic indorsements and their own indorsements and identifications onto a substitute check at the time that the substitute check is created. If a subsequent substitute check is created in the course of collection or return, that substitute check will contain, in its image of the back of the previous substitute check, reproductions of indorsements that were sprayed or overlaid onto the previous item. For purposes of the indorsement standard set forth in appendix D, a reproduction of a previously applied sprayed or overlaid indorsement contained within an image of a check does not constitute ''an indorsement that previously was applied electronically.'' To accommodate these two indorsement scenarios, the appendix includes two indorsement location specifications: one standard applies to banks spraying indorsements onto existing paper original checks and substitute checks, and another applies to reconverting banks overlaying indorsements that previously were applied electronically and their own indorsements onto substitute checks at the time the substitute checks are created.

3. A bank might use check processing equipment that captures an image of a check prior to spraying an indorsement onto that item. If the bank truncates that item, it should ensure that it also applies an indorsement to the item electronically. A reconverting bank satisfies its obligation to preserve all previously applied indorsements by overlaying a bank's indorsement that previously was applied electronically onto a substitute check that the reconverting bank creates.

4. The location of an indorsement applied to an original paper check in accordance with appendix D may shift if that check is truncated and later reconverted to a substitute check. If an indorsement applied to the original check in accordance with appendix D is overwritten by a subsequent indorsement applied to the substitute check in accordance with appendix D, then one or both of those indorsements could be rendered illegible. As explained in § 229.38(d) and the commentary thereto, a reconverting bank is liable for losses associated with indorsements that are rendered illegible as a result of check substitution.

5. To ensure that indorsements can be easily read and would remain legible after an image of a check is captured, the standard requires all indorsements applied to original checks and substitute checks to be printed in black ink as of January 1, 2006.

6. The standard requires the depositary bank's indorsement to include (1) its nine-digit routing number set off by an arrow at each end of the routing number and, if the depositary bank is a reconverting bank with respect to the check, an asterisk outside the arrow at each end of the routing number to identify the bank as a reconverting bank; (2) the indorsement date; and (3) if the indorsement is applied physically, name or location information. The standard also permits but does not require the indorsement to include other identifying information. The standard requires a collecting bank's or returning bank's indorsement to include only

(1) the bank's nine digit routing number (without arrows) and, if the collecting bank or returning bank is a reconverting bank with respect to the check, an asterisk at each end of the number to identify the bank as a reconverting bank, (2) the indorsement date, and (3) an optional trace or sequence number.

7. Depositary banks should not include information that can be confused with required information. For example, a nine-digit zip code could be confused with the nine-digit routing number.

8. A depositary bank may want to include an address in its indorsement in order to limit the number of locations at which it must receive returned checks. In instances where this address is not consistent with the routing number in the indorsement, the depositary bank is required to receive returned checks at a branch or head office consistent with the routing number. Banks should note, however, that § 229.32 requires a depositary bank to receive returned checks at the location(s) at which it receives forward-collection checks.

9. In addition to indorsing a substitute check in accordance with appendix D, a reconverting bank must identify itself and the truncating bank by applying its routing number and the routing number of the truncating bank to the front of the check in accordance with appendix D and ANS X9.100–140. Further, if the reconverting bank is the paying bank, it also must identify itself by applying its routing number to the back of the check in accordance with appendix D. In these instances, the reconverting bank and truncating bank routing numbers are for identification purposes only and are not indorsements or acceptances.

* * * * *

15. * * * With respect to the identification of a paying bank that is also a reconverting bank, see the commentary to § 229.51(b)(2).

* * * * *

■ 51. In appendix E, paragraph XXIII.A., remove the last sentence.

■ 52. In appendix E, paragraph XXIV.D., revise the last sentence of paragraph 1., redesignate paragraphs 2. and 3. as paragraphs 3. and 4., respectively, and add a new paragraph 2. to read as follows:

XXIV. * * *

D. * * *

1. Responsibility for back of check. * * * Accordingly, this provision places responsibility on the paying bank, depositary bank, or reconverting bank, as appropriate, for keeping the back of the check clear for bank indorsements during forward collection and return.

2. ANS X9.100–140 provides that an image of an original check must be reduced in size when placed on the first substitute check associated with that original check. (The image thereafter would be constant in size on any subsequent substitute check that might be created.) Because of this size reduction, the location of an indorsement, particularly a depositary bank indorsement, applied to an original paper check likely will change when the first reconverting bank creates a substitute check that contains that indorsement within the image of the original paper check. If the indorsement was applied to the original paper check in accordance with appendix D's location requirements for indorsements applied to existing paper checks, and if the size reduction of the image causes the placement of the indorsement to no longer be consistent with the appendix's requirements, then the reconverting bank bears the liability for any loss that results from the shift in the placement of the indorsement. Such a loss could result either because the original indorsement applied in accordance with appendix D is rendered illegible by a subsequent indorsement that later is applied to the substitute check in accordance with appendix D, or because the subsequent bank cannot apply its indorsement to the substitute check legibly in accordance with appendix D as a result of the shift in the previous indorsement.

Example.

In accordance with appendix D's specifications, a depositary bank sprays its indorsement onto a business-sized original check between 3.0 inches from the leading edge of the check and 1.5 inches from the trailing edge of the check. The check's conversion to electronic form and subsequent reconversion to paper form causes the location of the depositary bank indorsement, now contained within the image of the original check, to change such that it is less than 3.0 inches from the leading edge of the substitute check. In accordance with appendix D's specifications, a subsequent collecting bank sprays its indorsement onto the substitute check between the leading edge of the check and 3.0 inches from the leading edge of the check and the indorsement happens to be on top of the shifted depositary bank indorsement. If the check is returned unpaid and the return is not expeditious because of the illegibility of the depositary bank indorsement, and the depositary bank incurs a loss that it would not have incurred had the return been expeditious, the reconverting bank bears the liability for that loss.

* * * * *

■ 53. In appendix E, redesignate commentary XXX as commentary XXXVIII and add new commentaries XXX through XXXVII to read as follows:

* * * * *

XXX. § 229.51 General provisions governing substitute checks

A. § 229.51(a) Legal Equivalence

1. Section 229.51(a) states that a substitute check for which a bank has provided the substitute check warranties is the legal equivalent of the original check for all purposes and all persons if it meets the accuracy and legend requirements. Where the law (or a contract) requires production of the original check, production of a legally equivalent substitute check would satisfy that requirement. A person that receives a substitute check cannot be assessed costs associated with the creation of the substitute check, absent agreement to the contrary.

Examples.

a. A presenting bank presents a substitute check that meets the legal equivalence requirements to a paying bank. The paying bank cannot refuse presentment of the substitute check on the basis that it is a substitute check, because the substitute check is the legal equivalent of the original check.

b. A depositor's account agreement with a bank provides that the depositor is entitled to receive original cancelled checks back with his or her periodic account statement. The bank may honor that agreement by providing original checks, substitute checks, or a combination thereof. However, a bank may not honor such an agreement by providing something other than an original check or a substitute check.

c. A mortgage company argues that a consumer missed a monthly mortgage payment that the consumer believes she made. A legally equivalent substitute check concerning that mortgage payment could be used in the same manner as the original check to prove the payment.

2. A person other than a bank that creates a substitute check could transfer, present, or return that check only by agreement unless and until a bank provided the substitute check warranties.

3. To be the legal equivalent of the original check, a substitute check must accurately represent all the information on the front and back of the check as of the time the original check was truncated. An accurate representation of information that was illegible on the original check would satisfy this requirement. The payment instructions placed on the check by, or as authorized by, the drawer, such as the amount of the check, the payee, and the drawer's signature, must be accurately represented, because that information is an essential element of a negotiable instrument. Other information that must be accurately represented includes (1) the information identifying the drawer and the paying bank that is preprinted on the check, including the MICR line; and (2) other information placed on the check prior to the time an image of the check is captured, such as any required identification written on the front of the check and any indorsements applied to the back of the check. A substitute check need not capture other characteristics of the check, such as watermarks, microprinting, or other physical security features that cannot survive the imaging process or decorative images, in order to meet the accuracy requirement. Conversely, some security features that are latent on the original check might become visible as a result of the check imaging process. For example, the original check might have a faint representation of the word ''void'' that will appear more clearly on a photocopied or electronic image of the check. Provided the inclusion of the clearer version of the word on the image used to create a substitute check did not obscure the required information listed above, a substitute check that contained such information could be the legal equivalent of an original check under § 229.51(a). However, if a person suffered a loss due to receipt of such a substitute check instead of the original check, that person

could have an indemnity claim under § 229.53 and, in the case of a consumer, an expedited recredit claim under § 229.54.

4. To be the legal equivalent of the original check, a substitute check must bear the legal equivalence legend described in § 229.51(a)(2). A bank may not vary the language of the legal equivalence legend and must place the legend on the substitute check as specified by generally applicable industry standards for substitute checks contained in ANS X9.100–140.

5. In some cases, the original check used to create a substitute check could be forged or otherwise fraudulent. A substitute check created from a fraudulent original check would have the same status under Regulation CC and the U.C.C. as the original fraudulent check. For example, a substitute check of a fraudulent original check would not be properly payable under U.C.C. 4–401 and would be subject to the transfer and presentment warranties in U.C.C. 4–207 and 4–208.

B. 229.51(b) Reconverting Bank Duties

1. As discussed in more detail in appendix D and the commentary to § 229.35, a reconverting bank must indorse (or, if it is a paying bank with respect to the check, identify itself on) the back of a substitute check in a manner that preserves all indorsements applied, whether physically or electronically, by persons that previously handled the check in any form for forward collection or return. Indorsements applied physically to the original check before an image of the check was captured would be preserved through the image of the back of the original check that a substitute check must contain. Indorsements applied physically to the original check after an image of the original check was captured would be conveyed as electronic indorsements (see paragraph 3 of the commentary to § 229.35(a)). If indorsements were applied electronically after an image of the original check was captured or were applied electronically after a previous substitute check was converted to electronic form, the reconverting bank must apply those indorsements physically to the substitute check. A reconverting bank is not responsible for obtaining indorsements that persons that previously handled the check should have applied but did not apply.

2. A reconverting bank also must identify itself as such on the front and back of the substitute check and must preserve on the back of the substitute check the identifications of any previous reconverting banks in accordance with appendix D. The presence on the back of a substitute check of indorsements that were applied by previous reconverting banks and identified with asterisks in accordance with appendix D would satisfy the requirement that the reconverting bank preserve the identification of previous reconverting banks. As discussed in more detail in the commentary to § 229.35, the reconverting bank and truncating bank routing numbers on the front of a substitute check and, if the reconverting bank is the paying bank, the reconverting bank's routing number on the back of a substitute check are for identification only and are not indorsements or acceptances.

3. The reconverting bank must place the routing number of the truncating bank surrounded by brackets on the front of the substitute check in accordance with appendix D and ANS X9.100–140.

Example.

A bank's customer, which is a nonbank business, receives checks for payment and by agreement deposits substitute checks instead of the original checks with its depositary bank. The depositary bank is the reconverting bank with respect to the substitute checks and the truncating bank with respect to the original checks. In accordance with appendix D and with ANS X9.100–140, the bank must therefore be identified on the front of the substitute checks as a reconverting bank and as the truncating bank, and on the back of the substitute checks as the depositary bank and a reconverting bank.

C. 229.51(c) Applicable Law

1. A substitute check that meets the requirements for legal equivalence set forth in this section is subject to any provision of federal or state law that applies to original checks, except to the extent such provision is inconsistent with the Check 21 Act or subpart D. A legally equivalent substitute check is subject to all laws that are not preempted by the Check 21 Act in the same manner and to the same extent as is an original check. Thus, any person could satisfy a law that requires production of an original check by producing a substitute check that is derived from the relevant original check and that meets the legal equivalence requirements of § 229.51(a).

2. A law is not inconsistent with the Check 21 Act or subpart D merely because it allows for the recovery of a greater amount of damages.

Example.

A drawer that suffers a loss with respect to a substitute check that was improperly charged to its account and for which the drawer has an indemnity claim but not a warranty claim would be limited under the Check 21 Act to recovery of the amount of the substitute check plus interest and expenses. However, if the drawer also suffered damages that were proximately caused because the bank wrongfully dishonored subsequently presented checks as a result of the improper substitute check charge, the drawer could recover those losses under U.C.C. 4–402.

XXXI § 229.52 Substitute Check Warranties

A. 229.52(a) Warranty Content and Provision

1. The responsibility for providing the substitute check warranties begins with the reconverting bank. In the case of a substitute check created by a bank, the reconverting bank starts the flow of warranties when it transfers, presents, or returns a substitute check for which it receives consideration. A bank that receives a substitute check created by a nonbank starts the flow of warranties when it transfers, presents, or returns for consideration either the substitute check it received or an electronic or paper representation of that substitute check. To ensure that warranty protections flow all the way through to the ultimate recipient of a substitute check or paper or electronic representation thereof, any subsequent bank that transfers, presents, or returns for consideration either the substitute check or a paper or electronic representation of the substitute check is responsible to subsequent transferees for the warranties. Any warranty recipient could bring a claim for a breach of a substitute check warranty if it received either the actual substitute check or a paper or electronic representation of a substitute check.

2. The substitute check warranties and indemnity are not given under §§ 229.52 and 229.53 by a bank that truncates the original check and by agreement transfers the original check electronically to a subsequent bank for consideration. However, parties may, by agreement, allocate liabilities associated with the exchange of electronic check information.

Example.

A bank that receives check information electronically and uses it to create substitute checks is the reconverting bank and, when it transfers, presents, or returns that substitute check, becomes the first warrantor. However, that bank may protect itself by including in its agreement with the sending bank provisions that specify the sending bank's warranties and responsibilities to the receiving bank, particularly with respect to the accuracy of the check image and check data transmitted under the agreement.

3. A bank need not affirmatively make the warranties because they attach automatically when a bank transfers, presents, or returns the substitute check (or a representation thereof) for which it receives consideration. Because a substitute check transferred, presented, or returned for consideration is warranted to be the legal equivalent of the original check and thereby subject to existing laws as if it were the original check, all U.C.C. and other Regulation CC warranties that apply to the original check also apply to the substitute check.

4. The legal equivalence warranty by definition must be linked to a particular substitute check. When an original check is truncated, the check may move from electronic form to substitute check form and then back again, such that there would be multiple substitute checks associated with one original check. When a check changes form multiple times in the collection or return process, the first reconverting bank and subsequent banks that transfer, present, or return the first substitute check (or a paper or electronic representation of the first substitute check) warrant the legal equivalence of only the first substitute check. If a bank receives an electronic representation of a substitute check and uses that representation to create a second substitute check, the second reconverting bank and subsequent transferees of the second substitute check (or a representation thereof) warrant the legal equivalence of both the first and second substitute checks. A reconverting bank would not be liable for a warranty breach under § 229.52 if the legal equivalence defect is the fault of a subsequent bank that handled the substitute check, either as a substitute check or in other paper or electronic form.

5. The warranty in § 229.52(a)(2), which addresses multiple payment requests for the same check, is not linked to a particular substitute check but rather is given by each bank handling the substitute check, an electronic representation of a substitute check, or a subsequent substitute check created from an electronic representation of a substitute check. All banks that transfer, present, or return a substitute check (or a paper or electronic representation thereof) therefore provide the warranty regardless of whether the ultimate demand for double payment is based on the original check, the substitute check, or some other electronic or paper representation of the substitute or original check, and regardless of the order in which the duplicative payment requests occur. This warranty is given by the banks that transfer, present, or return a substitute check even if the demand for duplicative payment results from a fraudulent substitute check about which the warranting bank had no knowledge.

Example.

A nonbank depositor truncates a check and in lieu thereof sends an electronic version of that check to both Bank A and Bank B. Bank A and Bank B each uses the check information that it received electronically to create a substitute check, which it presents to Bank C for payment. Bank A and Bank B each is a reconverting bank that made the substitute check warranties when it presented a substitute check to and received payment from Bank C. Bank C could pursue a warranty claim for the loss it suffered as a result of the duplicative payment against either Bank A or Bank B.

B. 229.52(b) Warranty Recipients

1. A reconverting bank makes the warranties to the person to which it transfers, presents, or returns the substitute check for consideration and to any subsequent recipient that receives either the substitute check or a paper or electronic representation derived from the substitute check. These subsequent recipients could include a subsequent collecting or returning bank, the depositary bank, the drawer, the drawee, the payee, the depositor, and any indorser. The paying bank would be included as a warranty recipient, for example because it would be the drawee of a check or a transferee of a check that is payable through it.

2. The warranties flow with the substitute check to persons that receive a substitute check or a paper or electronic representation of a substitute check. The warranties do not flow to a person that receives only the original check or a representation of an original check that was not derived from a substitute check. However, a person that initially handled only the original check could become a warranty recipient if that person later receives a returned substitute check or a paper or electronic representation of a substitute check that was derived from that original check.

XXXII. § 229.53 Substitute Check Indemnity

A. 229.53(a) Scope of Indemnity

1. Each bank that for consideration transfers, presents, or returns a substitute check or a paper or electronic representation of a substitute check is responsible for providing the substitute check indemnity. The indemnity covers losses due to any subsequent recipient's receipt of the substitute check instead of the original check. The indemnity therefore covers the loss caused by receipt of the substitute check as well as the loss that a bank incurs because it pays an indemnity to another person. A bank that pays an indemnity would in turn have an indemnity claim regardless of whether it received the substitute check or a paper or electronic representation of the substitute check The indemnity would not apply to a person that handled only the original check or a paper or electronic version of the original check that was not derived from a substitute check.

Examples.

a. A paying bank makes payment based on a substitute check that was derived from a fraudulent original cashier's check. The amount and other characteristics of the original cashier's check are such that, had the original check been presented instead, the paying bank would have inspected the original check for security features. The paying bank's fraud detection procedures were designed to detect the fraud in question and allow the bank to return the fraudulent check in a timely manner. However, the security features that the bank would have inspected were security features that did not survive the imaging process (see the commentary to § 229.51(a)). Under these circumstances, the paying bank could assert an indemnity claim against the bank that presented the substitute check.

b. By contrast with the previous examples, the indemnity would not apply if the characteristics of the presented substitute check were such that the bank's security policies and procedures would not have detected the fraud even if the original had been presented. For example, if the check was under the threshold amount at which the bank subjects an item to its fraud detection procedures, the bank would not have inspected the item for security features regardless of the form of the item and accordingly would have suffered a loss even if it had received the original check.

c. A paying bank makes an erroneous payment based on an electronic representation of a substitute check because the electronic cash letter accompanying the electronic item included the wrong amount to be charged. The paying bank would not have an indemnity claim associated with that payment because its loss did not result from receipt of an actual substitute check instead of the original check. However, the paying bank could protect itself from such losses through its agreement with the bank that sent the check to it electronically and may have rights under other law.

d. A drawer has agreed with its bank that the drawer will not receive paid checks with periodic account statements. The drawer requested a copy of a paid check in order to prove payment and received a photocopy of a substitute check. The photocopy that the bank provided in response to this request was illegible, such that the drawer could not prove payment. Any loss that the drawer suffered as a result of receiving the blurry check image would not trigger an indemnity claim because the loss was not caused by the receipt of a substitute check. The drawer may, however, still have a warranty claim if he received a copy of a substitute check, and may also have rights under the U.C.C.

B. 229.53(b) Indemnity Amount

1. If a recipient of a substitute check is making an indemnity claim because a bank has breached one of the substitute check warranties, the recipient can recover any losses proximately caused by that warranty breach.

Examples.

a. A drawer discovers that its account has been charged for two different substitute checks that were provided to the drawer and that were associated with the same original check. As a result of this duplicative charge, the paying bank dishonored several subsequently-presented checks that it otherwise would have paid and charged the drawer returned check fees. The payees of the returned checks also charged the drawer returned check fees. The drawer would have a warranty claim against any of the warranting banks, including its bank, for breach of the warranty described in § 229.52(a)(2). The drawer also could assert an indemnity claim. Because there is only one original check for any payment transaction, if the collecting and presenting bank had collected the original check instead of using a substitute check the bank would have been asked to make only one payment. The drawer could assert its warranty and indemnity claims against the paying bank, because that is the bank with which the drawer has a customer relationship and the drawer has received an indemnity from that bank. The drawer could recover from the indemnifying bank the amount of the erroneous charge, as well as the amount of the returned check fees charged by both the paying bank and the payees of the returned checks. If the drawer's account were an interest-bearing account, the drawer also could recover any interest lost on the erroneously debited amount and the erroneous returned check fees. The drawer also could recover its expenditures for representation in connection with the claim. Finally, the drawer could recover any other losses that were proximately caused by the warranty breach.

b. In the example above, the paying bank that received the duplicate substitute checks also would have a warranty claim against the previous transferor(s) of those substitute checks and could seek an indemnity from that bank (or either of those banks). The indemnifying bank would be responsible for compensating the paying bank for all the losses proximately caused by the warranty breach, including representation expenses and other costs incurred by the paying bank in settling the drawer's claim.

2. If the recipient of the substitute check does not have a substitute check warranty claim with respect to the substitute check, the amount of the loss the recipient may recover under § 229.53 is limited to the

amount of the substitute check, plus interest and expenses. However, the indemnified person might be entitled to additional damages under some other provision of law.

Examples.

a. A drawer received a substitute check that met all the legal equivalence requirements and for which the drawer was only charged once, but the drawer believed that the underlying original check was a forgery. If the drawer suffered a loss because it could not prove the forgery based on the substitute check, for example because proving the forgery required analysis of pen pressure that could be determined only from the original check, the drawer would have an indemnity claim. However, the drawer would not have a substitute check warranty claim because the substitute check was the legal equivalent of the original check and no person was asked to pay the substitute check more than once. In that case, the amount of the drawer's indemnity under § 229.53 would be limited to the amount of the substitute check, plus interest and expenses. However, the drawer could attempt to recover additional losses, if any, under other law.

b. As described more fully in the commentary to § 229.53(a) regarding the scope of the indemnity, a paying bank could have an indemnity claim if it paid a legally equivalent substitute check that was created from a fraudulent cashier's check that the paying bank's fraud detection procedures would have caught and that the bank would have returned by its midnight deadline had it received the original check. However, if the substitute check was not subject to a warranty claim (because it met the legal equivalence requirements and there was only one payment request) the paying bank's indemnity would be limited to the amount of the substitute check plus interest and expenses.

3. The amount of an indemnity would be reduced in proportion to the amount of any amount loss attributable to the indemnified person's negligence or bad faith. This comparative negligence standard is intended to allocate liability in the same manner as the comparative negligence provision of § 229.38(c).

4. An indemnifying bank may limit the losses for which it is responsible under § 229.53 by producing the original check or a sufficient copy. However, production of the original check or a sufficient copy does not absolve the indemnifying bank from liability claims relating to a warranty the bank has provided under § 229.52 or any other law, including but not limited to subpart C of this part or the U.C.C.

C. 229.53(c) Subrogation of Rights

1. A bank that pays an indemnity claim is subrogated to the rights of the person it indemnified, to the extent of the indemnity it provided, so that it may attempt to recover that amount from another person based on an indemnity, warranty, or other claim. The person that the bank indemnified must comply with reasonable requests from the indemnifying bank for assistance with respect to the subrogated claim.

Example.

A paying bank indemnifies a drawer for a substitute check that the drawer alleged was a forgery that would have been detected had the original check instead been presented. The bank that provided the indemnity could pursue its own indemnity claim against the bank that presented the substitute check, could attempt to recover from the forger, or could pursue any claim that it might have under other law. The bank also could request from the drawer any information that the drawer might possess regarding the possible identity of the forger.

XXXIII. § 229.54 Expedited Recredit for Consumers

A. 229.54(a) Circumstances Giving Rise to a Claim

1. A consumer may make a claim for expedited recredit under this section only for a substitute check that he or she has received and for which the bank charged his or her deposit account. As a result, checks used to access loans, such as credit card checks or home equity line of credit checks, that are reconverted to substitute checks would not give rise to an expedited recredit claim, unless such a check was returned unpaid and the bank charged the consumer's deposit account for the amount of the returned check. In addition, a consumer who received only a statement that contained images of multiple substitute checks per page would not be entitled to make an expedited recredit claim, although he or she could seek redress under other provisions of law, such as § 229.52 or U.C.C. 4–401. However, a consumer who originally received only a statement containing images of multiple substitute checks per page but later received a substitute check, such as in response to a request for a copy of a check shown in the statement, could bring a claim if the other expedited recredit criteria were met. Although a consumer must at some point have received a substitute check to make an expedited recredit claim, the consumer need not be in possession of the substitute check at the time he or she submits the claim.

2. A consumer must in good faith assert that the bank improperly charged the consumer's account for the substitute check or that the consumer has a warranty claim for the substitute check (or both). The warranty in question could be a substitute check warranty described in § 229.52 or any other warranty that a bank provides with respect to a check under other law. A consumer could, for example, have a warranty claim under § 229.34(b), which contains returned check warranties that are made to the owner of the check.

3. A consumer's recovery under the expedited recredit section is limited to the amount of his or her loss, up to the amount of the substitute check subject to the claim, plus interest if the consumer's account is an interest-bearing account. The consumer's loss could include fees that resulted from the allegedly incorrect charge, such as bounced check fees that were imposed because the improper charge caused the bank to dishonor subsequently presented checks that it otherwise would have honored. A consumer who suffers a total loss greater than the amount of the substitute check plus interest could attempt to recover the remainder of that loss by bringing warranty, indemnity, or other claim under this subpart or other applicable law.

Examples.

a. A consumer who received a substitute check believed that he or she wrote the check for $150, but the bank charged his or her account for $1,500. The amount on the substitute check the consumer received is illegible. If the substitute check contained a blurry image of what was a legible original check, the consumer could have a claim for a breach of the legal equivalence warranty in addition to an improper charge claim. Because the amount of the check cannot be determined from the substitute check provided to the consumer, the consumer, if acting in good faith, could assert that the production of the original check or a better copy of the original check is necessary to determine the validity of the claim. The consumer in this case could attempt to recover his or her losses by using the expedited recredit procedure. The consumer's losses recoverable under § 229.54 could include the $1,350 he or she believed was incorrectly charged plus any improperly charged fees associated with that charge, up to $150 (plus foregone interest on the amount of the consumer's loss if the account was an interest-bearing account). The consumer could recover any additional losses, if any, under other law, such as U.C.C. 4–401 and 4–402.

b. A consumer received a substitute check for which his or her account was charged and believed that the original check from which the substitute was derived was a forgery. The forgery was good enough that analysis of the original check was necessary to verify whether the signature is that of the consumer. Under those circumstances, the consumer, if acting in good faith, could assert that the charge was improper, that he or she therefore had incurred a loss in the amount of the check (plus foregone interest if the account was an interest-bearing account), and that he or she needed the original check to determine the validity of the forgery claim. By contrast, if the signature on the substitute check obviously was forged (for example, if the forger signed a name other than that of the account holder) and there was no other defect with the substitute check, the consumer would not need the original check or a sufficient copy to determine the fact of the forgery and thus would not be able to make an expedited recredit claim under this section. However, the consumer would have a claim under U.C.C. 4–401 if the item was not properly payable.

B. 229.54(b) Procedures for Making Claims

1. The consumer must submit his or her expedited recredit claim to the bank within 40 calendar days of the later of the day on which the bank mailed or delivered, by a means agreed to by the consumer, (1) the periodic account statement containing information concerning the transaction giving rise to the claim, or (2) the substitute check giving rise to the claim. The mailing

or delivery of a substitute check could be in connection with a regular account statement, in response to a consumer's specific request for a copy of a check, or in connection with the return of a substitute check to the payee.

2. Section 229.54(b) contemplates more than one possible means of delivering an account statement or a substitute check to the consumer. The time period for making a claim thus could be triggered by the mailed, in-person, or electronic delivery of an account statement or by the mailed or in-person delivery of a substitute check. In-person delivery would include, for example, making an account statement or substitute check available at the bank for the consumer's retrieval under an arrangement agreed to by the consumer. In the case of a mailed statement or substitute check, the 40-day period should be calculated from the postmark on the envelope. In the case of in-person delivery, the 40-day period should be calculated from the earlier of the calendar day on which delivery occurred or the bank first made the statement or substitute check available for the consumer's retrieval.

3. A bank must extend the consumer's time for submitting a claim for a reasonable period if the consumer is prevented from submitting his or her claim within 40 days because of extenuating circumstances. Extenuating circumstances could include, for example, the extended travel or illness of the consumer.

4. For purposes of determining the timeliness of a consumer's actions, a consumer's claim is considered received on the banking day on which the consumer's bank receives a complete claim in person or by telephone or on the banking day on which the consumer's bank receives a letter or e-mail containing a complete claim. (But see paragraphs 9–11 of this section for a discussion of time periods related to oral claims that the bank requires to be put in writing.)

5. A consumer who makes an untimely claim would not be entitled to recover his or her losses using the expedited recredit procedure. However, he or she still could have rights under other law, such as a warranty or indemnity claim under subpart D, a claim for an improper charge to his or her account under U.C.C. 4–401, or a claim for wrongful dishonor under U.C.C. 4–402.

6. A consumer's claim must include the reason why the consumer believes that his or her account was charged improperly or why he or she has a warranty claim. A charge could be improper, for example, if the bank charged the consumer's account for an amount different than the consumer believes he or she authorized or charged the consumer more than once for the same check, or if the check in question was a forgery or otherwise fraudulent.

7. A consumer also must provide a reason why production of the original check or a sufficient copy is necessary to determine the validity of the claim identified by the consumer. For example, if the consumer believed that the bank charged his or her account for the wrong amount, the original check might be necessary to prove this claim if the amount of the substitute check were illegible. Similarly, if the consumer believed that his or her signature had been forged, the original check might be necessary to confirm the forgery if, for example, pen pressure or similar analysis were necessary to determine the genuineness of the signature.

8. The information that the consumer is required to provide under § 229.54(b)(2)(iv) to facilitate the bank's investigation of the claim could include, for example, a copy of the allegedly defective substitute check or information related to that check, such as the number, amount, and payee.

9. A bank may accept an expedited recredit claim in any form but could in its discretion require the consumer to submit the claim in writing. A bank that requires a recredit claim to be in writing must inform the consumer of that requirement and provide a location to which such a written claim should be sent. If the consumer attempts to make a claim orally, the bank must inform the consumer at that time of the written notice requirement. A bank that receives a timely oral claim and then requires the consumer to submit the claim in writing may require the consumer to submit the written claim within 10 business days of the bank's receipt of the timely oral claim. If the consumer's oral claim was timely and the consumer's written claim was received within the 10-day period for submitting the claim in writing, the consumer would satisfy the requirement of § 229.54(b)(1) to submit his or her claim within 40 days, even if the bank received the written claim after that 40-day period.

10. A bank may permit but may not require a consumer to submit a written claim electronically.

11. If a bank requires a consumer to submit a claim in writing, the bank may compute time periods for the bank's action on the claim from the date that the bank received the written claim. Thus, if a consumer called the bank to make an expedited recredit claim and the bank required the consumer to submit the claim in writing, the time at which the bank must take action on the claim would be determined based on the date on which the bank received the written claim, not the date on which the consumer made the oral claim.

12. Regardless of whether the consumer's communication with the bank is oral or written, a consumer complaint that does not contain all the elements described in § 229.54(b) is not a claim for purposes of § 229.54. If the consumer attempts to submit a claim but does not provide all the required information, then the bank has a duty to inform the consumer that the complaint does not constitute a claim under § 229.54 and identify what information is missing.

C. 229.54(c) Action on Claims

1. If the bank has not determined whether or not the consumer's claim is valid by the end of the 10th business day after the banking day on which the consumer submitted the claim, the bank must by that time recredit the consumer's account for the amount of the consumer's loss, up to the lesser of the amount of the substitute check or $2,500, plus interest if the account is an interest-bearing account. A bank must provide the recredit pending investigation for each substitute check for which the consumer submitted a claim, even if the consumer submitted multiple substitute check claims in the same communication.

2. A bank that provides a recredit to the consumer, either provisionally or after determining that the consumer's claim is valid, may reverse the amount of the recredit if the bank later determines that the claim in fact was not valid. A bank that reverses a recredit also may reverse the amount of any interest that it has paid on the previously recredited amount. A bank's time for reversing a recredit may be limited by a statute of limitations.

D. 229.54(d) Availability of Recredit

1. The availability of a recredit provided by a bank under § 229.54(c) is governed solely by § 229.54(d) and therefore is not subject to the availability provisions of subpart B. A bank generally must make a recredit available for withdrawal no later than the start of the business day after the banking day on which the bank provided the recredit. However, a bank may delay the availability of up to the first $2,500 that it provisionally recredits to a consumer account under § 229.54(c)(3)(i) if (1) the account is a new account, (2) without regard to the substitute check giving rise to the recredit claim, the account has been repeatedly overdrawn during the six month period ending on the date the bank received the claim, or (3) the bank has reasonable cause to believe that the claim is fraudulent. These first two exceptions are meant to operate in the same manner as the corresponding new account and repeated overdraft exceptions in subpart B, as described in § 229.13(a) and (d) and the commentary thereto regarding application of the exceptions. When a recredit amount for which a bank delays availability contains an interest component, that component also is subject to the delay because it is part of the amount recredited under § 229.54(c)(3)(i). However, interest continues to accrue during the hold period.

2. Section 229.54(d)(2) describes the maximum period of time that a bank may delay availability of a recredit provided under § 229.54(c). The bank may delay availability under one of the three listed exceptions until the business day after the banking day on which the bank determines that the consumer's claim is valid or the 45th calendar day after the banking day on which the bank received the consumer's claim, whichever is earlier. The only portion of the recredit that is subject to delay under § 229.54(d)(2) is the amount that the bank recredits under § 229.54(c)(3)(i) (including the interest component, if any) pending its investigation of a claim.

E. 229.54(e) Notices Relating to Consumer Expedited Recredit Claims

1. A bank must notify a consumer of its action regarding a recredit claim no later than the business day after the banking day that the bank makes a recredit, determines a claim is not valid, or reverses a recredit, as appropriate. As provided in § 229.58, a bank may provide any notice required by this section by U.S. mail or by any other means through which the consumer has agreed to receive account information.

2. A bank that denies the consumer's recredit claim must demonstrate to the consumer that the substitute check was properly charged or that the warranty claim was not valid, such as by explaining the reason that the substitute check charge was proper or the consumer's warranty claim was not valid. For example, if a consumer has claimed that the bank charged its account for an improper amount, the bank denying that claim must explain why it determined that the charged amount was proper.

3. A bank denying a recredit claim also must provide the original check or a sufficient copy, unless the bank is providing the claim denial notice electronically and the consumer has agreed to receive that type of information electronically. In that case, § 229.58 allows the bank instead to provide an image of the original check or an image of the sufficient copy that the bank would have sent to the consumer had the bank provided the notice by mail.

4. A bank that relies on information or documents in addition to the original check or sufficient copy when denying a consumer expedited recredit claim also must either provide such information or documents to the consumer or inform the consumer that he or she may request copies of such information or documents. This requirement does not apply to a bank that relies only on the original check or a sufficient copy to make its determination.

5. Models C–22 through C–25 in appendix C contain model language for each of three notices described in § 229.54(e). A bank may, but is not required to, use the language listed in the appendix. The Check 21 Act does not provide banks that use these models with a safe harbor. However, the Board has published these models to aid banks' efforts to comply with § 229.54(e).

F. 229.54(f) Recredit Does Not Abrogate Other Liabilities

1. The amount that a consumer may recover under § 229.54 is limited to the lesser of the amount of his or her loss or the amount of the substitute check, plus interest on that amount if his or her account earns interest. However, a consumer's total loss associated with the substitute check could exceed that amount, and the consumer could be entitled to additional damages under other law. For example, if a consumer's loss exceeded the amount of the substitute check plus interest and he or she had both a warranty and an indemnity claim with respect to the substitute check, he or she would be entitled to additional damages under § 229.53 of this subpart. Similarly, if a consumer was charged bounced check fees as a result of an improperly charged substitute check and could not recover all of those fees because of the § 229.54's limitation on recovery, he or she could attempt to recover additional amounts under U.C.C. 4–402.

XXXIV. § 229.55 Expedited Recredit Procedures for Banks

A. 229.55(a) Circumstances Giving Rise to a Claim

1. This section allows a bank to make an expedited recredit claim under two sets of circumstances: first, because it is obligated to provide a recredit, either to the consumer or to another bank that is obligated to provide a recredit in connection with the consumer's claim; and second, because the bank detected a problem with the substitute check that, if uncaught, could have given rise to a consumer claim.

2. The loss giving rise to an interbank recredit claim could be the recredit that the claimant bank provided directly to its consumer customer under § 229.54 or a loss incurred because the claimant bank was required to indemnify another bank that provided an expedited recredit to either a consumer or a bank.

Examples.

a. A paying bank charged a consumer's account based on a substitute check that contained a blurry image of a legible original check, and the consumer whose account was charged made an expedited recredit claim against the paying bank because the consumer suffered a loss and needed the original check or a sufficient copy to determine the validity of his or her claim. The paying bank would have a warranty claim against the presenting bank that transferred the defective substitute check to it and against any previous transferring bank(s) that handled that substitute check or another paper or electronic representation of the check. The paying bank therefore would meet each of the requirements necessary to bring an interbank expedited recredit claim.

b. Continuing with the example in paragraph a, if the presenting bank determined that the paying bank's claim was valid and provided a recredit, the presenting bank would have suffered a loss in the amount of the recredit it provided and could, in turn, make an expedited recredit claim against the bank that transferred the defective substitute check to it.

B. 229.55(b) Procedures for Making Claims

1. An interbank recredit claim under this section must be brought within 120 calendar days of the transaction giving rise to the claim. For purposes of computing this period, the transaction giving rise to the claim is the claimant bank's settlement for the substitute check in question.

2. When estimating the amount of its loss, § 229.55(b)(2)(ii) states that the claimant bank should include ''interest if applicable.'' The quoted phrase refers to any interest that the claimant bank or a bank that the claimant bank indemnified paid to a consumer who has an interest-bearing account in connection with an expedited recredit under § 229.54.

3. The information that the claimant bank is required to provide under § 229.55(b)(2)(iv) to facilitate investigation of the claim could include, for example, a copy of any written claim that a consumer submitted under § 229.54 or any written record the bank may have of a claim the consumer submitted orally. The information also could include a copy of the defective substitute check or information relating to that check, such as the number, amount, and payee of the check. However, a claimant bank that provides a copy of the substitute check must take reasonable steps to ensure that the copy is not mistaken for a legal equivalent of the original check or handled for forward collection or return.

4. The indemnifying bank's right to require a claimant bank to submit a claim in writing and the computation of time from the date of the written submission parallel the corresponding provision in the consumer recredit section (§ 229.54(b)(3)). However, the indemnifying bank also may require the claimant bank to submit a copy of the written or electronic claim submitted by the consumer under that section, if any.

C. 229.55(c) Action on Claims

1. An indemnifying bank that responds to an interbank expedited recredit claim by providing the original check or a sufficient copy of the original check need not demonstrate why that claim or the underlying consumer expedited recredit claim is or is not valid.

XXXV. § 229.56 Liability

A. 229.56(a) Measure of Damages

1. In general, a person's recovery under this section is limited to the amount of the loss up to the amount of the substitute check that is the subject of the claim, plus interest and expenses (including costs and reasonable attorney's fees and other expenses of representation) related to that substitute check. However, a person that is entitled to an indemnity under § 229.53 because of a breach of a substitute check warranty also may recover under § 229.53 any losses proximately caused by the warranty breach, including interest, costs, wrongfully-charged fees imposed as a result of the warranty breach, reasonable attorney's fees, and other expenses of representation.

2. A reconverting bank also may be liable under § 229.38 for damages associated with the illegibility of indorsements applied to substitute checks if that illegibility results because the reduction of the original check image and its placement on the substitute check shifted a previously-applied indorsement that, when applied, complied with appendix D. For more detailed discussion of this topic, see § 229.38 and the accompanying commentary.

B. 229.56(b) Timeliness of Action

1. A bank's delay beyond the time limits prescribed or permitted by any provision of subpart D is excused if the delay is caused by certain circumstances beyond the bank's control. This parallels the standard of U.C.C. 4–109(b).

C. 229.56(c) Jurisdiction

1. The Check 21 Act confers subject matter jurisdiction on courts of competent jurisdiction and provides a time limit for civil actions for violations of subpart D.

D. 229.56(d) Notice of Claims

1. This paragraph is designed to adopt the notice of claim provisions of U.C.C. 4–207(d) and 4–208(e), with an added provision that a timely § 229.54 expedited recredit claim satisfies the generally-applicable notice requirement. The time limit described in this paragraph applies only to notices of warranty and indemnity claims. As provided in § 229.56(c), all actions under § 229.56 must

be brought within one year of the date that the cause of action accrues.

XXXVI. Consumer Awareness

A. 229.57(a) General Disclosure Requirement and Content

1. A bank must provide the disclosure required by § 229.57 under two circumstances. First, each bank must provide the disclosure to each of its consumer customers who receives paid checks with his or her account statement. This requirement does not apply if the bank provides with the account statement something other than paid original checks, paid substitute checks, or a combination thereof. For example, this requirement would not apply if a bank provided with the account statement only a document that contained multiple check images per page. Second, a bank also must provide the disclosure when it (a) provides a substitute check to a consumer in response to that consumer's request for a check or check copy or (b) returns a substitute check to a consumer depositor. A bank must provide the disclosure each time it provides a substitute check to a consumer on an occasional basis, regardless of whether the bank previously provided the disclosure to that consumer.

2. A bank may, but is not required to, use the model disclosure in appendix C–5A to satisfy the disclosure content requirements of this section. A bank that uses the model language is deemed to comply with the disclosure content requirement(s) for which it uses the model language, provided the information in the disclosure accurately describes the bank's policies and practices. A bank also may include in its disclosure additional information relating to substitute checks that is not required by this section.

3. A bank may, by agreement or at the consumer's request, provide the disclosure required by this section in a language other than English, provided that the bank makes a complete English notice available at the consumer's request.

B. 229.57(b) Distribution

1. A consumer may request a check or a copy of a check on an occasional basis, such as to prove that he or she made a particular payment. A bank that responds to the consumer's request by providing a substitute check must provide the required disclosure at the time of the consumer's request if feasible. Otherwise, the bank must provide the disclosure no later than the time at which the bank provides a substitute check in response to the consumer's request. It would not be feasible for a bank to provide notice to the consumer at the time of the request if, for example, the bank did not know at the time of the request whether it would provide a substitute check in response to that request, regardless of the form of the consumer's request. It also would not be feasible for a bank to provide notice at the time of the request if the consumer's request was mailed to the bank or made by telephone, even if the bank knew when it received the request that it would provide a substitute check in response. A bank's provision to the consumer of something other a substitute check, such as a photocopy of a check or a statement containing images of multiple substitute checks per page, does not trigger the notice requirement.

2. A consumer who does not routinely receive paid checks might receive a returned substitute check. For example, a consumer deposits an original check that is payable to him or her into his or her deposit account. The paying bank returns the check unpaid and the depositary bank returns the check to the depositor in the form of a substitute check. A depositary bank that provides a returned substitute check to a consumer depositor must provide the substitute check disclosure at that time.

XXXVII. Variation by Agreement

Section 229.60 provides that banks involved in an interbank expedited recredit claim under § 229.55 may vary the terms of that section by agreement, but otherwise no person may vary the terms of subpart D by agreement. A bank's decision to provide more generous protections for consumers than this subpart requires, such as by providing consumers additional time to submit expedited claims under § 229.54 under non-exigent circumstances, would not be a variation prohibited by § 229.60.

* * * * *

■ 54. In appendix E, in newly-redesignated paragraph XXXVIII., revise the heading and paragraph A.1. to read as follows:

* * * * *

XXXVIII. Appendix C—Model Availability Policy Disclosures, Clauses, and Notices; and Model Substitute Check Policy Disclosure and Notices

A. Introduction

1. Appendix C contains model disclosure, clauses, and notices that may be used by banks to meet their disclosure and notice responsibilities under the regulation. Banks using the models (except models C–22 through C–25) properly will be deemed in compliance with the regulation's disclosure requirements.

* * * * *

■ 55. In appendix E, in newly-redesignated paragraph XXXVIII.B., revise the heading, the first sentence of paragraphs B.1.a. and the first sentence of paragraph B.1.c. and add a new paragraph B.7., to read as follows:

XXXVIII. * * *

B. Model Availability Policy and Substitute Check Policy Disclosures, Models C–1 through C–5A

1. *Models C–1 through C–5A generally.*

a. Models C–1 through C–5A are models for the availability policy disclosures described in § 229.16 and substitute check policy disclosure described in § 229.57.

* * *

* * * * *

c. Models C–1 through C–5A generally do not reflect any optional provisions of the regulation, or those that apply only to certain banks. * * *

* * * * *

7. *Model C–5A*

A bank may use this form when it is providing the disclosure to its consumers required by § 229.57 explaining that a substitute check is the legal equivalent of an original check and the circumstances under which the consumer may make a claim for expedited recredit.

* * * * *

■ 56. In appendix E, in newly-redesignated paragraph XXXVIII.D., revise the heading, the first sentence of paragraph D.1. and add new paragraphs D.11. through D.15. to read as follows:

XXXVIII. * * *

D. Model Notices, Models C–12 through C–25

1. Models C–12 through C–25 generally. Models C–12 through C–25 provide models of the various notices required by the regulation. * * *

* * * * *

11. *Models C–22 through C–25 generally.* Models C–22 through C–25 provide models for the various notices required when a consumer who receives substitute checks makes an expedited recredit claim under § 229.54 for a loss related to a substitute check. The Check 21 Act does not provide banks that use these models with a safe harbor. However, the Board has published these models to aid banks' efforts to comply with § 229.54(e).

12. *Model C–22 Valid Claim Refund Notice.* A bank may use this model when crediting the entire amount or the remaining amount of a consumer's expedited recredit claim after determining that the consumer's claim is valid. This notice could be used when the bank provides the consumer a full recredit based on a valid claim determination within ten days of the receipt of the consumer's claim or when the bank recredits the remaining amount of a consumer's expedited recredit claim by the 45th calendar day after receiving the consumer's claim, as required under § 229.54(e)(1).

13. *Model C–23 Provisional Refund Notice.* A bank may use this model when providing a full or partial expedited recredit to a consumer pending further investigation of the consumer's claim, as required under § 229.54(e)(1).

14. *Model C–24 Denial Notice.* A bank may use this model when denying a claim for an expedited recredit under § 229.54(e)(2).

15. *Model C–25 Reversal Notice.* A bank may use this model when reversing an expedited recredit that was credited to a consumer's account under § 229.54(e)(3).

* * * * *

■ 57. In appendix E, remove the phrase ''the Act'' wherever it appears and add the phrase ''the EFA Act'' in its place.

By order of the Board of Governors of the Federal Reserve System, July 27, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–17362 Filed 8–3–04; 8:45 am]

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Federal Register

Wednesday,
August 4, 2004

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Astragalus magdalenae var. peirsonii (Peirson's milk-vetch); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI77

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus magdalenae* var. *peirsonii* (Peirson's milk-vetch)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the federally threatened *Astragalus magdalenae* var. *peirsonii* (Peirson's milk-vetch) pursuant to the Endangered Species Act of 1973, as amended (Act). We designate a total of approximately 21,836 acres (ac) (8,848 hectares (ha)) of critical habitat in Imperial County, California.

DATES: This rule becomes effective on September 3, 2004.

ADDRESSES: All comments and materials received during the comment periods and supporting documentation used in preparation of the proposed and final rules will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92009. The final rule, economic analysis, and map will also be available via the Internet at *http://carlsbad.fws.gov.*

FOR FURTHER INFORMATION CONTACT: Field Supervisor, Carlsbad Fish and Wildlife Service (telephone 760/431–9440; facsimile 760/431–9618).

SUPPLEMENTARY INFORMATION: Please see the proposed rule for critical habitat for *Astragalus magdalenae* var. *peirsonii* for a discussion on critical habitat providing little additional protection to species, role of critical habitat in implementing the Act, and the procedural and resource difficulties in designating critical habitat (68 FR 46143).

Background

For a general discussion of the role of critical habitat in implementing the Act, background information on the biology of *Astragalus magdalenae* var. *peirsonii,* and a description of previous Federal actions, including our determination that designating critical habitat for this species is prudent, please see our August 5, 2003, proposed rule (68 FR 46143). On November 15, 2001, the Center for Biological Diversity and California Native Plant Society filed a lawsuit in the U.S. District Court for the Southern District of California challenging our determination not to designate critical habitat for eight desert plants, including *Astragalus magdalenae* var. *peirsonii* (*Center for Biological Diversity et al.* v. *Norton,* No. 01 CV 2101). A second lawsuit also asserting the same challenge was filed on November 21, 2001, by the Building Industry Legal Defense Fund (Building Industry Legal Defense Fund v. Norton, No. 01 CV 2145). On July 1, 2002, the court ordered the Service to complete a review of the prudency determination and, if prudent, to finalize critical habitat for the plant on or before July 28, 2004. On April 6, 2004, we published a notice of availability of the draft economic analysis for the designation of critical habitat and reopened the comment period for the proposed rule and draft economic analysis. This second comment period closed on May 6, 2004.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for *Astragalus magdalenae* var. *peirsonii* in the proposed rule published on August 5, 2003 (68 FR 46143). We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule. During the comment period that opened on August 5, 2003, and closed on October 6, 2003, we received 23 comment letters directly addressing the proposed critical habitat designation: 2 from peer reviewers, 1 from a Federal agency, and 20 from organizations or individuals. During the comment period that opened on April 6, 2004, and closed on May 6, 2004, we received 10 comment letters directly addressing the proposed critical habitat designation and the draft economic analysis. Of these latter comments, 1 was from a peer reviewer, 1 from a Federal agency, and 8 were from organizations. Eighteen commenters supported the designation of critical habitat for *A. magdalenae* var. *peirsonii* and six opposed the designation. Nine letters included comments or information, but did not express support or opposition to the proposed critical habitat designation. Comments received were grouped into three general issues specifically relating to the proposed critical habitat designation for *A. magdalenae* var. *peirsonii,* and are addressed in the following summary and incorporated into the final rule as appropriate. We did not receive any requests for a public hearing.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from eleven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from three of the peer reviewers. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review Comments

Comment 1: One commenter supported the model used to propose critical habitat for *Astragalus magdalenae* var. *peirsonii,* but pointed to the need for using metapopulation approaches, experimental approaches, and data from ecologically similar species. The commenter suggested future approaches for modeling, monitoring, and research.

Our Response: We agree that having the results of these modeling and research efforts would improve the process of delineating critical habitat, however, such data is not available. The suggested approaches also may have a benefit in developing a recovery plan or management and conservation plans for *Astragalus magdalenae* var. *peirsonii.*

Comment 2: The proposed rule cites the finding by Romspert and Burk (1979) that older plants were the primary seed producers and that plants that become reproductive in the first season do not make significant contributions to the seed bank. However, Phillips and Kennedy (2002) concluded that first-year plants can have a significant effect on the seed bank.

Our Response: First-year plants that flower and set seeds likely contribute to the seed bank. In a comparison between the mean number of fruits from older and younger plants, Phillips and Kennedy (2002) found that older plants had a mean of 171.5 fruits compared with an estimated 5 fruits for first-year plants. With an average of 14 seeds per fruit (Barneby 1964, TOA 2001), younger plants could produce 70 seeds while older plants could produce almost 2400 seeds per plant. Consequently, both older and younger plants that

flower and set seeds are needed to maintain the population.

Comment 3: One commenter indicated a seed bank analysis should have been completed for areas included in critical habitat on the basis of the probability of seeds being present in areas contiguous to, and having habitat continuity with, areas where *Astragalus magdalenae* var. *peirsonii* plants have been known to occur.

Our Response: We considered the work by Phillips and Kennedy (2002, 2003) on the seed bank for *A. magdalenae* var. *peirsonii* in assessing areas to include as critical habitat. Their work suggests that the seed bank is present in areas contiguous to and having habitat continuity where *A. magdalenae* var. *peirsonii* is known to occur. Their work further supported the inclusion of gaps between transects and cells in the essential habitat model where no standing plants of *A. magdalenae* var. *peirsonii* were observed.

Comment 4: The critical habitat map should be revised to include only substantial occurrences of the plant, not isolated occurrences, and connections between these areas. The proposed boundaries appear to include the entire dune system and much unoccupied, unfavorable habitat, particularly in Subunit C and Subunit D.

Our Response: Please see our responses to Public Comments Issues 1 and 2.

Public Comments

Issue 1: Biological Justification and Methodology

Comment 1: One commenter indicated we apparently identified all areas that may be occupied by *Astragalus magdalenae* var. *peirsonii* and included them in the proposed critical habitat designation without identifying why they are essential to the conservation of the species.

Our Response: We did not identify and propose critical habitat for all areas that may be occupied by *Astragalus magdalenae* var. *peirsonii.* For example, portions of the areas between Subunits A and B (south of Highway 78), between Subunits B and Subunits C and D (north and south of Interstate 8), and between Subunits C and D likely support low densities of standing plants, root crowns, or seed bank where the habitat is suitable. The gaps between Subunits A, B, C, and D were not proposed as critical habitat because these areas were not considered essential to the conservation of *A. magdalenae* var. *peirsonii.* We also state in the proposed rule that ''Outlier occurrences evidenced only by WESTEC 1977 were not included because of the age of the report and the lack of substantiation by more recent BLM surveys.'' (68 FR 46149). For the areas that were proposed as critical habitat, we provide a discussion of the essential habitat model and the use of the model to determine and justify those areas essential to the conservation of *A. magdalenae* var. *peirsonii. See also* our response to Comment 4.

Comment 2: One commenter suggested that areas where plants have not been mapped should be excluded.

Our Response: In the proposed rule, we state that ''Surveys conducted by BLM indicate variability in occurrences of standing plants from year to year'' and ''if standing plants were not found in a particular grid cell during a survey, but were recorded as present'' in that same grid cell in other survey years, we concluded that the grid cell was occupied (68 FR 46150). Not unexpectedly, gaps occur between transects because they were randomly selected across the length of the Algodones Dunes. We analyzed the gaps between transects to determine whether to include the intervening areas in the development of the essential habitat model. We state in the proposed rule that ''grid squares where this plant has not been encountered are included as critical habitat if they are contiguous with grid squares where the plant has been found and possess the primary constituent elements'' (68 FR 46151). Moreover, surveys conducted by Thomas Olson and Associates (TOA) (2001) filled in gaps between BLM's surveyed transects and grid cells. Thus, we proposed and designated critical habitat where plants were not mapped.

Comment 3: Various commenters indicated we should have included all of the Algodones Dunes.

Our Response: Astragalus magdalenae var. *peirsonii* has a limited distribution within the Algodones Dunes. Certain areas within the Algodones Dunes, such as areas characterized by desert pavement or by creosote bush scrub, do not support *A. magdalenae* var. *peirsonii.* The gaps between Subunits A, B, C, and D were not proposed as critical habitat because these areas were not considered essential to the conservation of *A. magdalenae* var. *peirsonii* (*see* response to Comment 1). Developed areas, Off-Highway Vehicle (OHV) staging areas, and disturbed areas along roadways were not proposed as critical habitat because these limited areas no longer support an intact active sand dune system with natural expanses of slopes and swales (*see* response to Comment 6). Consequently, the entire Algodones Dunes was not proposed or designated as critical habitat.

Comment 4: Commenters indicated the proposed critical habitat does not adequately provide for habitat connectivity and recovery by not including large, well-connected reserves. They stated that we should have followed conservation biology principles of reserve design to provide corridors for connectivity among the critical habitat subunits, or included all of the current and historical range of *A. magdalenae* var. *peirsonii* in critical habitat.

Our Response: Consistent with the principles of conservation biology, Subunits A and B are relatively large contiguous blocks of habitat that encompass the most important areas identified by our essential habitat model. Moreover, we stated in the proposed rule that ''Based on observations of unimpeded sand and wind movement across existing paved roads, we did not expect that the paved roads would represent a barrier to the dispersal of the fruits and seeds of *Astragalus magdalenae* var. *peirsonii,*'' (68 FR 46150) and the ''discontinuities associated with the highways are likely traversed occasionally by mature fruits dispersed by the wind as well as by pollinators.'' (68 FR 46152). Therefore, we do not believe that we need to provide, in the critical habitat designation, corridors for connectivity among the critical habitat Subunits A and B or that our designation of critical habitat does not follow the principles of conservation biology.

Comment 5: The proposed rule did not adequately explain why areas were excluded, including unoccupied habitat, developed areas, OHV staging areas, disturbed areas along roadways, areas between the southern areas (Subunit C and Subunit D), and areas connecting the southern and northern subunits.

Our Response: We did not propose critical habitat in areas that did not meet the definition of critical habitat under section 3(5)(A) of the Act. Developed areas, OHV staging areas, and disturbed areas along roadways were not proposed as critical habitat because these limited areas no longer support an intact active sand dune system with natural expanses of slopes and swales. For example, we state in the proposed rule that ''Significant impacts from OHV use on *A. magdalenae* var. *peirsonii* have been observed at and near OHV staging areas'' (68 FR 46145) and we believe these OHV staging areas no longer provide the primary constituent elements for this species. The areas between Subunits C and D and areas

connecting the northern subunit (Subunit A) and southern subunits (Subunits B, C, and D) were not proposed as critical habitat because these areas were not considered essential to the conservation of *A. magdalenae* var. *peirsonii.* See our response to Comment 4 for our explanation that these areas were not essential to the conservation of *A. magdalenae* var. *peirsonii.*

Comment 6: One commenter expressed the opinion that, although OHVs may destroy individual plants, the ''churning'' by OHVs aids the propagation of seeds.

Our Response: The commenter did not provide any additional information or data to support their opinion that ''churning'' by OHVs aids in the propagation of seeds. We were unable to incorporate this suggestion in the final rule.

Comment 7: No genetic information or population size estimates are included in the proposed rule. There is no ''correct'' demographic model that incorporates the spatial and temporal complexity exhibited by *Astragalus magdalenae* var. *peirsonii.*

Our Response: Critical habitat designations are based on the best available information. Genetic information, population size estimates, and demographic models are not currently available. If this type of information became available, it would be helpful in the development of a recovery plan and management and conservation plans for this species.

Comment 8: One commenter stated *Astragalus magdalenae* var. *peirsonii* is not in danger of going extinct and grows in several other areas. The commenter provided a Web site printout suggesting this species may occur in or near Joshua Tree National Park.

Our Response: Astragalus magdalenae var. *peirsonii* is listed as a ''threatened'' species. The term ''threatened species'' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. In contrast, the term ''endangered species'' means any species which is in danger of extinction throughout all or a significant portion of its range. A search of official Web sites for Joshua Tree National Park and the National Park Service provides no known locations of this plant on any National Park Service lands. Two plant lists for Joshua Tree National Monument (now Park) also did not reference this plant. The Algodones Dunes is the only location where we have confirmed the current existence of *A. magdalenae* var. *peirsonii* in the United States.

Comment 9: The acreages for each of the critical habitat subunits were not provided in the proposed rule.

Our Response: We have included the acreages for each subunit in the final critical habitat designation.

Issue 2: Legal and Procedural

Comment 10: The North Algodones Dune Wilderness is a 32,000-acre preserve for *Astragalus magdalenae* var. *peirsonii,* which should be considered in all decisions about critical habitat and listing for species found in the wilderness area. Subunit A should be removed from critical habitat because it is included in the wilderness area and already protected from most human contact. Subunit B, which includes the middle dune areas that have intense management efforts, other areas of habitat considered marginal for *A. magdalenae* var. *peirsonii,* and areas having only small stands of the species also should be removed from critical habitat designation.

Our Response: The North Algodones Dune Wilderness was designated a wilderness area to protect a number of rare and endemic plant and animal species, including *Astragalus magdalenae* var. *peirsonii.* The existence of *A. magdalenae* var. *peirsonii* in this designated wilderness area was considered when listing this species as threatened rather than endangered, as was originally proposed (57 FR 19844). Management of the North Algodones Dune Wilderness takes the form of ''minimal and subtle on-site controls and restrictions'' BLM (2003). The wilderness area is essential for the survival of *Astragalus magdalenae* var. *peirsonii.,* however, the area is not specifically managed for this plant. The North Algodones Dune Wilderness was not excluded from the critical habitat designation because the habitat within the Wilderness meets the definition of critical habitat and is not otherwise appropriate for exclusion under 4(b)(2). See Comments 1 and 5 for the basis for other areas being included or excluded in the critical habitat designation.

Comment 11: The BLM's Recreation Area Management Plan (RAMP) does not address the species-specific management needs and measures for *Astragalus magdalenae* var. *peirsonii.*

Our Response: As noted in the proposed rule, the RAMP does not include active management for *Astragalus magdalenae* var. *peirsonii.* Consequently, BLM lands covered by the RAMP are included in the critical habitat designation. The RAMP includes an intensive monitoring program for *A. magdalenae* var. *peirsonii* that is being implemented by BLM. Based on this monitoring program, management needs for this species will be better understood. The RAMP outlines the management of the Imperial San Dunes Recreation Area to maximize recreational opportunities. Monitoring of Peirson's milk-vetch is a component of this RAMP.

Comment 12: The Bureau of Reclamation stated that a 1-mile-long, 1,000-foot-wide area along All-American Canal in Critical Habitat Subunit D should be exempted from the critical habitat designation. The Bureau of Reclamation received a Biological and Conference Opinion of the All-American Canal Lining Project, dated February 9, 1996.

Our Response: Subunit D was not carried forward to the final designation of critical habitat because of the relatively small size and separation from the other critical habitat subunits. We considered the most important areas for *Astragalus magdalenae* var. *peirsonii* to extend along the central westerly spine of the Algodones Dunes. The previously proposed Subunit D was located along the easterly edge of the main sand dune formations at the southern end of the Algodones Dunes. In general, low numbers of *Astragalus magdalenae* var. *peirsonii* were found in the vicinity of the former Subunit D. The previously proposed Subunit D was also divided by the All-American Canal (Canal), with the majority of the subunit occurring northeast of the Canal. The Canal likely acts as a barrier to the dispersal of wind-blown seed and seed capsules, thereby isolating the northeast section of the former Subunit D from the rest of the Algodones Dunes. Thus, we determined that subunit D is not essential to the conservation of *Astragalus magdalenae* var. *peirsonii.* While this area is not designated as critical habitat, Federal agencies still have the requirement to consult with the Service under section 7 of the Act for their actions that may affect *Astragalus magdalenae* var. *peirsonii.*

Comment 13: Since all existing data show no historic or recent decline in the species, what constitutes recovery of the species?

Our Response: The data collected by BLM demonstrates a high degree of annual variability in the number of *Astragalus magdalenae* var. *peirsonii* plants observed during their surveys. The high variability is influenced by several factors, including rainfall patterns within the Algodones Dunes. For example, BLM counted 5,064 plants in 1998 (higher than average rainfall) and 942 plants in 1999 and 86 plants in 2000 (both years with lower than average rainfall) along these transects.

Astragalus magdalenae var. *peirsonii* has apparently been extirpated from Borrego Valley in eastern San Diego County, not having been seen there since 1959 and not located in 1978 surveys (Spolsky 1978). The periodically low numbers and restricted range of *A. magdalenae* var. *peirsonii* make it vulnerable to threats discussed in the final rule listing this plant. BLM has initiated a large-scale monitoring program for *A. magdalenae* var. *peirsonii* that will provide valuable information on population trends for this species (BLM 2003).

Recovery is defined in our regulations (50 CFR 402.02) as ''improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.'' The reasons for listing *A. magdalenae* var. *peirsonii* are detailed in the proposed (57 FR 19844) and final (63 FR 53596) rules to list the species as threatened. To achieve recovery, the threats must be eliminated, reduced, or managed to the extent that the status of *A. magdalenae* var. *peirsonii* no longer meets the definition of threatened (*i.e.*, in danger of becoming endangered in the foreseeable future throughout all or a significant portion of its range). Objective and measurable criteria included in a recovery plan are used to determine when a species has recovered and can be delisted. A draft recovery plan for *A. magdalenae* var. *peirsonii* is currently in preparation.

Comment 14: Two commenters expressed concern that the detailed legal descriptions used to define the areas proposed for inclusion in critical habitat do not allow easy comprehension of the critical habitat boundaries.

Our Response: Our regulations (50 CFR 17.94(b) and 50 CFR 424.12(c)) set forth the requirements for describing areas included in a critical habitat designation. Although maps are included, such maps are provided for reference purposes only to guide Federal agencies and other interested parties in locating the general critical habitat boundaries. Critical habitat subunits must be described by specific limits using reference points found on standard topographic maps of the area. We are required to provide legal definitions of the boundaries. The boundaries for critical habitat are provided as Universal Transverse Mercator (UTM) North American Datum coordinates that describe the critical habitat boundaries.

Comment 15: Determination of critical habitat should be postponed until completion of the status review announced in the 90-day finding (68 FR 52784) on a petition to delist *Astragalus magdalenae* var. *peirsonii.*

Our Response: Notice of the 12-month finding on a petition to delist *Astragalus magdalenae* var. *peirsonii* was published on June 4, 2004 (69 FR 31523). After reviewing the best scientific and commercial information available, we found that the petitioned action was not warranted. *Astragalus magdalenae* var. *peirsonii* is retained as a threatened species under the Act.

Comment 16: One commenter expressed the opinion that the proposed critical habitat represents a closure of the area to OHVs and constitutes a ''taking.'' Several commenters also seemed to believe that the designation would result in these areas being closed to OHVs and other human activity.

Our Response: Proposed or final designation of critical habitat does not of itself require that an area, including any of the BLM management areas within the Algodones Dunes, be closed to any particular activity. In the case of Federal lands, which constitute the overwhelming majority of the proposed and designated critical habitat, or federally funded or permitted activities, the designation requires the Federal agency in question to consult with the Service under section 7 of the ESA as to whether any activity which might adversely modify the critical habitat would in fact do so.

A section 7 consultation on the impact of BLM management of the Dunes, including the RAMP, on the *Astragalus magdalenae* var. *peirsonii,* and a conference on the proposed critical habitat, has been underway for some time. However, as of the date of this designation of critical habitat, it has not been concluded. We therefore do not know whether any closures might result from the consultation and conference, or whether there might be subsequent litigation, which might lead to closures of some or all of the area. All we can say at this time is that the designation of critical habitat does not of itself require closures to OHV or other human uses.

On the other hand, the designation does not affect land ownership or establish a refuge, wilderness, reserve, preserve or other type of conservation area. It does not affect activities on private land unless the landowner requires a Federal permit, funding or other assistance to conduct the activity. We prepared a Takings Implications Assessment for the proposed and final designations of critical habitat for *Astragalus magdalenae* var. *peirsonii* as required by Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''). These assessments concluded that the designation of critical habitat did not pose significant takings implications.

Comment 17: One comment letter recommended we provide more maps showing clearer details of proposed critical habitat, the historic range of *Astragalus magdalenae* var. *peirsonii,* and a detailed political map of the area.

Our Response: The maps we publish are limited by the printing capabilities of the **Federal Register** and the Code of Federal Regulations. We can provide more accurate maps on request, as well as answer questions regarding particular areas. Please contact the Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** section above) for assistance.

Comment 18: One commenter expressed neither support nor opposition to the proposed designation of critical habitat, but requested a ''plan'' and map for the proposed critical habitat.

Our Response: We do not develop management plans or recovery plans for designated critical habitat. The proposed and final rules include maps and legal descriptions of the critical habitat. See the response to Comment 17 regarding availability of more detailed maps.

Comment 19: One commenter recommended that we give full consideration to the threats from OHVs in the final rule.

Our Response: Critical habitat designation identifies areas essential to the conservation of the species that may require special management considerations (*see* Comment 1). Critical habitat does not directly address threats to the species. Instead, Federal agencies must consult with the Service on their actions that may affect critical habitat and ensure that their actions do not destroy or adversely modify critical habitat.

Issue 3: Economic Issues

Comment 20: One commenter stated the ''economic analysis'' in the notice of proposed rulemaking was incomplete and inadequate. Other commenters indicated the economic analysis must be included in the proposed rule, and the proposed rule should be revised to include an economic analysis and published again for review. Commenters were concerned that the public would not be able to comment on the economic analysis.

Our Response: The proposed rule did not contain an economic analysis. As is our usual practice because of the urgency of court orders the proposal indicated that we would announce the

availability of the draft economic analysis at a later date and would at that time seek public review and comment on the draft economic analysis. We published a notice of availability for the economic analysis in the **Federal Register** on April 6, 2004. That notice also reopened the comment period on the proposed rule and the draft economic. The comment period closed on May 6, 2004.

Comment 21: Commenters suggested that the benefits, such as non-consumptive uses, resulting from the designation of critical habitat to protect *Astragalus magdalenae* var. *peirsonii* should be taken into account.

Our Response: We are unable to quantify the benefits of non-consumptive uses resulting from critical habitat. While the ISDRA offers opportunities for non-OHV recreation, such as hiking and horseback riding, historical use patterns indicate that the number of individuals participating in these activities is far less than those involved in OHV-based recreation. As such, the analysis focuses on economic impacts to OHV enthusiasts and OHV-related businesses. The published economics literature has documented that real social welfare benefits can result from the conservation and recovery of endangered and threatened species. Regional economies and communities can benefit from the preservation of healthy populations of endangered and threatened species, and the habitat on which these species depend.

In Executive Order 12866, the Office of Management and Budget (OMB) directs Federal agencies to provide an assessment of costs and benefits of proposed regulatory actions. However, in its guidance for implementing Executive Order 12866, OMB acknowledges that often it may not be feasible to monetize, or even quantify, the benefits of environmental regulations. Where benefits cannot be quantified, OMB directs agencies to describe the benefits of a proposed regulation qualitatively. Given the limitations associated with estimating the benefits of critical habitat for *Astragalus magdalenae* var. *peirsonii,* the Service believes that the benefits of critical habitat are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking. Thus, we have qualitatively described the benefits in the final rule and we have not used the benefits of non-consumptive uses in our economic analysis.

Comment 21: One commenter objected to a statement that the proposed rule would not impose a cost on the OHV industry.

Our Response: The economic analysis considered a No Closure Scenario (BLM Management Areas are not closed to OHV recreation as a result of critical habitat) and a Closure Scenario (BLM Management Areas are closed to OHV recreation as a result of critical habitat) to estimate the economic costs of designating critical habitat. Under the No Closure Scenario, the annual efficiency impacts associated with future *Astragalus magdalenae* var. *peirsonii* protection associated with administrative and project modification costs only (such as a Federal agency compliance with section 7 of the Act) would be approximately $0.6 million. Under the No Closure Scenario, losses to OHV users would be zero.

Under the Closure Scenario, the efficiency effects would be associated with administrative costs, project modification costs, and consumer surplus losses to OHV users. That is, efficiency effects would be the sum of the administrative and project modification costs ($0.57 million) and the consumer surplus contribution associated with the affected regions. If all of the areas designated as critical habitat within the Imperial Sand Dunes Recreation Area (ISDRA) were closed to OHV use, the efficiency effects would range from $9.5 million per year to $10.5 million per year ($0.57 million per year in administrative and project modification costs plus consumer surplus impacts ranging from $8.9 million per year to $9.9 million per year) (2003 dollars). If all of the areas designated as critical habitat within the ISDRA were closed to OHV use, the regional economy would see an upper bound reduction in output of $55 million to $124 million in year 2013 (2003 dollars), and a potential loss in employment of 1,207 to 2,585 jobs. If no closures were to take place, the lower bound regional economic impact would be zero.

For the regulatory flexibility analysis, we identified the OHV industry as being the only small entities that could be affected by the designation of critical habitat. The designation of critical habitat only affects Federal agencies that must consult on impacts to critical habitat under section 7 of the Act. An analysis of past section 7 consultations revealed that business activities of the OHV industry have not directly triggered section 7 consultations in the past and are unlikely to trigger future section 7 consultations. Therefore, we concluded that critical habitat would not create new costs for small entities to comply with the designation.

Comment 22: One commenter believes that the range of forecast economic impacts is too wide (*i.e.*, scenarios in the DEA range from no closure to blanket closures of certain areas).

Our Response: Given the uncertainty in the nature and scope of future limitations of OHV use in the Imperial Sand Dunes Recreation Area (ISDRA) associated with PMV conservation measures, the analysis provides impact measures under a range of scenarios, from no closures to complete closure. As proposed in the 2003 Biological Opinion issued by the Service on management of the ISDRA, BLM has initiated an extensive monitoring program for the PMV. BLM proposes to reinitiate consultation with the Service in four years based on information obtained from monitoring or studies. BLM also proposes to reinitiate sooner than four years if the PMV population in any Management Area falls to 50 percent of the baseline level in a subsequent year with comparable rainfall at or above the long-term mean (Service, 2003). This future consultation has the potential to result in additional management actions to protect the PMV, although currently no actions are anticipated that would reduce OHV opportunities or adversely impact the regional economy. Given uncertainties related to future management decisions and biological factors, narrowing the range of potential scenarios is not possible at this time. As a result, the analysis can be used to determine the social welfare and regional economic impacts that might occur under a range of potential future management actions related specifically to closure scenarios. Both technical reviewers of the draft report concluded that this approach is appropriate given the uncertainty associated with future policy decisions.

Comment 23: Several commenters note that the analysis underestimates expenditures made by ISDRA visitors. Commenters provide estimates of expenditures per trip ranging from $1,000 to $2,000.

Our Response: The analysis recognizes that OHV users incur large trip-related expenses when visiting the ISDRA. However, the high-end estimates reported by several commenters may not represent the average of expenditures across all groups who visit the dunes, and overstates the expenditures made by the average visitor within the two counties included in the analysis.

The $265 to $515 per trip expenditure range used in the analysis is derived from an American Sand Association newsletter (dating May 2003), and is

intended to represent an average across the hundreds of thousands of trips taken to the ISDRA each year. Clearly some visitors spend more; however, the range used is intended to represent an average. More important, the expenditure range applied in the DEA is used to represent expenditures by visitors solely within Imperial and Yuma Counties. BLM and OHV stakeholder groups indicate that many ISDRA visitors purchase goods and services outside of Imperial and Yuma Counties (*e.g.* gas, groceries, supplies, and equipment are purchased within counties of origin featured in Exhibit 3–1 of the report).

The report's trip expenditure assumptions are similar to estimates used in an economic study conducted by BLM in its Final Environmental Impact Statement for the Imperial Sand Dunes Recreation Area Management Plan (May 2003). The BLM study's estimate of $260 in expenditures per household OHV trip is taken from a California Department of Parks and Recreation Off-Highway Vehicle study. This estimate is assumed to represent the portion of expenditures spent within the local economy, consisting of Imperial and Yuma Counties. The high-end expenditure-per-trip estimates provided by commenters likely do not represent purchases made entirely within the counties modeled in the analysis.

Technical reviewers of the DEA note that visitor expenditure estimates are critical to estimating the regional economic impacts and support the assumptions employed within the DEA. Moreover, expenditures generated by applying the $250–$515 range to estimated number of ISDRA trips per year are reasonable when viewed in the context of the local economy. While overall estimates of expenditures per trip remain unchanged from the DEA, the final report has been revised to include discussion of the high-end trip expenditures incurred by ISDRA OHV users (Section 4.1.5).

Comment 24: Several commenters note that analysis does not address impacts to OHV and OHV-related equipment manufacturers within Imperial and Yuma Counties.

Our Response: BLM and OHV user groups have indicated that most ISDRA visitors purchase OHVs and other recreational vehicles in areas outside of Imperial and Yuma Counties (*i.e.* in counties of origin depicted in Exhibit 3–1). The analysis recognizes, however, that OHV businesses within Imperial and Yuma Counties benefit directly from OHV recreation at the ISDRA. Section 3.2.2 states, ''Several businesses that operate within Imperial and Yuma Counties are dependent on the recreational activities that occur within the ISDRA * * * major towns in the counties have a number of small businesses that sell OHVs and OHV accessories and services and market to both local and tourist populations. In addition, a number of small businesses exist within the geographical boundaries of the ISDRA itself, catering exclusively to dune visitors. Any reduction in visitation is likely to adversely impact these local businesses''.

Potential impacts to local businesses selling OHV equipment, supplies and services in Imperial and Yuma counties are examined in the analysis of regional economic impacts (Exhibit 4–13). In 2003, direct expenditures incurred by ISDRA recreators on OHV equipment, supplies, and services are estimated to be $69.2 million (on average $194.60 per trip multiplied by an estimated 355,704 trips). Information on the number of ISDRA visitors who live in and purchase OHVs and OHV-related vehicles within Imperial and Yuma Counties is not available. Therefore, data do not exist to accurately estimate potential reductions in OHV purchases made within Imperial and Yuma Counties given possible changes in ISDRA management. The report, however, does recognize the potential for impacts to these regional OHV retailers.

While overall cost estimates remain unchanged from the DEA, the report has been revised to incorporate additional information on OHV. Specifically, local governments and OHV groups have provided information on OHV retailers within Imperial and Yuma Counties.

Comment 25: Several commenters stated that the report underestimates or excludes expenditures incurred through purchasing OHVs and OHV-related equipment, including trailers, haulers, specialized dune transportation equipment.

Our Response: The above response describes why potential economic impacts to regional OHV retailers were not quantified in the analysis. While overall cost estimates within the report remain unchanged, Section 3.2.1 of the report has been revised to describe additional information on investment in OHV equipment.

Comment 26: One commenter questioned whether the regional economic analysis incorporates impacts to permitted vendors within the ISDRA.

Our Response: The analysis addresses potential impacts of decreased expenditures in industries related to OHV recreation by utilizing IMPLAN, a software package that translates initial changes in expenditures into changes in demand for inputs to affected sectors. The sectors examined include fuel, food, camping supplies, medical goods and services sales and equipment repairs within Imperial and Yuma Counties. To the extent that permitted vendors are included as part of these sectors and are taxed by local governments, impacts to them are captured in the regional economic impact analyses of these industries.

Comment 27: One commenter notes that current closures in the Algodones Dunes are creating an adverse economic impact that is not being defined within this draft report.

Our Response: The analysis addresses impacts from past and current closures. Section 4.1.6, ''Summary of Past Impacts'', provides estimates of consumer losses and regional economic impacts stemming from the 2001 temporary closures.

Comment 28: Several commenters note that the report underestimates lost revenues within Imperial and Yuma Counties. One commenter notes that a former BLM economic study underestimated economic contributions associated with ISDRA visitation. Another commenter states that the text-box in the Executive Summary underestimates the economic contribution of the ISDRA to Imperial County.

Our Response: The analysis calculates a range of economic contributions associated with ISDRA visitation assuming high and low visitation projections and high and low expenditures per trip. The report first calculates the economic contribution of the entire ISDRA and then attempts to distinguish contributions associated with visitation in areas proposed as critical habitat. Exhibit ES–6, Figure 4–2 and Exhibit 4–14 summarize contributions of OHV-related expenditures and contributions by each management area and proposed critical habitat. The value generated by Glamis alone within Yuma County is as high as $17.36 million per year. Placed in the context of both counties' annual taxable sales, regional economic contributions of the ISDRA comprise a sizable portion of the two counties' economies.

The text-box within the Executive Summary examines the current economic value generated by OHV use within the Glamis Management Area relative to the county's revenues. Total expenditures generated from OHV use within the entire ISDRA in 2003 can be calculated by multiplying current visitation by assumed expenditures per trip. Exhibit 4–14 also provides total

expenditures generated by the entire ISDRA by management area assuming 2013 visitation. The text-box has been clarified to highlight the focus on the Glamis Management Area.

Comment 29: Several commenters note that the estimated impacts should be placed in the context of OHV-related business sales and not the entire region's economy. One commenter requests that the analysis include a definition of ''significant'' when comparing reported economic impacts on local economies. Another commenter notes that sales taxes lost to the region would equate to a 5 percent loss in workforce and small businesses that rely on OHV recreation would cease to exist. Finally, one commenter notes that the analysis does not adequately address how the estimated job losses (of up to 2,585 jobs) will impact a region that already experiences high unemployment.

Our Response: Response to comments above addresses potential impacts to small businesses in the two-county area. The analysis has been revised to include estimated losses as a percent of OHV-related businesses and sales, specifically sales within the retail trade, accommodation, and food services sectors within the two counties (Exhibits ES–5 and 4–17). In addition, Section 4.2.6 within the report has been revised to further discuss how potential losses in revenues, employment, and taxes may impact the local economies. Note that Section 3.1.4 within the report describes the high unemployment rates prevalent in both counties and major cities within the region.

Comment 30: Several commenters note that the economic analysis does not address potential impacts to OHV trailer manufacturing and OHV accessory businesses that exist outside of Imperial and Yuma Counties. One commenter notes that OHV recreation provides approximately $9 billion to California's economy and that since the ISDRA is the most heavily used OHV area in the state, potential closures would be far greater than those estimated in the economic analysis.

Our Response: The report recognizes that OHV businesses operating outside of the primary study area (Imperial and Yuma Counties) have the potential to be impacted by any limitations on OHV activity within the ISDRA, provided that limitations discourage users from purchasing OHVs and related equipment (Section 3, paragraph 89). These potential impacts are difficult to analyze as no data exist to model where OHV enthusiasts from the greater California and Arizona region purchase vehicles and other equipment, and how these purchases will change in response to closures within the ISDRA.

First, as stated in paragraph 89, ''OHV-related businesses located outside of Yuma and Imperial Counties may experience a lesser impact than those within these counties, since OHV enthusiasts may decide to visit other OHV areas in California, Arizona, and neighboring states.'' Technical reviewers of the report agree that if an area is closed, the visitor may not give up OHV recreational experiences but instead may seek other places to visit. By not taking into account this behavioral phenomenon, generated impact estimates could be greatly overestimated.

Second, while OHV and related equipment manufacturers may experience impacts within the greater California and Arizona area, these impacts are anticipated to be small relative to the overall size of these counties' economies. As stated in paragraph 89, ''This analysis does not quantify the expenditures OHV users make on vehicles or related equipment because these purchases are likely made over a broader geographic area.'' Potential changes in OHV-related expenditures are not expected to have a significant impact outside of Imperial and Yuma Counties, because the majority of these counties are large, with diverse economies (*e.g.* Los Angeles).

Finally, losses to businesses within the two-county area from decreased ISDRA visitation are unlikely to be replaced by expenditures on other goods and services of the same order of magnitude. However, impacts to OHV-related businesses in other areas (*e.g.* origin counties) will likely be offset by expenditures on other goods and services in those regions, even if OHV use declines.

The most recent OHV survey conducted by the California Off-Highway Motor Vehicle Recreation Division in 2002 estimates the annual economic impact of OHV recreation in California at $3.049 billion (CA Off-Highway Motor Vehicle Recreation Division, 2001). The extent that use limitations within the ISDRA discourage OHV users from the greater economic study area from purchasing OHVs and OHV-related equipment, OHV businesses within the broader geographic area are likely to be impacted.

Comment 31: One commenter notes that decreases in revenues within Imperial and Yuma Counties as a result OHV-use restrictions may increase revenues in other counties that provide sand dune opportunities that do not host rare species.

Our Response: The analysis acknowledges within Section 3 that, ''* * * OHV-related businesses located outside of Yuma and Imperial may experience a lesser impact than those within these counties, since OHV enthusiasts may decide to visit other OHV areas in California, Arizona, and neighboring states''. Exhibit 3–8 within the report provides examples of substitute sites available to OHV users and notes this occurrence as a key assumption in Exhibit ES–7. However, with over 83,000 acres currently open to OHV use and 132,870 acres available once the temporary closures are lifted, the ISDRA remains one of the largest dune systems available for motorized-recreation in the region. Three sites, Ocotillo Wells, Superstition Mountain, and Dumont Dunes, closest to the ISDRA provide for recreation.

While decreased expenditures within Imperial and Yuma Counties may be offset by increased expenditures, though difficult to quantify, in other OHV areas, understanding potential impacts to this region is critical to understanding the potential impacts of any changes in OHV use at the ISDRA. Several businesses that operate within the region rely heavily on income generated by OHV-based recreation. Reduced visitation resulting in revenue, employment and tax losses may pose considerable burdens to local communities.

Comment 32: One commenter noted that visitation is not evenly distributed throughout the ISDRA: the inner areas of the dunes are the most popular, and the inner areas are what draw visitors to the dunes. Another commenter notes that the analysis inflates impacts by assuming visitation is evenly distributed within each management area when ''highest use areas were already excluded''. Another commenter notes that assuming visitation is evenly distributed within each management area is unrealistic because of ''the known distributional patterns of motorized recreation over the OHV accessible areas of the dunes''.

Our Response: The analysis recognizes that high-use, developed, staging, and camping areas that are unlikely to contribute to the conservation of the species have been excluded from the proposed designation. The analysis also agrees that the inner portions of the dunes may be more attractive to some users (Sections 2.3.1; Section 4, paragraph 121; and Section 4.1.1). However, while the inner portions of the dunes may draw many users to the dunes, these areas are more remote and are therefore likely to experience less intensive

visitation (*i.e.*, such visitation may require specialized equipment).

It is not possible, using existing data, to predict the percentage of OHV users who visit areas of the ISDRA that are proposed for critical habitat. Lacking detailed data and user patterns and to offset conflicting attitudes towards visitation distribution, the report models visitation based on BLM visitor counts and assumes an equitable distribution of visitation within each management area. To the extent that areas proposed for designation are less or more popular with OHV users, this analysis could overstate or understate impacts by over- or underestimating the number of trips that could be affected by the designation.

Comment 33: One commenter suggests that any potential limitations on OHV use may displace visitation to other parts of the season (users might spread usage over other times, resulting in similar usage and economic expenditures). Another commenter notes that the analysis cannot assume lasting impacts of any future closures on visitation levels within the ISDRA.

Our Response: The analysis recognizes that OHV limitations in the past may have resulted in a redistribution of visitation over the recreation season. Section 4.1.1 states that that in the years subsequent to the temporary 2001 closures, BLM ''documented an increase in visitation during traditionally off-peak weekends, likely a result of OHV recreationists seeking a less-crowded ISDRA experience * * * whether visitation to the ISDRA declined as a result of the closures is debated.''

Data are not available to model intertemporal substitution by ISDRA visitors given closure of one or more of the management areas. To determine the economic impact of past limitations on OHV recreation, the analysis assumes that OHV-users who would otherwise recreate at the closed ISDRA management areas would limit or refrain from visits to the dunes. Thus, the analysis can be used to understand the upper-bound social welfare and regional economic impacts under a variety of closure scenarios.

Comment 33: Several commenters note that ISDRA visitation actually increased rather than declined subsequent to the 2001 closures and that it is erroneous to conclude that visitation declined by 15 percent due to the closures particularly since visitation fluctuates based on weather and other factors.

Our Response: The report acknowledges in Section 4.1.4 that the reported change in ISDRA visitation between 2001 and 2002 is not likely due to actual increased visitation but rather to refined counting methodologies employed by BLM. The analysis states that ''prior to 2002, BLM extrapolated visitation by employing on-the-ground and fly-over estimates of vehicles during peak weekends. In 2002, BLM installed underground vehicle counters at each major ISDRA entrance point. Accordingly, accurate visitation data by management area prior to the 2002 recreation season is not available.''

The report also recognizes in Section 4.1.4, that fluctuations in annual visitation reflect a variety of factors, including economic and weather conditions. While BLM did not observe a drop in visitation subsequent to the closures, users within the OHV community expressed that visitation levels were likely impacted. The 15 percent reduction was therefore assumed to represent visitation in the areas slated for temporary closure. To understand the maximum social welfare and regional economic impacts of a closure, the DEA assumed that under closures OHV users who preferred to recreate in the closed areas would choose to not visit the dunes or make fewer trips per year. In Exhibit 4–8, this assumption of a 15 percent reduction is listed as a key assumption employed in the analysis of past economic impacts.

Comment 35: One commenter notes that the DEA does not consider economic costs associated with managing OHV activities at the ISDRA, including law enforcement required during high-use weekends. Another commenter notes that the analysis overlooks costs inflicted upon public safety by OHV use. Finally, a commenter remarks that it is incorrect to assume that closures are associated with cost savings to public agencies. (CNPS, BN, BLM)

Our Response: The analysis addresses costs associated with the public provision of on-site services at the ISDRA within Section 3.2.3. As stated:

> Accommodating the millions of visitors that visit the ISDRA each year requires the provision of additional services and on-site infrastructure by both BLM and local government agencies * * * (m)oreover, the high visitation that occurs at the ISDRA during holiday weekends between March and October necessitates the provision of additional enforcement and emergency services. During high-use holiday weekends, BLM employs as many as 100 officers from state, local, and federal agencies to patrol the dunes. In the ISDRA Business Plan, BLM anticipates incurring annual costs of up to $3.12 million related to law enforcement ($500,000), emergency ($280,000), and additional holiday staffing ($2.34 million) * * * The Imperial County Sheriff's Office has also led a coalition of law enforcement agencies over the past three years to enforce legal behavior and provide for public safety at the dunes. In December 2003, the Sheriff's Office was granted approximately $750,000 for OHV law enforcement and emergency services at the ISDRA by the California Off-Highway Motor Vehicle Recreation Commission. Any reduction in future visitation at the ISDRA is potentially associated with public costs savings in expenditures related to providing on-site infrastructure, enforcement, and emergency services at the dunes. However, data are not available to estimate the extent of these cost savings; as such, these cost savings are not monetized in this analysis.

Comment 37: Two commenters noted that the substitute sites listed in Figure 3–2 do not provide recreational opportunities provided by the ISDRA in terms of acres available for dune recreation and distance from point of origin. One commenter specified that comparable alternatives should be limited a 250 mile radius from Los Angeles or Phoenix, cities from where the majority of ISDRA users originate.

Our Response: Substitute sites were compiled from a variety of sources, including published documents and personal communication with ISDRA dune users. As visitors from the ISDRA originate from a broad geographic area, the analysis assumed a broad distribution of OHV recreation. Figure 3–2 has been revised to incorporate updated information on types of recreational opportunities offered by the alternative OHV recreation areas (*e.g.* whether sites offer dune-based recreation). Information on potential substitute sites for OHV recreation within the region is provided as a basis for comparison and does not impact cost estimates presented in the report.

Comment 38: Several comments noted that the report fails to address or minimizes the economic contribution of non-OHV recreation, overlooking the fact that non-OHV recreation may be precluded by OHV use due to safety concerns. One commenter also requested that the analysis address contributions of recreational activities associated with botanical opportunity.

Our Response: The report acknowledges the presence of non-OHV related recreational activities within the ISDRA, including hiking, horseback riding, conservation activities, and some commercial activities including filming (as stated in paragraph 6 and Section 2.3). While the ISDRA offers opportunities for non-OHV recreation, BLM has noted that these activities occur infrequently relative to OHV-based recreation. Based on historical use patterns within areas open to non-motorized recreation, non-OHV related

activities are expected to remain relatively modest in the future.

While non-motorized recreation is precluded in OHV-recreation areas due to safety concerns, it is difficult to determine whether closures to OHV-use would generate similar levels of visitation and expenditures by non-OHV recreational activities. Given the current disparity between the number of non-OHV trips and OHV based trips, non-OHV recreation given closures to OHV-use would likely draw several order of magnitude less visitation.

Comment 39: One commenter notes that the number of acres available to OHV use within the ISDRA reported in Figure 3–8 is misleading. The report presents 83,560 acres available to OHV use and the commenter notes that number should reflect acreage prior to the temporary closures, or 132,870 acres.

Our Response: Figure 3–8 has been revised to incorporate both temporary and permanent acreage numbers (83,560 and 132,870 acres available for OHV use).

Summary of Changes From the Proposed Rule

In the development of our final designation of critical habitat for *Astragalus magdalenae* var. *peirsonii*, we reviewed comments received on the proposed designation of critical habitat. In addition to minor clarifications and incorporation of additional information on the biology of *A. magdalenae* var. *peirsonii*, we made the following changes to the proposed designation:

(1) We did not include Subunit D in the final designation of critical habitat. Because of its relatively small size and separation from the other subunits, we do not consider it essential to the conservation of the taxon.

(2) We excluded portions of Subunit B and all of Subunit C from the final designation of critical habitat under section 4(b)(2) of the Act.

(3) We modified the primary constituent elements to include the associated co-adapted psammophytic (sand-loving) scrub plant community that supports the white-faced digger bee (*Habropoda* spp.), the primary pollinator of *Astragalus magdalenae* var. *peirsonii* (Porter 2003b).

Critical Habitat

Please see the proposed rule for critical habitat for *Astragalus magdalenae* var. *peirsonii* for a general discussion on sections 3, 4, and 7 of the Act in relation to critical habitat (68 FR 46143).

Methods

As required by section 4(b)(2) of the Act and regulations at 50 CFR 424.12, we used the best scientific and commercial information available to determine areas that contain the physical and biological features that are essential for the conservation of *Astragalus magdalenae* var. *peirsonii*. This included information from our own documents on this plant and related taxa; available information that pertains to the biology and habitat requirements of this taxon, including data from research and survey observations, such as WESTEC (1977), BLM surveys conducted from 1998 to 2002 (Willoughby 2000, 2001), TOA (2001), and Phillips and Kennedy (2002, 2003); the California Natural Diversity Database (2003); peer-reviewed journal articles and book excerpts regarding *A. magdalenae* var. *peirsonii*, similar species, or more generalized issues of conservation biology; unpublished biological documents; site visits; and discussions with botanical experts regarding *A. magdalenae* var. *peirsonii* and related species.

The areas designated as critical habitat are occupied by *Astragalus magdalenae* var. *peirsonii* as demonstrated by repeated surveys by BLM (Willoughby 2000, 2001), and independently confirmed by other surveys (TOA 2001; Phillips and Kennedy 2002, 2003). This plant may be present as standing plants, persisting as perennial root crowns in the sand, or as seed bank in the sand. During any given year, the suitable habitat for *A. magdalenae* var. *peirsonii* may be occupied by various combinations of these three life history phases. These surveys confirm the continuity of habitat for *A. magdalenae* var. *peirsonii* along the northwest-to-southeast axis of the Algodones Dunes. The dynamics of dune morphology, local rainfall patterns and amounts, spatial distribution of the seed bank, and seed scarification each contribute to the patchy or mosaic nature of the distribution of standing plants of *A. magdalenae* var. *peirsonii*. Local rainfall patterns and amounts are likely to cause shifts in the proportions of these three life history phases. All areas designated as critical habitat contain at least one of the primary constituent elements and have been determined to be essential to the conservation of the species.

The most extensive survey of the Algodones Dunes was conducted in 1977 (WESTEC 1977). This survey used 66 transects that ran across the dunes from west to east. The presence and relative abundance of standing plants of *Astragalus magdalenae* var. *peirsonii* and four other rare psammophytic scrub species were recorded along these transects. In 1998, BLM began surveying for rare plants in the dunes repeating the methodology used by WESTEC in their 1977 survey. BLM surveyed 34 of the original 66 transects and employed a different abundance measure. The BLM conducted these surveys for 5 consecutive years (1998, 1999, 2000, 2001, and 2002) recording the presence and abundance of the rare plant taxa along these transects.

To determine the general range of *Astragalus magdalenae* var. *peirsonii* in the Algodones Dunes, we used survey information from published and unpublished documents and maps including WESTEC (1977), BLM (Willoughby 2000, 2001), and TOA (2001). WESTEC (1977) devised a grid system overlay for the Algodones Dunes. Each quadrant of the grid was approximately 0.45 mi (0.72 km) on a side. BLM reproduced this grid system to present data from their subsequent annual surveys from 1998 to 2002 (Willoughby 2000, 2001). Both WESTEC and BLM considered a grid square occupied if *A. magdalenae* var. *peirsonii* was encountered anywhere within that grid square. For comparison, we also superimposed census data included by TOA (2001) on this same grid system. We produced maps based on WESTEC (1977), BLM (Willoughby 2000, 2001), and TOA (2001) data. Because of the differences in survey methodologies and abundance classes used by these surveys, we considered each of these records to document presence or absence. Due to fluctuations in both the presence and abundance of *A. magdalenae* var. *peirsonii* from year to year, we combined the data from multiple years of survey data. Also the various surveys recorded standing plants as the only measure of occupancy, not taking into account a dormant seed bank or root crowns.

The survey efforts discussed above provided us with the data necessary to construct a model showing which regions of the Algodones Dunes represent habitat essential for the conservation of *Astragalus magdalenae* var. *peirsonii*. The model that we created used the data collected by the BLM from 1998 to 2002 as the input data and the data collected by WESTEC (1977) and TOA (2001) as a means of verifying the information generated by the model. The BLM data were used as the input data source for the model because it was more current, covered multiple years, and used the same methodology each year. Time and resources precluded us from conducting

independent surveys. Outlier occurrences evidenced only by WESTEC (1977) were not included because of the age of the report and the lack of substantiation by more recent BLM surveys.

In order to create this model we used BLM data to extrapolate the values for four variables: (1) The presence or absence of standing plants of *Astragalus magdalenae* var. *peirsonii*. This variable indicated localities where *A. magdalenae* var. *peirsonii* had been found in any of the five survey years either as seedlings or as older plants; (2) the relative abundance of *A. magdalenae* var. *peirsonii* in any of the five survey years. The highest abundance class value recorded for each grid cell during the five years of surveys was used as the cell's value for this variable. This variable was used to identify areas that support higher plant densities; (3) the frequency of occurrence of *A. magdalenae* var. *peirsonii* from year to year. This variable was calculated based on the number of times *A. magdalenae* var. *peirsonii* was reported in a grid cell throughout the five years of surveys. This variable was used to identify areas that continued to persist as productive habitat for *A. magdalenae* var. *peirsonii* over time; and (4) the number of associated rare psammophytic (dune loving) plant taxa present. These plants included *Croton wigginsii*, *Helianthus niveus* ssp. *tephrodes*, *Palafoxia arida* var. *gigantea*, and *Pholisma sonorae*. For each grid cell, scores were assigned based on the number of these associated plants that were found over the course of the five years of surveys. Higher scores may indicate a higher likelihood of the presence of *A. magdalenae* var. *peirsonii*, the biological diversity of associated psammophytic scrub species, and/or the presence of higher quality psammophytic scrub habitat that supports *A. magdalenae* var. *peirsonii*.

We calculated scores for each of these variables and then extrapolated the values for each variable for the entire dune area. We made this extrapolation based on a statistical method called Kriging, which calculates new values for unsurveyed areas based on the known values for the cells that were surveyed (Royle, Clausen, and Frederiksen, 1981; Oliver, M. A. and R. Webster. 1990). The data for these four variables were then standardized to a scale of 0 to 5 points so that the range of scores, from low to high, would be comparable to one another. The standardized scores were then totaled for each cell, for a possible high score of 20 points. This set of values was then further refined using the Kriging method to generate a map similar in appearance to a topographic map, showing the resulting scores of the model in the same way a topographic map shows variations in elevation. This map showed a strong band of high values that ran along the northwest to southeast axis of the dune field. The portion of the dunes that corresponded to the top three categories of scores was delineated and identified as essential to the conservation of *Astragalus magdalenae* var. *peirsonii*. In order to provide legal descriptions of the critical habitat boundaries, we then overlayed a 100–meter grid to establish UTM North American Datum 27 (NAD 27) coordinates to define the critical habitat subunit boundaries.

Intrinsic to the creation of the essential habitat model for *Astragalus magdalenae* var. *peirsonii* was the application of several assumptions related to the (1) BLM study design (Willoughby 2000, 2001); (2) habitat and weather variability across the entire dune system; (3) paved roads as barriers to dispersal; (4) occurrences of plants and seeds in grid cells over different survey periods; and (5) model protocol. These assumptions are described to allow the reviewer to understand the potential strengths and limitations of the results of the habitat modeling. Based on the BLM study design, a consistent survey methodology was used for the plant surveys conducted in 1998, 1999, and 2000 (Willoughby 2000, 2001). Vegetation maps (BLM 2003), wind patterns (Romspert and Burk 1979; Norris and Norris 1961), and precipitation patterns (Willoughby 2000, 2001) supported our assumption that the habitat (in terms of dune action) precipitation, and vegetation, was uniform in variation and continuous throughout the dune system. Based on rainfall data collected from November 16, 2000, to March 16, 2001, (1.40 inches of precipitation was recorded at Cahuilla Ranger Station in the northwest part of the dunes and 2.67 inches of precipitation was reported at Buttercup Campground in the southern end of the dunes (Willoughby 2001)), BLM indicated that more precipitation may fall in the southern portion of the Algodones Dunes compared to the northern end of the dunes. However, given the limited precipitation data available for the Algodones Dunes (5 months) and the relatively short linear extent of the dunes (40 mi (64 km) long), we could not project a rainfall gradient and, instead, assumed that the precipitation was uniformly variable and continuous throughout the dune system. Based on observations of unimpeded sand and wind movement across existing paved roads, we did not expect that the paved roads would represent a barrier to the dispersal of the fruits and seeds of *A. magdalenae* var. *peirsonii*. Surveys conducted by BLM indicate variability in occurrences of standing plants from year to year (Willoughby 2000, 2001), and that at any given time, these occurrences may represent standing plants, root crown regrowth, or seedlings of *A. magdalenae* var. *peirsonii*. We assumed that if standing plants were not found in a particular grid cell during a survey, but were recorded as present in other survey years, then that grid cell may be occupied by either root crowns or seeds of this species. BLM randomly selected survey transects and, as expected, this random selection results in gaps between transects. We projected the distribution of *A. magdalenae* var. *peirsonii* across the gaps by assuming that the values of unknown grid cells are more closely related to nearby cells rather than distant cells. Based on our analysis of these assumptions, we believe that the essential habitat model can be used to identify areas that are essential to the conservation of *A. magdalenae* var. *peirsonii* within the Algodones Dunes.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. These include but are not limited to: space for individual and population growth and for normal behavior; food, water, air, light, minerals or other nutritional or physiological requirements; cover or shelter; sites for germination or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

All areas designated as critical habitat for *A. magdalenae* var. *peirsonii* are within the species' historical range and contain one or more of the biological and physical features (primary constituent elements) identified as essential for the conservation of the species. The primary constituent elements essential to the conservation of *Astragalus magdalenae* var. *peirsonii* habitat are based on specific components that are described below.

Space for Individual and Population Growth, Including Sites for Germination, Pollination, Reproduction, Seed Dispersal, and Seed Bank

The active sand dunes provide space for individual and population growth for *Astragalus magdalenae* var. *peirsonii*. In the United States, *A. magdalenae* var. *peirsonii* is limited to a band of sand dunes in the central portion of the Algodones Dunes. The dunes in this band are composed of a series of transitional crescentic ridges (Muhs *et al.* 1995). Active sand dunes are characterized by bowls (hollows among the dunes), swales (low area), and slip faces (areas so steep that the loose sand naturally cascades downward) that run transverse to the primary ridge line. *Astragalus magdalenae* var. *peirsonii* occurs on the active sand dunes, generally where the slopes of the faces of the sand dunes are less than 30 degrees, but generally less than 20 degrees. These active sand dunes provide the habitat for the natural fluctuations of the population over time.

Astragalus magdalenae var. *peirsonii* occurs in a vegetation community referred to as psammophytic scrub (WESTEC 1977; Willoughby 2000). *Astragalus magdalenae* var. *peirsonii* is associated with other psammophytic plants (*e.g.*, *Croton wigginsii*, *Eriogonum deserticola*, *Helianthus niveus* ssp. *tephrodes*, *Palafoxia arida* var. *gigantea*, *Pholisma sonorae*, and *Tiquilia plicata*). In areas where the sand dunes are more stabilized (less sand dune building and movement), such as along the margins of the dune fields, the open canopy psammophytic scrub community is replaced by the sandier phases of the creosote bush scrub community. *Astragalus magdalenae* var. *peirsonii* is apparently excluded from the relatively more closed canopy creosote bush scrub community. The associated co-adapted psammophytic scrub plant community also supports the white-faced digger bee (Habropoda spp.), the primary pollinator of *Astragalus magdalenae* var. *peirsonii* (Porter 2003b).

Sand movement, dune-building, and dune migration are likely determined by the wind regime (Norris and Norris 1961). Winds from the northwest are prevalent in the winter, while in the summer the winds are from the southeast (Romspert and Burk 1979). Muhs *et al.* (1995) found during a study of the sand source for the Algodones Dunes that dominant sand-moving winds are as follows: prevailing from the northwest all year at Indio, California, from the west or southwest all year at El Centro, California, and from the northwest in winter and from the southeast in summer at Yuma, Arizona. These winds are responsible for the dispersal of seeds and fruits within the Algodones Dunes. Seeds are either dispersed locally by falling out of partly opened fruits on the parent plant or by their release from fruits blown across the sand after falling from the parent plant. Seed germination patterns likely reflect the horizontal and vertical distribution of the seed bank in the shifting sand dunes (seeds will not effectively germinate where they are buried below a certain depth of sand). As an adaptation to shifting sands and low soil moisture, this species has developed extremely long tap roots (Barneby 1964) that penetrate deeply to the more moist sand and anchor the plants in the shifting dunes. Seeds buried in the sand function as the seed bank and allow for growth when suitable conditions, such as adequate rainfall, scarification, and suitable sand depths, are met.

Intervening Areas for Gene Flow and Connectivity Within the Population

The active sand dunes are continuous along the northwest-to-southeast axis. The continuity of the sand dunes provide connectivity and facilitate gene flow within the population by allowing the movement of pollinators and the wind dispersal of fruit and seeds. Consistent with the principles of conservation biology, critical habitat includes relatively large contiguous blocks of habitat that encompass the most important areas identified by our essential habitat model. Moreover, we do not expect that the paved roads would represent a barrier to the dispersal of the fruits and seeds of *Astragalus magdalenae* var. *peirsonii*.

Areas That Provide the Basic Requirements for Growth (Such as Water, Light, and Minerals)

A soil survey for the Imperial Valley area of Imperial County (Zimmerman 1981) did not include the areas east of the Coachella Canal but did depict a few adjacent portions of the Algodones Dunes as Rositas fine sand with 9 to 30 percent slopes. Rositas fine sand are described as deep, somewhat excessively drained, sloping soils formed in wind-blown sands of diverse origin. Dean (1978) describes the sand as quartz with a mean grain size of 0.006 in (0.17 mm). The dunes contain 60 to 70 percent quartz and 30 to 40 percent feldspar sand (Norris and Norris1961). The Algodones Dunes are one of the driest and hottest regions in the United States. Romspert and Burk (1979) reported average yearly precipitation between 1941–1970 was 2.6 in (67.8 mm). The rainfall is often described as scattered or patchy. Rainfall amounts differ from place to place and from year to year with areas to the northwest being generally dryer than those to the southeast (Willoughby 2001). The central areas of the Algodones Dunes provide the appropriate sand substrate and rainfall pattern to augment the basic requirements for growth of *Astragalus magdalenae* var. *peirsonii*.

Based on the best available information at this time, the primary constituent elements of critical habitat for *Astragalus magdalenae* var. *peirsonii* consist of:

(1) Intact, active sand dune systems (defined as sand areas that are subject to sand-moving winds that result in natural expanses of bowls, swales, and slopes and support the co-adapted psammophytic scrub plant and invertebrate communities) within the existing range of *Astragalus magdalenae* var. *peirsonii* that are characterized by:

(A) Substrates of the Rositas soil series, specifically Rositas fine sands of sufficient depth to promote *Astragalus magdalenae* var. *peirsonii* and discourage creosote bush scrub;

(B) Wind-formed slopes of less than 30 degrees, but generally less than 20 degrees; and

(C) The associated co-adapted psammophytic scrub plant community (*e.g.*, *Croton wigginsii*, *Eriogonum deserticola*, *Helianthus niveus* ssp. *tephrodes*, *Palafoxia arida* var. *gigantea*, *Pholisma sonorae*, and *Tiquilia plicata*) that supports the white-faced digger bee (*Habropoda* spp.), the primary pollinator of *Astragalus magdalenae* var. *peirsonii* (Porter 2003b).

Criteria Used To Identify Critical Habitat

We identified critical habitat essential to the conservation of *Astragalus magdalenae* var. *peirsonii* where it currently occurs or has been known to occur in the Algodones Dunes. We are designating critical habitat to maintain self-sustaining populations of *A. magdalenae var. peirsonii* within the range of the taxon in the United States.

Astragalus magdalenae var. *peirsonii* has a very limited range even within the Algodones Dunes. Less than one-third of the area delineated by the ISDRA has documented occurrences of *A. magdalenae* var. *peirsonii*. Extreme fluctuations in populations have been demonstrated. As a result, it is likely in some years that few, if any, seeds are added to the soil seed bank. The patchy distribution of the plants in any given year is likely a combination of several factors including the dynamics of dune

morphology, local rainfall patterns and amounts, as well as the spatial distribution of the seed bank, and seed scarification.

We used the top three rankings of the essential habitat model to select areas to designate as critical habitat for *Astragalus magdalenae* var. *peirsonii*. The top three rankings identified areas where standing plants, root crowns, or seed bank are likely to occur at higher densities based on abundance class values, occurred at a higher frequency and persisted from year to year, and co-occurred with other rare psammophytic scrub plants as an indicator of habitat quality and biological diversity. We consider the most important areas for *Astragalus magdalenae* var. *peirsonii* to extend along the central westerly spine of the Algodones Dunes. The previously proposed Subunit D was located along the easterly edge of the main sand dune formations at the southern end of the Algodones Dunes. In general, low numbers of *Astragalus magdalenae* var. *peirsonii* were found in the vicinity of the former Subunit D. The previously proposed Subunit D was also divided by the All-American Canal (Canal), with the majority of the subunit occurring northeast of the Canal. The Canal likely acts as a barrier to the dispersal of wind-blown seed and seed capsules, thereby isolating the northeast section of the former Subunit D from the rest of the Algodones Dunes. Therefore, we did not include Subunit D in the final designation of critical habitat for *Astragalus magdalenae* var. *peirsonii* because of its relatively small size and separation from the other critical habitat subunits.

In designating critical habitat, we made an effort to avoid developed areas, OHV staging areas, and disturbed areas along roadways that are unlikely to contain the primary constituent elements. However, we did not map critical habitat in sufficient detail to exclude all developed areas or other lands unlikely to contain the primary constituent elements essential for the conservation of *Astragalus magdalenae* var. *peirsonii*. Areas within the boundaries of the mapped subunits, such as buildings, roads, parking lots, railroad tracks, canals, and other paved areas, will not contain one or more of the primary constituent elements and thus do not constitute critical habitat for the species. Federal actions limited to these areas, therefore, would not trigger a consultation under section 7 of the Act, unless it is determined that such actions may affect the species and/or adjacent critical habitat.

Special Management Considerations or Protections

Special management considerations or protections may be needed to maintain the physical and biological features as well as the primary constituent elements that are essential for the conservation of *Astragalus magdalenae* var. *peirsonii* within designated critical habitat. The term ''special management considerations or protection'' originates in section 3(5)(A) of the Act under the definition of critical habitat. We believe that the designated critical habitat subunits may require the special management considerations or protections due to the threats outlined below.

1. Activities that disrupt the natural processes that support dune formation, movement, and structure to allow the natural distribution pattern of *Astragalus magdalenae* var. *peirsonii*. For examples, barriers to sand movement that deplete downwind sand dunes and habitats.

2. Activities that degrade the psammophytic scrub plant community that is an indicator of habitat quality.

3. Activities that increase sand compaction, such as OHV activity, leading to burial of the seed bank from the collapse of dune faces and ridges, and exposure of the seed bank.

BLM released a Recreation Area Management Plan (RAMP) for the Imperial Sand Dunes (BLM 2003). A specified major focus of the RAMP is to ensure that the OHV recreational opportunities of the ISDRA are continuously available while responding to increased need for protection of plant and animal species in the dunes (BLM 2003). Species-specific management needs and measures for *Astragalus magdalenae* var. *peirsonii* are not addressed in the RAMP. In the RAMP, BLM includes an intensive monitoring/study plan that they are implementing. The results of this monitoring will be incorporated into a management plan developed for *A. magdalenae* var. *peirsonii*.

Critical Habitat Designation

The critical habitat areas described below include one or more of the primary constituent elements described above and constitute our best assessment at this time of the areas needed for the conservation of *Astragalus magdalenae* var. *peirsonii*. Lands designated as critical habitat include Federal and private lands. The approximate areas of critical habitat by land ownership and subunits are summarized in Table 1.

TABLE 1.—APPROXIMATE AREAS IN ACRES (AC) AND HECTARES (HA) OF DESIGNATED CRITICAL HABITAT FOR *Astragalus magdalenae* VAR. *peirsonii* BY LAND OWNERSHIP AND SUBUNITS.

Unit	Federal	State	Private	Total
Subunit A	14,544 ac (5,886 ha)	550 ac (223 ha)	1,414 ac (572 ha)	16,509 ac (6,681 ha).
Subunit B	5,355 ac (2,167 ha)	0 ac (0 ha)	0 ac (0 ha)	5,355 ac (2,167 ha).
Total	19,899 ac (8,053 ha)	550 ac (223 ha)	1,414 ac (572 ha)	21,863 ac (8,848 ha).

The Algodones Dunes Critical Habitat Unit is divided into two subunits (Subunits A and B). The essential habitat model for *Astragalus magdalenae* var. *peirsonii* was used to identify those portions of the Algodones Dunes that were considered essential for the conservation of this species. Only a portion of the Algodones Dunes was designated as critical habitat based on the essential habitat model and discussion with BLM on high use recreational areas within the ISDRA. Subunits A and B contain the top three rankings (on a five rank scale) of the essential habitat model and were designated as critical habitat. Areas in Subunits A and B that fell within the top three rankings were believed to provide the best habitat because of the documented presence, higher densities, and long-term persistence of *A. magdalenae* var. *peirsonii*, and habitat quality based on co-occurences with other psammophytic scrub plants. The gaps and highways between critical habitat subunits are likely traversed occasionally by mature fruits dispersed by the wind and by pollinators.

Subunit A is north of State Highway 78 and encompasses portions of the Mammoth and North Algodones Dunes Wilderness. The majority of this critical habitat subunit lies within the North Algodones Dunes Wilderness. This subunit receives the lowest level of

human disturbance because the North Algodones Dunes Wilderness is closed by BLM to recreational motorized vehicles. This subunit is essential to the conservation of *Astragalus magdalenae* var. *peirsonii* because it retains the most natural and pristine features of the Algodones Dunes ecosystem. This subunit includes the best remaining example of a dune system undisturbed by intensive OHV recreation.

Subunit B is south of State Highway 78 and north of Interstate 8 and encompasses the Ogilby Management Area. This subunit is essential to the conservation of *Astragalus magdalenae* var. *peirsonii* because it represents the largest, widest, and highest sand dune fields within the Algodones Dunes and thereby supports large numbers and high densities of *A. magdalenae* var. *peirsonii*. The natural processes of dune movement that maintain the biological conditions necessary to support *A. magdalenae* var. *peirsonii* are still retained.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' However, in a March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit (*Sierra Club* v. *U.S. Fish and Wildlife Service* et al., F.3d 434), the court found our definition of adverse modification to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat. Destruction or adverse modification of critical habitat occurs when a Federal action directly or indirectly alters critical habitat to the extent that it appreciably diminishes the value of critical habitat for the conservation of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide ''reasonable and prudent alternatives'' to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions under certain circumstances, including instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat, respectively.

Nearly all of the designated critical habitat is on BLM lands. Activities on BLM lands or by Federal agencies that may affect *Astragalus magdalenae* var. *peirsonii* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from BLM or any other activity requiring Federal action (*i.e.* funding or authorization) that may affect this species will also continue to be subject to the section 7 consultation. Federal actions not affecting *A. magdalenae* var. *peirsonii* or its critical habitat, as well as actions on non-Federal lands that are not federally funded or permitted, will not require section 7 consultations for this species.

The areas designated as critical habitat are occupied by either above-ground plants or a seedbank of *A. magdalenae* var. *peirsonii*. BLM and other Federal agencies already consults with us on activities where the species may be present to ensure that their actions do not jeopardize the continued existence of the species. Actions on which Federal agencies consult with us on effects to *A. magdalenae* var. *peirsonii* include, but are not limited to:

(1) Development of the Recreational Area Management Plan for the Imperial Sand Dunes Recreation Area by the Bureau of Land Management;

(2) Issuance of permits for private actions (*e.g.* filming) on Federal lands within the Algodones Dunes by the Bureau of Land Management;

(3) Modifications to the All American Canal by the Bureau of Reclamation; and,

(4) Construction and maintenance of facilities by the U.S. Border Patrol.

Section 4(b)(8) of the Act requires us to evaluate briefly and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat would be those that alter the primary constituent elements to the extent that the value of critical habitat for the conservation of the *Astragalus magdalenae* var. *peirsonii* is appreciably reduced.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and require that a section 7 consultation be conducted include, but are not limited to:

(1) Activities that may affect *Astragalus magdalenae* var. *peirsonii* by disturbing or degrading the structure of the dunes (ridges, slip faces, bowls, and swales);

(2) Activities that may affect *Astragalus magdalenae* var. *peirsonii* by compacting or disturbing the sand such that seeds of *Astragalus magdalenae* var. *peirsonii* are not capable of germinating or plants are not able to survive; and,

Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and

recovery of *Astragalus magdalenae* var. *peirsonii* is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

We completed a section 7 consultation with BLM on the Imperial Sand Dunes RAMP dated April 3, 2003. In that biological opinion, we concluded that the implementation of the RAMP is not likely to jeopardize the continued existence of *Astragalus magdalenae* var. *peirsonii*.

We recognize that the designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, we want to ensure that the public is aware that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the designated critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the prohibitions of section 9 of the Act. Critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Ave, Portland, OR 97232 (telephone 503/231–2063; facsimile 503/231–6243).

All lands designated as critical habitat are within the geographical area occupied by the species and are essential for the conservation of *Astragalus magdalenae* var. *peirsonii*. Federal agencies already consult with us on actions that may affect *A. magdalenae* var. *peirsonii* to ensure that their actions do not jeopardize the continued existence of the species. Thus, we do not anticipate substantial additional regulatory protection will result from critical habitat designation.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

An analysis of the potential economic impacts of designating critical habitat for the *Astragalus magdalenae* var. *peirsonii* was prepared and was made available for public review on April 6, 2004 (69 FR 18016). We accepted comments on the draft economic analysis until May 6, 2004. This analysis considered the potential economic effects of designating critical habitat as well as the protective measures taken as a result of the listing of *A. magdalenae* var. *peirsonii* as a threatened species, and other Federal, State, and local laws that aid habitat conservation in areas designated as critical habitat. The economic analysis considered a No Closure Scenario (BLM Management Areas are not closed to OHV recreation as a result of critical habitat) and a Closure Scenario (BLM Management Areas are closed to OHV recreation as a result of critical habitat) to estimate the economic costs of designating critical habitat.

Application of Section 4(b)(2) and Exclusions Under Section 4(b)(2) of the Act

Pursuant to section 4(b)(2) of the Act, we must consider relevant impacts in addition to economic ones. We determined that the lands within the designation of critical habitat for *Astragalus magdalenae* var. *peirsonii* are not owned or managed by the Department of Defense, there are currently no habitat conservation plans for *A. magdalenae* var. *peirsonii*, and the designation does not include any Tribal lands or trust resources. The BLM's RAMP for the ISDRA does not address the species-specific management needs and measures for *A. magdalenae* var. *peirsonii*. A specified major focus of the RAMP is to ensure that the OHV recreational opportunities of the ISDRA are continuously available while responding to increased need for protection of plant and animal species in the dunes. In the RAMP, BLM includes an intensive monitoring/study plan that they are implementing. The results of this monitoring will be incorporated into a management plan developed for *A. magdalenae* var. *peirsonii*. Within the ISDRA, the 32,000-acre North Algodones Dune Wilderness was designated as a wilderness area to protect a number of rare and endemic plant and animal species, including *A. magdalenae* var. *peirsonii*. Management of the North Algodones Dune Wilderness takes the form of ''minimal and subtle on-site controls and restrictions'' (BLM 2003). The North Algodones Dune Wilderness was not excluded from the critical habitat designation because this area is essential to the conservation of the species and may require special management consideration or protection.

We have excluded portions of Unit 1B, consisting of the proposed critical habitat within the Gecko and Glamis Management Areas, and the Adaptive Management Area, totaling approximately 28,978, and all of proposed unit 1C, totaling 1,490 acres, under section 4(b)(2) of the Act. This section allows the Secretary to exclude areas from critical habitat if she determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat, unless the exclusion will result in the extinction of the species concerned. This is a discretionary authority Congress has provided to the Secretary with respect to critical habitat. The analysis, which led us to the conclusion that the benefits of excluding these areas exceed the benefits of designating them as critical habitat, and will not result in the extinction of the species, follows.

(1) Benefits of Inclusion

The areas excluded are within proposed Unit 1B and all of proposed Unit 1C. Unit 1B absent this exclusion would consist of 33,958 acres of Federal land, 91 acres of private land, and 283 acres of State land as critical habitat for *Astragalus magdalenae* var. *peirsonii*. It is currently occupied by the species. Unit 1C absent this exclusion would consist of 1,490 acres of Federal land, and is also currently occupied.

If these areas were designated as critical habitat, any actions BLM proposed to approve, fund or undertake which might adversely modify the critical habitat would require a consultation with us. If the action affected an area occupied by the plants, consultation would be required even without the critical habitat designation. As indicated above, these two units are each occupied by the listed plant, so consultation on BLM's activities on the

excluded lands will be required even without the critical habitat designation.

Another possible benefit of a critical habitat designation is education of landowners and the public regarding the potential conservation value of these areas. This may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this educational benefit has largely been achieved. Almost all of the proposed critical habitat is Federal land managed by BLM. As a Federal agency, they have a statutory duty to manage their lands for the conservation of listed species, including *Astragalus magdalenae* var. *peirsonii*. They have already developed a management plan for the species on these lands, and are currently engaged in a section 7 consultation with the Service on it, and a conference on the proposed critical habitat. However, this process will not be concluded prior to the date by which a final decision on this critical habitat designation must be made. These units have already been identified through the draft proposal. In addition, an organization of OHV users has sponsored studies of the plant on the lands included in the proposal, and there has been litigation over management of the area. Therefore, we believe the education benefits, which might arise from a critical habitat designation here, have already been generated.

In summary, we believe that a critical habitat designation for this plant species would provide virtually no additional Federal regulatory benefits. Because almost all of the proposed critical habitat is Federal land occupied by the species, the BLM must consult with the Service over any action it undertakes, approves or funds which might impact the *Astragalus magdalenae* var. *peirsonii*. The additional educational benefits, which might arise from critical habitat designation, are largely accomplished through the proposed rule and request for public comment that accompanied the development of this regulation, and the proposed critical habitat is known to the BLM and to the recreational users of the land.

(2) Benefits of Exclusion

We fully recognize there is a great deal of uncertainty in estimating the impact of management for the conservation of this species on future use of the ISDRA. As set out in the economic analysis done for this proposal, the outcome of future management decisions could range from no effects to complete closure of certain management areas to OHV use. Alternatively, future consultations and other management actions could result in limitations on the number of users allowed within a given management area. We note that it is not possible to forecast with certainty whether critical habitat designation would result in closures of portions of the ISDRA to OHV use, or in limitations on numbers of users.

In this regard, it is important to note that the concept of closing all or part of the ISDRA to OHV use due to the presence of the *Astragalus magdalenae* var. *peirsonii* is not a hypothetical concern—portions of the area have been closed as a result of litigation and resulting conservation actions related to the *Astragalus magdalenae* var. *peirsonii.*

The economic analysis estimates that the total present value of lost OHV opportunities due to this closure occurring between 2001 and 2004 is approximately $20.37 million. On an annual basis, these consumer surplus impacts associated with lost OHV opportunities are approximately $5.09 million per year during the closure period (2001 to 2004). While these closures are potentially associated with cost savings to public agencies, local communities, and health and safety service providers, the economic analysis did not attempt to provide monetary estimates for these, and it is not clear that they would be significant when compared to the economic benefits of OHV use even if analyzed.

The estimated regional economic impact of the current closure ranges from approximately $13 million to $26 million, and in the loss of up to 527 jobs. The loss in trips may also impact taxes by as much as $1.46 million in Imperial County, California and $260,000 in Yuma County, Arizona.

We are therefore not addressing solely theoretical economic and human impacts, but rather the possibility of future economic and human impacts greater than those that have already occurred. In this context, it is important to note that Imperial and Yuma Counties have consistently had unemployment rates far greater than the national average, which will be addressed in more detail below.

Although the outcome of future section 7 consultations or litigation associated with implementation of the RAMP and the designation of critical habitat are uncertain, closure of management areas within the ISDRA to OHV use to protect the PMV has occurred in the past. As a result, the economic analysis provided a range of economic estimates that could be used to understand the impact of a variety of potential future regulatory outcomes. Those desiring a detailed understanding of those estimates, and the limitations associated with them, should consult the economic analysis.

Whether OHV access would be limited in the future within the proposed critical habitat areas we have excluded would depend on the outcome of currently ongoing and future section 7 consultations, which, in turn, must be made on the basis of the best available scientific information, and not the economic impacts which might occur. Similarly, litigation over the adequacy of conservation measures for the *Astragalus magdalenae* var. *peirsonii* would not likely take economic or other impacts into account. Congress has provided this opportunity, during the designation of critical habitat, for economic, national security and other relevant impacts to be taken into account as we decide whether to exclude areas from the designation because the benefits of avoiding those possible impacts, through exclusion, exceed the benefit of designating the area as critical habitat.

The economic analysis looked at two different generally accepted ways of measuring economic impacts from possible closures of areas to OHV use—economic efficiency and regional economic impact. The figures resulting from these analyses are not the same, and should not be added in an effort to obtain cumulative totals. Please consult the economic analysis for explanations of the two methods and of their differences.

The economic analysis found that if all of the areas proposed for designation within the ISDRA were closed to OHV use, the efficiency effects would range from $9.5 million per year to $10.5 million per year—$0.57 million per year in administrative and project modification costs plus consumer surplus impacts ranging from $8.9 million per year to $9.9 million per year, in 2003 dollars. Similarly, such a closure would cause the regional economy would see an upper bound reduction in output of $55 million to $124 million in year 2013 (2003 dollars), and a potential loss in employment of 1,207 to 2,585 jobs.

Output (*i.e.*, industry revenue) for all industries in these two counties is approximately $8.6 billion. Employment in these two counties is approximately 134,000. The upper-bound regional economic contribution of OHV recreation within the proposed critical habitat areas of the ISDRA represents 1.4 percent of total output and nearly 2 percent of total employment in the two-county area.

Additionally, total annual sales within Imperial and Yuma County industries that benefit from OHV recreation provide an additional basis of comparison for the result of the regional economic contributions. These industries include retail trade and accommodation and food services. Total annual sales in these industries were approximately $2.24 billion in 1997. Employment in these two sectors was 18,871.

The upper-bound regional economic contribution of OHV recreation within the proposed critical habitat areas of the ISDRA represents 5.5 percent of total output and 13.7 percent of total employment within these two sectors in the two-county area.

As noted above, Imperial and Yuma Counties have historically experienced significantly higher levels of unemployment relative to neighboring counties, their respective states and the rest of the nation. As of June 2004, the unemployment rate was 21.6% in Imperial County, California, and 27.6% in Yuma County Arizona (see websites referenced in the Economic Analysis for this date). Moreover, these two counties have a less diverse economic base than most others in the two States. Thus, reduced ISDRA visitation that results in revenue, employment and tax losses may pose considerable burdens to local communities.

Because we are not excluding all proposed critical habitat, the economic impact figures adjusted downwards slightly to reflect the impact of possible closures on just the areas we are excluding. Future administrative and project modification costs, discounted to present value using a rate of seven percent, are forecast at $11.4 million, or $0.6 million annually. These costs will be incurred by BLM on implementing ISDRA-wide milk-vetch conservation measures, including monitoring and enforcement, and section 7 consultation with the Service. Future costs related specifically to monitoring and enforcing the geographical extent of the final critical habitat designation are likely to be smaller and represent a portion of total forecast costs. If all critical habitat areas were closed to OHV use, the efficiency effects would be the sum of administrative and project modification costs ($0.6 million annually), and consumer surplus losses associated with Mammoth Wash, North Algodones, and Ogilby management areas (a total of $0.2 million annually). Total efficiency effects associated with the designation would be $0.8 million annually.

Similarly, the upper boundary of possible reductions in output and loss of jobs must be adjusted. If no OHV closures were to occur, the rule would have no impact on the regional economy. If all of the critical habitat areas within the ISDRA were closed to OHV use, the regional economy would experience an upper bound reduction in output of $2.8 million (2003 dollars) and a potential loss in employment of 60 jobs.

Several businesses located in the major towns within Imperial and Yuma Counties are dependent on the recreational activities that occur within the ISDRA, specifically OHV activities. Any reduction in the number of trips made to the dunes is likely to adversely impact these businesses and the overall regional economy. Additionally, losses to businesses within Imperial and Yuma Counties from decreased ISDRA visitation are unlikely to be replaced by expenditures on other goods and services of the same order and magnitude.

Thus, the economic impact of closure of the areas we have excluded within the proposed critical habitat to OHV use would be locally very significant, as would the human impact of the potential job losses.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We do not believe that the benefits from the designation of critical habitat for lands we have decided to exclude—a limited educational benefit and very limited regulatory benefit, which are largely otherwise provided for, as discussed above—exceed the benefits of avoiding the potential economic and human costs which could result from including those lands in this designation of critical habitat. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

In summary, the benefit of excluding these areas from critical habitat is avoidance of the risk that the areas would be closed in whole or in part to OHV use as a result of the critical habitat designation. This would avoid the potential adverse efficiency effects of up to $193.93, adverse impacts on the regional economy between $53.73 million and $121.16 million, and the possible loss of 1,179 and 2,525 jobs, as projected in the economic analysis, in two counties with current unemployment rates of 21.6 and 27.6 percent.

We again recognize that there is no certainty that economic impacts would reach the projected levels should closures occur, or that there would be future closures of these areas due to a critical habitat designation. However, we believe that the designation increases the risk of closure, as two of the three actions described later in this document as likely to trigger section 7 consultations for possible adverse modification of critical habitat are directly related to OHV use. We also recognize that we are excluding a sizeable portion of the original proposal.

However, Congress expressly contemplated that exclusions based on potential impacts, and of this or even larger portions of proposed critical habitat, might occur when it enacted the exclusion authority. House Report 95–1625, stated on page 17:

> Factors of recognized *or potential importance* to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat * * * *In some situations, no critical habitat would be specified.* In such situations, the Act would still be in force prevent any taking or other prohibited act. * * * (emphasis supplied).

We accordingly believe that these exclusions, and the basis upon which they are made, are fully within the parameters for the use of section 4(b)(2) set out by Congress.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands will not result in extinction of the species. Nearly 99% of the excluded lands are Federal lands occupied by the species. The species is accordingly protected under section 9(a)(2) of the Act. Any actions by the BLM, which might adversely affect the plants, must undergo a consultation with the Service under the requirements of sec. 7 of the Act. The exclusions leave these protections unchanged from those that would exist if the excluded areas were designated as critical habitat. The plant is listed as threatened, not endangered. A sizeable portion of its habitat is designed wilderness, where OHV use and other mechanical transportation or development is prohibited by statute. There is accordingly no reason to believe that these exclusions would result in extinction of the species.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of

Management and Budget (OMB) has not formally reviewed this rule. We prepared an economic analysis of this action and used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat and excluding any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless failure to designate such area as critical habitat will lead to the extinction of the *Astragalus magdalenae* var. *peirsonii.*

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the Regulatory Flexibility Act to require a certification statement. Based on the information that is available to us at this time, we are certifying that designation of critical habitat will not have a significant economic impact on a substantial numbers of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations, including any independent nonprofit organization that is not dominant in its field, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. The SBA defines small businesses categorically and has provided standards for determining what constitutes a small business at 13 CFR parts 121–201 (also found at *http://www.sba.gov/size/*), which the Regulatory Flexibility Act requires all Federal agencies to follow. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result.

The Regulatory Flexibility Act does not explicitly define either ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in the area. Similarly, this analysis considers the relative cost of compliance on the revenues/profit margins of small entities in determining whether or not entities incur a ''significant economic impact.'' Only small entities that are expected to be directly affected by the designation are considered in this portion of the analysis. This approach is consistent with several judicial opinions related to the scope of the Regulatory Flexibility Act. (*Mid-Tex Electric Co-Op, Inc.* v. *FERC* and *American Trucking Associations, Inc.* v. *EPA*).

To determine if the rule would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting). We applied the ''substantial number'' test individually to each affected industry to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies; non-Federal activities are not affected by the designation if they lack a Federal nexus. In areas where the species is present, Federal agencies funding, permitting, or implementing activities are already required to avoid jeopardizing the continued existence of the *Astragalus magdalenae* var. *peirsonii* through consultation with us under section 7 of the Act. If this critical habitat designation is finalized, Federal agencies must also consult with us to ensure that their activities do not destroy or adversely modify designated critical habitat through consultation with us.

Should a federally funded, permitted, or implemented project be proposed that may affect designated critical habitat, we will work with the Federal action agency and any applicant, through section 7 consultation, to identify ways to implement the proposed project while minimizing or avoiding any adverse effect to the species or critical habitat. In our experience, the vast majority of such projects can be successfully implemented with at most minor changes that avoid significant economic impacts to project proponents.

Based on our experience with section 7 consultations for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. The kinds of actions that may be included in future reasonable and prudent alternatives include avoidance, conservation set-asides, management of competing non-native species, restoration of degraded habitat, construction of protective fencing, and regular monitoring. These measures are not likely to result in a significant economic impact to project proponents.

The economic analysis also evaluated potential impacts to small businesses. Several businesses that operate within Imperial and Yuma Counties are dependent on the recreational activities that occur within the ISDRA. Major towns in the counties have a number of small businesses that sell OHVs and OHV accessories and services and market to both local and tourist populations. In addition, a number of small businesses exist within the geographical boundaries of the ISDRA itself, catering exclusively to dune visitors. Any reduction in visitation is likely to adversely impact these local businesses.

Using data gathered from the U.S. Census Bureau (IEC 2004) and Dun and Bradstreet (IEC 2004) on OHV-related small businesses in Imperial and Yuma Counties, this analysis concluded that it is unlikely that the impacts presented in the economic analysis would have a significant effect on small businesses at the national or county level. However, to the extent that changes in OHV-related expenditures are concentrated in specific geographic locations (*e.g.*, Brawley and El Centro in California and Yuma, Arizona), any change in user access to the ISDRA could have a significant impact on area small businesses.

Based on the consultation history for *Astragalus magdalenae* var. *peirsonii,* we do not anticipate that the designation of critical habitat will result in increased compliance costs for small entities. The business activities of these small entities and their effects on *A. magdalenae* var. *peirsonii* or its critical habitat have not directly triggered a section 7 consultation with the Service. The designation of critical habitat does not, therefore, create a new cost for the small entities to comply with the Act. Instead, the designation only impacts Federal agencies that conduct, fund, or permit activities that may affect critical habitat for *A. magdalenae* var. *peirsonii*. Moreover, none of the small entities have been applicants with a Federal agency for a section 7 consultation with the Service. Thus, we conclude that the designation of critical habitat is not likely to result in a significant impact to this group of small entities.

In addition, we completed an informal section 7 consultation with BLM on the potential effects to *Astragalus magdalenae* var. *peirsonii* of a private company filming a movie on Federal lands within the Algodones Dunes. Given the relatively small number of consultations related to film-making activities on Federal lands within the Algodones Dunes, we anticipate that the designation of critical habitat is not likely to have a significant impact on this group of small entities.

In summary, we have considered whether this designation would result in a significant economic impact on a substantial number of small entities and find that it would not. This rule would result in project modifications only when proposed activities with a Federal nexus would destroy or adversely modify critical habitat. While this may occur, it is not expected to occur frequently enough to affect a substantial number of small entities. Even if a small entity is affected, we do not expect it to result in a significant economic impact, as the measures included in reasonable and prudent alternatives must be economically feasible and consistent with the proposed action. The kinds of measures we anticipate we would recommend can usually be implemented at low cost. Therefore, we are certifying that the designation of critical habitat for *Astragalus magdalenae* var. *peirsonii* will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)), this rule is not a major rule. We do not foresee or anticipate that BLM would close any Management Areas as a result of the designation of critical habitat. Nothing in the designation of critical habitat creates any obligation for BLM to close any Management Area. If no closures were to take place, the lower bound regional economic impact would be zero. If all of the critical habitat areas within the ISDRA were closed to OHV use, the regional economy would experience an upper bound reduction in output of $2.8 million (2003 dollars) and a potential loss in employment of 60 jobs. The percentage of small business sales generated (from Motor Vehicle and Parts Dealers, Food and Beverage Stores, and Food Services and Drinking Places businesses) by upper bound OHV-related expenditures in the BLM management areas included in the final designation are 0.01% for Mammoth, 0.00% for North Algodones Wilderness and 0.33% for Ogilby. Thus, less than one percent of total OHV-related expenditures in the two county area are linked to the usage for these three areas.

Based on the effects identified in the economic analysis, we believe that this critical habitat designation will not have an effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S-based enterprises to compete with foreign-based enterprises. Please refer to the final economic analysis for a discussion of the potential effects of the critical habitat designation.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. None of these criteria are relevant to this analysis. Based on the economic analysis, the likelihood of any energy-related activity occurring within designated critical habitat is minimal for the following reasons: (1) Utility corridors exist outside of the designated critical habitat; (2) areas likely to experience development have been excluded from the designation; (3) these activities likely would be discouraged by BLM in the designated critical habitat for potentially interfering with the recreational function of the ISDRA; and (4) the construction and maintenance of projects (such as utility lines) away from current roads, canals, and railways and through the central, more remote portions of the dunes is likely to be economically infeasible. This final rule to designate critical habitat for the *Astragalus magdalenae* var. *peirsonii* is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty

on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) The economic analysis that was prepared in support of this rulemaking fully assesses the effects of this designation on Federal, State, local, and tribal governments, and to the private sector, and indicates that this rule will not significantly or uniquely affect small governments. As such, Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights,'' March 18, 1988; 53 FR 8859), we have analyzed the potential takings implications of designating critical habitat for *Astragalus magdalenae* var. *peirsonii*. This assessment concludes that this final rule does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policies, we requested information from and coordinated development of this critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by the *Astragalus magdalenae* var. *peirsonii* imposes no additional significant restrictions beyond those currently in place and, therefore, has little incremental impact on State and local governments and their activities.

The designation of critical habitat may have some benefit to the State and local resource agencies in that the areas essential to the conservation of this species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of this species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the *Astragalus magdalenae* var. *peirsonii*.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This final rule does not contain new or revised information collection for which OMB approval is required under the Paperwork Reduction Act. Information collections associated with certain Act permits are covered by an existing OMB approval and are assigned clearance No. 1018–0094, Forms 3–200–55 and 3–200–56, with an expiration date of July 31, 2004. Detailed information for Act documentation appears at 50 CFR part 17. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act

We have determined that an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. A notice outlining our reason for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244). This final rule does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands essential for the conservation of *Astragalus magdalenae* var. *peirsonii*. Therefore, no tribal lands have been designated as critical habitat for *A. m.* var. *peirsonii*.

References Cited

A complete list of all references cited in this final rule is available upon request from the Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** section).

Author

The primary authors of this rule are staff of the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service (*see* **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.12(h) revise the entry for ''*Astragalus magdalenae* var. *peirsonii*,'' under ''FLOWERING PLANTS,'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
Flowering Plants							
*	*	*	*	*	*	*	
Astragalaus magdalenae var. *peirsonii.*	Peirson's milk-vetch	U.S.A. (CA)	Fabaceae—Pea	T	647	17.96(a)	NA
*	*	*	*	*	*	*	

■ 3. In § 17.96, amend paragraph (a) by adding an entry for *Astragalus magdalenae* var. *peirsonii* in alphabetical order under Family Fabaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family Fabaceae: *Astragalus magdalenae* var. *peirsonii* (Peirson's Milk-Vetch)

(1) Critical habitat subunits are depicted for Algodones Dunes in Imperial County, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Astragalus magdalenae* var. *peirsonii* consist of intact, active sand dune systems (defined as sand areas that are subject to sand-moving winds that result in natural expanses of bowls, swales, and slopes and support the co-adapted psammophytic scrub plant and invertebrate communities) within the existing range of *Astragalus magdalenae* var. *peirsonii* that are characterized by:

(i) Substrates of the Rositas soil series, specifically Rositas fine sands of sufficient depth to promote *Astragalus magdalenae* var. *peirsonii* and discourage creosote bush scrub;

(ii) Wind-formed slopes of less than 30 degrees, but generally less than 20 degrees; and

(iii) The associated co-adapted psammophytic scrub plant community (*e.g., Croton wigginsii*, *Eriogonum deserticola*, *Helianthus niveus* ssp. *tephrodes*, *Palafoxia arida* var. *gigantea*, *Pholisma sonorae,* and *Tiquilia plicata*) that supports the white-faced digger bee (*Habropoda* spp.) (the primary pollinator of *Astragalus magdalenae* var. *peirsonii*).

(3) Critical habitat does not include existing features and structures, such as buildings, roads, aqueducts, railroads, airport runways and buildings, other paved areas, lawns, and other urban landscaped areas not containing one or more of the primary constituent elements.

(4) Critical Habitat Map Subunits.

(i) Map Unit 1: Algodones Dunes, Imperial County, California. From USGS 1:24,000 quadrangle maps Acolita, Amos, Cactus, Glamis NW, Grays Well, and Tortuga, California.

(A) Subunit 1A: lands bounded by the following UTM NAD27 coordinates (E,N): 657200, 3668800; 658100, 3668800; 658100, 3668500; 658000, 3668500; 658000, 3668000; 658100, 3668000; 658100, 3667800; 658200, 3667800; 658200, 3667600; 658300, 3667600; 658300, 3667300; 658400, 3667300; 658400, 3667100; 658500, 3667100; 658500, 3666800; 658600, 3666800; 658600, 3666600; 658700, 3666600; 658700, 3666500; 658800, 3666500; 658800, 3666400; 658900, 3666400; 658900, 3666300; 659000, 3666300; 659000, 3666200; 659100, 3666200; 659100, 3666100; 659300, 3666100; 659300, 3666000; 659400, 3666000; 659400, 3665900; 659500, 3665900; 659500, 3665800; 659600, 3665800; 659600, 3665700; 659700, 3665700; 659700, 3665600; 659800, 3665600; 659800, 3665500; 660000, 3665500; 660000, 3665400; 660100, 3665400; 660100, 3665300; 660200, 3665300; 660200, 3665200; 660300, 3665200; 660300, 3665100; 660500, 3665100; 660500, 3665000; 660700, 3665000; 660700, 3664900; 660800, 3664900; 660800, 3664700; 660900, 3664700; 660900, 3664500; 661000, 3664500; 661000, 3664400; 661200, 3664400; 661200, 3664300; 661400, 3664300; 661400, 3664100; 661500, 3664100; 661500, 3663900; 661600, 3663900; 661600, 3663700; 661700, 3663700; 661700, 3663600; 661800, 3663600; 661800, 3663500; 662000, 3663500; 662000, 3663400; 662100, 3663400; 662100, 3663200; 662200, 3663200; 662200, 3662900; 662300, 3662900; 662300, 3662700; 662400, 3662700; 662400, 3662500; 662500, 3662500; 662500, 3662400; 662600, 3662400; 662600, 3662300; 662700, 3662300; 662700, 3662200; 662800, 3662200; 662800, 3662100; 664000, 3662100; 664000, 3662000; 664400, 3662000; 664400, 3661900; 664600, 3661900; 664600, 3661800; 664800, 3661800; 664800, 3661500; 664900, 3661500; 664900, 3661300; 665000, 3661300; 665000, 3661100; 665100, 3661100; 665100, 3660200; 665200, 3660200; 665200, 3660000; 665500, 3660000; 665500, 3659900; 665900, 3659900; 665900, 3659800; 666100, 3659800; 666100, 3659700; 666200, 3659700; 666200, 3659600; 666300, 3659600; 666300, 3659500; 666400, 3659500; 666400, 3659300; 666500, 3659300; 666500, 3658800; 666600, 3658800; 666600, 3658500; 666700, 3658500; 666700, 3658200; 666800, 3658200; 666800, 3658100; 666900, 3658100; 666900, 3658000; 667100, 3658000; 667100, 3657900; 667400, 3657900; 667400, 3657800; 667600, 3657800; 667600, 3657700; 667800, 3657700; 667800, 3657500; 667900, 3657500; 667900, 3657400; 668000, 3657400; 668000, 3657200; 668100, 3657200; 668100, 3657100; 668300, 3657100; 668300, 3657000; 668500, 3657000; 668500, 3656900; 668600, 3656900; 668600, 3656800; 668700, 3656800; 668700, 3656700; 668800, 3656700; 668800, 3656600; 669000, 3656600; 669000, 3656700; 669300, 3656700; 669300, 3656800; 669700, 3656800; 669700, 3656700; 669800, 3656700; 669800, 3656600; 669900, 3656600; 669900, 3656500; 670100, 3656500; 670100, 3656400; 670300, 3656400; 670300, 3656300; 671100, 3656300; 671100, 3656200; 671300, 3656200; 671300, 3656100; 671400, 3656100; 671400, 3656000; 671500, 3656000; 671500, 3655900; 671600, 3655900; 671600, 3655700; 671700, 3655700; 671700, 3655600; 671800, 3655600; 671800, 3655500; 671900, 3655500; 671900, 3655400; 672000, 3655400; 672000, 3655200; 672100, 3655200; 672100, 3654900; 672200, 3654900; 672200, 3654500; 672300, 3654500; 672300, 3654300; 672400, 3654300; 672400, 3654100; 672900, 3654100; 672900, 3654200; 673700, 3654200; 673700, 3654100; 674100, 3654100; 674100, 3654000; 674200, 3654000; 674200, 3653900; 674300, 3653900; 674300, 3653700; 674400, 3653700; 674400, 3652300; 674300, 3652300; 674400, 3652100; 674400, 3651500; 674500, 3651500; 674500, 3651400; 674600, 3651400; 674600, 3651300; 674700,

3651300; 674700, 3651200; 674400, 3651200; thence south to the Imperial Sand Dunes Recreational Area (ISDRA), North Algodones Dunes Wilderness Management Area (NADWMA) boundary at UTM NAD27 x-coordinate 674400; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3651100; thence west following UTM NAD27 coordinates 674200, 3651100; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 674200; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3651000; thence west following UTM NAD27 coordinates 673900, 3651000; 673900, 3650900; 673800, 3650900; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 673800; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650800; thence west following UTM NAD27 coordinates 673600, 3650800; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 673600; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650700; thence west following UTM NAD27 coordinates 673400, 3650700; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 673400; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650600; thence west following UTM NAD27 coordinates 673100, 3650600; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 673100; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650500; thence west following UTM NAD27 coordinates 672500, 3650500; 672500, 3650400; 671900, 3650400; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 671900; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650300; thence west following UTM NAD27 coordinates 671500, 3650300; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 671500; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650200; thence west following UTM NAD27 coordinates 671200, 3650200; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 671200; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650100; thence west following UTM NAD27 coordinates 670900, 3650100; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 670900; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3650000; thence west following UTM NAD27 coordinates 670600, 3650000; 670600, 3649900; 670300, 3649900; 670300, 3649800; 670100, 3649800; thence south to the ISDRA, NADWMA boundary at UTM NAD27 x-coordinate 670100; thence west following the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3649700; thence west following UTM NAD27 coordinates 669900, 3649700; thence south to the ISDRA, NADWMA at UTM NAD27 x-coordinate 669900; thence west along the ISDRA, NADWMA boundary to UTM NAD27 y-coordinate 3649600; thence due west to the ISDRA, NADWMA boundary at UTM NAD27 y-coordinate 3649600; thence northwest following the ISDRA, NADWMA boundary to UTM NAD27 x-coordinate 669100; thence north following UTM NAD27 coordinates 669100, 3650500; 669000, 3650500; 669000, 3650900; 669100, 3650900; 669100, 3651200; 669200, 3651200; 669200, 3651300; 669300, 3651300; 669300, 3651400; 669400, 3651400; 669400, 3651700; 669300, 3651700; 669300, 3651800; 669200, 3651800; 669200, 3652400; 669300, 3652400; 669300, 3652500; 669400, 3652500; 669400, 3652700; 669500, 3652700; 669500, 3652900; 669600, 3652900; 669600, 3653600; 669500, 3653600; 669500, 3653700; 669400, 3653700; 669400, 3653800; 669100, 3653800; 669100, 3653900; 669000, 3653900; 669000, 3654100; 668900, 3654100; 668900, 3654200; 668800, 3654200; 668800, 3654300; 668600, 3654300; 668600, 3654400; 668300, 3654400; 668300, 3654500; 668100, 3654500; 668100, 3654600; 667900, 3654600; 667900, 3654700; 667700, 3654700; 667700, 3654800; 667600, 3654800; 667600, 3654900; 667500, 3654900; 667500, 3655000; 667300, 3655000; 667300, 3655100; 667100, 3655100; 667100, 3655200; 666900, 3655200; 666900, 3655300; 666800, 3655300; 666800, 3655400; 666700, 3655400; 666700, 3655500; 666600, 3655500; 666600, 3655600; 666500, 3655600; 666500, 3655700; 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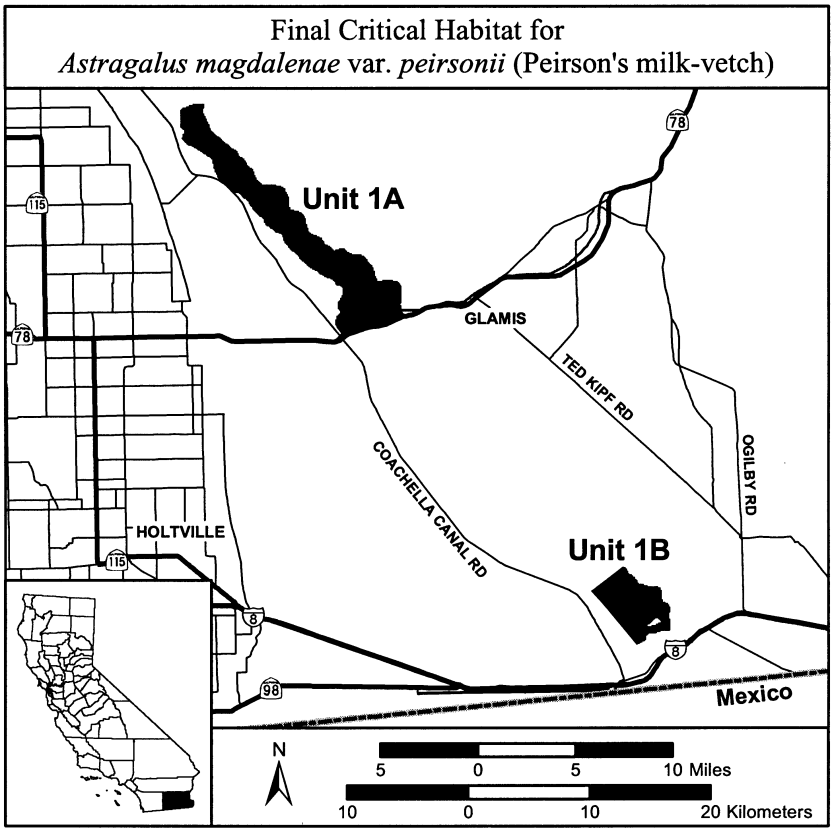
656400, 3666700; 656400, 3666800; 656300, 3666800; 656300, 3666900; 656200, 3666900; 656200, 3668300; 656300, 3668300; 656300, 3668400; 656400, 3668400; 656400, 3668500; 656700, 3668500; 656700, 3668600; 656900, 3668600; 656900, 3668700; 657200, 3668700; returning to UTM NAD27 coordinates 657200, 3668800.

(B) Subunit 1B: starting at the ISDRA, Ogilby Management Area (OMA) boundary at UTM NAD27 x-coordinate 692700; thence south to UTM NAD27 coordinates 692700, 3630400; thence south following UTM NAD27 coordinates 692900, 3630400; 692900, 3630300; 693000, 3630300; 693000, 3630100; 693100, 3630100; 693100, 3629900; 693200, 3629900; 693200, 3629800; 693400, 3629800; 693400, 3629700; 693500, 3629700; 693500, 3629600; 693700, 3629600; 693700, 3629400; 693800, 3629400; 693800, 3629300; 693900, 3629300; 693900, 3629100; 694000, 3629100; 694000, 3629000; 694400, 3629000; 694400, 3628900; 694700, 3628900; 694700, 3628800; 695600, 3628800; 695600, 3628700; 695800, 3628700; 695800, 3628500; 695900, 3628500; 695900, 3627700; 696000, 3627700; 696000, 3627500; 696200, 3627500; 696200, 3627400; 696400, 3627400; 696400, 3627300; 696500, 3627300; 696500, 3627100; 696600, 3627100; 696600, 3626700; 696500, 3626700; 696500, 3626100; 696600, 3626100; 696600, 3625200; 695800, 3625200; 695800, 3625100; 695500, 3625100; 695500, 3625000; 694800, 3625000; 694800, 3624900; 694700, 3624900; 694700, 3624800; 694600, 3624800; 694600, 3624400; 694500, 3624400; 694500, 3624300; 694300, 3624300; 694300, 3624200; 694100, 3624200; 694100, 3624100; 693900, 3624100; thence south to the ISDRA, OMA boundary at UTM NAD27 x-coordinate 693900, thence north and east following the ISDRA, OMA boundary returning to UTM NAD27 x-coordinate 692700; excluding lands bounded by the following UTM NAD27 coordinates 695500, 3626300; 695600, 3626300; 695600, 3626200; 695700, 3626200; 695700, 3626100; 695800, 3626100; 695800, 3626000; 695900, 3626000; 695900, 3625800; 695700, 3625800; 695700, 3625700; 695500, 3625700; 695500, 3625600; 695100, 3625600; 695100, 3625500; 694600, 3625500; 694600, 3625600; 694700, 3625600; 694700, 3625700; 694900, 3625700; 694900, 3625800; 695000, 3625800; 695000, 3625900; 695100, 3625900; 695100, 3626000; 695200, 3626000; 695200, 3626100; 695300, 3626100; 695300, 3626200; 695500, 3626200; 695500, 3626300.

(ii) Map of *Astragalus magdalenae* var. *peirsonii* Critical Habitat Unit follows:



* * * * *

Dated: July 28, 2004.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–17575 Filed 8–3–04; 8:45 am]

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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.

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- Propanoic acid; published 8-4-04
- Propiconazole; published 8-4-04

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Coast Guard

Ports and waterways safety:
- Lake Washington, WA; safety zones; published 7-8-04

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Internal Revenue Service

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S. 741/P.L. 108–282

To amend the Federal Food, Drug, and Cosmetic Act with regard to new animal drugs, and for other purposes. (Aug. 2, 2004; 118 Stat. 891)

S. 2264/P.L. 108–283

Northern Uganda Crisis Response Act (Aug. 2, 2004; 118 Stat. 912)

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Providing for the appointment of Eli Broad as a citizen regent of the Board of Regents of the Smithsonian Institution. (Aug. 2, 2004; 118 Stat. 916)

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